ANOTHER JACKPOT (IN)JUSTICE: VERDICT VARIABILITY AND ISSUE PRECLUSION IN MASS TORTS

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Byron Stier is an Associate Professor of Law at Southwestern Law School in Los Angeles, where since 2005 he has taught and written in the areas of torts, products liability, and mass tort litigation. An expert in mass tort litigation, Professor Stier began his legal career in 1996 with the law firm of Jones, Day in New York, where he primarily handled products liability litigation and served on a lead counsel team that defended the tobacco industry against numerous class action lawsuits. In 2001, he joined Skadden, Arps, Slate, Meagher & Flom as an associate in the firm's Complex Mass Torts Group, and coordinated scientific evidence in the federal multidistrict court for the phenylpropanolamine (PPA) litigation involving cough-cold medications and appetite suppressants. In 2003, Professor Stier left private practice to return to academia as a fellow and lecturer at Temple University, where he taught civil procedure, torts, legal ethics, and mass tort litigation. He holds a J.D. from Harvard Law School, where he was a Senior Editor of the *Harvard Journal of Law & Public Policy*; an LL.M. from Temple University School of Law, where he was a Freedman Fellow; and a B.A. from the University of Pennsylvania. In addition, Professor Stier is the founding editor of the Mass Tort Litigation Blog, which has received over 160,000 page views from courts, law firms, and the public, and is permanently archived by the Library of Congress and linked by the National Center for State Courts.

Professor Stier's last article, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, which is forthcoming in the *Temple Law Review*, argued that class actions should be rejected in mass torts because of the risk of extrapolating a single outlier verdict to perhaps hundreds of thousands of claimants. In this article, Professor Stier deepens and extends his analysis, addressing a similar concern of an outlier verdict being extrapolated to perhaps thousands of claims in mass torts, through the device of issue preclusion. Drawing upon empirical evidence of verdict variability, Professor Stier argues courts should exercise their discretion to deny issue preclusion in mass torts. Instead, Professor Stier urges courts to join the emerging consensus of mass tort management that ultimately better serves the goals of judicial efficiency and public respect supposedly underlying issue preclusion: allow multiple verdicts to unfold a more balanced view of liability that will frequently be used for well-informed and far-reaching settlements.

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Abstract

If there are no prior inconsistent verdicts, non-mutual offensive issue preclusion generally allows a finding by a single jury to bar relitigation, in future cases, of the issue by the defendant who lost in the prior case. This approach, however, ignores the possibility that the first verdict delivered may have been an outlier if further verdicts were permitted to be delivered. In mass tort litigation, such a flawed approach may result in critical issues such as defect or negligence being resolved by only six jurors, whose potentially outlier verdict is then applied to resolve the cases of thousands, perhaps bankrupting a company or an industry when most juries would not so hold. Focusing on mass tort litigation, this article presents the growing empirical evidence of verdict variability and then critiques the use of issue preclusion, whose downside is applied only against defendants, not plaintiffs, because only defendants were parties to the prior action. As a result, the article argues that courts should exercise their discretion to deny issue preclusion in mass tort litigation. Instead, courts should join the emerging consensus of mass tort management that ultimately better serves the goals of efficiency and public respect supposedly underlying issue preclusion: allow multiple verdicts to unfold a more balanced view of liability that will frequently be used for well-informed and far-reaching settlements.

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I. INTRODUCTION

What if in a case involving a single plaintiff, a corporate defendant in a mass tort litigation faces a single jury of six people that find, in a special interrogatory, that its product is defective? That single finding by six people on one jury could well result in a finding of defectiveness for the defendant's product in perhaps thousands of other suits. Indeed, that finding may bind future juries, even if most subsequent juries may have found no product defect. That is because issue preclusion, or collateral estoppel, as it was previously known,[1] would in the discretion of the trial court permit a plaintiff to use a single jury's verdict against a defendant in a prior case to foreclose further litigation on the issue litigated. Indeed, the use of issue preclusion may gain renewed attention for mass tort management subsequent to the Florida Supreme Court's 2006 decision that the *Engle* statewide tobacco-class-action jury's findings of *inter alia* defect and negligence would preclude further litigation on those issues in follow-up trials of former class members.[2]

Under the United States Supreme Court's seminal opinion in *Parklane Hosiery Co., Inc. v. Shore*, issue preclusion may be applied if the issue was necessary to the prior jury's decision, the current plaintiff could not have easily joined the prior action, and

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[1] This article will employ the more recent term, issue preclusion, rather than collateral estoppel. *See* RESTATEMENT (SECOND) OF JUDGMENTS § 74 (referring to res judicata as "claim preclusion," and collateral estoppel as "issue preclusion").

[2] Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006). Because *Engle* occurred in a class setting, and the court viewed the jury's issue findings as res judicata against class members in their follow-up trials, *Engle* is appropriately characterized as an issue class action, which involves considerations not present in individual-case issue preclusion. *See* Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 IND. L.J. 567 (2004); Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003); *cf.* Spitzfadden v. Dow Corning Corp., 833 So. 2d 512 (La. App. 2002) (reversing decision that Phase I class verdict benefitted absent class members after class was decertified). Full exploration of issue class actions is beyond the scope of this article.

application of issue preclusion would not otherwise be "unfair."[3] Fairness considerations set forth in *Parklane* include whether the defendant had incentive to litigate vigorously, in light of the amount of damages alleged in the earlier suit and foreseeable future suits;[4] whether the judgment sought to be used for issue preclusion is itself inconsistent with one or more previous judgments for defendant;[5] and whether the second suit provides defendant procedural differences that could change the result.[6]

In an often-cited footnote, the *Parklane* Court expanded on the question of prior inconsistent verdicts and discussed an article by Professor Brainerd Currie in which he detailed the issue-preclusion problem facing a railroad after a railroad crash.[7] As Professor Currie explained, various plaintiffs might lose the first 25 suits against the railroad, but then a plaintiff might win suit number 26.[8] Issue preclusion might conceivably allow plaintiffs to benefit from the single adverse verdict against the defendant on issues such as negligence, when suits 1 to 25 had been lost by other plaintiffs on that issue;[9] those losses could not be applied via issue preclusion against subsequent plaintiffs because, unlike the defendant, the later plaintiffs were not parties to the prior suit and had a due process right to present their own arguments on the issue.[10] The Supreme Court suggested, with Professor Currie, that such a result would be unfair,

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[3] *See* Parklane Hosiery Co., Inc. v. Shore, 439 U.S. 322, 329-31 (1979).
[4] *Id.* at 330.
[5] *Id.*
[6] *Id.* at 331 (stating that such "procedural opportunities" could "readily cause a different result").
[7] *Id.* at 330 n.14 (citing Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 STAN. L. REV. 281 (1957)).
[8] *Id.* at 300 n.14.
[9] *Id.*
[10] As the Supreme Court of the United States had previously noted in *Blonder*-Tongue:

> Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position.

Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation, 402 U.S. 313, 329 (1971) (citing Hansberry v. Lee, 311 U.S. 32, 40 (1940)).

and that issue preclusion should not be used where there have been prior inconsistent verdicts.[11]

But what if the first jury, which happened to find defectiveness in a mass tort case, would have in fact conflicted with most of the subsequent juries? Under the Supreme Court's approach, there would be no prior inconsistent verdicts, and the future inconsistent verdicts would never appear – because future plaintiffs would seek to have the issue bindingly resolved in all subsequent litigation. Is that fair? As a result of the decision of a single jury, composed of perhaps six to twelve people, a company, or even an industry, could be bankrupted as thousands of plaintiffs in the jurisdiction seek to take advantage of the single jury's finding.[12] If the jury's finding is an outlier among whose juries would so find, proper implementation of tort goals of deterrence and corrective justice in the mass tort litigation are also undercut.

Defense counsel might seek to avoid this problem by seeking a general verdict from which it is impossible to derive a jury finding applicable to other cases, such as whether the product is defective. But a judge seeking the judicial efficiency that supposedly underlies issue preclusion[13] might well use special jury interrogatories that offer generalizable findings on particular issues, and indeed put all the parties on notice at

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[11] *Parklane*, 439 U.S. at 652; *see also* Lawrence C. George*, Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action*, 32 STAN. L. REV. 655, 675 (1980) (describing result of all subsequent plaintiffs benefiting from plaintiff win after several plaintiff losses, as "capricious – certainly unfair to defendant, but also to those early plaintiffs, if any, unable to reap the benefits of a later triumph").

[12] If the governing law is the same, a verdict could conceivably be given issue preclusive effect even outside the particular state jurisdiction. *See* Rogers v. Ford Motor Co., 925 F. Supp. 1413, 1418-20 (N.D. Ind. 1996) (plaintiff sought preclusive effect for prior California verdict, but court rejected on other grounds); Kortenhaus v. Eli Lilly & Co., 549 A.2d 437 (N.J. App. Div. 1988) (reversing partial summary judgment based on issue preclusion from prior New York judgment); Goodson v. McDonough Power Equipment, Inc, No. 80-CA-34, 1981 WL 2886 (Ohio App. 2 Dist. Aug 18, 1981) (applying Florida judgment in Ohio court on negligence for manufacturer of mower), *rev'd*, 443 N.E.2d 978 (Ohio 1983).

[13] *See Parklane*, 439 U.S. at 326 (noting that "collateral estoppel … has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of *promoting judicial economy by preventing needless litigation*" (emphasis added)).

the start of the case of the judge's intention to use issue preclusion in subsequent cases if the verdict is against the defendant.

Indeed, the United States Supreme Court's fairness factors do not remedy this problem, even though their consideration of inconsistent verdicts implies the Court's concern about verdict variability. In effect, the Court's approach makes fairness turn on the luck of which verdict goes first in time. A defense verdict that arises first should stop subsequent issue preclusion on an issue, because a prior pro-defense verdict would be inconsistent with the subsequent plaintiff verdict. But if the pro-plaintiff verdict occurs first, the pro-defense verdict may never be heard, because issue preclusion would prevent subsequent juries from opining on the issue. Thus, even though the United States Supreme Court has sought to avoid the "aura of the gaming table,"[14] the Court's approach simply turns on which verdict is dealt first.

All of these concerns are exacerbated in light of the recent and growing empirical evidence of verdict variability. Notwithstanding judicial mechanisms to control the jury verdict, such as awarding judgment notwithstanding the verdict,[15] substantial verdict variability remains. As a result, while one jury may find for plaintiffs on an issue such as defect, other juries may indeed reach the other conclusion. This burgeoning evidence of verdict variability confirms lawyers' long-held beliefs about the unpredictability of any one jury's verdict, and especially calls into question the use of issue preclusion in mass

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[14] *Blonder-Tongue*, 402 U.S. at 329 (stating in the context of defensive non-mutual issue preclusion that "[p]ermitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out" may reflect "the aura of the gaming table"); *see also id.* at 1439 ("[B]entham had attached [sic] the doctrine 'as destitute of any semblance or reason, and as 'a maxim which one would suppose to have found its way from the gaming-table to the bench.").

[15] *See* Fed. R. Civ. P. 50 (setting forth Judgment as a Matter of Law and stating that "[i]f a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may … resolve the issue against the party[.]").

torts, where a single, outlier pro-plaintiff verdict on issues such as design defect, warning, or negligence could bankrupt a company or industry, even though most juries would have found otherwise.

To avoid these problems, this article argues that courts should in mass tort litigation exercise their "broad discretion" to deny as "unfair" the application of offensive non-mutual issue preclusion.[16] Instead, rather than affix resolution of crucial issues in a mass tort on a single pro-plaintiff verdict, courts should allow multiple jury verdicts to unfold and convey a more accurate and representative community assessment of difficult issues such as defect, warning, and negligence. Such an approach stills serves judicial efficiency, because these multiple verdicts frequently form the basis for broad settlements that dispose of thousands of claims without trial. Moreover, while this approach may permit seemingly inconsistent verdicts, raising concern for the public perceptions of the judicial system, it reflects, in its proper assessment of the use and limits of juries, an honesty that can only enhance respect for the judiciary. In exploring the implications of recent evidence of verdict variability for issue preclusion and situating issue preclusion within the emerging consensus of mass tort management, this article furthers the analysis

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[16] As the United States Supreme Court stated in *Parklane*:

> [T]he preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts *broad discretion* to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be *unfair* to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

Parklane, 439 U.S. at 651-52 (emphasis added; footnote omitted).

of my prior work examining verdict variability and mass tort class actions,[17] and deepens the scholarly criticism of the use of issue preclusion in mass tort litigation.[18]

Part II of this article discusses the growing empirical evidence of verdict variability on general issues of liability, and explains that variability as expectable given the jury's necessarily limited representation of the community. Part III then examines and critiques the doctrine of offensive non-mutual issue preclusion in mass tort litigation, particularly in light of the concerns created by verdict variability. Next, part IV discusses, as an alternative mass tort management approach to issue preclusion, the use of multiple verdicts in individual trials that frequently lead to broad, well-informed mass tort settlements that serve judicial efficiency and effectuate well the tort goals of corrective justice, deterrence, and compensation. Finally, in part V, I conclude that offensive non-mutual issue preclusion is problematic, and that courts should use their discretion to reject issue preclusion in mass tort litigation, and join in moving the entire mass tort to maturity and likely settlement through multiple verdicts that provide a more balanced assessment of the issues involved.

II. VERDICT VARIABILITY IN MASS TORT TRIALS

Evidence of verdict variability conforms to lawyers' long-held beliefs about the unpredictability of trial.[19] Juries may well deliver verdicts that substantially differ,

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[17] *See* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, TEMPLE L. REV. (forthcoming 2008).

[18] Professor Michael Green, for example, wrote intelligently and thoroughly in criticizing the use of issue preclusion for products liability cases in 1984, only a few years subsequent to *Parklane*. *See* Michael D. Green, *The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Collateral Estoppel in Asbestos Litigation*, 70 IOWA L. REV. 141 (1984). Much has occurred in the intervening nearly 25 years, both with regard to research on juries and their record in mass tort litigation, and evolving approaches to mass tort case management.

[19] *See* Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. REV. 411, 412 (2008) ("[M]edia portrayals of jury verdicts in tort cases as

though based on identical facts.[20] Indeed, any one jury's verdict may be an outlier among numerous jury responses applying the law to the facts before it.[21] If one tried the same case before different juries multiple times, one would expect to be able to chart the variety of verdict responses.[22] So numerous trials would need to occur to sketch the likelihood of liability.[23] As a result, the decision of any one jury may well not be indicative of whether a plaintiff would prevail with another jury.[24] Indeed, because of problems of uniformity and predictability, courts in England have ruled that personal injury cases should be tried by a judge, rather than a jury – although that approach also raises the question of variability among judges.[25]

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disproportionate and inconsistent have revealed a crisis of legitimacy."); *see also* Stier, *supra* note 17 (discussing evidence of verdict variability).

[20] As Professor Trangsrud has noted:

> If the cases in a mass tort are tried separately, some similarly situated plaintiffs may recover and others may not. . . . We should not pretend that there is only one proper result in a hotly disputed case. Reasonable persons and reasonable juries may disagree on the significance of the same or similar evidence.

Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 77.

[21] *See, e.g.*, Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833 (1992) ("Every verdict is itself merely a sample from the large population of potential verdicts"); *id.* at 834 ("The fact that we normally obtain only one award from one trial of each case obscures the population of possible awards from which that one was drawn."); *id.* at 839 ("We already have noted one flaw in the imagery of the archetypal civil trial: The verdict appears precise and individualized, but in reality it is only a sample of one from a wider population of possible outcomes.").

[22] *See id.* at 833 ("That 'population of verdicts' consists of all the awards that would result from trying the same case repeatedly for an infinite number of times."); *id.* at 834 ("Imagine a case were tried 100 times. Then the verdicts are arrayed on a frequency distribution. . . . It should be apparent that any single verdict is just one from among those." (footnote omitted)).

[23] As Professor Moran has noted:

> [T]o determine the plaintiff's probability of success at trial, the research firm would need to stage hundreds or thousands of mock trials in which all of the evidence is presented and argued to hundreds or thousands of mock juries, each of which is then asked to assess the probability that defendant was negligent and the probability that the defendant caused plaintiff's injuries.

David A. Moran, *Jury Uncertainty, Elemental Independence and the Conjunction Paradox: A Response to Allen and Jehl*, 2003 MICH. ST. L. REV. 945, 948.

[24] *See id.* at 948 ("If the research firm conducted a single mock trial and the jury responded that the probability of negligence was .7 and causation was .6, that result would tell the researchers almost nothing about plaintiff's chances of success at the real trial.").

