Building a Better Mousetrap: A New Approach to Trying Mass Tort Cases

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I. PREFACE

For many years, both state and federal courts have struggled with the extraordinarily difficult problems raised by mass tort litigation.¹ In an effort to resolve these controversies, the courts have resorted to increasingly creative procedures, with mixed results.² Courts have tried class certification in various forms, consolidation on a “controversy by controversy” basis or on the basis of “common issues,” and bellwether trials with smaller groups of

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Mr. Faulk and Mr. Meadows were counsel for Chevron USA, Inc. in In re Chevron USA, Inc., 109 F.3d 1016 (5th Cir. 1997). The opinions expressed in this article are solely those of the authors.

1. See MANUAL FOR COMPLEX LITIGATION § 38.2 (3d ed. 1995).
2. See id.
plaintiffs selected by varying procedures. These creative techniques have
been employed in the interest of achieving results and ending the
controversies expeditiously. In pursuing those goals courts have found,
unfortunately, that each technique collides, in one way or another, with
the constitutional requirements of due process. As a result, no single solution has
emerged as the tool of choice for resolving mass tort controversies. More
often than not, such controversies have been managed through protracted
proceedings, resulting in lengthy delays and massive settlements. These
settlements are prompted in most cases by the general uncertainties of
litigation, including the specter of collateral estoppel raised if defendants lost
early trials of "test cases."

Recently, the Fifth Circuit in In re Chevron USA, Inc. faced yet another
innovative trial plan: the concept of a bellwether trial in which certain
dispositive issues would be tried on behalf of all remaining plaintiffs in a
"unitary" format. Once again, as it did many times during the protracted
asbestos controversy, the Fifth Circuit found that a creative plan adopted by
a district court to expedite mass tort resolutions was inappropriate and granted
a writ of mandamus to correct the error. In the process of doing so, however,
the Fifth Circuit, for the first time in American jurisprudence, decided what
procedural safeguards are necessary for such a trial to have a dispositive
effect. Specifically, the Fifth Circuit held that, under appropriate
circumstances, a trial court may try a bellwether trial of properly selected
"representative" plaintiffs and use the results of that trial to resolve common
issues alleged by the remaining mass of plaintiffs. Although the Fifth
Circuit did not say that a trial court must use such a format to resolve mass
tort cases, and did not even decide that the format was necessarily appropriate
in the Chevron case, it generally recognized the viability and utility of such

3. See id. § 33.28. See generally Richard O. Faulk, Determining Trial Type in Complex Toxic
Tort and Environmental Cases, 10 TOXICS L. REP. 1483, 1483 (1996) (suggesting four options for dealing
with complex tort cases: (1) a conventional plenary trial, (2) separate trials on selected issues, (3) "pilot"
or bellwether trials, and (4) class action suits).
4. See MANUAL FOR COMPLEX LITIGATION, supra note 1, §§ 33.2, 33.26, 33.28.
5. See id., MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.2; Faulk, supra note 3, at
1484-87.
6. See MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.28; Faulk, supra note 3, at 1484-
87.
7. 109 F.3d 1016, 1017-18 (5th Cir. 1997).
(discussing Jenkins v. Raymark Indus., 782 F.2d 468 (5th Cir. 1986), in which the Fifth Circuit endorsed
judicial creativity in managing asbestos cases). See, e.g., Hardy v. Johns-Manville Sales Corp., 681 F.2d
334, 348 (5th Cir. 1982) (disapproving a trial court's application of collateral estoppel on the issue of
whether asbestos is "unreasonably dangerous"); Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir.
1981) (rejecting application of stare decisis in asbestos cases).
10. See id. at 1019-21.
11. See id. at 1020-21.
a plan, provided, of course, that the plan's structure satisfies the requirements of due process.12

This article traces the origins of the *Chevron* mandamus controversy, analyzes the Fifth Circuit's opinions, including the special concurrence by Judge Jones, and evaluates the impact and significance of the court's ruling on mass tort litigation generally. The article addresses some of the thorny problems raised by Judge Jones' concurrence and discusses the circumstances under which a bellwether unitary trial may or may not be effective to resolve particular mass tort controversies.

II. BACKGROUND OF THE CONTROVERSY

The mass tort proceeding in *Chevron* involved over three thousand plaintiffs and intervenors in a consolidated federal action.13 Along with several hundred plaintiffs in a related state court case, the plaintiffs and intervenors claimed damages for personal injuries, wrongful death, and property contamination allegedly caused by Chevron's acts and omissions.14 Plaintiffs and intervenors alleged that their residential subdivision, Kennedy Heights, was built on land used in the 1920s by Gulf Pipeline Company for crude oil storage.15 Allegedly, crude oil residue remaining when storage tanks were taken out of service in the 1920s presented a health and safety risk to the current residents.16 Among other claims, the plaintiffs and intervenors asserted that (i) the residue produced methane gas that created an explosion hazard, and (ii) the residue contaminated the residents' water by entering broken municipal water lines in the area, thereby causing illnesses and deaths among the Kennedy Heights residents.17

Based upon these allegations, the plaintiffs and intervenors asserted causes of action in negligence, trespass, nuisance, civil conspiracy, toxic assault and battery, and fraud.18 They also sought recovery of response costs and injunctive relief pursuant to Comprehensive Environmental Response

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12. *See id.*
13. *See id. at 1017.*
14. *See id.*
15. *See id.*
16. *See id.*
Compensation and Liability Act (CERCLA), and the Resource Conservation and Recovery Act of 1976 (RCRA). Plaintiffs also asserted claims under the federal civil rights statutes for environmental racism.

Judge Kenneth Hoyt, the federal judge presiding over the dispute, was not the first judge to express concern over the manner in which the case would be tried. Determining how to most fairly and efficiently try this mass tort action was a struggle from the commencement of this action in state court. For example, the original judge who presided over the case in state court ordered that the case proceed with separate trials. The first trial was to involve only the plaintiffs' property damage claims. A second trial would then address the plaintiffs' personal injury claims. The judge determined that the trials would proceed in a bellwether fashion.

Following the original judge's recusal, the case was transferred to another state court judge who continued to work toward a bellwether trial primarily focused on the plaintiffs' property damage claims. The new judge soon recognized, however, that a bellwether trial of the plaintiffs' property damage claims would also implicate their personal injury claims. Consequently, the judge worked to develop a plan for a bellwether trial that would focus primarily on property damage and contamination issues, but would also include the personal injury claims of the selected bellwether plaintiffs.

Chevron urged the state court judge to remain mindful that the goal of a bellwether trial is to try a representative sample of the plaintiff population. Plaintiffs' counsel, on the other hand, urged the court to adopt a procedure whereby each side would be allowed to pick fifteen plaintiffs without any

21. See Petition for Writ of Mandamus at 4-6, Chevron (No. 97-20042).
22. See id. at 4.
25. See id.
26. See id.
27. See Letter Ruling from The Honorable Tony Lindsay, Simmons (280th Dist. Ct., Harris County, Tex., Apr. 30, 1996) (No 95-14770) (on file in Appendix, supra note 17, at 3).
28. See id.
29. See id.
30. See Hearing Transcript at 64, Simmons (280th Dist. Ct., Harris County, Tex., Mar. 8, 1996) (No. 95-14770-B) (on file in Appendix, supra note 17, at 1).
restrictions.31 Thereafter, the plaintiffs submitted their “bellwether designations.”32 The court rejected the plaintiffs’ bellwether designations and ordered a bellwether selection process that would produce a more representative sample.33 Before this process could be concluded, the plaintiffs sought and obtained the new judge’s recusal.34 Shortly after the case was transferred to yet another state court, the case was removed and eventually consolidated with a related CERCLA action previously filed in federal court.35 At the first pretrial conference in federal court, Judge Hoyt entered a scheduling order to control case development and required the parties to submit trial plans.36

The plaintiffs in the consolidated federal action then moved Judge Hoyt to ratify the same bellwether designations that the state court had rejected.37 In arguments, and in an expert affidavit by Dr. Ronald G. Frankiewicz, Chevron urged that the plaintiffs’ proposed plan was prejudicially nonrepresentative and that any bellwether plaintiffs should be selected according to “stratified random sampling,” an established statistical technique which would yield a truly representative group.38 Chevron also proposed a first unitary trial limited to the issue of whether levels of contaminants exist in or around Kennedy Heights that could have caused the plaintiffs’ alleged personal injuries and property damages.39 If Chevron won the first trial, the case would be over. If Chevron lost the first trial, the plaintiffs would then try individual causation and damages “mini-trials.”40

Judge Hoyt eventually adopted a hybrid of the plaintiffs’ and Chevron’s proposed plans.41 He ordered the selection of thirty bellwether plaintiffs

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31. See Hearing Transcript at 102, 147, Simmons (280th Dist. Ct., Harris County, Tex., Apr. 29, 1996) (No. 95-14770-D) (on file in Appendix, supra note 17, at 2).
33. See Letter Ruling, supra note 27.
35. See In re Chevron USA, Inc., 109 F.3d 1016, 1017 (5th Cir. 1997); Transfer Order After Recusal, Simmons (280th Dist. Ct., Harris County, Tex., May 23, 1996) (No. 95-14770).
40. See id. at 8.
(fifteen by plaintiffs, fifteen by defendant) to participate in a unitary trial of consolidated "general liability or causation" issues on behalf of the remaining twenty-nine hundred plaintiffs. The goal of the unitary trial was to determine Chevron's liability, or lack thereof, in a single trial and to establish bellwether verdicts to which the remaining twenty-nine hundred claims could be matched for settlement purposes.

The court ordered the selection despite its awareness that the parties would not attempt a representative sample of the plaintiff population. The court provided no guidelines for the selection of the bellwether plaintiffs, and indeed, understood that the process would result in the selection of the fifteen "most seriously injured" and the fifteen "least seriously injured" plaintiffs. The court ordered the unrestricted selection process despite uncontroverted and conclusive evidence from Chevron’s statistical expert that (i) the arbitrary plan could not achieve a reliable bellwether result, and (ii) the only means by which such a result could be achieved was through stratified random sampling, an established statistical procedure for selecting predictive groups. Thereafter, the district court denied Chevron's request to certify an interlocutory appeal from its trial plan order. Chevron then filed its petition for mandamus in the Fifth Circuit.

III. MOTIVATIONS FOR SEEKING MANDAMUS

Unquestionably, it was necessary to establish a procedure for trying the claims fairly and expeditiously. Neither party disagreed with this point, and neither party disagreed with the use of bellwether plaintiffs in the context of a unitary trial of consolidated issues to accomplish that goal. There was substantial disagreement, however, regarding whether the bellwether plaintiffs must be representative of the group of plaintiffs whose claims would remain unresolved. This disagreement was critical because Chevron believed that the great majority of plaintiffs sustained no serious injuries and suffered from no serious health condition. Chevron also believed that the plaintiffs were

42. *Id.*
43. *See id.*
45. *Id.* at 11.
49. *See id.* at 3.
50. *See id.*
51. *See id.*
not similarly situated and that there were vast differences in the types, as well as severity, of illnesses allegedly caused by toxic exposures.\(^2\)

Notwithstanding this scenario, the district court approved a trial plan that was decidedly not representative of the entire group of plaintiffs.\(^3\) As expected, the plaintiffs’ bellwether selections included a disproportionate number of plaintiffs who were severely ill.\(^4\) Essentially, the plaintiffs’ bellwether selections suggested that half of more than three thousand plaintiffs were seriously ill.\(^5\)

In Chevron’s view, this was not a representative sample of the entire plaintiff population.\(^6\) Although the plaintiff population was skewed, it would not only warp the jury’s perspective regarding each individual claim, but also would prejudicially contaminate its evaluation of the consolidated issues tried on behalf of all parties in the simultaneous unitary trial.\(^7\)

Because the district court refused to certify an interlocutory appeal, a writ of mandamus was the only means by which Chevron could secure relief from the manifest injustice of the district court’s order.\(^8\) Because a trial of nonrepresentative plaintiffs’ claims to establish liability in the unitary trial magnified the severity of the population’s medical complaints, the unfair selection exaggerated the risk of trial for Chevron, the party disadvantaged by the skewed sample. Stated simply, trying the case with a nonrepresentative group of plaintiffs was an unacceptable risk. The district court’s order placed Chevron under great pressure to settle, in which case an appealable final judgment might never occur.

Even more importantly, the use of nonrepresentative bellwether plaintiffs at a unitary trial of general liability or causation usurped the very purpose for which the bellwether trial was designed.\(^9\) Unless the bellwether group was selected in a manner which ensured that the resulting verdict could be matched with the remaining plaintiffs’ claims, the trial would yield nothing more than a hammer for imposing an unjust settlement.\(^10\) Considering the immaturity of this mass tort controversy, imposition of a settlement based on such verdicts would forever preclude a realistic case evaluation.\(^11\) A trial based upon the true condition of the plaintiff population would never be held.

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52. See id.
53. See id.
55. See id.
56. See Petition for Writ of Mandamus at 4, Chevron (No. 97-20042).
57. See id.
58. See id. at 8.
59. See In re Fibreboard Corp., 893 F.2d 706, 711 (5th Cir. 1990).
60. See id.
61. See Petition for Writ of Mandamus at 9, Chevron (No. 97-20042).
Instead, all further proceedings would be contaminated by unrealistic values based upon self-serving selections by counsel.

IV. INVOKING MANDAMUS RELIEF FROM THE FIFTH CIRCUIT

Chevron's first concern was whether issuance of a writ of mandamus was a proper remedy to address this interlocutory ruling.\textsuperscript{62} Although certification of an interlocutory appeal had been refused, plaintiffs would almost certainly argue that any harm could be rectified on an appeal from the final judgment. If this were an ordinary case, such an argument might have been appropriate—but this was not an ordinary case. The extraordinary circumstances created by this immature mass tort case justified extraordinary relief, relief that could only be obtained through mandamus.

A. Special Problems of Immature Mass Tort Litigation

The Manual for Complex Litigation (Manual) clearly recognizes a distinction between "mature" and "immature" mass tort litigation, insofar as the propriety of creative administrative procedures are concerned:

In general, those mass torts in which general causation has become relatively clear over time are likely to be candidates for large consolidations or even class action treatment. Fairness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units—even single-plaintiff, single-defendant trials—until general causation, typical injuries, and levels of damages become established. Thus, "mature" mass torts like asbestos or Dalkon Shield may call for procedures that are not appropriate for incipient mass tort cases, such as those involving injuries arising from new products, chemical substances, or pharmaceuticals.\textsuperscript{63}

"Maturity," as used in the Manual and its supporting authorities, is established by "full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions."\textsuperscript{64} As Professor McGovern stresses: "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."\textsuperscript{65} According to the Manual and Professor McGovern, the asbestos and Dalkon Shield

\textsuperscript{62.} See id. at 10.
\textsuperscript{63.} MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.26, at 322.
\textsuperscript{65.} Id.
controversies are "paradigm cases" for creative judicial solutions in mature mass tort litigation.\textsuperscript{66}

The Fifth Circuit rejected another creative interlocutory solution to a mass tort controversy because of the immaturity of the litigation less than a year before it decided \textit{Chevron}.\textsuperscript{67} In \textit{Castano v. American Tobacco Co.}, Judge Smith, speaking for a unanimous panel, reversed national class certification in a nicotine addiction case by holding, as a matter of law, that the class action road should never have been taken at such an early, immature stage of the controversy.\textsuperscript{68} As the \textit{Castano} court noted, there is no substitute for actual experience, especially when an immature tort is concerned.\textsuperscript{69} Without actual experience, as opposed to speculation, creative judicial solutions to immature mass torts should be approached cautiously, especially when they threaten to subject defendants to massive risks.\textsuperscript{70}

In \textit{Chevron}'s view, the Kenneth Heights controversy was clearly immature.\textsuperscript{71} Unlike the asbestos and Dalkon Shield litigation, discovery was not complete.\textsuperscript{72} Indeed, soil and water testing were still underway in the plaintiffs' neighborhoods, and only preliminary depositions of approximately ninety plaintiffs had been concluded.\textsuperscript{73} All of the evidence in the case was "new," and more proof was expected to arise as the case progressed toward trial.\textsuperscript{74} Certainly, no jury verdicts had been returned, and no appellate court had reviewed any of the complex and novel legal issues raised by the case. Accordingly, the "vitality" of the plaintiffs' claims could not be assessed, much less their "persistence." Thus, \textit{Chevron} argued that creative judicial solutions used to resolve the controversy must be approached with extreme care—with a view toward maturing the controversy so that the proceedings could produce a just resolution, rather than mere judicial economy.\textsuperscript{75}