[25] *See* Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 91 n.2 (2006) (citing Ward v. James, 1 Q.B. 273 (1966)); *see also* Justice Scott Brister, *The Decline in Jury Trials: What Would Wal-*

A. Verdict Variability in Litigated Mass Torts

Various mass torts have displayed verdict variability on the same issues. For example, verdicts in individual-plaintiff tobacco trials in Florida markedly conflict with the findings of the *Engle* statewide-class-action jury, whose pro-plaintiff findings are now being applied to preclude common issues in litigation filed by some of the approximately 700,000 smoker class members. In *Engle*, the Florida Supreme Court held that the certain common liability findings by the jury in phase I of the class action could stand, but that remaining issues were individualized and required decertification of the class.[26] Accordingly, jury findings against the tobacco defendants on general causation, addiction of cigarettes, strict liability, fraud by concealment, civil conspiracy concealment, breach of implied warranty, breach of express warranty, and negligence were res judicata as to all 700,000 class members.[27]

Prior to *Engle*, however, in thirteen cases involving smokers against the tobacco industry whose verdicts were not overturned on appeal,[28] the defendants prevailed in

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Mart Do?, 47 S. TEX. L. REV. 191, 201 (2005) ("The unpredictability of jury verdicts has been cited for limiting or abolishing jury trials, both here and abroad.").

[26] *Engle*, 945 So. 2d at 1254.

[27] *Id.* at 1255, 1276-77; *see also* Stier, *supra* note 17. The court, however, also found that jury findings against defendants on fraud and misrepresentation, and on intentional infliction of emotional distress were "inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause" and therefore could not be applied to the rest of the class. *Engle,* 945 So. 2d at 1255. In addition, the finding of civil conspiracy for misrepresentation was not upheld, because it relied upon the underlying misrepresentation finding. *Id.*

[28] In *Jones v. R.J. Reynolds Tobacco Co.*, the jury returned a verdict for plaintiff for $200,028.57. 830 So. 2d 854, 855 (Fla. 2d Dist Ct. App. 2002). The trial court, however, granted a new trial to defendant on the grounds of erroneous admission of evidence, and the appellate court affirmed. *Id.* Similarly, in *Widdick v. Brown & Williamson Tobacco Corp.,* the jury returned a plaintiff verdict for $52,249 for medical expenses, $500,000 for the spouse's loss of husband's companionship and pain and suffering, and $450,000 in punitive damages. No. 97-3522-CA (Fla. Cir. Ct. 4th Jud. Cir. Duval County June 10, 1998). The Fourth District Court of Appeal, however, reversed the judgment below, finding that the trial court impermissibly denied defendants' motion to transfer venue. Brown & Williamson Tobacco Corp. v. Widdick, 717 So. 2d 572 (Fla. Ct. App. 1998).

eight of them.[29] In the defense verdicts, juries answered "no" to special interrogatories concerning negligence,[30] design defect,[31] defect based on failure to warn,[32] fraud,[33] and civil conspiracy.[34] Each special interrogatory included the additional statement that the alleged misconduct was a "legal cause" of plaintiffs' harm, rendering seemingly unclear the inconsistency with the common-issue findings of *Engle.*[35] But the jury findings in two Florida tobacco cases are necessarily inconsistent with the findings in *Engle*. In *Eastman v. Brown & Williamson Tobacco Corp.*, the jury found no negligence in failing to warn or negligence in design defect that was a legal cause of plaintiff's injuries.[36] But the jury still determined that Philip Morris and Brown and Williamson had manufactured

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[29] The eight verdicts for defendants are: Schwartz v. Liggett Group Inc., No. CA 03-2078 AA (Fla. Cir. Ct. 15th Jud. Cir. Beach County March 2, 2006); Beckum v. Philip Morris USA, Inc., No. 02-01836 (Fla. Cir. Ct. 13 Jud. Cir. Hillsborough County April 29, 2005); Martinez v. Liggett Group, Inc., No. 02-20943-CA-15 (Fla. Cir. Ct. 11th Jud. Cir. Miami-Dade County Feb. 11, 2005); Hall v. R.J. Reynolds Tobacco Co., No. 00-1061 (Fla. Cir. Ct. 13th Jud. Cir. Hillsborough County Dec. 10, 2003); Allen v. R.J. Reynolds Tobacco Co., No. 01-4319-CIV-KING/O'SULLIVAN (S.D. Fla. Feb. 28, 2003); Tune v. Philip Morris Inc., No. 97-4678-CI-11 (Fla. Cir. Ct. 6th Jud. Cir. Pinellas County May 24, 2002); Karbiwnyk v. R.J. Reynolds Tobacco Co., No. 95-04697-CA (Fla. Cir. Ct. 4th Jud. Cir. Duval County October 31, 1997); Raulerson v. R.J. Reynolds Tobacco Co., No. 95-01820-CA (Fla. Cir. Ct. 4th Jud. Cir. Duval County May 5, 1997). *See* Stier, *supra* note 17. The plaintiff-verdict tobacco cases were: Arnitz v. Philip Morris USA, Inc., No. 00-4208-Div. H (Fla. Cir. Ct. 13th Jud. Cir. Hillsborough County Oct. 21, 2004); Davis v. Liggett Group, Inc., No. 02-18944 05 (Fla. Cir. Ct. Broward County April 28, 2004); Eastman v. Brown & Williamson Tobacco Corp., No. 97-5968-CI-11 (Fla. Cir. Ct. Pinellas County April 3, 2003); Kenyon v. R.J. Reynolds Tobacco Co., No. 00-5401 (Fla. Cir. Ct. 13th Jud. Cir. Hillsborough County Dec. 12, 2001); Carter v. Brown & Williamson Tobacco Corp., No. 95-00934 (Fla. Cir. Ct. 4th Jud. Cir. Duval County Aug. 9, 1996). *See* Stier, *supra* note 17.

[30] *Schwartz*, No. CA 03-2078 AA, at 1; *Martinez*, No. 02-20943 CA 15, at 1-2; *Hall*, No. 00-1061, at 2; *Allen*, No. 01-4319-CIV-KING/O'SULLIVAN, at 1; *Tune*, No. 97-4678-CI-11, at 1; *Karbiwnyk*, No. 95-04697, at 1; *Raulerson,* No. 95-01820, at 1.

[31] *Schwartz*, No. CA 03-2078 AA, at 1 ("place cigarettes on the market with a defect"); *Martinez*, No. 02-20943 CA 15, at 1; *Hall*, No. 00-1061, at 2; *Tune*, No. 97-4678-CI-11, at 1; *Karbiwnyk*, No. 95-04697, at 1 (jury finding with regard to "unreasonably dangerous and defective"); *Allen*, No. 01-4319-CIV-KING/O'SULLIVAN, at 1; *Raulerson,* No. 95-01820, at 1.

[32] *Hall*, No. 00-1061, at 2; *Allen*, No. 01-4319-CIV-KING/O'SULLIVAN, at 2; *Tune*, No. 97-4678-CI-11, at 1; *Karbiwnyk*, No. 95-04697, at 1 (jury finding with regard to "unreasonably dangerous and defective").

[33] *Martinez*, No. 02-20943 CA 15, at 2; *Allen*, No. 01-4319-CIV-KING/O'SULLIVAN at 2; *Tune*, No. 97-4678-CI-11, at 2 (conspiracy-based fraudulent misrepresentation or concealment).

[34] *Martinez*, No. 02-20943 CA 15, at 3; *Tune*, No. 97-4678-CI-11, at 2.

[35] *See, e.g.,* Martinez, No. 02-20943 CA 15, at 1 ("Was there negligence on the part of the Defendant in designing its products, resulting in a defect that was a legal cause of damage to Plaintiff Angel Martinez?" (empasis added).)

[36] Verdict, Eastman v. Brown & Williamson Tobacco Corp., No. 97-5968-CI-11, at 1 (Fla. Cir. Ct. Pinellas County April 3, 2003); *see also* Stier, *supra* note 17.

products that were defective in design and for failing to warn, and found that the defects were a legal cause of plaintiff's injuries.[37] In addition, in *Kenyon v. R.J. Reynolds Tobacco Co.*, the jury found no negligence in failure to warn or design, and found no defect for failure to warn.[38] But the jury found for plaintiff based on defective design.[39] Thus, in both *Eastman* and *Kenyon*, the jury found for plaintiff on causation, but neither jury determined that there was negligence by defendants, and one found no strict-liability failure to warn – both of the latter findings inconsistent with the *Engle* class jury. Moreover, the defendants in the Florida tobacco cases vigorously contested these common issues, arguing that their cigarettes were not defective[40] by *inter alia* emphasizing knowledge of smoking risks pertinent to a consumer-expectations approach

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[37] Verdict, Eastman v. Brown & Williamson Tobacco Corp., No. 97-5968-CI-11, at 1; *see also* Stier, *supra* note 17.

[38] *Kenyon*, No. 005401, at 2-3; David Karp, *Man gets $165,000 in tobacco lawsuit*, ST. PETERSBURG TIMES, Dec. 13, 2001 (noting defense lawyer Stephanie Parker's comment, "We were very pleased that the jury found that our actions were reasonable."); *see also* Stier, *supra* note 17.

[39] *Kenyon*, No. 005401, at 2-3; *see also* Stier, *supra* note 17.

[40] *See, e.g.*, *Florida Jury Awards Smoker $600,000 in Damages, Finds Smoker 40 Percent Liable*, 18-8 MEALEY'S LITIG. REP. TOBACCO 4 (Oct. 25, 2004) (noting that in *Arnitz* case, "Philip Morris argued that the dangers were common knowledge. The company also argued that the cigarettes were not defective."); *Florida Jury Rejects Smoker's Design Defect Claims*, 20-2 MEALEY'S LITIG. REP. TOBACCO 11 (April 2006) (stating that in *Beckum*, "Defense: Relative safety of cigarette does not constitute defect"); *see also* Stier, *supra* note 17. For example, in *Beckum,* the defense offered numerous arguments challenging the defectiveness of the cigarettes at issue:

> [J]ust because a cigarettes is not safe, does not make it defective. Philip Morris defended against Plaintiffs' defect claims by demonstrating that additives are common in many products and that none of the additives in cigarettes make them any more dangerous than they otherwise would be. It is the burning of tobacco, not the additives, that make smoking dangerous. In addition, people expect cigarettes to have the very properties that Plaintiffs claim make them defective – they expect cigarettes to taste good, to contain nicotine, to contain additives and to be inhalable. Moreover, neither the government, the public-health community nor any company in the competitive tobacco industry has endorsed or accepted Plaintiffs' defect allegations

Beckum v. Philip Morris USA Inc., No. 0201836, Verdicts, Settlements, & Tactics, at 1 (West April 29, 2005). Defendants also contested product defect in cases they lost. *See, e.g.*, *Carter Awarded $750,000 in Tobacco Case Against Brown & Williamson Corp.*, 10-8 MEALEY'S LITIG. REP. TOBACCO 1 (1996) ("The company had a duty to warn only when the hazards of using the product were not reasonably obvious, [defense attorney] said, or if the manufacturers new more than the consumers about the product's risks.").

to design defect.[41] And plaintiffs presented detailed and controversial theories of product defect.[42] In sum, the common issues identified in *Engle* were litigated in these trials of individual plaintiffs, and these common issues, rather than legal causation, may well have been the basis for defense verdicts.[43]

Similarly, juries' verdicts varied in the Vioxx litigation against Merck. The first three jury verdicts in the Vioxx litigation, for example, resulted in inconsistent findings for defendant and plaintiff, though they applied the law of three different states.[44] The first jury, in Texas, awarded $253.5 million in compensatory and punitive damages to the plaintiff; the punitive damage award was then reduced under Texas's cap on punitive damages.[45] Then, in New Jersey, a second jury found in favor of Merck.[46] The third

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[41] *See* Fla. Jury Verdict Reporter, Davis v. Liggett Group, Inc., No 02-18944 05 (April 28, 2004) ("Defendants alleged that the dangers of smoking were well known as far back as 1936.") (verdict for plaintiff); *see also* Stier, *supra* note 17.

[42] For example, in *Beckum*:

> Plaintiffs identified four alleged defects in Marlboro cigarettes: (1) that the tobacco was cured in a way that made it more carcinogenic than other means of curing; (2) that Philip Morris manipulated nicotine levels and additives to increase the likelihood of addiction; (3) that additives were used to make smoke more deeply inhale (unlike pipe and cigar smoke), which increased the risk of lung cancer; and (4) that consumers did not expect cigarettes designed with filters to be as dangerous as they really were. Plaintiffs essentially maintained that a product is defective if it is not the safest product that can be made with the technology at a given time. Accordingly, they argued that only the lowest-tar cigarette ever made was not defective. All other commercially available cigarettes are (and have always been) defective and unreasonably dangerous.

Beckum v. Philip Morris USA Inc., No. 0201836, Verdicts, Settlements, & Tactics, at 1 (West April 29, 2005); *see also* Stier, *supra* note 17.

[43] *See Beckum v. Philip Morris USA Inc.*, No. 0201836, Verdicts, Settlements, & Tactics, at 1 ("The juror's questions provided insight into their thinking and suggested that they were skeptical of Plaintiffs' case early on."); *see also* Stier, *supra* note 17. *But see* Fla Jury Verdict Reporter, Martinez v. Liggett Group, Inc. (July 2005) ("Defendant alleged that Plaintiff did not smoke its cigarettes."); Verdict Report, Schwartz v. Liggett Group, Inc., 20006 WL 986357 (Fla. Cir. Ct. 15th Jud. Cir. March 13, 2006) ("Defense counsel argued that Schwartz didn't die from lung cancer and therefore Liggett . . . wasn't responsible."); Verdict, Tune v. Philip Morris, Inc., 2002 WL 32128381 (Fla. Cir. Ct. May 24, 2002) ("Defendant alleged that, other than cigarettes, Plaintiff was exposed to a variety of substances which might have caused his cancer, including: (1) regular alcohol use; (2) previous exposure to harmful chemicals including DDT through various occupations; and (3) residency in a heavy industrial state (New Jersey) where the population is at a higher risk for cancer.") *Wilner Begins Third Assault on Tobacco*, 11-11 MEALEY'S LITIG. REP. TOBACCO 9 (Oct. 9, 1997) ("R.J. Reynolds contends that Karbiwnyk did not develop lung cancer from using its products and has a type of tumor statistically associated with smoking").

[44] *See* Dooley, *supra* note 19, at 413.

[45] *See* Ernst v. Merck & Co., No. 19961-BH02, 2005 WL 2620257 (Tex. Dist. Ct. Aug. 19, 2005); Dooley, *supra* note 19, at 413 n. 6.

jury, in Louisiana, resulted in a mistrial, after jurors could not reach a unanimous verdict and remained deadlocked at eight to one in favor of Merck.[47]

Moreover, in the asbestos litigation, one asbestos case tried to multiple juries resulted in varying results in an experiment by Judge Richard Parker in the Eastern District of Texas.[48] Five juries heard the same evidence in a consolidated proceeding in which all juries were present in the courtroom.[49] Despite receiving jury instructions together and nearly uniform special interrogatories on common issues to the asbestos cases, the juries returned varying verdicts: earliest dates of knowledge of asbestos danger were found to be 1935, 1946, and 1965 by one jury each, and 1946 by two juries; on design defect, one jury found all products defective and two found none defective; and juries also varied as to what warnings were adequate.[50] Indeed, the Fifth Circuit was right to note in rejecting issue preclusion for asbestos litigation that "different juries may reach equally valid verdicts," and that "[o]ne jury's determination should not … bind another jury's determination of an issue over which there are equally reasonable resolutions of doubt."[51] Quoting the Restatement of Judgments, the Fifth Circuit also stated that "taking the prior judgments at face value for purposes of the second action

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[46] *See* Humeston v. Merck & Co., No. ATL-L-2272-03-M, 2005 WL 3440614 (N.J. Super. Ct. Law. Div. Nov. 3, 2005); Dooley, *supra* note 19, at 413 n. 6. The trial court, however, granted a new trial based on "new evidence." Humeston v. Merck & Co., No. ATL-L-2272-03-MT (N.J. Super. Ct. Law. Div. Aug. 17, 2006); Dooley, *supra* note 19, at 413 n.6. The re-empanelled jury found for plaintiff for $20 million in compensatory damages and $27.5 million in punitive damages. *See* Dooley, *supra* note 19, at 413 n.6.
[47] *See* Dooley, *supra* note 19, at 413 n.6. On retrial, Merck won, but the court ordered yet another retrial. *See* Plunkett v. Merck & Co. (In re Vioxx Prods. Liab. Litig.), 489 F. Supp. 2d 587, 588 (E.D. La. 2007).
[48] *See* Green, *supra* note 18, at 221-224 & app.; Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 91 (1988); Michael J. Waggoner, *Fifty Years of* Bernhard v. Bank of America *Is Enough: Collateral Estopppel Should Require Mutuality But Res Judicata Should Not*, 12 REV. LITIG. 391, 415 (1993) ("The indeterminacy of litigation was graphically demonstrated when one case was simultaneously tried to five juries and produced quite divergent answers to special interrogatories.").
[49] *See* Green, *supra* note 18, at 222.
[50] *See id.* at 222-223 & App.; *see also* Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 60 B.U. L. REV. 659, 662 (1989) (discussing Judge Parker's approach in asbestos and noting, "The lack of consistency in outcomes doomed this method.").
[51] Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982).

would extend the effects of imperfections in the adjudicative process beyond the limits of the first adjudication, within which they are accepted only because of the practical necessity of achieving finality."[52]

Furthermore, as Judge Jack Weinstein has noted, "[t]he Bendectin litigations have also produced inconsistent results."[53] The first jury verdict for plaintiffs relied heavily on a single juror's "stubbornness" in forcing a compromise verdict for plaintiff, but subsequent judgments differed on Bendectin.[54] Because the first Bendectin verdict was set aside on appeal, issue preclusion was never subsequently raised.[55] In addition, in the multidistrict litigation court, Judge Rubin conducted a common-issue trial on causation by Bendectin of birth defects, for plaintiffs in his jurisdiction and those who opted in – a remarkable bet on a single jury for all those plaintiffs.[56] The jury in the MDL trial found no generic causation, eliminating the claims of all the plaintiffs.[57]

Evidence of verdict variability can therefore be gleaned from multiple mass tort contexts. Indeed, such variability has also occurred in jury verdicts for silicone breast

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[52] *Id*. at 343-44 (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 29 cmt. g)).
[53] Jack B.Weinstein, *Procedural and Substantive Problems in Complex Litigation Arising from Disasters*, 5 TOURO L. REV. 1, 7 n.27 (1988); *see also* Richardson v. Richardson-Merrell, Inc., 857 F.2d 823, 826-27, 832-33 (D.C. Cir. 1988) (affirming trial court j.n.o.v. for defendant, overturning jury verdict of causation of plaintiff's birth defects); *In re* Richardson-Merrell, Inc., 624 F. Supp. 1212 (S.D. Ohio 1985), *aff'd in part, vacated in part, and remanded with directions sub nom. In re* Bendectin Litig., 857 F.2d 290 (6th Cir. 1988) (upholding jury verdict of no causation of birth defects); Oxendine v. Merrell Dow Pharmaceuticals, No. 82-1245, 1996 WL 680992 (D.C. Super. Oct. 24, 1996) (overturning jury verdict finding causation of birth defects).
[54] *See* MICHAEL D. GREEN, BENDECTIN AND BIRTH DEFECTS: THE CHALLENGES OF MASS TOXIC SUBSTANCES LITIGATION 144 (1996) ("Grover Ashcroft's presence on the first Mekdeci jury, and his stubbornness in forcing a compromise verdict, provided a modicum of encouragement not onlyfor the lawyers in Mekdici, but for others as well."); Richard L. Marcus, *Reexamining the Bendectin Litigation Story*, 83 IOWA L. REV. 231, 250 (1997) (concluding based on Bendectin that "[t]he courts have properly been very hesitant to apply collateral estoppel in products liability cases."); Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DEPAUL L. REV. 479, 484 (1998) (noting that "[i]n the Bendectin litigation, … a series of directed verdicts for defendants based on lack of general causation was both bracketed and interrupted by several large plaintiffs' verdicts.").
[55] Marcus, *supra* note 54, at 250.
[56] *See* GREEN, *supra* note 54, at 227.
[57] *Id.*

implants.[58] Moreover, outside the mass tort context, even *Blonder-Tongue* employed issue preclusion to overturn a subsequent judge's finding that the patent there was valid, in conflict with a prior court's decision.[59]

B. Verdict Variability: Empirical Research and Explanations

Experimental research on the behavior of juries has also shown variation, even when juries hear the same evidence.[60] In one study, jurors watched precisely the same products liability trial on videotape, and then delivered their verdicts.[61] Fifty-one percent of jurors gave verdicts for the plaintiff.[62] Reviewing the varying verdicts of subsequently pooled juries, the study authors stated that "[t]he combined perspective of the particular

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[58] *See* Schuck, supra note 54, at 484-85 (stating that "[i]n the silicone breast implant litigation, where the evidence on general causation of immunological disorders was weak and became progressively weaker over time, most of the juries rendered defendants' verdicts, but some of them awarded large damages to plaintiffs, even after a string of defendant victories."); *id*. at 492 (noting "the great variability in jury verdicts in mass tort cases").

[59] *Blonder-Tongue*, 402 U.S. at 350; *see also* Waggoner, *supra* note 48, at 414.

[60] As Professors Kenneth Bordens and Irwin Horowitz have noted:

> [R]esearch has shown that different juries hearing precisely the same evidence may arrive at widely differing verdicts. …We certainly cannot predict what any hypothetical jury would do based on the verdicts of one or two juries in allegedly 'similar' cases.

Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 LAW & PSYCHOL. REV. 43, 65 (1998); *see also* Stier, *supra* note 17; Irwin A. Horowitz & Kenneth S. Bordens, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24 (1989) ("[T]here was a rather significant amount of inter-jury disagreement. Juries exposed to precisely the same evidence and experimental manipulations rendered highly divergent decisions."). Reviewing various empirical studies on jury verdicts, Professor Michael Saks similarly concluded that some variation existed:

> In general, studies show persistent correlations between evidence and outcomes in many contexts. But while there is substantial predictability, there also is considerable variation within conditions, that is, unpredictability and error. The two are by no means incompatible. While most juries respond to pro-plaintiff evidence with verdicts for the plaintiff, and to pro-defendant evidence with verdicts for the defendant, not all do. The closer the evidence is to equipoise, the greater will be the rate of disagreement among juries. The more extreme the evidence, the greater the proportion of juries that will reach the same verdict.

Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System – And Why Not?*, 140 U. PA. L. REV. 1147, 1238 (1992) (discussing study by Kalven and Zeisel in light of settlement likelihood for clear cases, and stating that "[t]he more perfectly the litigation system performs, the more random trial outcomes will be.").

[61] *See* Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency,* 48 DEPAUL L. REV. 301, 303-05 (1998); *see also* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages,* 1998 WIS. L. REV. 297, 316.

[62] *See* Diamond et al., *supra* note 61, at 305.

set of jurors who happen to be selected for a case will determine the outcome and that outcome might have been different if a different sample of six had been selected."[63] When the jurors deliberated as members of juries, 30% of juries who saw the moderate case found for the plaintiff, and 12% of juries who saw the weak case found for the plaintiff.[64] The study found that nine variables in attitudes among jurors could lead to a 67% prediction rate of a juror's decisions on liability.[65]

In another study, in which the same toxic tort trial was presented to jurors and the effect of separated trial structures was examined, 72% of juries in a bifurcated or trifurcated trial found for plaintiff.[66] When liability was determined before causation, 83% of juries found for plaintiff, and when liability was judged after causation, 97% of juries found for plaintiff.[67] With regard to general causation verdicts, 85.7% of juries found for plaintiffs after hearing a unitary trial, and 56.5% of juries found for plaintiffs in when presented with a separated trial.[68]

Interestingly, Professor Shari Seidman Diamond gathered information on agreement rates of people in variety of complex settings.[69] Across multiple areas, Professor Diamond found that a disagreement rate of 25-30%, including 25% for scientists doing peer review, 30% for psychiatrists diagnosing mental illness, 23%-34% for physicians diagnosing physical illness, and 30% or more for judges on sentencing

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[63] *See id.* at 317.
[64] *See* Landsman et al., *supra* note 61, at 322.
[65] *See* Diamond et al., *supra* note 60, at 313.
[66] Horowitz & Bordens, *supra* note 60, at 26.
[67] *Id*.
[68] *Id*.
[69] *See* Philip G. Peters, *Doctors & Juries*, 105 MICH. L. REV. 1453, 1477 (2007) (discussing Shari Seidman Diamond, *Order in the Court: Consistency in Criminal-Court Decisions*, in 2 THE MASTER LECTURE SERIES: PSYCHOLOGY AND THE LAW 119, 125 (1982)).

councils deciding on prison for a convict.[70] Reviewing these studies, Professor Philip Peters recently concluded that "[i]t is now well established that a modest, but significant, level of disagreement is inherent in the nature of performance assessment,"[71] which would seemingly underlie any claim for negligence, including those in mass tort cases. Such findings are also roughly consonant with the classic Kaven and Zeisel research involving 600 judges and 8,000 trials, which found a judge-jury liability disagreement rate of 21% for personal-injury cases.[72]

Numerous sources contribute to this verdict variability. Of course, sources of variability include the varying performances and arguments of lawyers and witnesses, differing rulings and comments by the same or different judges, and the varying circumstances and injuries of different plaintiffs.[73] Minimal explanation and training to juries about their task may also contribute to differing verdicts.[74] Moreover, juries often have difficulty remembering the instructions given to them.[75] Indeed, in a recent study, individual jury members could only score an average of five percent correct on a test of

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[70] *Id.* at 1477-78; *see also* Shari Seidman Diamond & Hans Zeisel, *Sentencing Councils: A Study in Sentence Disparity and Its Reduction*, 43 U. CHI. L. REV. 109, 119-20 (1975).
[71] Peters, *supra* note 69, at 1478.
[72] *See* HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 64 n.12 (1966); Harry Kalven, Jr., *The Dignity of the Civil Jury,* 50 VA. L. REV. 1055, 1063-68 (1964); *see also* Saks, *supra* note 60, at 1232-34; David M. Studdert & Michelle M. Mello, *When Tort Resolutions Are "Wrong": Predictors of Discordant Outcomes in Medical Malpractice Litigation*, 36 J. LEGAL STUD. S47, 73 (2007) ("This study found that discordant outcomes in malpractice litigation occur in approximately a quarter of cases. Although lower than most previous estimates of system inaccuracy, this level of discordance is still cause for concern.").
[73] *See* Saks & Blanck, *supra* note 21, at 834 ("[T]he case could have been tried using different permutations of the same facts of different facts and arguments that could have been assembled out of the same case. Clearly, any given trial of a case is but a single instance from among thousands of possible trials of that same basic case.").
[74] *See* Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury,* 54 BUFF. L. REV. 717, 750 (2006) ("[T]here is … evidence that legal instructions as they are typically given often fail to provide jurors with helpful legal guidance.").
[75] *See* CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 21 (2002) ("[W]e were surprised by how rarely jurors mentioned judicial instructions when thinking about their individual decisions and even when deliberating as juries.").

memory and understanding of jury instructions,[76] and what memory jurors do have may be inaccurate.[77] In addition, the complexity of a mass tort trial may also account for jury difficulty in comprehension and additional variability.[78]

At base, though, the existence of verdict variability should not surprise, given the make-up of the jury. The jury represents a serious attempt at bringing unbiased community sentiment on such issues as risk and defect to bear.[79] But a single jury of six[80] to twelve persons cannot be deemed a statistically significant sample of the community. To compile a federal jury, the court creates a "master file" of at least one half of one percent of the total names of possible jurors in a district.[81] The court then randomly draws a smaller group from the master file, and sends these persons questionnaires to determine their eligibility for, or exemption from, jury service.[82] Eligible persons comprise the "jury wheel," from which a random list of prospective jurors to summon to the court house as a "jury venire" or "jury panel."[83] Initially, the

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[76] *Id.* at 23 tbl.1.1.
[77] *Id.* ("[J]urors did not have accurate memories of the instructions, even when tested a few minutes after making their decisions.").
[78] *See* Joe S. Cecil, et al., *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials,* 40 AM. U. L. REV. 727, 755-60 (1991); Reid Hastie & W. Kip Viscusi, *What Juries Can't Do Well: The Jury's Performance as Risk Manager*, 40 ARIZ. L. REV. 901, 909-10 (1998); Peters, *supra* note 69, at 1480-81 ("The most clearly established [jury] weakness lies in the comprehension and application of probabilistic evidence. … [P]eople tend to overestimate the significance of some low probability risks."); Joseph Sanders, *Scientifically Complex Cases, Trial by Jury, and the Erosion of Adversarial Processes,* 48 DEPAUL L. REV. 355, 365 (1998).
[79] *See* Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J.L. & PUB POL'Y 523, 528 (2000) ("The civil jury assesses liability for product defectiveness by evaluating the 'reasonableness' of the risk at issue. This assessment depends on the risk attitudes of the jurors, which in turn depend on the jury selection process and properties of the constitutionally ideal civil jury.").
[80] *Rhone-Poulenc*, 51 F.3d at 1300 (noting that typical federal jury contains six jurors and two alternate jurors); Michael J. Saks, *Litigating Medical Malpractice Claims*, SG095 ALI-ABA 275, 279 (2002) ("The Trend toward smaller juries (down to 6 or 8 from the traditional 12) has contributed to greater unpredictability in verdicts.").
[81] *See* Villiers, *supra* note 79, at 529.
[82] *See id.*
[83] *See id.*

court may eliminate members of the jury panel for hardship.[84] Those remaining undergo "voir dire," in which attorneys for each side may eliminate additional jurors for cause (based on bias) or with a peremptory challenge.[85] Those jurors that are not eliminated in voir dire comprise the "petit jury," which sits in the jury box for the duration of the trial.[86]

Though most of the United States Supreme Court's jurisprudence on juries concerns criminal, rather than civil proceedings,[87] the Court requires that juries be "drawn from a cross-section of the community,"[88] and be free of bias.[89] The Supreme Court, however, has recognized that the petit jury or a jury panel is not constitutionally guaranteed to represent perfectly every aspect of the community,[90] and indeed, any jury

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[84] *See id.*

[85] *See id.* Statute usually limits the number of permissible peremptory challenges, under which an explanation need not be given the juror's elimination. *See id. But see* Batson v. Kentucky, 476 U.S. 79 (1986) (stating that peremptory challenges may not be based on racial grounds).

[86] *See* Villiers, *supra* note 79, at 529.

[87] As Profession Dooley has noted:

> There is some question about whether the fair cross-section requirement, which emanates from the Sixth Amendment's guarantee of an impartial jury, applies in civil cases as a constitutional matter. In civil cases pending in federal court, however, the Supreme Court has imposed a fair cross-section requirement. Most of the Court's analysis has developed on the criminal side of the docket.

Dooley, *supra* note 19, at 439 (footnotes omitted)). *Compare* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to a … trial, by an *impartial* jury of the state and district wherein the crime shall have been committed[.]" (emphasis added)), *with* U.S. CONST. amend. VII ("In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved[.]").

[88] Thiel v. Southern Pacific Co., 328 U.S. 217, 220 (1946) ("The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community."); *see also* Taylor v. Louisiana, 419 U.S. 522 (1975); Peters v. Kiff, 407 U.S. 493 (1972); Villiers, *supra* note 79, at 530.

[89] Dennis v. U.S., 339 U.S. 162 (1950); Frasier v. U.S., 335 U.S. 497 (1948); Villiers, *supra* note 79, at 530, 531-32 (noting that the Court has defined lack of bias as a jury where "each juror is, a priori, indifferent to the outcome of the case and 'conscientiously appl[ies] the law and find[s] the facts") (footnote omitted; brackets in original).

[90] *See* Holland v. Illinois, 493 U.S. 474, 480 (1990); *Taylor*, 419 U.S. at 538 (petit jury need not "mirror the community"); Thiel v. S. Pac. Co. 328 U.S. 217, 220 (1946) (Sixth Amendment does not mandate that petit jury "contain representatives of all the economic, social, religious, racial, political and geographic groups of the community"); Dooley, *supra* note 19, at 439-440 ("The Supreme Court has consistently held that the fair-cross-section requirement applies only to the jury venire, not to the panel chosen to sit in a particular case."); Villiers, *supra* note 79, at 531.

of even twelve members will not be completely representative.[91] The United States Supreme Court only requires that no "cognizable group"[92] be excluded, but of courses members within that group may differ markedly.

With regard to bias, two types may be distinguished. First, specific bias concerns any predisposition by a juror toward the right outcome in the case before the court.[93] Methods of controlling such bias include voir dire and peremptory and for cause challenges.[94] In contrast, general biases involve general views on issues such as risk and the value of life or health.[95] Variation among jurors in general bias is not considered problematic so long as the overall mix of views is broadly reflective of the community.[96] Racism among jurors, though not countenanced, may still surface and affect verdicts.[97] A jury with a mix of views, but without any specific biases, achieves what has been termed, "diffused impartiality."[98]

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[91] *See* Villiers, *supra* note 79, at 531 ("The cross-section requirement is a theoretical ideal that an individual twelve-member jury cannot achieve.").

[92] *See Taylor*, 419 U.S. at 538 (no guarantee that petit jury will "reflect the various distinctive groups of the population."); Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (no systematic rejection by jury panels of "identifiable segments of the community"); Dooley, *supra* note 19, at 439; Villiers, *supra* note 79, at 531 (noting that "[c]ourts have defined a cognizable group as one with (1) a common defining and limiting attribute, (ii) a distinctive attitude or experience, and (iii) a 'community of interest,' the exclusion of which would render the jury pool unrepresentative of the community").