The issue presented by \textit{Chevron}, namely, the standards by which bellwether plaintiffs can be selected and used in unitary trials of consolidated issues, was a natural sequel to \textit{Castano}. If, as \textit{Castano} teaches, class certification is an inappropriate solution to immature mass torts,\textsuperscript{76} then

\textsuperscript{66} See \textit{Manual for Complex Litigation, supra} note 1, § 33.26, at 322; McGovem, \textit{supra} note 64, at 659.
\textsuperscript{68} Id. ("These problems are not speculative; the district court faced, and ignored, many of the problems that immature torts can cause.").
\textsuperscript{69} See id. at 748-49.
\textsuperscript{70} See id. (citing \textit{Manual for Complex Litigation, supra} note 1, § 33.26).
\textsuperscript{71} See \textit{Petition for Writ of Mandamus at 12, In re Chevron USA, Inc.}, 109 F.3d 1016 (5th Cir. 1997) (No. 97-20042).
\textsuperscript{72} See id.
\textsuperscript{73} See id.
\textsuperscript{74} See id.
\textsuperscript{75} See id.
\textsuperscript{76} See 84 F.3d at 749.
bellwether and unitary trials are logical alternatives. Nevertheless, these procedures, when used unfairly, carry all of the "seeds of abuse" inherent in premature class certification. Prior to Chevron, no federal appellate court, and very few district courts, had ever addressed the circumstances by which these abuses can be avoided. Accordingly, Chevron argued that unless clear standards were set for their use, immature tort controversies might never grow into maturity or, even worse, they might grow into caricatures—caricatures created by a rush to judgment without regard to a just result.

**B. The Use of Mandamus to Review Unduly Prejudicial Trial Plans**

In recent years, creative administrative solutions to mass tort controversies have increasingly been addressed by writs of mandamus. Generally, in the mass tort context, the order and its circumstances must result in irreparable harm that will not be "effectively reviewable at the end of the case." Additionally, "the order must so far exceed the proper bounds of judicial discretion as to be legitimately considered usurpative in character, or in violation of a clear and indisputable legal right, or, at the very least, patently erroneous."

However, "application of these ‘black letter’ rules . . . has not been unwavering." The writ of mandamus is a safety valve against the general rule forbidding interlocutory review of district court orders and "its proper use cannot be wholly reduced to a formula." As the Fifth Circuit held in another mandamus decision, "departure from the final judgment rule [is warranted] when the appellate court is convinced that resolution of an important, undecided issue will forecast future error in trial courts, eliminate uncertainty and add importantly to the efficient administration of justice." Although the "ordinary inconvenience" of further proceedings occasioned by a district court's interlocutory order will not justify mandamus, "extraordinary

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77. See In re Chevron USA, Inc., 109 F.3d 1016, 1019-20 (5th Cir. 1997).
79. See Petition for Writ of Mandamus at 13, Chevron (No. 97-20042).
80. See In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1295 (7th Cir. 1995); see also In re Repetitive Stress Injury Litig., 11 F.3d 368, 373-74 (2d Cir. 1993) (granting mandamus precluding trial of improperly consolidated mass tort claims); In re Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (granting mandamus against improperly constructed trial plan in asbestos litigation).
81. Rhone-Poulenc, 51 F.3d at 1295 (citing Kerr v. United States, 426 U.S. 394, 403 (1976)).
82. Id. (citing Gulfstream Aerospace Corp. v. Mayacamas Corp. 485 U.S. 271, 289 (1988)).
83. Maloney v. Plunkett, 854 F.2d 152, 155 (7th Cir. 1988).
84. Id.; see Rhone-Poulenc, 51 F.3d at 1304 ("[T]he use of the writ cannot be reduced to formula.").
85. In re EEOC, 709 F.2d 392, 394 (5th Cir. 1983) (quoting Colonial Times, Inc. v. Gasch, 509 F.2d 317, 524 (D.C. Cir. 1975)).
inconveniences may do so.\textsuperscript{86} Accordingly, the propriety of mandamus should not be determined by allegiance to inflexible rules, but rather by careful consideration of the prejudicial effects and jurisprudential implications of the particular interlocutory order.

Most recently, the Seventh Circuit faced the unusual question of whether to mandamus decertification of a class action in the hemophiliac AIDS controversy.\textsuperscript{87} In In re Rhone-Poulenc Rorer, Inc., the Seventh Circuit recognized that the magnitude of the risk posed by a district court's innovative solution may place defendants "under intense pressure to settle" and thereby preclude appellate review.\textsuperscript{88} As the Seventh Circuit stated:

[Defendants] may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. If they settle, the class certification—the ruling that will have forced them to settle—will never be reviewed. Judge Friendly, who was not given to hyperbole, called settlements induced by a small probability of an immense judgment in a class action "blackmail settlements." Judicial concern about them is legitimate\textsuperscript{89}

The Fifth Circuit recognized similar problems in Castano v. American Tobacco Co. when it reversed a national tobacco class action suit.\textsuperscript{90} As Judge Smith stated in Castano, an unfairly constructed comprehensive solution to an immature mass tort case can place the parties in an untenable position: "The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low. These settlements have been referred to as judicial blackmail."\textsuperscript{91} Few scenarios are more usurpatory than those which, because of their unfairness, threaten to blackmail parties into settlement through insurmountable settlement pressures.\textsuperscript{92} Similar to Castano, the district court's trial plan in Chevron "magnifie[d] and strengthen[ed] the number of unmeritorious claims" by creating an illusion that the bellwether group was somehow representative of the total plaintiffs' group, and then proposing to use the illusion to control overall case resolution.\textsuperscript{93}

86. Plunkett, 854 F.2d at 155.
87. See Rhone-Poulenc, 51 F.3d at 1294.
88. Id. at 1298.
89. Id. (citations omitted).
90. 84 F.3d 734 (5th Cir. 1996), rev'd 160 F.R.D. 544 (E.D. La. 1995). See generally Faulk & Colbert, supra note 78 (noting that several national class action litigation and settlement cases have been reversed recently, including the Fifth Circuit's reversal in Castano).
91. Castano, 84 F.3d at 746; see also In re Repetitive Stress Injury Litig., 11 F.3d 368, 374 (2d Cir. 1993) (holding that mandamus is proper when a district court's plan "would make settlement easier to achieve, but that would occur only at the cost of elemental fairness").
92. See Castano, 84 F.3d at 746.
Although the district court in *Chevron* did not certify a class action, its order was just as dangerous. If the self-serving bellwether selection was sustained, and was combined with a unitary trial on general liability or causation, the rights of all parties—not just the thirty bellwether plaintiffs—would be decided in a single trial. A properly constructed unitary trial is not necessarily objectionable, but conducting such a trial in conjunction with improperly selected bellwether plaintiffs risks an interlocutory judgment that cannot justify any bellwether conclusions.94 Although plaintiffs argued that they faced the same risk under the district court's plan, the sharing of risk did not eliminate its injustice.95 If, as the district court clearly planned, the verdict was intended to decide general liability or causation in the format of a bellwether trial, justice required that such a result be achieved with bellwether plaintiffs who reliably match the claims and conditions experienced by the remaining claimants.96 Otherwise, an adverse interlocutory bellwether verdict would put Chevron under intense pressure to settle, and if it settled, "the ruling that will have forced them to settle will never be reviewed."97 For this reason, as in *Rhone-Poulenc*, the district court's ruling inflicted irreparable harm that would not be effectively reviewable when, and if, a final judgment was ever rendered.98

Likewise, in the narrow sense recognized by *Rhone-Poulenc*, the district court's order was usurpative because it arbitrarily imposed a trial plan that could not possibly achieve its announced purpose.99 As in *Rhone-Poulenc*, Chevron believed the district court acted "imaginatively and in the best of faith."100 Nevertheless, the plan "exceed[ed] the proper bounds of judicial discretion" by frustrating the goal it professed to pursue.101 Although Chevron recognized that the trial court had broad discretion, Chevron argued that the