[93] *See* Villiers, *supra* note 79, at 532.

[94] *Id.* (also noting use of sequestration and change of venue); *see also* Holland v. Illinois, 493 U.S. 474, 484 (1990) ("Peremptory challenges, by enabling each side to exclude those jurors it believes will be most partial toward the other side, are a means of 'eliminat[ing] extremes of partiality on both sides,' thereby 'assuring the selection of a qualified and unbiased jury'") (citations omitted).

[95] *See* Villiers, *supra* note 79, at 532.

[96] *Id.* ("[T]his type of bias does not violate the Seventh Amendment, but is essential to satisfy the fair cross-section requirement.")*; see also* People v. Wheeler, 583 P.2d 748, 861 (Cal. 1978) (noting desire to "achieve an overall impartiality by allowing the interaction of diverse beliefs and values the jurors bring from their group experiences.").

[97] *See* Saks & Blanck, *supra* note 21, at 836 n.145 (noting biases including racism).

[98] *See* Villiers, *supra* note 79, at 533.

These differences in views among the jury affect jurors assessment of, for example, risk that underlies notions of negligence and product defect.[99] Assessment of risk varies with risk tolerance, wealth, and age.[100] In particular, empirical studies have shown that less-risk-averse individuals put a lower value on a statistical life that more-risk-averse individuals.[101] Wealthier individuals also place a higher value on a statistical life.[102] In addition, jurors with higher education may prefer more detailed product warnings, and those with lesser education may want more simple product warnings.[103] As a result of particular mix of individuals on a jury, with attitudes on risk that may vary markedly from the community, the resulting verdict variability, shown in previous mass torts and replicated in empirical studies, should be no surprise.

The court's ability to take a case from a jury does not remedy the problem of jury verdict variability.[104] On issues of liability, the jury's decision is only partly hemmed by summary judgment, directed verdict, or judgment notwithstanding the verdict ("j.n.o.v"). Summary judgment is only granted when there is "no genuine issue of material fact," because a reasonable jury could not based on the evidence in the record find for the party

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[99] *Id.* ("Liability depends on a judgment of the reasonableness of a risk, which in turn depends on the risk attitudes of the person making the judgment.").

[100] *Id.*; *see also* W. KIP VISCUSI, FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK 7 (1992) ("Risk-dollar tradeoffs reflect individual preferences that will differ across individuals, just as do tastes and preferences for other economic goods…. [W]e should be concerned with ascertaining the distribution of values that are pertinent to the preferences for individuals whose lives are at risk."). *But see* Diamond, *supra* note 74, at 737 ("Demographic characteristics like gender, race, and age generally account for very little of the variation in response.").

[101] *See* Villiers, *supra* note 79, at 533; *see also* VISCUSI, *supra* note 100, at 47 (noting that workers in lowest quartile of risk appreciation value a statistical life between $5 and $8 million, while the highest-risk quartile valued a life between $2.8 and $3 million).

[102] *See* Villiers, *supra* note 79, at 534.

[103] *See id*.

[104] *See* Randal R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling "Pain and Suffering,"* 83 NW. U. L. REV. 908, 915 (1989) ("Judicial oversight only marginally curbs jury discretion."); Stephan Landsman, *Appellate Courts and Civil Juries,* 70 U. CIN. L. REV. 873, 893 (2002) ("[T]here are simply too many reasons justifying new trials to attempt an enumeration, but at the heart of the rule is a concern for the avoidance of serious injustice and a desire to insure [sic] that verdicts bear some reasonable relation to the weight of the evidence.").

opposing summary judgment – an approach leaving considerable leeway for variation among "reasonable" juries.[105] Under motions for judgment notwithstanding the verdict, a jury verdict is reversed if no reasonable factfinder, based on the evidence presented, could find as the jury had.[106] But of course where reasonable factfinders could find either way on issues of liability, those verdicts would stand. Similarly, judges may have differing notions of what a reasonable factfinder might be able to find, resulting in further variability.[107]

III. ISSUE PRECLUSION IN MASS TORT LITIGATION: A CRITIQUE

Issue preclusion permits one jury's finding on a particular legal issue to foreclose a subsequent jury from deciding that issue.[108] For issue preclusion to apply, resolution of

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[105] *See* FED. R. CIV. P. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986); Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574 (1986).

[106] *See* FED. R. CIV. P. 50(b); *see also* FED. R. CIV. P. 50(a)(1):

> If during a trial by jury a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue, the court may determine the issue against that party and may grant a motion for judgment as a matter of law against that party with respect to a claim or defense that cannot under the controlling law be maintained or defeated without a favorable finding on that issue.

[107] One study in Texas found a statewide jury verdict reversal rate of 25% of cases. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals,* 44 S. TEX. L. REV. 431, 440 (2003). Interestingly, however, appellate courts reversed 30% of jury verdict judgments in tort and Deceptive Trade Practices Act cases, with a 40% rate for defendants appealing a plaintiff jury verdict and a 10% rate for plaintiffs appealing a defendant jury verdict. *Id.* at 455. In personal injury cases only, defendants prevailed in appeals of 38% of plaintiff jury verdicts, and plaintiffs succeeded in appeals of 6% of defendant jury verdicts. *Id.* at 456. 60% of the statewide reversals derived from legal insufficiency of evidence pertaining to causation, damages, or another element (sometimes due to expert testimony that should have been excluded. *Id.* at 440. Only 4% of the reversals were based on challenges that the jury verdict was contrary to the great weight or preponderance of the evidence. *Id.* at 442. In addition, appellate courts increased jury involvement by reversing 24% of directed verdicts and 58% of grants of judgment notwithstanding the verdict. Sanders, *supra* note 29, at 443, 446. Appellate courts also reversed 33% of awards of summary judgment, of which 58% of the reversals were based on the existence of fact issues for the jury. *Id.* at 446. One study examining medical malpractice cases found that after 210 jury verdicts for plaintiff in Florida, there was only 1 j.n.o.v.; out of 112 jury verdicts for plaintiff in New York, there were only 4 instances of j.n.o.v.; and out of 179 jury verdicts for plaintiff in California, there was only 1 j.n.o.v. Neil Vidmar et al., *Jury Awards for Medical Malpratice and Post-Verdict Adjustments of Those Awards,* 48 DEPAUL L. REV. 265, 285, 292, 294 (1998).

[108] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 27 (1982) ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the same parties.").

the legal issue must have been necessary to the prior jury's judgment,[109] and the issue must be identical to the issue that arises before a subsequent jury.[110] As a result, the governing legal standard for the issue being decided must be the same in both courts.[111] Earlier versions of issue preclusion required mutuality of parties – that the parties in the first lawsuit and the second suit were the same.[112] But federal[113] and most state courts[114]

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[109] *See* Allen v. McCurry, 449 U.S. 90, 414 (1980) ("Under collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision may preclude relitigation of the issue in a suit on a different cause of action involving a party to the first case."); Dodge v. Cotter Corp. 203 F.3d 1190, 1198 (10th Cir. 2000); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816, 818 (Tex. 1984) (requiring that facts were "fully and fairly litigated in the prior action"; that facts were "essential" to the first action's judgment; and the litigants were "cast as adversaries in the prior action"). If the judgment indicates there could there were potentially multiple independent grounds for the jury's decision, then in some jurisdictions that decision may not be accorded preclusive effect. *See* Monica Renee Bromwell, Note, *Rethinking the Restatement (Again!): Multiple Independent Holdings and the Doctrine of Issue Preclusion*, 47 VAL. U. L. REV. 879, 880 (2003); *see also* REST. 2D JUDGMENTS § 27 cmt. i. Some courts treat each of multiple independent grounds for a decision as deserving of issue preclusive effect. *See, e.g.,* Westgate-California Corp., 642 F.2d 1174 (9th Cir. 1981); Yamaha Corp. of America v. United States, 961 F.2d 245 (D.C. Cir. 1992). Other courts, however, will not apply issue preclusion when multiple independent holdings support the decision. *See, e.g.,* Halpern v. Schwartz, 426 F.2d 102 (2d Cir. 1970).

[110] *See Bernhard*, 122 P.2d at 813; Kurt Erlenbach, *Offensive Collateral Estoppel and Products Liability: Reasoning with the Unreasonable*, 14 ST. MARY'S L.J. 19, 26 (1982) (noting the "first and most troublesome" collateral-estoppel issue is "whether the issue decided in the first suit is identical to the issue in the second suit for which collateral estoppel is being invoked"); Villiers, *supra* note 79, at 542; Susan R. Johnson, Note, *Civil Procedure: The Use of Collateral Estoppel and the Implications on the Multiple Trials Flowing from a Denial of Class Certification* – Dodge v. Cotter Corporation, 32 N.M. L. REV. 409, 416 (2002).

[111] *See* Erlenbach, *supra* note 110, at 28 ("[U]sing collateral estoppel in products liability suits poses the problem of reconciling varying standards of defectiveness used in different jurisdictions."); Green, *supra* note 18, at 189-90 ("[T]he laws that govern the determination of liability differ…. [A] finding of liability in a failure to warn case in New Jersey, where knowledge of the danger is imputed to the defendant, has no preclusion utility in Illinois, where plaintiff must prove that the defendant had or should have had knowledge of the risks involved in the product at the time of manufacture." (footnote omitted)); Villiers, *supra* note 79, at 523 ("Application of collateral estoppel requires not only identity between the issue to be precluded and that decided in the prior action (e.g., product defectiveness), but also requires that the definition of defectiveness applied in the prior case be consistent with the standard followed in the jurisdiction where collateral estoppel is sought.").

[112] *See, e.g.,* Bigelow v. Old Dominion Copper Mining & Smelting Co., 225 U.S. 111, 117-18 (1912); *Bonniwell*, 663 S.W.2d at 818; Erlenbach, *supra* note 110, at 29; Villiers, *supra* note 79, at 543; Note, *Offensive Use of Collateral Estoppel and the Right to Jury Trial*, 93 HARV. L. REV. 219, 222 (1979).

[113] *See Allen*, 449 U.S. at 94-95; Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326-28, 330 (1979) (allowing offensive collateral estoppel in subsequent suit, by non-party to prior litigation against party to the prior litigation); Blonder-Tongue Laboratiories, Inc. v. University of Illinois Foundation, 402 U.S. 313 (1971); Villiers, *supra* note 79, at 544. In diversity cases, federal courts may generally apply the law of the state in which they sit for matters of issue preclusion, though decisions have varied. *See Blonder-Tongue*, 402 U.S. at 1441 ("Many federal courts, exercising both federal question and diversity jurisdiction, are in accord unless in a diversity case bound to apply a conflicting state rule requiring mutuality."); *see also id.* at 1440 n.12 ("In federal-question cases, the law applies is federal law…. '[I]t has been held in non-diversity cases since *Erie* … that the federal courts will apply their own rule of res judicata."); Lynch v.

have since jettisoned mutuality in favor of a due-process analysis that merely requires that the party against whom a prior jury resolution is to be applied was a party to the prior suit, or in privity with that party.[115] The prior party must also have had a full and fair opportunity to litigate the first lawsuit.[116] And even then, the Supreme Court allows

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Merrell National Labs., 830 F.2d 1190, 1192 (1st Cir. 1987). *But see* Freeman v. Lester Coggins Trucking, Inc., 771 F.2d 860, 862 (5th Cir. 1985) ("Federal law determines the res judicata and collateral effect given a prior decision of a federal tribunal, regardless of the bases of the federal court's jurisdiction."); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334 (5th Cir. 1982) (stating that "federal res dudicata [sic] principles apply in federal tort claims actions in order to preserve the integrity of federal court judgment and that this rationale applies even equally to diversity cases."); Harrison v. Celotex Corp., 583 F. Supp. 1497, 1502 (E.D. Tenn. 1984) (federal law governs issue preclusive effect of prior diversity-jurisdiction federal decision); Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836, 839 (E.D. Tex. 1980) (same); RESTATEMENT (SECOND) OF JUDGMENTS § 87 (requiring that "federal law determine the effects under the res judicata of a judgment of a federal court"); *see generally* Howard M. Erichson, *Interjurisdictional Preclusion,* 96 MICH. L. REV. 945 (1998) ("The preclusive effect of a judgment, with rare exceptions, should be governed by the preclusion law of the rendering jurisdiction.").

[114] *See, e.g.,* Silva v. State, 745 P.2d 380, 384 (N.M. 1987); Eagle Properties, Ltd. v. Sharbauer, 807 S.W.2d 714, 721 (Tex. 1990) (stating that "it is only necessary that the party against whom the plea of collateral estoppel is being asserted be a party or in privity with a party in the prior litigation."); Bonniwell v. Beech Aircraft Corp., 663 S.W.2d 816 (Tex. 1984); Bernhard v. Bank of America Nat'l Trust & Savings Ass'n, 122 P.2d 892 (Cal. 1942); B.R. DeWitt, inc., v. Hall, 225 N.E.2d 195, 198-99 (N.Y. 1967) (mutuality is "dead letter"); Bahler v. Fletcher, 474 P.2d 338 (Or. 1970) ("mutality is not a relevant basis on which to determine the finality of the litigation."); Erlenbach, *supra* note 110, at 30 n. 67; Villiers, *supra* note 79, at 544; Johnson, *supra* note 110, at 413; Deric Zacca, *Florida's Position on Nonmutual Collateral Estoppel After* Stogniew*,* 52 U. MIAMI L. REV. 889, 898 (1998) (stating that although Florida retains the mutuality requirement for offensive collateral estoppel, "[m]ost state courts have … embraced nonmutual collateral estoppel."); *see generally* Stogniew v. McQueen, 656 So. 2d 917, 920 n.2 (Fla. 1995) (retaining mutuality requirement and for issue preclusion and listing other states' positions on the issue).

[115] *See* Taylor v. Sturgell, 128 S. Ct. 2161, 2171 (2008) ("A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'"); *id.* at Blonder-*Tongue*, 402 U.S. at 320-21; Dooley, *supra* note 19, at 431 ("Most courts, including federal courts, have abolished the mutality doctrine that restricted issue preclusion to parties actually joined in the earlier case."); Erlenbach, *supra* note 110, at 29 ("Before a plaintiff can be bound by a judgment in favor of a particular defendant, the plaintiff must either have been the plaintiff or be in privity in the original case."); George, *supra* note 11, at 660 ("[T]o assure the precluded party of this due process requirement, the Court deems it essential to be able to tell the precluded loser in [the second suit]: 'You (or your privy) have had your day in court in [the earlier suit]."); Villiers, *supra* note 79, at 543 ("Due process concerns require that only a party to an action or their privies later be bound by the judgment in the action."). The United States Supreme Court recently made clear that a party may not be virtually represented based simply on common interests. *Taylor*, 128 S. Ct. at 2161; *cf.* Montana v. United States, 440 U.S. 147, 154 (1979) (allowing preclusion against "nonparties [who] assume control over litigation in which they have a direct financial or proprietary interest"); *see generally* Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193 (1992) (discussing nonparty preclusion).

[116] *See Allen*, 439 U.S. at 415 ("[O]ne general limitation the Court has repeatedly recognized is that the concept of colalteral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case."); *Parklane*, 439 U.S. at 326-329.

courts applying offensive issue preclusion broad discretion as to whether to apply issue preclusion and has articulated various fairness factors that must also be met before applying issue preclusion, such as whether procedural advantages in the second litigation "could readily cause a different result," whether the party had adequate incentive to fully litigate then prior case, and whether the plaintiff held off easily joining the prior case to wait to see if a favorable verdict would result.[117] Moreover, if there are prior inconsistent verdicts, courts may not apply offensive issue preclusion.[118] In addition, development of

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[117] *See Parklane*, 439 U.S. at 330-32; *see also Blonder-Tongue*, 402 U.S. at 333-34 ("[N]o one set of facts, no one collection of words or phrases, will provide an automatic formulat for proper rulings on estoppels pleas. … [D]ecision will necessarily rest on the trial courts' sense of justice and equity."); *Hardy*, 681 F.2d at 346 ("[A]pplication of collatereal estoppel would still be unfair … because it is very doubtful that these defendants could have foreseen that their $68,000 liability to plaintiff … would foreshadow multimillion dollar asbestos liability."); Scurlock Oil v. Smithwick, 724 S.W.2d 1, 6 (Tex. 1986); Villiers, *supra* note 79, at 542 ("To discourage a wait-and-see attitude among potential plaintiffs, courts are reluctant to apply offensive collateral estoppel in cases where plaintiff could easily have joined in the first action, or where such action would be unfair to a defendant.").

[118] *See Parklane*, 439 U.S. at 330 (suggesting no issue preclusion if based on judgment that "is itself inconsistent with one or more previous judgments in favor of the defendant"); Setter v. A.H. Robins Co., 748 F.2d 1328, 1330 (8th Cir. 1984) (affirming no issue preclusion in Dalkon Shield case because of prior inconsistent verdicts); *Harrison*, 583 F. Supp. at 1503 ("It seems most inappropriate for this Court to pick out one case upon which the jury reached a verdict for plaintiff , and accord it preclusive effect, and at the same time to ignore all the others in which equally competent juries have reached the opposite conclusion."); Tretter v. Alden, 88 F.R.D. 329, 333 (E.D. Mo. 1980) (rejecting issue preclusion because "[t]hough plaintiff points to several cases in which a finding that asbestos was unreasonably dangerous was necessarily included within a jury verdict, defendants likewise can point to cases in which the jury found in favor of the defendant."); Kortenhaus v. Eli Lilly Co., 549 A.2d 437, 440 (N.J. App. Div. 1988) ("[A]pplication of offensive collateral estoppel in the face of inconsistent verdicts is antithetical to the very basis of the rule[.]"); *Sandoval*, 140 Cal. App. 3d at 944 (rejecting issue preclusion because of inconsistent verdicts on design defect); Dooley, *supra* note 19, at 413 n.5 ("Many courts refuse to allow offensive issue preclusion against a defendant who has won the issue in at least one previous case, even if another plaintiff has later won the issue."); Alison Kennamer, *Issues Raised by the Potential Application of Non-Mutual Offensive Collateral Estoppel in Texas Products Liability Cases*, 40 TEX. TECH. L. REV. 1127, 1152-53 (1999) (discussing *Setter*); *see generally Kortenhaus*, 439 A.2d at 166 ("Fundamental to the theory of collateral estoppel is the notion that the earlier decision is reliable, an underlying confidence the result was substantially correct. The premise is that properly retried, the output should be the same."). Interestingly, if a prior verdict for defendant is in the form of a general verdict, it is possible that in a mass tort, for example, the verdict was based on lack of causation and thus not technically inconsistent with a following plaintiff verdict necessarily based on defect. *See, e.g.,* Mooney v. Fibreboard Corp., 485 F. Supp. 242, 246-48 (E.D. Tex. 1980) (applying issue preclusion in favor of asbestos plaintiff despite prior general verdicts for defendant); Richard Hynes, Comment, *Inconsistent Verdicts, Issue Preclusion, and Settlement in the Presence of Judicial Bias*, 2 U. CHI. L. SCH. ROUNDTABLE 663, 667 & n.25 (1995). *But see* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 346 (5th Cir. 1982) ("A court able to say the approximately 35 suits decided in favor of asbestos manufacturers were all decided on the basis of insufficient exposure on the part of the the plaintiff or failure to demonstrate asbestos-related disease would be clairvoyant."); Vogt v. Emerson Elec. Co., 805 F. Supp. 506, 510 (M.D. Tenn. 1992); Hoppe v. G.D. Searle & Co., 779 F. Supp.

new evidence on an issue such as causation may result in not applying issue preclusion.[119] Similarly, if the prior court issued evidentiary rulings which the subsequent court found prejudicial, then issue preclusion may not be applied.[120] Assuming these requirements are met, the court may then under the doctrine of offensive non-mutual issue preclusion allow a plaintiff to use a prior adverse judgment against the defendant to foreclose the defendant's relitigating the issue in the subsequent litigation.[121]

The purpose of issue preclusion is to promote judicial efficiency[122] and decisional consistency.[123] When applied, issue preclusion saves the judicial resources and litigation

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1425, 1427 (S.D.N.Y. 1991); Lavetter v. Intl. Playtex, 706 F. Supp. 722, 723 (D. Ariz. 1988); Harrison v. Celotex Corp., 583 F. Supp. 1497 (E.D. Tenn. 1984).

[119] *See Rogers,* 925 F. Supp. at 1419 ("[C]onfidence in the … verdict is undermined by the existence of additional evidence … that was unavailable during the … trial – which conceivably could lead to a different result."); Zweig v. E.R. Squibb & Sons, 536 A.2d 1280 (N.J. App. Div. 1988) (new evidence "cast doubt" on medical causation of injuries from anti-miscarriage drug); *see also Oxendine*, 1996 WL 680992, at *34 ("The science that existed in 1983 has changed and it would, in these circumstances, be inappropriate to allow the 1983 judgment to stand or to do anything other than enter a judgment mandated by the state of scientific knowledge."); M. Stuart Madden, *Issue Preclusion in Products Liability*, 11 PACE L. REV. 87, 102 (1990); Jonathan David Pauerstein, Comment, *The Future of Offensive Collateral Estoppel in Texas*, 35 BAYLOR L. REV. 291, 319 (1983) ("[W]hen new scientific evidence is discovered relating to whether a certain drug can cause a given harmful result, a plaintiff's plea of estoppel is properly denied.").

[120] *See Zweig*, 536 A.2d at 1283; Madden, *supra* note 119, at 118.

[121] *See* Dooley, *supra* note 19, at 431 n.101 ("[U]nrelated may plaintiffs may use a previous plaintiff's win on a key issue against a common defendant.").

[122] *See Parklane Hosiery*, 439 U.S. at 326 ("Collateral estoppel, like the related doctrine of res judicata, has the dual purpose of protecting litigants from the burden of relitigating an identical issues with the same party or his privy and of promoting judicial economy by preventing needless litigation."); *see also* Allen v. McCurry, 449 U.S. 90, 94-96 (1980); George*, supra* note 11, at 663 (noting "waste and vexation to the common opponent" when no collateral estoppel because of lack of privity); Villiers, *supra* note 79, at 547; Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 (1996) ("The general doctrine of collateral estoppel has its roots in the notions that like cases should be treated alike, that judicial efficiency demands a degree of finality in judgments, and that multiple, conflicting judgments undermine confidence in the judicial process."); Student Note, *supra* note 112, at 224 (stating that *Parklane* "resolves th[e] balance in favor of the needs of judicial economy"). *But see Hardy*, 681 F.2d at 348 (rejecting collateral estoppel and refusing "to elevate judicial expedience over considerations of justice and fair play"). But of course, saving of expense alone is not sufficient to abridge the Seventh Amendment right to trial in federal court. *See* Villiers, *supra* note 79, at 550-51; *see also* Hobson v. Brennan, 637 F. Supp. 173 (D.D.C. 1986) (rejecting denial of civil jury trial because of impending budgetary difficulties); Armster, v. United States District Court, 792 F.2d 1423 (9th Cir. 1986) (same).

[123] *See Taylor*, 128 S. Ct. at 2171 ("these two doctrines protect against 'the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions.'" (quoting *Montana*, 440 U.S. at 153-54)); George*, supra* note 11, at 663 (noting "[i]nconsistency and thus embarrassment to the judicial system" resulting from using lack of privity to block collateral estoppel); Villiers, *supra* note 79, at 547; Hynes, *supra* note 118, at 663 (noting

expenses of subsequent parties re-litigating the prior issue.[124] This preservation of decisional consistency may raise the public's regard for the justice system.[125] In addition, the Supreme Court of the United States has criticized the notion that a party has a right to more than one litigation of an issue. In *Blonder-Tongue*, the Court stated that such an approach has the aura of "the gaming table."[126]

In most litigations, in which there are few repeat litigations, application of issue preclusion may not appear onerous. For example, a single, small accident may seem appropriate for issue preclusion. In *Skrat v. Ford Motor Company*,[127] one person was killed and one injured as a result of an accident in which the gas tank exploded in a Ford Maverick. In the first suit on behalf of the person killed, the gas tank was found to be defectively designed, and the manufacturer held liable.[128] Then, in the second suit on

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that issue preclusion "reduces the possibility of inconsistent verdicts, which create considerable embarrassment for the legal system" (footnote omitted)); Note, *The Due Process Roots of Criminal Collateral Estoppel*, 109 HARV. L. REV. 1729, 1730 (1996); *see also* Montanta v. United States, 440 U.S. 147, 153-54 (1979) ("To preclude parties from contesting matters that they have had a full and fair opportunity to litigate protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions."). Professor George broadens his concern for inconsistent verdicts into a general value of "solidarity – a legally ordained systematic preference for equality of treatment among all persons similarly situated." George*, supra* note 11, at 676; Johnson, *supra* note 110, at 412.

[124] *See* Dooley, *supra* note 19, at 432 ("Collateral estoppel … evolved from an ideal of efficiency: using court resources to relitigate issues already decided seems wasteful and unnecessary."); Villiers, *supra* note 79*,* at 549.

[125] *See* Arasimo Settemo Lucido v. Superior Court of Mendocino County, 795 P.2d 1223, 1229 (Cal. 1990) (noting that "[p]ublic confidence in the integrity of the judicial system is threatened whenever two tribunals render inconsistent verdicts," but rejecting issue preclusion in the criminal case before the court); Laura Gaston Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 VA. L. REV. 43, 51 (1996) ("[W]e justify … collateral estopppel because of fear that different decisionmakers in the context of different cases might make inconsistent findings – this is thought to be somehow unseemly and subversive of the authority of the court system. So in order to mask the uncertainty that inevitably flows from an imperfect system of truthfinding, we extol the virtues of finality."); George*, supra* note 11, at (noting the "risk of embarrassment to the system that essentially like cases will be decided in different ways").

[126] *Blonder-Tongue*, 402 U.S. at 329.

[127] 389 F. Supp. 753 (D.R.I. 1975).

[128] *Id.*; *see also* Villiers, *supra* note 79, at 543; *cf.* Ezagui v. Dow Chemical Corp., 598 F.2d 727 (2d Cir. 1979) (applying collateral estoppel for claim of product defect from inadequate warning).

behalf of the injured person, the court granted summary judgment on liability based upon the earlier judgment.[129]

But in litigations with many subsequent related actions, the inherent problems of issue preclusion become more apparent. In mass tort litigation, for example, the first case may involve allegations of product defectiveness that may affect the claims of hundreds of thousands of individuals, such as actions involving pharmaceuticals such as Vioxx or consumer products such as tobacco. If the first jury in a jury interrogatory finds that the product is defective,[130] all subsequent juries may be bound by that finding.[131] Notably, these subsequent juries may be bound on the issue, even they may well have varied and found no defect.[132]

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[129] *Skrat*, 389 F. Supp. at 753.

[130] *See, e.g,* Hines, *The Dangerous Allure of the Issue Class Action, supra* note 2, at 574 ("While special interrogatory verdicts might be used that make more clear the exact grounds on which a jury bases its verdict, the problem of isolating the same issue in complex factual and legal circumstances remains a serious impediment to the use of collateral estoppel in mass tort cases."); *see also* Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 344 (5th Cir. 1982) (rejecting issue preclusion, and noting that "it is impossible to determine what the [prior] jury decided about when a duty to warn attached").

[131] *See* Dooley, *supra* note 19, at 413 ("[B]ecause of preclusion principles, a favorable plaintiff's verdict on a key issue – such as whether a product is unreasonably dangerous – may relieve future plaintiffs of having to prove the point."); Erlenbach, *supra* note 110, at 20 ("Once a product is found defective, if certain criteria are met, plaintiffs in subsequent suits can obtain a summary judgment on the issue of defect by establishing that the defendant is collaterally estopped to deny the defectiveness of the product.").

[132] *See* Richard A. Epstein, *The Consolidation of Complex Litigation: A Critical Evaluation of the ALI Proposal,* 10 J. LAW & COMM. 1, 59 (1990) (noting "the possibility that an erroneous decision in a hotly disputed case will receive dispositive weight in all future cases."); Erlenbach, *supra* note 110, at 20 (noting that "[t]he potential for injustice … is great: finders of fact are not fallible"); Green, *supra* note 18, at 223 ("From the perspective of an asbestos defendant, … there is substantial unfairness in universalizing a single adverse jury decision, which experience has demonstrated is not reliable."); Greenbaum, *In Defense of the Mutuality of Estoppel*, 45 IND. L.J. 1, 2 (1969) ("The fallibility of the litigation process is the most fundamental basis for the mutual-lity requirement …; no one should ever undertake to guarantee the accuracy of the results of litigation."); Kennamer, *supra* note 118, at 1137 ("Another danger inherent in the application of non-mutual offensive collateral estoppel is the possibility that a plaintiff might unfairly use an inconsistent *or aberrant* result to support his or her claim of collateral estoppel" (emphasis added)); Ratliff, *supra* note 48, at 82 ("[T]here is no requirement that the first and controlling case be fairly representative of the issue to be decided."); Schuck, *supra* note 54, at 480 ("[T]he variability in trial outcomes – even assuming that the underlying facts are identical – may be significant."); Waggoner, *supra* note 48, at 410 ("[T]here can be little doubt that many cases are decided incorrectly."); *id*. at 416 ("That nonmutual collateral estoppel is unfair emerges from the fact that litigation involves a substantial element of chance, that the results of litigation run a substantial risk of being inaccurate."); *id.* at 416-17 ("Once the likelihood of inaccurate litigation results is recognized, once litigation is seen as to a great extent a matter of chance, then the unfairness of nonmutual collateral estoppel is manfiest."); *id.* at 423 (noting that "[a]

But those subsequent juries' verdicts will never be delivered because issue preclusion will silence them. Preserving the appearance of consistency,[133] issue preclusion fastens on the first verdict, even when it may not in fact be representative of what most juries would do.[134] For example, even if the trial court views the verdict as "probably wrong," the trial court may not award judgment notwithstanding the verdict if a reasonable jury could so find.[135] Moreover, the first plaintiff may have been selected to be the most sympathetic by plaintiffs' counsel, increasing the chance of an aberrational verdict in favor of plaintiffs in the first suit.[136] The plaintiff may have particularly egregious damages, leading the jury to more likely find liability, which could be exported

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major assumption of courts approving nonmutual collateral estoppel … is that a fairly tried case necessarily produces the right answer," and stating that is an "obviously erroneous assumption" (footnote omitted)).

[133] *See id.* at 64 ("[C]ollateral estoppel artificially fixes as true a finding that simply represents the ideologically-determined interpretation of an initial factfinder[.]").

[134] *See* Spettigue v. Mahoney, 445 P.2d 557 (Ariz. App. 1968) (rejecting offensive collateral estoppel and noting that "[w]hile this court believes that our system of justice has no peer in this fallible world, nevertheless it is unable to consider that our trial processes unerringly discover Truth."); JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE § 14.9, at 660 (1993) ("Collateral estoppel operates without regard to whether the first determination of a particular issue was correct. The court does not concern itself with the rightness of the finding."); Hiroshi Motomura, *Using Judgments as Evidence*, 70 MINN. L. REV. 979, 1009 (1986) ("Litigation is not an infallible determiner of historical truth, but rather an imperfect exercise that may produce a different result each time, influenced heavily but unpredictably by the identity of the parties, the advocates, and the decisionmakers…. The very basis of collateral estoppel is that the prior judgment may be binding even if it is wrong."); Victor E. Schwartz & Liberty Mahshigian, *Offensive Collateral Estoppel: It Will Not Work in Product Liability*, 31 N.Y. L. SCH. REV. 583, 586-87 (1986) ("[T]here is always the possibility that the prior verdict relied upon by the subsequent plaintiff may have been erroneously decided. The court may have erred in admitting or excluding evidence or in instructing the jury."); Steven C. Malin, Comment, *Collateral Estoppel: The Fairness Exception*, 53 J. AIR L. & COMM. 959, 987 (1988) (stating that "if a defendant won ninety-five out of one hundred suits arising from a common set of facts (such as an air crash)," and "if one of the five abberational judgments had occurred in the first action and the remaining courts barred the defendant from relitigating his liability, then all subsequent cases would be controlled by, perhaps, an idiosyncratic judge or jury.").

[135] *See* Fed. R. Civ. P. 50; Waggoner, *supra* note 48, at 412 (noting that "[a] jury will be allowed to return a verdict, rather than have a judgment entered as a matter of law, so long as the evidence is such that a reasonable person could arrive at the jury's verdict, even if that verdict is probably wrong."); *id.* ("A judge's findings of fact must be accepted even though they are probably wrong, so long as they are not clearly erroneous.").

[136] *See* Lundeen v. Hackbarth, 171 N.W.2d 87 (1969); Malin, *supra* note 134, at 987 ("[S]uch an idiosyncratic decision for the plaintiff is most likely to occur in the first action since, knowing of potential estoppel effect, the most sympathetic plaintiff is often put fourth [sic] first."); Ratliff, *supra* note 48, at 90 (suggesting disparity if first plaintiff were a "nun-neurosurgeon" as opposed to an "escaped convict"); Schwartz & Mashigian, *supra* note 134, at 587 ("[T]he prior plaintiff may have aroused extreme sympathy from the court or jury.").

to other cases via issue preclusion.[137] In addition, the first jury may have been a compromise verdict of liability in favor of reduced damages.[138]

In *Parklane*, the United States Supreme Court's concern with prior inconsistent judgments[139] ignored the possibility that the first verdict would be inconsistent with the verdicts that followed, and indeed, may have been an outlier in favor of plaintiffs when most other juries would have found for the defendant. The Court discussed Professor Currie's example of a railroad crash with multiple suit to underscore the problem of inconsistent prior verdicts.[140] But in the same article cited by the Court, Professor Currie underscored that the concern of an aberrational verdict also applies to the first verdict:

> If we are unwilling to treat the judgment against the railroad as res judicata when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as res judicata even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series.[141]

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[137] *See* Ratliff, *supra* note 48, at 89 ("The damages proof often spills over into the liability issues so that a case weak on liability is saved if the damages are strong, and vice versa.").