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94. See *Chevron*, 109 F.3d at 1019.
95. See *id.*
96. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).
97. See *id.*
98. See *id.*
99. The Fifth Circuit in *Chevron* noted that a bellwether trial only achieves its purpose, which is to "answer troubling . . . issues common to the universe of claimants," if the plaintiffs are truly representative. *Chevron*, 109 F.3d at 1019. The court then defined representativeness: "[A] sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained." *Id.*
100. Petition for Writ of Mandamus at 16, *Chevron* (No. 97-20042) (quoting *Rhone-Poulenc*, 51 F.3d at 1299).
101. *Rhone-Poulenc*, 51 F.3d at 1295.
court did not have the legal authority to declare that a situation is predictive when it obviously is not, and then use that fictional declaration to motivate settlement.\textsuperscript{102} Simply stated, a district court that chooses to use bellwether trials to influence the resolution of an immature mass tort controversy must, as a matter of law, ensure that the procedures governing such a trial will result in the rendition of a reliable bellwether verdict.\textsuperscript{103} Otherwise, the procedure usurps the very purpose for which the bellwether procedure was created and justifies the issuance of mandamus to preclude blackmail settlements.\textsuperscript{104}

V. THE NECESSITY OF REPRESENTATIVE BELLWETHER PLAINTIFFS

The sole question raised by Chevron's petition for mandamus was whether, in conjunction with a unitary trial of issues affecting all parties, the district court exceeded its authority by ordering a trial of nonrepresentative bellwether plaintiffs that could not, as a matter of law, yield a bellwether result.\textsuperscript{105} Chevron emphasized that, in doing so, the district court disregarded the following basic instructions from the \textit{Manual for Complex Litigation}:

Sampling and surveying can be used to obtain information useful both for settlement and for bellwether trials of the sample cases or for a class trial. Whether the aim is settlement or trial, the court should ensure that the sample is representative of all claims encompassed in the particular proceeding with respect to relevant factors, such as the severity of the injuries, the circumstances of exposure to the product or accident, applicable state law, and the products and defendants alleged to be responsible.\textsuperscript{106}

According to Chevron, unless this error was corrected, the controversy might never have matured sufficiently or properly for reliable case evaluation, trial or, ultimately, meaningful appellate review.\textsuperscript{107}

\textit{A. Problems With Nonrepresentative Bellwethers}

The use of bellwether trials of selected plaintiffs' claims is a common practice in mass tort litigation and is not necessarily objectionable.\textsuperscript{108} In fact, the use of bellwether trials is an acceptable alternative to the use of class

\textsuperscript{102} See Charles Silver, Comparing Class Actions and Consolidations, 10 \textit{REV. LITIG.} 495, 517 (1991) ("[T]he rule enables judges to exploit naturally occurring economies of scale, not to manufacture economies where none obtain by denying parties the opportunity to litigate unique aspects of their claims.").
\textsuperscript{103} See Chevron, 109 F.3d at 1020-21.
\textsuperscript{104} See Rhone-Poulenc, 51 F.3d at 1294; Castano, 84 F.3d at 746.
\textsuperscript{105} See Petition for Writ of Mandamus at 1-2, Chevron (No. 97-20042).
\textsuperscript{106} MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.27, at 326 (emphasis added).
\textsuperscript{107} See Petition for Writ of Mandamus at 2, Chevron (No. 97-20042).
\textsuperscript{108} See MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.28, at 328-30.
Although prior to *Chevron* no circuit had addressed the issue of how a reliably predictive bellwether group could be selected, the problem had provoked judicial concern:

Haunted by the specter of protracted trials and in an effort to better serve judicial economy, courts are increasingly experimenting with utilizing representative plaintiffs for determining a defendant’s liability to the class as a whole in mass, complex, toxic tort cases. All of this experimentation occurs amid questions about the effectiveness of the representative plaintiffs’ approach in accomplishing the goal of setting benchmarks for settlement. However, as this debate continues, courts increasingly are required to establish a criterion for selecting such representatives.\(^{109}\)

As the Sixth Circuit noted in *Sterling v. Velsicol Chemical Corp.*, “There are essentially four basic approaches to selecting representative plaintiffs: plaintiffs’ counsel selects all representatives; each side selects an equal number of representatives; plaintiffs’ counsel or both sides nominate plaintiffs and the judge selects the representatives; or representatives are randomly selected from established categories of plaintiffs.”\(^{111}\)

Although all of these practices have been used in mass tort cases, mere usage does not establish their reliability. The question, rather, is which, if any, of these selection procedures reliably yields a true bellwether verdict. Unless a selection process can be counted on to forecast a cumulative result that all parties can use to influence settlement, the process fails its intended purpose. Even worse, the use of a verdict generated by improper selection procedures, when combined with a unitary trial of issues affecting the entire case, threatens to skew not only the verdict, but also any ultimate result extrapolated from it.\(^{112}\)

To avoid this dangerous situation, *Chevron* argued that a district court considering an immature mass tort controversy must ensure that the bellwether plaintiffs are selected in a manner that will produce a true bellwether result.\(^{113}\) In bellwether trials, courts attempt to provide verdicts to “develop a pattern for evaluation.”\(^{114}\) The goal is to select typical cases “which

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109. See, e.g., *Baughton v. Cotter Corp.*, 65 F.3d 823, 828 (10th Cir. 1995) (affirming a denial of class action and decision to proceed with bellwether trials to resolve mass tort case).

110. *Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1196 n.6 (6th Cir. 1988) (declining to address the issue because it was not raised as error on appeal) (emphasis added).

111. Id.


when decided and reviewed may provide a legal and factual pattern against which the remaining issues in the pending cases may be subsequently matched. Because matching between the bellwether plaintiffs is an essential element of any effective plan, no method that depends upon self-serving selections by counsel can yield a reliably predictive bellwether group. Indeed, the district court proceedings in *Chevron* candidly reflected that a true bellwether group was not possible under the district court’s plan. All parties, as well as the district court, understood that the group would be composed of the most seriously damaged and least seriously damaged plaintiffs, a combination that all parties, as well as the district court, knew was not representative of the remaining three thousand claims.

Although the bellwether effect of this plan was illusory, the prejudice of the plan was real. By the terms of its order and its comments during the proceedings, the district court clearly intended that the combined bellwether and unitary trial would have *preclusive* effects, either establishing or defeating general liability or causation with respect to all plaintiffs’ claims. Under these circumstances, Chevron argued that use of a nonrepresentative bellwether group was erroneous and usurpative of the procedure’s proper purpose. Indeed, the district court’s plan had all of the characteristics of the premature class action the Fifth Circuit condemned in *Castano*. As Professor Silver explained:

> Although the lack of procedural protections in consolidated proceedings is ordinarily of no concern, it becomes alarming when judges run consolidations like class suits. Judges possess enormous power and discretion over the structure of consolidations. . . . [T]hey can order trials of test cases involving a few plaintiffs and apply the results to all pending suits. In short, judges can run consolidations as class actions—that is, as representational suits.

Significantly, the Fifth Circuit had previously noted that some consolidations carry a “penumbra of class-type interests” that require application of certain
Accordingly, for the same reasons stated in *Castano*, Chevron asserted that the district court could not act unfairly in selecting the bellwether plaintiffs who would be instrumental in resolving this immature controversy. If the court used the combined bellwether and unitary format—a general procedure to which Chevron did not object—Chevron argued that the court must act carefully to ensure that a bellwether verdict could actually be returned. Otherwise, the court was merely certifying a de facto premature class action, a procedure the Fifth Circuit had already disapproved.

### B. Selecting a Representative Bellwether Group

It was possible to avoid this problem entirely. As Chevron argued to the district court, using the proper selection process, a bellwether and unitary trial could actually produce a reliable bellwether result. Such a result could be obtained if a representative group of plaintiffs were selected through stratified random sampling. As the court stated in *Meranus v. Gangel*:

> The choice of representative plaintiffs for bellwether discovery cannot be made in a vacuum. . . . Choosing an appropriate sampling technique will depend upon the extent to which the plaintiffs differ from one another with respect to characteristics relevant to this litigation. . . . Because clusters of plaintiffs may have different attributes, then, stratified random sampling rather than pure random selection may be necessary. This, in turn, requires identification of the pertinent characteristics and categorization of the plaintiffs according to those factors.

At the hearing before the district court, and by a written expert affidavit filed thereafter, Chevron urged the court to abandon its allegiance to arbitrary procedures in favor of stratified random sampling, a statistical process that courts have approved to select representatives in other mass tort controversies. For example, in *Cimino v. Raymark Industries, Inc.*, Judge Parker used statistical sampling by Professor Ronald G. Frankiewicz—the same expert who authored the affidavit submitted in *Chevron*—to select the

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122. *In re Air Crash Disaster on Dec. 29, 1972, 549 F.2d 1006, 1012 (5th Cir. 1977)* (using FED. R. CIV. P. 23(d) to support district court’s power to manage consolidated mass tort cases).
123. See 84 F.3d at 746.
124. See Petition for Writ of Mandamus at 20, *Chevron* (No. 97-20042).
125. See id.
126. See *Castano*, 84 F.3d at 748 (rejecting class certification of a mass tort action because the litigation was immature).
127. See Petition for Writ of Mandamus at 20, *Chevron* (No. 97-20042).
128. See id.
130. See *In re Chevron USA, Inc.*, 109 F.3d 1016, 1017-18 (5th Cir. 1997).
representative plaintiffs whose claims would be tried in the asbestos controversy.\textsuperscript{131}

In his affidavit, Dr. Frankiewicz made the following critical findings:

(A) the plan proposed by plaintiffs' counsel (thirty plaintiffs, with fifteen selected by each side) is a "pinpoint sample of deliberately selected plaintiffs NOT REPRESENTATIVE IN FACT of the class or population of plaintiffs;"

(B) the average number of medical complaints per plaintiff proposed by plaintiffs' counsel is nine, while the average number of complaints in the entire plaintiff population is 2.7, an exaggeration of 333%;

(C) The representative plaintiffs, selected by plaintiffs' counsel, have medical complaints that exaggerate the average severity of complaints in the entire population by 500%, at the very least.\textsuperscript{132}

Thus, according to the statistical evidence before the district court, plaintiffs' plan not only did not represent the population at issue, but also greatly exaggerated the number and severity of complaints. Any verdict rendered after a trial of such plaintiffs' complaints would be a fundamental distortion of the remaining claims. Such a gross distortion would not only infect the bellwether claims, but would also warp the jury's perception of consolidated issues in the unitary trial. The magnitude of the error would contaminate the entire proceeding. As two noted authorities have concluded:

Unfortunately, juries have a great deal of difficulty comprehending complex trial evidence and also have difficulty compartmentalizing evidence from the different trial issues. \textit{The net effect is that evidence for one trial issue contaminates the judgment of the other trial issues.}\textsuperscript{133}

Because this contamination was inevitable under the district court's plan, a fair trial was impossible. As the Fifth Circuit has stated: "[I]f one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially

\textsuperscript{131} 751 F. Supp. 649, 664 (E.D. Tex. 1990). Judge Parker's opinion in \textit{Cimino} contains an extensive and scholarly discussion of the history and reliability of these statistical procedures. See id. at 659-66. Essentially, Professor Frankiewicz's procedures are acceptable for the "same reasons that society embraces the science of statistics. It has been proved to provide information with an acceptable degree of accuracy and economy." \textit{Id.} at 663; see also \textit{In re Estate of Marcos Human Rights Litig.}, 910 F. Supp. 1460, 1464-68 (D. Haw. 1995) (using stratified random sampling to select representative trial plaintiffs).


\textsuperscript{133} Borden & Horowitz, \textit{supra} note 112, at 27 (emphasis added).
swayed by the error, it is impossible to conclude that substantial rights were not affected.\footnote{134}

Although the district court’s plan usurped the purpose of a bellwether trial, Dr. Frankiewicz concluded that the plan Chevron offered could achieve a reliable bellwether result.\footnote{135} According to Dr. Frankiewicz, a truly representative group of plaintiffs could be assembled through stratified random sampling, an approach used by the United States Census Bureau that treats the total group of plaintiffs as a series of component populations, each of which is sampled using a simple random plan.\footnote{136} The plaintiffs could be stratified in smaller groups according to (i) primary medical complaint and (ii) severity of the medical condition, and sampled at random to obtain a group of reliable bellwether plaintiffs.\footnote{137} In his affidavit, Dr. Frankiewicz opined that “[t]he representativeness of such a sample is beyond reproach.”\footnote{138}

Dr. Frankiewicz’s stratified random sampling procedure has been endorsed by important legal scholars. For example, Professors Saks and Blanck explained the merits of the procedure as follows:

Mass torts represent a sampling theorist’s dream. The population of cases from which the sample is to be drawn is known with unusual completeness. This provides the sampling frame from which any type of case sampling proceeds. In addition, many details are known or can be learned about each member of the population. Thus, the degree to which the sample is representative of the population can be known with near certainty—a great improvement over most sampling situations. Representative is the touchstone of good sampling.\footnote{139}

The use of this procedure in Cimino allowed Judge Parker to determine that his selections were reliable to a 99% confidence interval.\footnote{140}

\footnote{134} O’Rear v. Fruehauf Corp., 554 F.2d 1304, 1308 (5th Cir. 1977); see also Cain v. Armstrong World Indus., 785 F. Supp. 1448, 1457 (S.D. Ala. 1992) (granting a new trial in a consolidated trial of 13 asbestos claims where it became “obvious to [the] Court that a process had been unleashed that left the jury the impossible task of being able to . . . distinguish the facts and law of thirteen plaintiffs’ cases that varied greatly in so many critical aspects”).

\footnote{135} See Affidavit of Ronald G. Frankiewicz, Ph.D. at 9, Adams (No. H-96-1462) (on file in Appendix, supra note 17, at 20). Dr. Frankiewicz’s sampling procedure was also uncontroversed in Cimino even though, as in Chevron, the opposing party had access to identical data. See Cimino v. Raymark Indus., Inc., 751 F. Supp. 649, 664 (E.D. Tex. 1990). As Judge Parker stated, “The Court can only conclude that if Frankiewicz’s methodology was inappropriate or if the sample was, in fact, skewed and not representative of the class, the Court would have heard that evidence.” Id.

\footnote{136} See Affidavit of Ronald G. Frankiewicz, Ph.D. at 4, Adams (No. H-96-1462) (on file in Appendix, supra note 17, at 20).

\footnote{137} See id. at 7-9.

\footnote{138} Id. at 9.


\footnote{140} See Cimino, 751 F. Supp. at 664.
Given this record, Chevron argued that the district court’s plan went beyond a mere abuse of discretion, especially considering its broad impact. Chevron asserted that, under these facts, once the district court decided to employ the bellwether technique, the court had no authority to adopt any plan other than the stratified random sampling plan Chevron proposed. Stated another way, Chevron argued that a district court which chooses to use a bellwether trial to resolve an immature mass tort controversy must, as a matter of law, ensure that the bellwether plaintiffs are selected in the manner best suited to achieve a reliable bellwether verdict. According to Chevron, such a bright line rule was necessary to avoid usurping the purpose of bellwether trials and, ultimately, to prevent the irreparable harm resulting from judicial pressures to settle cases based upon unreliable interlocutory verdicts.

VI. THE FIFTH CIRCUIT’S DECISION

A three judge panel of the Fifth Circuit, composed of Judges Jones, DeMoss, and Parker, partially granted and partially denied Chevron’s petition for mandamus. The panel granted the petition insofar as it related “to utilization of the results obtained from the trial of the thirty (30) selected cases for any purpose affecting issues or claims of, or defenses to, the remaining untried cases.” The panel denied the petition insofar as it sought to require the district court to adopt Chevron’s alternate plan, preferring to leave the district court free, in its discretion, to adopt the plan or merely try the thirty claims to reach individual judgments. As Judge Parker stated:

Whether the district court wishes to proceed with [the] trial, to secure thirty (30) individual judgments, is a matter within the discretion of the trial court. Likewise, whether the trial judge wishes to attempt to structure a common-issues trial or conduct a bellwether trial based on a properly selected sample are matters also within the discretion of the district court. The results of any such trials and appropriateness of the requisite findings necessary to so proceed will then be matters for another panel to consider in the event those decisions are subject to appellate review.