[138] *See* Katz v. Eli Lilly & Co., 84 F.R.D. 378, 382 (E.D.N.Y. 1979) ("[W]here an original judgment is questioned on the ground that it was based on a compromise verdict, a court must in fairness provide a litigant every opportunity to explore the basis for a defense to offensive use of the judgment and collateral estoppel against it."); Kaufman v. Abbot Laboratories, Inc., 482 N.E.2d 63, 69 (N.Y. 1985) (noting in a DES case, that "[a]lthough indications of jury compromise is one factor properly to be considered in determining whether a party against whom collateral estoppel is sought had a full and fair opportunity to litigate the issues in the prior determation, the evidence offered to defeat application of the doctrine in this case is insufficient." (footnote and citations omitted)); Green, *supra* note 18, at 202 ("Confidence in the first judgment may also be impaired if it was the result of jury compromise."); Hynes, *supra* note 118, at 663 ("One possible casualty is accuracy. Issue preclusion may enhance the risk associated with a lawsuit by possibly preserving an anomalous judgment or by making a compromise verdict the basis of liability in future cases." (footnote omitted)); Saks, *supra* note 80, at 283 ("Where 'fusion' [of liability and damages] is found, it usually takes the form of a reduced damage awards [sic] when the defendant's liability is less than clear."). *But see Blonder-Tongue*, 439 U.S. at 1445 n.26 (noting compromise-verdict concern, but noting that "it would not appear ot be a significant consideration in deciding when to sustain a plea of estoppel in patent litigation, since most patent cases are tried to the court").

[139] *Parklane*, 439 U.S. at 330.

[140] *Id.* at 330 n.14.

[141] Currie, supra note 7, at 289. As Professor Richard Marcus has noted, "[a]lthough the Supreme Court acknowledged that inconsistent verdicts provide a reason for denying estoppel on grounds of fairness, it did not seem to appreciate Currie's basic point" – which is that we cannot be assured the first verdict is not

The tremendous sums turning on the question of product defectiveness, or negligence, counsel that multiple juries bringing a more collective wisdom on the issue, not cut short jury input via issue preclusion.[142] As Judge Posner opined in class actions, an area with similar problems,[143] [o]ne jury, consisting of six persons …, will hold the fate of an industry in the palm of its hand."[144] Imposing such a potentially outlier verdict on all subsequent cases is not fair,[145] and therefore should be rejected by judges in the mass tort context under the discretion with regard to offensive non-mutual issue

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aberrational. Marcus, *supra* note 54, at 249. Professor Jack Ratliff expanded on Currie's persisting problem, post-*Parklane*:

> [I]f a court applied collateral estoppel in the situation in which Case 26 was tried first, the anomaly would never come to light. The repeated use of a single initial finding would conceal the problem. The situation presents only the theoretical potential for other, conflicting fact-findings. Even though the result is no less anomalous, we would never have the anomaly demonstrated. The system would maintain an appearance – though a false one – of regularity. Curiously enough, this idea of cosmetic regularity has been one of the mainstays of the argument favoring the application of collateral estoppel. The argument is that different fact finders will inevitably reach conflicting results on the same questions. Therefore, consistency will never be possible, and so we might as well settle for the appearance of it.

Ratliff, *supra* note 48, at 74 n.77. Professor Currie later retreated somewhat from his position, noting that "so long as we retain sufficient faith in the institution of trial by jury to retain it for civil cases at all, what warrant is there for mistrusting the verdict for purposes of collateral estoppel when there is no suggestion that there has been compromise or other impropriety?" *See* Brainerd Currie, *Civil Procedure: The Tempest Brews*, 53 CAL. L. REV. 25, 36 (1965); *see also Sandoval*, 140 Cal. App. 3d at 943 (stating that "Currie himself retreated from his original position").

[142] *See* Erlenbach, *supra* note 110, at 22 ("[I]t is … unjust to prove the plaintiff's case for him by taking from the factfinder the opportunity to pass on the defectiveness of the product when that question is still a matter of reasonable dispute."); *id.* at 53 ("A lone jury's decision that a defendant's conduct was unreasonable should not resolve the issue in all subsequent cases; something more is needed."); Waggoner, *supra* note 48, at 409 ("The risk of inaccuracy in litigation is too high to let us justify estoppel by confidence that the first result is likely to have been correct."); Malin, *supra* note 134, at 987 ("[T]rying multiple cases consumes valuable judicial resources; but, one must consider whether (as in the present system) the possibility of ninety-five unfair, unjust judgments is an acceptable cost therefore.").

[143] *See* Stier, *supra* note 17.

[144] In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995); Dooley, *supra* note 19, at 432 (discussing "unease" of *inter alia* the Supreme Court and Congress, and noting that "[t]hese critics question whether the initial decisionmaker, the local jury, should wield such power.").

[145] *See* Hines, *The Dangerous Allure of the Issue Class Action*, *supra* note 2, at 575 ("[I]t would be unfair to permit preclusion based on a single verdict in mass tort cases where the evidence would have supported a judgment for either party."); Alexandara D. Lahav, *Bellwether Trials,* 76 GEO. WASH. L. REV. 576, 594 (2008) (noting "greater possibility of systemic bias" in situation where "only one jury … makes decisions that are to be extrapolated to a larger population, [because] one set of jurors, rather than many sets over many years, will decide the fate of thousands of cases"); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 CORNELL L. REV. 779, 813 (1985) ("In such circumstances, there is no certainty that the initial verdict was correct and imposing the facts found in the first action on all later cases is unfair.").

preclusion.[146] Any one individual trial represents a just attempt at resolving the dispute between the parties,[147] but applying that one jury's finding to perhaps thousands of other cases overstates the accuracy of any one jury.[148]

While the concern of verdict variability on issues of such high stakes should be enough to cause courts to refrain in their discretion from utilizing issue preclusion in mass torts, an additional reason for the unfairness of non-mutual issue preclusion is that it only imposes the downside of the first verdict on defendants, not plaintiffs, in a mass tort

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[146] *See* In re Bendectin Prods. Liab. Litig., 739 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane*'s discussion of Currie's hypothetical, and stating that "[i]n *Parklane Hosiery*, the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation."); *Hardy*, 681 F.2d at 346 n.13 ("The injustice of applying collateral estoppel in cases involving mass torts is especially obvious."); Amy Gibson, Note, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts,* 46 BAYLOR L. REV. 463, 464 (1994) ("Often, however, these 'missed opportunities' reflect a recognition that procedural changes designed to decrease the federal caseload impermissibly alter substantive rights. For example, allowing offensive collateral estoppel in the context of mass torts violates the principles announced in *Parklane Hosiery Co. v. Shore.*"); Kennamer*, supra* note 118, at 1145 ("The problems inherent in attempting to apply non-mutual offensive collateral estoppel to products liability litigation further demonstrate that Texas courts should, like those other courts whose decisions were well-reasoned, find the application of non-mutual offensive collateral estoppel in products liability cases largelyl unfair."); Schwartz & Mashigian, *supra* note 134, at 591 ("The Supreme Court was warned trial courts not to apply offensive collateral estoppel if it would be unfair to a defendant…. [I]t is not justified in product liability lawsuits." (footnote omitted)); *see also* Nations v. Sun Oil Co., 705 F.2d 742, 744 (5th Cir. 1983) ("[Collateral estoppel] is a doctrine of equitable discretion to be applied only when the alignment of the parties and the legal and factual issues raised warrant it."). Another intriguing suggestion is the possibility is for issue preclusion only to be granted based on summary judgment finding that no rational jury could find other than against the defendant on defect. Attorney Erlenbach, for example, argued that "a products liability defendant should not be estopped to deny the alleged defect in his product *unless the judge is convinced that there is no reasonable dispute on the matter*," a standard that is tantamount to a summary judgment or directed verdict. *See* Erlenbach, *supra* note 110, at 54. Even here, however, there are concerns circumventing juries and imposing the will of a single individual – the judge – to decide the entire mass tort. Again, the risk of an outlier judgment instead counsels a more-decentralized approach of multiple juries not constrained by issue preclusion.

[147] *See* Waggoner, *supra* note 48, at 415 ("If decisions are too often inaccurate to be accepted for nonmutal collateral estoppel, why should their results be accepted even in the first case…? …[T]he court systems do make a major effort to produce accurate results, and this effort deserves respect even though accuracy may often not be achieved.").

[148] *See* Schwartz & Mashigian, *supra* note 134, at 590 ("[C]hoosing any single verdict to establish the issue in a subsequent case is inherently arbitrary."); Waggoner, *supra* note 48, at 415 ("We should not put the results of litigation to uses that could be justified only if the results could confidently be expected to be accurate.").

litigation.[149] In a mass tort, each individual suit may pit a single plaintiff against a defendant alleged to have caused the mass tort. A loss on an issue such as product defect by any one plaintiff will not result in issue preclusive effect upon other plaintiffs, because those subsequent plaintiffs will not have been a party to the prior action; due process prohibits the application of issue preclusion.[150] Yet if the first plaintiff wins on defectiveness against the common defendant, then subsequent plaintiffs may gain issue preclusion and prevail on defect, because the common defendant was in the prior case.[151]

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[149] *See Parklane*, 439 U.S. at 338 (Rehnquist, J., dissenting) (noting a "nagging sense of unfairness as to the way petitioners have been treated, engendered by the imprimatur placed by the Court of Appeals on respondent's 'heads I win, tails you lose' theory of this litigation"); Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases,* 29 TEX. TECH. L. REV. 779, 805-806 (1998) ("[Defendants'] concern is exacerbated by the fact that, even if the first bellwether trial results in a defense verdict, that verdict would have no effect on the remaining claims because their claims were not actually litigated in the prior trial. Accordingly, defendants face the potential of being collaterally estopped by a loss, while a loss by a plaintiffs' bellwether group has absolutely no legal impact on the thousands of remaining claims." (footnote omitted)); Gibson, *supra* note 146, at 464 n.9 ("The unfairness of a contrary result is apparent. A defendant in a products liability action could win an issue in the first 500 cases, lose the issue in the 501st case, and face the prospect of losing the issue in the next 1,000 cases due to plaintiffs' use of collateral estoppel.").

[150] *See Blonder-Tongue*, 402 U.S. at 1443 ("Some litigants – those who never appeared in a prior action – may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position."). Professor Jack Ratliff referred to this problem as the "option effect":

> The option effect works this way. If a plaintiff establishes in Case 1 that the roll bar on a four-wheel drive Blaster is defective, subsequent plaintiffs who were not parties to Case 1 can hold Blaster Company to that finding. But subsequent plaintiffs are not bound to a finding against the first plaintiff. Each subsequent plaintiff has a due process right to a day in court on that question. Therefore, each has an option. He can adopt the Case 1 finding if it goes against Blaster Company or ignore it if it does not. Each subsequent plaintiff has a "heads-I-win, tails-you-lose" advantage.

Ratliff, *supra* note 48, at 65 (footnote omitted); *see also* Erlenbach, *supra* note 110, at 29. Professor Villiers similarly described the problem:

> This privity requirement prevents a defendant who prevailed in an action to collateral estop a non-plaintiff. Suppose, for instance, a victim of an automobile accident sues the manufacturer of an automobile alleging a defectively designed gasoline tank. The manufacturer then prevails on the defectiveness issue. The judgment does not preclude a different plaintiff from relitigating the identical issue in a different cause of action.

Villiers, *supra* note 79, at 543; *see also* In re TMI, 193 F.3d at 724; Johnson, *supra* note 110, at 417.

[151] *See id.* ("Collateral estoppel may be used offensively … by a non-privy plaintiff in a subsequent suit. If, in the automobile example, the decision had gone against the defendant, a subsequent non-privy plaintiff could have used collateral estoppel offensively to estop defendant from denying defectiveness."); Green, *supra* note 18, at 151 ("[P]otential plaintiffs can await the outcome of another suit against a common defendant, potentially benefit from it, and at no risk."); Hynes, *supra* note 118, at 667 (noting the "asymmetry of offensive, non-mutual issue preclusion."); Waggoner, *supra* note 48, at 408 ("Under non-mutual collateral estoppel, the common party's loss of the first case may be available to all the other

This inequity may result in free riding by plaintiffs who might seek not to be the first plaintiff.[152] The subsequent plaintiff would then gain summary judgment on the issue of defectiveness, and further evidence would be introduced on issues of causation and damages.[153] Moreover, it is not fair to allow subsequent plaintiffs to gain the benefit selectively of a pro-plaintiff first verdict, because those subsequent plaintiffs have not been subjected to the risk of a loss in the first case.[154] Indeed, the result resembles the

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claimants as an estoppel of the common party on issues which may be dispositive, yet a victory by the common party cannot be used against the other claimants because of the limitations of the Due Process Clause. Thus, the common party in litigating the first case can win no more than that case, but the common party may lose all the cases." (footnote omitted)); Weinstein, *supra* note 53, at 14 & n.54 ("Up to now these doctrines [of res judicata and collateral estoppel] have been of greater help to plaintiffs than defendants").

[152] *See* George, *supra* note 11, at 665 (noting that those who may seek issue preclusion based on "*Parklane* and *Blonder-Tongue* are basically defined by free riding – they are 'bound' only by the victories of earlier parties").

[153] *See* Villiers, *supra* note 79, at 544 ("If the issue of liability were precluded by application of offensive collateral estoppel, the jury will be instructed to assess damages on the presumption that the defendant is liable. In cases evidence of liability is separate from damages testimony, either party can, through a motion in limine, move to exclude evidence on liability as irrelevant or prejudicial.") (footnote omitted).

[154] As Professor Waggoner has noted:

> The risk in litigation is much like the risk in a coin flip, even though the court system by a variety of mechanisms tries to resolve disputes accurately, and even though each side tries by retention of skilled counsel and by diligent preparation to make the odds as much as possible favor it. In such a coin flip, you put up your money and you abide by the result, win or lose. That seems fair. Now suppose a bystander who has watched the coin flip but who has not risked his cash were to approach the loser and say, "Pay me, too." Such a demand would be laughed away, it is so obviously unfair. Yet such demands are now commonly enforced under the doctrine of nonmutual collateral estoppel.

Waggoner, *supra* note 48, at 417; *see also* Epstein, *supra* note 132, at 58-59 (noting the "potential abuses associated with the offensive use of collateral estoppel," and stating that "[w]here individual plaintiffs are free to 'hang back' from consolidated litigation, they can place themselves in a 'heads-I-win-tails-I-relitigate' position."); Ratliff, *supra* note 48, at 77-79 ("[G]ood procedural rules should allocate the risk of chance [of] miscarriages fairly, which in civil cases means evenly…. [I]t is clear that the option effect forces the first-case defendant to play for low stakes if he wins, but for high stakes if he loses."); Waggnoner, *supra* note 48, at 418 ("The other claimants able to invoke nonmutual collateral estoppel are able to win without having risked anything. While such a result might seem appropriate if we were confident the first result was correct, such confidence cannot be justified. There is no fair claim to such a windfall."); *id.* at 425 ("Courts are used not because they are accurate (on the contrary they appear often to be inaccurate), but because they attempt to be fair and accurate and they are a reasonable risk allocation mechanism. A process justified by fair risk allocation cannot fairly be extended to others who risked nothing."); Malin, *supra* note 134, at 988 ("A fundamental flaw in the offensive collateral estoppel doctrine is the glaring fact that the defendant has everything to risk in the first action while nonparty plaintiffs risk nothing."). To remedy this "basic asymmetry of risk," some have proposed that issue preclusion only be applied if both parties agreed to be bound by the first verdict. *See* Epstein, *supra* note 132, at 59 ("[T]he problem of outsider abuse can be ameliorated by a simple procedural measure…: require the outsider to *elect* at the outset whether or not it chooses to be both benefited and burdened by any judgment or settlement in the class litigation."); Malin, *supra* note 134, at 991; *see also Taylor*, 128 S. Ct. at 2172 ("[A]

one-way intervention of the spurious class action that was rejected by the Rule 23 amendments in 1966.[155] Although *Parklane* advises courts to be mindful of whether plaintiffs "could easily have joined the prior action,"[156] this concern alone may not be enough to prevent issue preclusion in mass torts, where joinder of perhaps thousands of plaintiffs is not practicable, and where identifying putative plaintiffs may be difficult.[157]

As a result of this pro-plaintiff bias, defendants are incentivized to settle with plaintiffs for more than they would without issue preclusion,[158] increasing their total litigation exposure.[159] Moreover, a relatively more attractive plaintiff would likely command a settlement premium, because of the greater fear of an initial pro-plaintiff finding on general issues such as defect.[160] Indeed, the risk for a mass tort defendant of issue preclusion on a single jury, the defendant may feel compelled to settle stronger

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person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement.'" (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 40); *In re* Air Crash Disaster at Stapleton Int'l Airport*,* 720 F. Supp. 1505 (D. Colo. 1989) (applying results of first test trial on common issues to those plaintiffs who agreed to be bound by result, but denying issue preclusion benefit to "wait and see" plaintiffs), *rev'd on other grounds sub nom.* Johnson v. Continental Airlines Corp., 964 F.2d 1059 (10th Cir. 1992). Although litigants should be free to resolve their lawsuit as they wish (as in settlement), this approach does not remedy the underlying problem of verdict variability and resulting unreliability in the first verdict.