In reaching these conclusions, Judge Parker conclusively determined that the plan adopted by the district court was improper because it attempted to
reach preclusive findings on the basis of a nonrepresentative bellwether group. Before making this determination, the judge noted a number of obvious problems with the district court’s plan. First, the plan did not "identify any common issues or explain how the verdicts in the thirty (30) selected cases are supposed to resolve liability for the remaining 2970 plaintiffs." Moreover, it was "impossible to discern" what "variables may exist" regarding the personal injury and property damage claims in the case. Under these circumstances, although the concept of bellwether and common issue trials is "a sound one that has achieved general acceptance by both bench and bar," Judge Parker could not agree that a preclusive result could be based on a nonrepresentative bellwether trial.

According to the court, "[w]hatsoever may be said about the trial contemplated by the district court’s December 19, 1996 order, one thing is clear. It is not a bellwether trial." As a trial of fifteen of the best and fifteen of the worst cases contained in the "universe of claims," there was "no pretense" that the thirty cases were representative of the three thousand plaintiffs in the case. Continuing, the court held that no preclusive effect could arise from any trial of the claims held by the plaintiffs named in the upcoming trial:

"The results that would be obtained from a trial of these thirty (30) cases lack the requisite level of representativeness so that the results could permit a court to draw sufficiently reliable inferences about the whole that could, in turn, form the basis for a judgment affecting cases other than the selected thirty."

Notwithstanding this ruling, Judge Parker clearly recognized that a preclusive result could be obtained with a properly selected representative sample, stating that, "[w]hile this particular sample of thirty cases is lacking in representativeness, statistical sampling with an appropriate level of representativeness has been utilized and approved." In an extremely important ruling, Judge Parker stated:

"We, therefore, hold that before a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried,

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149. See id. at 1019-20.
150. See id. at 1019.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id.
156. Id. at 1020.
157. Id.
it must, prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected. Typically, such a finding must be based on competent, scientific, statistical evidence that identifies the variables involved and that provides a sample of sufficient size so as to permit a finding that there is a sufficient level of confidence that the results obtained reflect results that would be obtained from trials of the whole.\textsuperscript{138}

According to the court, the representativeness requirement was compelled by constitutional due process.\textsuperscript{159} The district court’s trial plan was “devoid of safeguards” designed to ensure the reliability of the bellwether trial’s findings and lacked the assurances of fundamental fairness:

The elements of basic fairness contained in our historical understanding of both procedural and substantive due process therefore dictate that when a unitary trial is conducted where common issues, issues of general liability, or issues of causation are coupled with a sample of individual claims or cases, the sample must be one that is a randomly selected, statistically significant sample.\textsuperscript{160}

After reaching these conclusions, Judge Parker took a hands off approach to future activity in the case, leaving further proceedings in the case to the district court’s discretion, so long as the court comported with the Fifth Circuit’s judgment.\textsuperscript{161} Accordingly, the Fifth Circuit left the district court free to select a new representative bellwether group or, alternatively, to try the thirty currently selected claims to individual judgments without preclusive effect.\textsuperscript{162}

In a special concurring opinion, Judge Jones agreed that the “stringent criteria” for mandamus were satisfied in this immature mass tort controversy.\textsuperscript{163} According to Judge Jones, the district court’s trial plan carried the same unacceptable risks as the class certifications reversed in \textit{Castano v. American Tobacco Co.}\textsuperscript{164} and \textit{In re Rhone-Poulenc Rorer, Inc.},\textsuperscript{165} where improper class certifications had “potentially devastating impact” and created a “tendency to force defendants to settle even when they might have meritorious defenses.”\textsuperscript{166} As the concurring opinion states: “An imperfectly designed bellwether group cannot yield a statistically reliable set of verdicts.

\begin{itemize}
  \item \textsuperscript{158} \textit{Id.}
  \item \textsuperscript{159} See \textit{id.}
  \item \textsuperscript{160} \textit{Id. at} 1020-21.
  \item \textsuperscript{161} See \textit{id. at} 1021.
  \item \textsuperscript{162} See \textit{id.}
  \item \textsuperscript{163} \textit{Id.} (Jones, J., specially concurring).
  \item \textsuperscript{164} 84 F.3d 734, 746 (5th Cir. 1996).
  \item \textsuperscript{165} 51 F.3d 1293, 1298 (7th Cir. 1995).
  \item \textsuperscript{166} \textit{Chevron}, 109 F.3d at 1022 (Jones, J., specially concurring).
\end{itemize}
Nevertheless, once in place, the verdicts would create enormous momentum for settlement. There would then be nothing to review on appeal and no realistic opportunity for Chevron to appeal. Judge Jones recognized that the district court "allowed the parties to pick faces from the crowd of plaintiffs, and [the court's] order forces the parties to expend huge resources preparing for a trial whose results cannot possibly fairly be extrapolated to cover the rest of the crowd. As a 'bellwether,' the exercise is pointless." Judge Jones disagreed, however, with Judge Parker's conclusion that the results of a representative bellwether trial are necessarily entitled to preclusive effect. She had "serious doubts" about the procedure even where, "as here, Chevron agreed to use of a statistically sound bellwether trial process." She noted that the use of statistical sampling to identify and resolve common issues in tort cases had been severely criticized. Judge Jones was particularly concerned about potential violations of the Seventh Amendment right to jury trial, stating that "even if the bellwether jury found liability on the part of Chevron, later juries could be called upon to reassess that decision when faced with questions of comparative causation or comparative negligence." Continuing, she expressed concern that these problems may be compounded by "potential ethical problems" faced by plaintiffs' counsel who represent the entire plaintiff population. Although Judge Jones did not specify the ethical problems involved in this situation, one speculates that she was concerned about plaintiffs' counsel's ethical responsibilities to plaintiffs who are not selected for the bellwether trial.

Concluding, Judge Jones, without expressly rejecting the acceptability of a preclusive bellwether trial, showed strong concern that such a procedure might exceed the traditional role of the judiciary:

"There is a fine line between deriving results from trials based on statistical sampling and pure legislation. Judges must be sensitive to stay within our proper bounds of adjudicating individual disputes. . . . Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case. . . . In sum, I simply do not share Judge Parker's confidence that bellwether trials can be used to resolve mass tort controversies."
Accordingly, despite Judge Jones’ reservations, it appears that a definite statement of her opinions will have to wait until a specific scenario is presented with a statistically selected bellwether group. Although her opinion raises a number of important concerns—concerns that may or may not be shared by the entire circuit—the overall result in *Chevron* not only precludes the use of nonrepresentative bellwether trials to achieve dispositive results in mass tort cases, but also *permits* a district court to resolve a mass tort case with a single trial of a bellwether group whose representativeness is ensured by stratified random sampling. The wisdom and propriety of such a plan depends on the circumstances of each particular case. As explained below, the bellwether/unitary trial format is not necessarily a panacea for every mass tort case.

VII. A BETTER MOUSETRAP?

Are bellwether/unitary trials a “better mousetrap” for trying mass tort cases? The answer to this question depends upon one’s perspective: whether one is the designer of the trap, or the mouse—whether one is trying to catch something, or trying to avoid being caught. These observations may sound whimsical, but the problems *Chevron* raised for litigants are deadly serious. Because a bellwether/unitary trial is designed to set up an “all or nothing” trial scenario for both plaintiffs or defendants, the choice to accept that risk must be considered with the utmost care.