[155] *See* Ratliff, *supra* note 48, at 79 ("One-way intervention made its appearance in the early days of class actions and was widely condemned as unfair. … Some thirteen years after the 1966 rule change shut down the … option effect, *Parklane* opened it up again."); Waggoner, *supra* note 48, at 419 ("To tolerate non-mutual collateral estoppel is to resurrect the unfairness the 1966 revision of the federal rules sought to inter.").

[156] *Parklane,* 439 U.S. at 322-23.

[157] *See* Ratliff, *supra* note 48, at 82 ("[C]ourts cannot effectively identify and disarm most wait-and-see plaintiffs.").

[158] *See* Hynes, *supra* note 118, at 674 ("[T]he defendant is willing to offer a greater settlement than he would if there were no offensive, non-mutual issue preclusion."); *see also* Madden, *supra* note 119, at 135 ("[I]t would be rare for the defense counsel of a national manufacturer or marketer to fail to review every litigation decision with an eye towards the effect upon later and similar lawsuits that may be anticipated from any systematic product problem.").

[159] *See* Hynes, *supra* note 118, at 674 (calling the extra amount the "issue preclusion bonus" and noting that "even if courts interpret 'inconsistent' verdicts broadly, the defendant's expected total liability will still be greater than if the courts maintained the mutuality requirement").

[160] *See id.* at 683.

cases.[161] But a relatively unattractive plaintiff may at the beginning of a litigation push the defendant toward trial, because of the greater chance of a pro-defense verdict that could stop future issue preclusion because of the prior pro-defense verdict.[162] For their part, plaintiffs' counsel may try to avoid bringing claims for less-attractive plaintiffs first.[163] And defendants are incentivized to undertake tremendous expenditures defending the first trial, to avoid collateral estoppel.[164] Moreover, litigation surrounding whether the elements of issue preclusion are met consumes additional resources.[165] In any event, the putative efficiency benefits of issue preclusion may be lost if, as has happened, plaintiffs and defendants agree to a settlement premium for a settlement including vacatur of the underlying judgment, which in some jurisdictions the trial court

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[161] *See* George*, supra* note 11, at 668 ("The threat of later preclusion, like the threat of class certification, may deny economically rational actors the opportunity to exercise their constitutionally protected procedural rights to fully litigate each case, because the stakes are simply apt to be too high. Many litigants would settle simple, private controversies before the day of judgment ….") (footnote omitted); Marcus, *supra* note 54, at 251.

[162] *Id.*

[163] This motivation may have been behind the dispute between the lawyers and their plaintiff Betty Mekdeci, who had strategic difficulties with her Bendectin claim, leading her lawyers to want to drop her case. *See* Marcus, *supra* note 54, at 250-51.

[164] *See id.* at 251; Schwartz & Mashigian, *supra* note 134, at 589 ("The possibility of a court applying collateral estoppel thus forces defendants to litigate all cases on the assumption that the disposition of any issue might prove critical in subsequent cases."); Stephen J. Spurr, *An Economic Analysis of Collateral Estoppel*, 11 INT'L REV. OF LAW & ECON. 47, 47 (1991) (collateral estoppel "might give [defendant manufacturer] an incentive to invest a disproportionate amount in defending itself against [plaintiff's] suit"); *see also* GREEN*, supra* note 54, at 158 (stating that in the first Bendectin trial, "Betty Mekdeci … faced a defense that was of an effort and size that reflected much more than the single claim being asserted.").

[165] *See* Goodson v. McDonough Power Equipment, Inc., 443 N.E.2d 978 (Ohio 1983) ("time-consuming and costly investigations may well be necessitated into collateral issues that may be essentially irrelevant to the actual issues between the parties … and may indeed increase the total amount of litigation, negating one of the prime supportive arguments, i.e., the economy of judicial process"); Green, *supra* note 18, at 186 (noting "a significant proportion of party and judicial resources may be consumed by the efforts invested in determining whether collateral estoppel is appropriate in a particular case."); Schwartz & Mashigian, *supra* note 134, at 589 ("The resources devoted to litigating these [collateral estoppel] issues may offset any savings derived from the use of collateral estoppel and actually increase the total burden on the judicial system."); Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group,* 187 F.R.D. 328, 428 (1999) ("Even if some attempts to relitigate are unsuccessful, the attempts themselves consume judicial and party resources.").

may do to effectuate settlement.[166] The vacated judgment would therefore not be able to used for issue preclusion.[167] In sum, the gamesmanship engendered in ordering plaintiffs, and the sizable additional litigation and settlement costs, call into question the fairness of issue preclusion, as well as its efficiency goals.[168]

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[166] *See* Outboard Marine Corp. v. Liberty Mut. Ins. Co., 536 F.2d 730, 733 (7th Cir. 1976) (recounting plaintiff attorneys' request to settle with vacatur, so as to avoid collateral estoppel); Erlenbach, *supra* note 110, at 20 n.5 (discussing *Outboard Marine*); Elizabeth R.P. Bowen, *Routine Vacatur: The Supreme Court Strikes the Balance in Favor of Finality*, 3 FED. CIR. B.J. 259, 263 (1993) ("The inconsistent treatment within the court system has subjected parties seeking to invoke the collateral effects of a prior judgment – or to avoid such effects – to uncertain and arbitrary application of the vacatur doctrine."); Jill E. Fisch, *Rewriting History: The Propriety of Eradicating Prior Decisional Law Through Settlement and Vacatur*, 76 CORNELL L. REV. 589, 595 (1991) ("Vacatur enables an unsuccessful litigant to obtain the collateral benefits of reversal, such as … destruction of any collateral estoppel … in exchange for the settlement price."); Brandon T. Allen, Note, *A New Rationale for an Old Practice: Vacatur and the Rules of Professional Responsibility*, 76 TEX. L. REV. 661, 663 (1998) ("[V]acatur creates problems for future plaintiffs who would like to use the trial court's judgment when attempting to invoke the doctrine of offensive collateral estoppel."); Steven R. Harmon, Comment, *Unsettling Judgments: Should Stipulated Reversals Be Allowed to Trump Judgements' Collateral Estoppel Effects Under* Neary*?*, 85 CAL. L. REV. 479 (1997); *cf.* Note, *Collateral Estoppel Not Allowed if Settlement Agreement Precedes Final Judgment for Both Liability and Damages*, 2001 UTAH L. REV. 1090 (2001). *But see* U.S. Bancorp Mortgage Co. v. Bonner Mall Partnership, 513 U.S. 18 (1994) ("[M]ootness by reason of settlement does not justify vacatur of a judgment under review."). A judgment on appeal may not be sufficiently final to warrant issue preclusive effect. *See* Kramer v. Showa Denko K.K., 929 F. Supp. 733, 750 (S.D.N.Y. 1996) (rejecting preclusive effect of California judgment still on appeal); Sandoval v. Superior Court of Kings County, 104 Cal. App. 3d 932, 936-37 (1983) ("Although California law is settled that *pending* appeal a trial court judgment is not final and will not be given res judicata effect, once the appeal is settled favorably to the plaintiff and thereafter dismissed, the Restatement analysis and reason itself dictate that the trial court judgment reemerges with sufficient finality to permit the application of collateral estoppel."); *cf.* Winters v. Diamond Shamrock Chem. Co., 149 F.3d 387, 395 (5th Cir. 1998) ("[T]he availability of review is of paramount importance to the issue of preclusion."); Merced-Torres v. Merck & Co., 393 F. Supp. 2d 1299, 1303 (M.D. Fla. 2005) ("Offensive collateral estoppel is not appropriate in cases where an issue is not reviewable on appeal."); *Sandoval*, 140 Cal. App. 3d at 936 n.2 ("Under the federal rule and in a majority of state courts, the second plaintiff can use a judgment as res judicata in a later trial at any time before the first judgment has been reversed, vacated or modified.").

[167] Harmon*, supra* note 166, at 479 (noting that "if the initial action is reversed by stipulation, the first judgment has no preclusive effect in later actions.").

[168] *See* Motomura, *supra* note 134, at 1004 ("[I]n many cases collateral estoppel is also very inefficient. It may simply substitute one area of contention for another. Instead of arguing about the merits of the case, the parties argue about what the prior litigation decided."); Schwartz & Mahshigian, *supra* note 134, at 584-85 ("[T]he determination of whether to apply [collateral estoppel], in light of the particular facts of a case, actually increases the burden on the judiciary by exhausting the same judicial resources that would have been spent on litigating the issue to be estopped."); Spurr, *supra* note 137, at 47 (stating that the "fact that the stakes have increased for [defendant manufacturer in the first case raises the question whether more resources will be consumed in litigation, even though relitigation of the issues is avoided"); Malin, *supra* note 134, at 983-84 (noting loss of efficiency in plaintiffs' not joining in first action, additional defense costs in first suit, and subsequent litigation over whether issue preclusion applies).

Furthermore, the jury pool for the single plaintiff is a fair cross-section of members of the community around the court in which the plaintiff brought suit. But applying that verdict statewide via preclusion undercuts the ability of other juries, representative of other communities within the state, to opine as to issues such as product defect.[169] These jury concerns are exacerbated in the context of mass tort claims based on negligence and product defect that are so fluid as to be especially be unpredictable as to how any one jury would find, and therefore particularly require broader community input via multiple juries. For example, mass tort claims involve emotional settings that may be particularly susceptible to verdict variability, as Professor Lawrence George emphasized:

> The *Parklane* Court's refusal to extend preclusion to the plaintiff estoppel class in the Currie mass-tort situation was sound because the standards of liability in a personal injury litigation are so uncertain that their application even to victims of the same accident is intended to be inseparable from such factors as the appeal of the plaintiff to the jury's sympathy. It is this intensely populistic, antirational emphasis on emotive or aleatory aspects of tort law application … which accounts for the strong intuitive appeal of the mass-tort anomaly[.] … Thus, on issues of negligence, the principle of solidarity is illusory.[170]

Moreoever, the claims of products liability litigation themselves are particularly open in their interpretations, leading to more variation among juries. As Professor Michael Green has stated,

> Difficult evaluative questions and well-nigh impossible factual issues must be answered in order to resolve many asbestos products liability cases. The evaluative aspects may require the fact finder to assess what risks the user "would reasonably not expect to find," to determine what degree of danger is "beyond that which would be contemplated by an ordinary consumer," or to balance lungs, lives, and limbs against the utility of asbestos products. These indeterminate and value-laden questions, direct descendants of the "reasonable person" of

[169] *Cf.* Dooley, *supra* note 19, at 417 (arguing that "[a] national case demands a national jury drawn from a national pool."); *see also id.* ("The waning legitimacy of the civil jury in large-scale litigation reflects the disparity between the scope of the local jury pool and the scope of the cases.").
[170] George, *supra* note 11, at 678-79 (footnote omitted).

> negligence law, are simply not susceptible to reliable resolution, at least in close cases. But it is precisely these issues in close cases that are candidates for collateral estoppel.[171]

Furthermore, as the Supreme Court of Ohio has noted, the complexity of products liability claims – both with regard to the need for expert testimony and evaluating the manufacturer's conduct within knowledge prevalent at the time of manufacture – renders more difficult and unpredictable the jury's verdict.[172]

In addition, courts have strictly adhered to the requirement that, for issue preclusion to apply, the current issue must be identical to that in the prior litigation, leading sometimes to denial of issue preclusion where issues are not identical.[173] Courts have permitted, for example, issue preclusion on identical issues arising from airplane-

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[171] Green, *supra* note 18, at 217 (footnotes omitted).

[172] As the Supreme Court of Ohio stated:

> The danger is multiplied in cases such as this one where the issue determined in the first litigation relates to a product's design. This is due to the nature of the questions and the potentially broad impact of their resolution. These questions are very technical, requiring expert testimony to bring out the specifics. Also a jury's ultimate determination requires delicate balancing between the design decisions actually made by the manufacturer and those which are postulated as feasible within the industry at any given point of time. Thus, the determination made by a jury in any particular case will ofttimes not be free from doubt.
>
> Just as the risk of an erroneous determination is increased by the complex nature of design issues, the potential impact of such a decision would be unfairly broadened by the offensive application of nonmutual collateral estoppel.

Goodson v. McDonough Power Equip., Inc., 443 N.E.2d 978, 987 (Ohio. 1983); *see also* Ratliff, *supra* note 48, at 77-79 ("[N]o procedural rules can eliminate entirely the risk of error or the role of chance, especially when fact finders must often make close calls on conflicting evidence."); Schwartz & Mashigian, *supra* note 134, at 587 ("[J]uries are composed of laymen, and the prior jury may not have understood the complex technical issues regarding design or manufacture of a particular product or the mechanical workings of an unfamiliar piece of equipment."); *cf.* In re Japanese Elec. Prods. Antitrust Litig., 631 F.2d 1069, 1086 (7th Cir. 1980) (holding that antitrust case too complex for jury to hear, so no jury trial right under Seventh Amendment).

[173] *See Kramer*, 929 F. Supp. at 750 ("Case law is clear that collateral estoppel is in applicable to cases where there is any ambiguity regarding which issues actually were decided in the prior proceeding." (footnote omitted)); Kessinger v. Grefco, Inc., 672 N.E.2d 1149, 1158 (Ill. 1996) ("Application of the doctrine of collateral estoppel must be narrowly tailored to fit the precise facts and issues that were clearly determined in the prior judgment."); Owens-Corning Fiberglass Corp. v. Sitz, 970 S.W.2d 103, 106 (Tex. App. 1998); Vincent v. Thompson, 50 A.D.2d 211, 219 (N.Y. App. Div. 1975) (rejecting issue preclusion and noting that "[o]ne turns upon the establishment of a defect in the pertussis vaccine component of Quadrigen and the other turns upon the establishment of a defect in the Salk polio vaccine component thereof.").

crash cases.[174] In contrast, the Fifth Circuit in an asbestos case carefully examined the issue decided below, and found that asbestos products in the case could not be viewed as defective based on a prior jury's finding only with regard to certain types of asbestos products.[175] Moreoever, even design defect may turn on the facts of the individual case. Sometimes, in products liability, the particular factual setting makes different the determination of a putatively common issues such as defect.[176] For example, in rejecting

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[174] *See In re* Air Crash at Detroit Metropolitan Airport, 791 F. Supp. 1204 (E.D. Mich. 1992), *aff'd sub nom. In re* Air Crash Disaster, 86 F.3d 498 (6th Cir. 1996); Georgakis v. Eastern Air Lines, Inc., 512 F. Supp. 330, 335 (E.D.N.Y. 1981) (issue preclusion against defendant's contention that crash covered by Warsaw Convention); Stoddard v. Ling-Temco-Vought, Inc., 513 F. Supp. 335, 337-38 (C.D. Cal. 1981) (issue preclusion against defendant for liability). *But see* Schneider v. Lockheed Aircraft Corp., 658 F.2d 835, 853 (D.C. Cir. 1981) (reversing issue preclusion on capacity of crash to injure infant, because of lack of identical issues). *See generally* Malin, *supra* note 134, at 979-80 (discussing *Georgakis*, *Stoddard*, and *Schneider*). Issue preclusion has also been applied in DES cases. *See, e.g.,* Schaeffer v. Eli Lilly and Co., 113 A.D.2d 827 (N.Y. App. Div. 1985).