A. Designing a Bellwether/Unitary Trial

According to Judge Parker’s majority opinion in *Chevron*, a workable bellwether/unitary trial for an environmental mass tort must:

(A) specify the common issues affecting the claims of all plaintiffs that will be consolidated for trial with the bellwether group;
(B) identify the variables affecting the claims, including time, proximity, and contamination levels of exposure, as well as the mixtures of alleged exposures and maladies that may be affected by those variables; and
(C) select bellwether plaintiffs according to competent, scientific, statistical evidence that accounts for the variables involved and provides a sample of sufficient size, thereby ensuring a sufficient level of confidence that
the results of the bellwether trial reflect results that would be obtained from trials of the whole.¹⁷⁵

This is not a simple process. Certainly, parties faced with a potential bellwether/unitary trial cannot blindly or generally advocate its merits without a thorough evaluation of whether their case is suitable for such a trial. Even in *Chevron*, Judge Parker expressed "no opinion on whether the mix of claims that collectively make up the consolidated case lend themselves to the sampling techniques required to conduct a bellwether trial or whether this is an appropriate case for a stand-alone, common-issue trial."¹⁷⁶

Accordingly, before a bellwether/unitary trial is advocated, and certainly before it is argued, the parties and the court must determine whether the case lends itself to the statistical techniques necessary to select a representative bellwether group, and whether dispositive common issues in the case can be identified, consolidated, and fairly tried. The first step in this process is to ensure that the overall group of plaintiffs is sufficiently large to yield a statistically powerful result.¹⁷⁷ Mass tort controversies come in many sizes, but in each controversy, there is a calculable number that must be present before sampling results reach an acceptable confidence level.¹⁷⁸ If the analysis cannot yield a statistically reliable result because there are not enough claims, a statistical bellwether analysis is pointless because it lacks the confidence level necessary for a preclusive result.

Mass tort cases that involve single incidents, such as air crashes or explosions, present entirely different problems than environmental mass torts, which may involve substantially more variables. In an environmental case, the population typically does not have the same intensity, duration, or even type of exposures, nor do they typically suffer from the same types of diseases or injuries. Moreover, even property damage issues may involve different degrees and types of damages, whether by soil, water, or air pollution. In either event, most plaintiffs have sustained their personal injuries and property damages at different times. Any statistical sampling technique must reliably account for all of these variables before a representative bellwether group is selected and dispositive common issues are identified.

For example, in cases like *Chevron*, which involved varying claims of both personal injury and property damages, a truly representative bellwether group would include (i) plaintiffs who claim personal injuries only, (ii) plaintiffs who claim property damages only, and (iii) plaintiffs who claim both personal injuries and property damages. To be representative, the bellwether group must include persons who are not claiming illness from toxic

¹⁷⁵. See id. 1019-20 (5th Cir. 1997).
¹⁷⁶. Id. at 1021.
¹⁷⁷. See id.
¹⁷⁸. See id.
exposures, and those "well" persons should be included in the proportion that they appear in the overall plaintiffs' group. Likewise, the bellwether plaintiffs must also include persons who do not claim property damages, and those persons should be included in the same proportion that they appear in the overall plaintiff population.

Within these broad categories, plaintiffs claiming personal injuries must be stratified according to the variables underlying the claims, such as duration, intensity and types of exposures, and the nature and severity of their injuries. Appropriate numbers of plaintiffs must then be randomly selected from the stratified groups in proportion to the incidence of the respective injuries in the overall population. If the number and severity of major injuries in the population is high, then those types of persons will comprise a relatively higher percentage of the bellwether group. If, on the other hand, such persons are relatively rare in the population, they will comprise a small percentage of the bellwhers.

Similarly, plaintiffs claiming property damages must also be stratified according to variables affecting their properties, such as times of ownership, location relative to contamination, and degree and nature of the contamination. If the number of severely contaminated properties in the overall group is high, then plaintiffs owning those properties will comprise a large percentage of the bellwhers. If such properties are not common, they will be correspondingly few in the bellwether group. The goal of this analysis is to have a bellwether group that, to a reliable degree, mirrors the entire group of plaintiffs. Under those circumstances, the verdict can have

179. See MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.27, at 326.
180. Cf. Chevron, 109 F.3d at 1020 (stating that the finding must be based on the variables involved in the case); see also Affidavit of Ronald C. Frankiewicz, Ph.D. at 5, Adams v. Chevron USA, Inc. (S.D. Tex. Dec. 23, 1996) (No. H-96-1462) (on file in Appendix, supra note 17, at 20) (advocating classifications according to "severity of injury"). Although this "wellness" requirement is not specifically discussed in the court's opinions, a representative sampling would necessarily include such persons as a variable. Cf. Chevron, 109 F.3d at 1020 (stating that bellwether plans must identify the variables involved in the population).
181. See Affidavit of Ronald C. Frankiewicz, Ph.D. at 5-6, Adams (No. H-96-1462) (on file in Appendix, supra note 17, at 20).
182. See id.
183. See id.
184. See id.
185. Cf. Chevron, 109 F.3d at 1020 (stating that the finding must be based on the variables involved in the case). Although the initial plan outlined by Dr. Frankiewicz addressed personal injury bellwether selections, property damage claims likewise have variables which, according to the court's reasoning, must be considered before any binding bellwether verdicts can be rendered. Cf. id. (stating that binding bellwether findings "must be based on competent, scientific, statistical evidence that identifies the variables involved") (emphasis added). Significantly, the court made no distinction between personal injury and property damage claims regarding the applicability of this rule. See id. at 1019 ("Similar litigation typically contains property issue variables that are related to time, proximity, and contamination levels of exposure to any pollutants that may be present, and personal injury claims that contain a mix of alleged exposure related maladies that also may be affected by time, proximity, and exposure levels.").
predictive and preclusive power on issues common to the remaining plaintiffs.\textsuperscript{186}

Finally, the common issues that will be consolidated and litigated on behalf of all parties must be identified. There is a temptation to define these issues broadly, as the district court did in Chevron.\textsuperscript{187} Unfortunately, broadly defined issues such as "general liability or causation" do not provide adequate specificity and may not satisfy procedural due process.\textsuperscript{188} In order for a common issue trial to have preclusive effects, it must adequately identify the specific issues which will be resolved.\textsuperscript{189} Otherwise, the procedural due process requirement of "notice and opportunity to be heard" may be violated insofar as nonbellwether plaintiffs are concerned.\textsuperscript{190} The better practice, therefore, is for the court's order to identify the issues in the same manner as it might in submitting the case to a jury on special interrogatories. In that way, all parties are clearly advised of the specific common issues that will be litigated in a unitary fashion.

There is also a temptation to include a number of common issues in an effort to give the trial its broadest possible impact. This practice raises practical and strategic problems. Superficially, it may seem that there are numerous common issues in an environmental mass tort case, but practically, it is very difficult to define them. Isolation of an issue that all plaintiffs hold in common against a defendant is very difficult considering the numerous variables that inevitably underlie each plaintiff's claim. In other types of mass tort cases with relatively few variables, common issues may be easier to define. For example, in a mass products liability action, the presence or absence of an adequate warning, or the presence or absence of a

\textsuperscript{186.} See id. at 1020.
\textsuperscript{187.} The district court listed common issues of "general liability or causation." Order Establishing Trial Plan and Resolving Related Issues at 5-6, Adams (No. H-96-1462) (on file in Appendix, supra note 17, at 19).
\textsuperscript{188.} Chevron, 109 F.3d at 1019. The court stated:
The trial plan, while clearly designed to resolve the issue of liability on the part of Chevron to all the plaintiffs by referring to a unitary trial on the issues of general liability or causation, does not identify any common issues or explain how the verdicts in the thirty (30) selected cases are supposed to resolve liability for the remaining 2970 plaintiffs.
\textsuperscript{189.} See Chevron, 109 F.3d at 1019.
\textsuperscript{190.} See id.
manufacturing or design defect, might be proper common issues. Other mass tort cases probably have their own potential common issues, depending on the facts and causes of action asserted in each controversy. Perhaps the best practice is to use as few common issues as possible. In that way, potential errors caused by including improper issues can be minimized.

B. Advantages of the Bellwether/Unitary Trial Format

In the environmental arena, a bellwether/unitary trial offers a true opportunity to balance the risks associated with trying mass tort cases. For many years, one of the major concerns for defendants in these cases has been an unfair potential for collateral estoppel or issue preclusion that might arise from an adverse bellwether verdict. As a general rule, under federal law, and under the law of most states, a party may be collaterally estopped from relitigating an issue decided adversely to the party in a previous proceeding. Although some cases have cast doubt on the applicability of this rule in mass tort cases, defendants remain concerned about its potential impact. Their 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

191. This concern is based upon a continuing disagreement in the courts of appeal regarding whether the United States Supreme Court absolutely precluded the use of offensive collateral estoppel in mass tort cases in Parklane Hosiery Co. v. Shore, 439 U.S. 322, 330 (1979). Compare In re Bendectin Prods. Liability Litig., 749 F.2d 300, 305 n.11 (6th Cir. 1984) ("In Parklane Hosiery, the Supreme Court explicitly stated that offensive collateral estoppel could not be used in mass tort litigation."); with Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 338 (5th Cir. 1982) (holding that the Parklane Court "adopted a general rule of fairness" that did not absolutely preclude use of offensive collateral estoppel in mass tort cases). If the Fifth Circuit's holding in Hardy is correct, a risk of offensive collateral estoppel remains in some mass tort cases.