[175] Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 345 (5th Cir. 1982); *see also* Arnold v. Garlock, Inc., 278 F.3d 426, 443 (5th Cir. 2001) ("[N]o matter how creative the procedural avenue, and in spite of the fact that this litigation would benefit from a uniform approach, at almost every turn this circuit has rejected attempts at aggregation and issue preclusion in asbestos cases. Our adversity toward group resolution sounds in our concern that no one be deprived the right to a full and fair opportunity to litigate their claims."); *id.* ("The passage of time has not weakened the teachings of *Hardy*."); Setter v. A.H. Robins Co., 748 F.2d 1328, 1330-31 (8th Cir. 1984) (not clear which type of negligence proven in prior Dalkon Shield trial); Kramer v. Showa Denko, K.K., 929 F. Supp. 733, 750 (S.D.N.Y. 1996) (no identical issues of manufacturing defect for L-tryptofan, because of different manufactured lots); Rogers v. Ford Motor Co., 925 F. Supp. 1413, 1419-20 (N.D. Ind. 1996) (rejecting issue preclusion and noting that "the two buckles [in the two cases] were manufactured and assembled largely from different components with distinct part numbers and dissimilar weights."); In re Asbestos Litigation, 1993 WL 81288, at *2 (Del. Super. Ct. Feb. 18, 1993); Corey v. Int'l Playtex, No. 92 C 5778, 1993 U.S. Dist. LEXIS 527, at *3 (N.D. Ill. Jan. 21, 1993) ("[N]one of the questions the [prior] jury answered addressed the issue of whether the tampons were defective or unreasonably dangerous."); *see also* Dooley, *supra* note 19, at 432; Kennamer, *supra* note 118, at 1146-47 ("In asbestos cases, … courts refuse to apply non-mutual offensive collateral estoppel either because they find that differences in the underlying facts render the issues not identical for purposes of collateral estoppel analysis, or that such differences would make application of the doctrine unfair."). *But see* Batson v. Lederle Laboratories, 674 A.2d 1013 (N.J. Super. App. Div. 1996) (approving issue preclusion for issue of date of manufacturer's knowledge of tooth-staining properties of tetracycline), *aff'd in part as modified*, 702 A.2d 471 (N.J. 1997); Ezagui v. Dow Chemical Corp., 598 F.2d 727, 730 (2d Cir. 1979) (allowing issue preclusion for inadequacy of warnings for vaccine Quadrigen); Kennamer, *supra* note 118, at 1147-51 (discussing *Batson* and criticizing *Ezagui*). Early cases permitted issue preclusion in asbestos cases. *See, e.g.,* Flatt v. Johns Manville Sales Corp., 488 F. Supp. 836 (E.D. Tex. 1980); Mooney v. Fibreboard Corp., 485 F. Supp. 242 (E.D. Tex. 1980).

[176] *See Kramer*, 929 F. Supp. at 750-51 ("[A] products liability case typically involves individualized circumstances peculiar to that case alone, such as the age and health of the plaintiff, the conditions under which the product was used, or the precise circumstances surrounding the plaintiff's injury. Such factual idiosyncracies necessarily prevent a single finding from one such case to be applied to all other cases in a cookie-cutter fashio. To find otherwise could distort a jury's decision on the remaining, open questions, prejudice a defendant's ability to litigate case-specific issues, and insulate a plaintiff from the burden of

issue preclusion for a seat belt system found defective in a prior case from a car accident in a separate car, the Northern District of Indiana stated:

> The conclusion in a prior proceeding that a product failed due to a defective design necessarily rests upon a determination that the design was inadequate to withstand the specific, foreseeable circumstances of the underlying incident. It does not automatically follow that the product would fail due to defective design in a different type of incident, where the forces acting upon the product may have been distinct from those in the earlier litigated incident (and possibly unforeseeable).[177]

Furthermore, use of collateral estoppel on issues such as negligence and product defect may not be workable, in light of the need to address comparative fault in subsequent follow-up trials.[178] The juries in subsequent cases would not be able to compare fault between the plaintiff and defendant without reexamining the evidence of fault of defendant considered by the first jury, which would call into question the efficiency of issue preclusion and could conceivably be seen to violate the Reexamination Clause of the Seventh Amendment to the Constitution of the United States.[179] A similar

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having to prove his case."); *Rogers*, 925 F. Supp. at 1419 ("The conclusion in a prior proceeding that a product failed due to defective design necessarily rests upon a determination that the design was inadequate to withstand the specific, foreseeable circumstances of the underlying incident. It does not automatically follow that the product would fail due to defective design in a different *type* of incident, where the forces acting upon the product may have been distinct form those in the earlier incident (and possibly unforeseeable)." (emphasis in original)); *Goodson*, 443 N.E.2d at 987 ("It would not be prudent to raise a decision made by one jury in the context of one set of facts to the standard under which all subsequent cases involving separate factual circumstances are judged."); Schwartz & Mashigian, *supra* note 134, at 587-88 ("For instance, in situations involving alleged side effects from a pharmaceutical or an illness alleged to have arisen from exposure to a chemical, the facts and issues of a product liability case are too individualized to permit a finding in one case to control in another case.").

[177] Rogers v. Ford Motor Co., 925 F. Supp. 1413, 1418 (N.D. Ind. 1996).

[178] *See* Green, *supra* note 18, at 210 ("Preclusion is further complicated when conduct of the plaintiff or plaintiff's decedent is asserted as a defense in an asbestos case."); *see also id.* at 211 ("Whatever the difficulties of assessing comparative percentages of responsibility, they are significantly enhanced when preclusion is employed and no evidence of defectiveness is introduced, leaving the jury with an empty, if condemned, vessel to compare with the plaintiff's conduct."); Kennamer, *supra* note 118, at 1138 ("[N]on-mutual offensive collateral estoppel deprives a Texas tort defendant of its right, similar to the right to try liability and damages together, to have its percentage of liability assessed after the jury hears all thefacts and circumstances of the case at hand.").

[179] *See* U.S. CONST. amdt. VII ("In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."); *cf. Rhone-Poulenc*, 51 F.3d at 1303 ("The right to a jury trial in federal civil cases, conferred by the Seventh

problem arises in cases seeking punitive damages, for evidence with regard to liability would also be required as a basis on which to award punitive damages.[180]

IV. COLLECTIVE WISDOM: OF MULTIPLE TRIALS, MATURITY, AND MASS TORT SETTLEMENT

Rather than employ issue preclusion, if courts permit multiple mass tort verdicts in multiple cases, even though that may lead to inconsistent verdicts,[181] these verdicts can foster well-informed and broad-reaching settlements.[182] The multiple verdicts on contested issues such as defect will over time provide more reliable inferences of claim valuation, contributing to what Professor Francis McGovern has termed the "maturity" of the mass tort.[183] When the parties' claim valuations are sufficiently settled, the press of attorneys' fees and other transaction costs will push them toward settlement,[184] which achieves much of the efficiency sought to be achieved by issue preclusion. In addition, settlements that follow multiple verdicts are likely to be more accurate than settlements predicated upon mere attorney speculation before any verdicts, or based on merely the

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Amendment, is a right to have juriable issues determined by the first jury impaneled to hear them (provided there are no errors warranting a new trial), and not reexamined by another finder of fact.").

[180] *See* Setter v. A.H. Robins Co., 748 F.2d 1328 (8th Cir. 1985) ("Even if collateral estoppel were invoked here, little court time would be saved, because most of the plaintiffs, including [the plaintiff before the court], claim punitive damages in Dalkon Shield cases, and the same facts, or most of them, that would have been relevant on the issue of liability would still have to come in and be considered by the court or jury on the issue of exemplary damages.").

[181] *See* Dooley*, supra* note 19, at 442 ("Multiple trials avoid the [Seventh Amendment] reexamination problem but create problems ranging from inconsistent verdicts ….").

[182] *Cf.* United States v. Mendoza, 464 U.S. 154, 160 (1984):

> A rule allowing nonmutual collateral estoppel against the government in such cases would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari.

[183] Professor McGovern noted that

> [in] "mature mass torts" or mass tort litigation … there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions. Typically at the mature stage, little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted.

Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

[184] *See* Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989).

single potentially outlier jury that delivered the verdict subsequently used for issue preclusion.

And of course the accuracy of the amounts paid is essential to effectuate tort goals of corrective justice, deterrence, and compensation.[185] Indeed, with regard to efficiency-based deterrence, the overall efficiency of the legal system may well be served by spending additional transaction costs on individual trials, if those trials engender the more efficient allocation of amounts involved in safety of mass products.[186] Mass tort litigation involves vast resources, sometimes with settlements in the billions of dollars, and affects thousands of workers in the industry, as well as consumers.[187] Spending more on procedure via multiple juries that supply more accurate information and incentives to manufacturers may be a sound social investment.[188]

Judges Richard Posner and Frank Easterbrook of the Seventh Circuit, in both scholarship and judicial opinions, have described the collective wisdom that results from

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[185] *See* Stier, *supra* note 17 (discussing effectuation of tort goals by mass tort settlement based on individual trials).

[186] Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1498 n.45 ("Some cases are so huge that a single jury, even of 12, is too small to assure accuracy commensurate with the stakes. This is a problem in mass tort class action, when claims with aggregate stakes of literally billions of dollars may be combined for trial before a single jury. The solution is to have a sample of the cases tried before separate juries.").

[187] *See* Erlenbach, *supra* note 110, at ("Products liability suits, unlike most tort actions, affect interests far beyond those of the litigants; the defendant's stockholders, employees, creditors, insurers, customers, and occasionally the entire industry, can be seriously shaken by a finding of defect, and the liberal application of collateral estoppel on the issue of defect greatly magnifies the effect."); *id.* at 55 (noting need concern that "manufacturers of mass-produced products … not be destroyed by a lone judgment").

[188] Arguing for multiple individual trials of common issues as more "robust" than single class determatination, Judge Posner stated that

> [T]he pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals. For this consensus or maturing of judgment the district court proposes to substitute a single trial before a single jury[.]

Rhone-Poulenc, 51 F.3d at 1299-1300; *see also* In re Bridgestone/Firestone, 288 F.3d at 1020 ("Markets … use diversified decisionmaking to supply and evaluate information …. [T]his method looks 'inefficient' from the planner's perspective, … [but] it produces more information [and] more accura[cy]"); Hines, *The Dangerous Allure of the Issue Class Action, supra* note 2, at 601 (noting "skepticism [with regard to] the one time, one-jury, one-roll-of-the-dice adjudication of an issue that might reasonably be found for or against the class").

multiple juries, sometimes connecting this approach to the decentralized methods of free-market economics. For example, in rejecting class certification in *Bridgestone/Firestone*, Judge Easterbrook noted that "[o]ne suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal."[189] Instead, Judge Easterbook has urged that "when courts think of efficiency, they should think of market models," observing that "markets use diversified decisionmaking to supply and evaluate information."[190] Similarly, Judge Posner, in rejecting the single-adjudication class approach in *Rhone-Poulenc*, noted his "concern with forcing these defendants to stake their companies on the outcome of a single trial … when it is entirely feasible to allow a … determination of their liability … to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions."[191] According to Judge Posner, such an approach would "reflect a consensus, or at least a pooling of judgment, of many different tribunals."[192]

In contrast to issue preclusion, which fosters settlements based merely on the early speculations of counsel or the result of a single jury verdict on common issues, multiple verdicts encourage the parties to craft a settlement based on a more full community judgment on the legal claims alleged.[193] For example, out of the many

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[189] *In re* Bridgestone/Firestone, Inc., 288 F.3d at 1012.

[190] *Id.* at 1020; *see also id.* ("Thousands of traders affect prices by their purchasers and sales over the course of a crop year. This method looks 'inefficient' from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy.").

[191] *Rhone-Poulenc*, 51 F.3d at 1293; *see also id.* at 1300 (stating that "the alternative [to a class action] exists of submitting an issue to multiple juries, constituting in the aggregate a much larger and more diverse sample of decisionmakers.").

[192] *Id.* at 1299-1300.

[193] *See* In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 288 F.3d 1012, 1020 (7th Cir. 2002) (Easterbrook, J.) ("[O]nly 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions,' will yield the information needed for accurate evaluation of mass tort claims." (quoting *Rhone-Poulenc*, 51 F.3d at 1299)); *see also Rhone-Poulenc*, 51 F.3d at 1300 (urging use of "multiple juries constituting in the aggregate a much larger and more diverse sample of decisionmakers").

varying individual verdicts in the Vioxx litigation, came a broad settlement.[194] The parties used the total compiled individual verdicts to gauge the value of pending claims.[195] The parties then put together a far-reaching settlement of $4.85 billion.[196] Although the costs of those individual trials – likely in the millions – may seem substantial in themselves, they do not seem unduly high in relation to the mammoth $4.85 billion settlement negotiated based on those trial verdicts.

Such an approach draws support from the democratic approach of empowering broad community sentiment to opine as to the legal claims of the mass tort. Unlike current doctrine on issue preclusion, this multiple-verdict approach credits the role of multiple juries in individual cases, allowing variation in verdict.[197] It also does not export a local jury, drawn from a specific local community, to have preclusive effects across a broader geographic area, such as an entire state.[198] Moreover, allowing multiple juries might allow a greater possibility of clustering of minority members of the community, whose views might be otherwise be discounted in a jury comprised mainly without them.[199] Allowing multiple juries to weigh in on the meaning and application of terms

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[194] *See supra* section II.A.
[195] *See* Dooley, *supra* note 19, at 413 ("These [first three trials] and other early cases indicated to the parties the relative strength of their positions[.]"
[196] *See id.* ("The [Vioxx] parties then crafted a proposed global settlement of the litigation."); Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. TIMES, Nov. 10, 2007, at A1.
[197] *See* Dooley, *supra* note 19, at 433 ("The subtext is that we can tolerate the imprecise calculations made by a jury in an individual case, but we hesitate to export such an imperfect product to other cases, especially outside that locality.").
[198] *Id.;* Dooley, *supra* note 125, at 46 ("If you believe, as I do, that the jury is in most situations the superior decisionmaker (being more diverse demographically and more diffuse functionall), then we must examine whether the doctrine of collateral estoppel should be used to circumvent the power of the community to speak in given contexts, despite the inefficiencies that 'relitigation' may entail" (footnotes omitted)); *id.* at 58-59 (noting that applying first jury's finding via issue preclusion "still poses dangers to a local community interpretation" and that "since both judges and juries are drawn typically from the immediate vicinity of courts, the earlier finding may have been made in a different local context").
[199] *See id.* at 50 ("[R]esearch shows that often the dynamics of a jury room operate to silence the voices of women and minorities. … [T]he initial factfinding supposedly captured by the articulation later proposed for collateral estoppel effect may be tainted by the suppression of some voices.").

such as "unreasonably dangerous," which undergirds product liability claims for defect, allows for a more complete conveying of the community sensibility that forms the background of contracts and business practices.[200]

With regard to inconsistency, courts should not hide the limits of the adjudicative process.[201] By eliminating inconsistent verdicts, issue preclusion has not avoided the underlying reality of jury verdict variability that may lead to the first verdict's being an outlier. Indeed, issue preclusion may only magnify the unrepresentative verdict's effects by extrapolating its finding to numerous other cases, and placing the downside risk on only own party, the defendant who was present in the prior case. It is difficult to see how such a process, fully understood, encourages respect for the judiciary, as issue preclusion promises. Rather, courts should be forthright an open about the capabilities and limitations of the jury system by allowing a more full array of verdicts to provide a balanced societal assessment of issues such as defect and negligence. Such an approach may well enhance public respect for the judiciary. In addition, revealing those limits may assist in designing better approaches for future adjudication.[202]

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[200] *See id.* at 52-53 (discussing varying possible jury and community interpretations of "unreasonably dangerous"); *id.* at 62 ("[T]he finding that the chainsaw is or is not unreasonably dangerous is unherently unstable, that it is a social construction produced by the interpretive communities represented by the prior decisionmaker[.]").

[201] *See* Waggoner, *supra* note 48, at 423 ("[O]ne must ask whether it is good for the courts to pretend to have greater accuracy than they possess."). As Professor Green has noted:

> One wonders… if there isn't value in honestly confronting the inability of the judicial process to find truth in a system utilizing indeterminate and value-laden standards and relying on the jury to apply those standards. Perhaps we should confront the dissonance head on, rather than surreptitiously burying it beneath a collateral estoppel shroud.

Green, *supra* note 18, at 214-15 (footnotes omitted).

[202] *See id.* at 423 ("In the long run, institutions are likely to operate better with their flaws revealed and subject to pressure for reform, than if they hide their flaws and leave dissatisfaction to fester until the institution is thoroughly deficient or its support gone.").

V. CONCLUSION

In mass tort litigation, offensive non-mutual issue preclusion promises vast efficiency and protection against inconsistent judgments, propping up public confidence in the courts. Upon scrutiny, however, issue preclusion may lock in place the possibly outlier first verdict only in situations where it benefits plaintiffs, not defendants – thus suffering from being both unreliable and one-sided. Recent and growing empirical evidence of jury verdict variability calls into question the fairness of such a method. In contrast, an approach that relies upon multiple verdicts to provide a more complete view of core contested issues such as negligence or defect offers litigants valuable, more accurate information that can be used to fashion informed settlements. Indeed, these far-reaching settlements may better achieve efficiency than issue preclusion. Courts should therefore use their discretion to decline to apply issue preclusion in the mass tort context.