192. See Parklane, 439 U.S. at 326 (stating that collateral estoppel serves a "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").

193. See id. at 330 & n.14. The Parklane Court based its reservations about offensive collateral estoppel on Professor Currie's famous hypothetical mass tort example. See id. at 330. In Professor Currie's hypothetical, a railroad wins the first 25 lawsuits filed by passengers injured in a crash based on findings that it was not negligent. See Brainerd Currie, Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine, 9 STAN. L. REV. 281, 286 (1957). The jury in case 26, however, finds the railroad negligent. See id. To allow every remaining plaintiff to establish the railroad's negligence through collateral estoppel would necessarily be unfair. See id. at 289.

194. Under Professor Currie's example, the railroad could not raise collateral estoppel offensively even if it won the last 25 cases. See Currie, supra note 193, at 289. This is because the person against whom the estoppel is asserted "must be a party or a privy to the prior judgment." Hardy, 681 F.2d at 338. Nonbellwether plaintiffs, in the absence of a unitary trial, are not, by definition, parties to nonrepresentative bellwether trials. See In re Chevron USA, Inc., 109 F.3d 1016, 1020 (5th Cir. 1997). Accordingly, without the safeguards described in Chevron, only defendants face a risk of collateral estoppel. See id.
involved, statistics have little, if anything, to do with the decision to consolidate. Under those circumstances, statistics relate only to the bellwether selection process, a process about which Fibreboard was not concerned.\textsuperscript{211} If the trial court properly specifies the common issues consistent with due process, and if the common issues concern truly generic, rather than individual, questions, it seems that all plaintiffs' rights to a jury trial will be respected in a bellwether/unitary trial format. The bottom line is that those rights are respected because, as a result of notice and consolidation, the nonbellwether plaintiffs are \textit{actually participating in the trial}, insofar as the consolidated common issues are concerned.

Judge Jones was also concerned about ethical problems plaintiffs' counsel may face by participating in the bellwether/unitary trial process.\textsuperscript{212} If, as discussed above, common issues are selected carefully, plaintiffs' counsel may not run the risk of prejudicing nonbellwether clients by denying their rights to jury trial.\textsuperscript{213} More troubling, however, is the problem created by favoring one client's claim over another's in the bellwether selection process. Clients might justifiably object to the deferral of their claims pending trial of a bellwether/unitary proceeding in which they will not participate. They may be concerned about losing their day in court and the opportunity to have the jury decide how their individual stories impact the common issue findings. This thorny ethical problem can be resolved in two steps. First, as in any multiple client representation, plaintiffs' counsel should inform all of their clients fully about the advantages and disadvantages of the bellwether/unitary trial procedure, and should secure consent from the clients to use such a procedure. Secondly, if some clients object to the selection process, the process can be removed from the advocates' responsibility by using a court-appointed statistical expert to make the bellwether selections.

Lastly, and perhaps most importantly, anyone advocating a bellwether/unitary trial should realize, and ensure that all clients realize, that such a trial may be an all or nothing event. Just as it is possible for a defendant to win outright and to terminate a mass tort case, it is also possible that the defendant may lose on important common issues, issues that will be forever foreclosed to reconsideration insofar as the thousands of nonbellwether plaintiffs are concerned. Under those circumstances, a seemingly endless array of individual causation and damage trials will loom. Before willingly participating in such a proceeding, full disclosure of these risks is absolutely necessary, and substantial client resolve is essential.

\textsuperscript{211} See \textit{id. at 707}.
\textsuperscript{212} See \textit{In re Chevron USA, Inc.}, 109 F.3d 1016, 1023 (5th Cir. 1997) (Jones, J., specially concurring).
\textsuperscript{213} See \textit{id. at 1019}. 
Mass tort cases are a fact of life in American civil litigation. Ever since the asbestos litigation crisis commenced its domination of tort dockets, courts, parties, and advocates have struggled with ways to manage saturated dockets consistent with traditional notions that every litigant is entitled to his or her day in court.214 This principle is no less important for defendants than it is for plaintiffs. These traditional concerns must be counterbalanced, however, by the extensive delays and extraordinary expenses incurred in mass tort cases.

Perhaps there is no single way to resolve such cases effectively and efficiently. Some cases, especially those which have now matured through years of trials and appeals, are probably suitable for class certification.215 Others, however, like the controversy in Chevron are not sufficiently mature.216 In those cases, the lack of experience by the parties and the courts requires a more cautious approach. The most conservative approach to those controversies would be to develop a long history of trials and appeals, such as that developed in the asbestos crisis. But one must seriously question whether such an approach actually produces a just result, especially if the results are attended by delays and expenses that offend even the most tolerant litigants. Moreover, the case by case approach allows organized plaintiffs’ counsel to front load their best cases, thereby creating a skewed momentum that may drive the settlement costs in a mass tort controversy far beyond their realistic values. As many defendants have learned to their dismay, the speeding locomotive of mass tort litigation is difficult to stop without suffering dire financial consequences.

In the right cases, the bellwether/unity trial format offers an opportunity to avoid excess delays, extraordinary expenses, and the arbitrary selection of cases based upon the self-serving perspectives of counsel. Properly structured, it offers an opportunity to fairly and constitutionally

214. The long line of Fifth Circuit cases dealing with innovative ways to administer the massive asbestos docket in the Eastern District of Texas are but one example. See In re Fibreboard Corp., 893 F.2d at 712 (rejecting the statistical construction of a class action trial plan); Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 473 (5th Cir. 1986) (approving class certification of asbestos personal injury and wrongful death claims); Hardy v. Johns-Manville Sales Corp., 681 F.2d 334, 348 (5th Cir. 1982) (rejecting use of offensive collateral estoppel on issue of whether asbestos is “unreasonably dangerous”); Migues v. Fibreboard Corp., 662 F.2d 1182, 1189 (5th Cir. 1981) (rejecting a trial court’s application of stare decisis to hold asbestos products “unreasonably dangerous” as a matter of law). See generally Faulk, supra note 8, at 387-90 (discussing the Fifth Circuit’s endorsement of creative case management in managing asbestos cases).

215. See MANUAL FOR COMPLEX LITIGATION, supra note 1, § 33.26, at 322.

216. Although Judge Parker did not find the immaturity of the controversy to be controlling in this non-elastic mass tort case, Judge Jones stressed the immaturity factor in her concurring opinion. See Chevron, 109 F.3d at 1022 (Jones, J., specially concurring). As Judge Jones noted, “this is an ‘immature’ mass tort action, in which the defendant’s liability has not even been tested, much yet firmly established. The use of innovative judicial techniques particularly to resolve immature mass tort actions has been disfavored.” Id. (Jones, J., specially concurring).
resolve a mass tort controversy without sacrificing the attention that real individual issues deserve. The bellwether/unitary trial format allows nonbellwether plaintiffs to actually participate in the unitary trial through consolidation of issues they hold in common with the bellwethers, while providing all parties with a case evaluation vehicle for the untried individual damage claims. Most importantly, it offers a chance for all litigants to stop the litigation locomotive before it starts, thereby expediting the administration of justice to all parties, plaintiffs, and defendants alike. Mass tort resolution plans that administer justice on a first come, first served basis are, by their nature, unjust to all parties. In the final analysis, justice must serve the interests of all parties, not just those plaintiffs who are arbitrarily advanced to the front of the line. Properly utilized, this procedure may ensure that resources that are otherwise consumed in massive transaction costs are available to compensate justly entitled plaintiffs. It may also allow controversies to be decided rationally on the basis of legitimate litigation strategies, instead of those designed to stack the deck to motivate settlements by unfairly structured trials.