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Justice Thomas' Hits and Misses in Dissent from Denial of Review in MDL-Related Case

by Gregory S. Chernack

On November 20, 2023, the Supreme Court declined to hear a case involving the use of nonmutual collateral estoppel in the context of a multidistrict litigation (MDL). Justice Thomas issued an interesting dissent from the *cert* denial worth examining. In his dissent, he flagged the serious risks defendants face in the first trials in an MDL, risks not faced by plaintiffs and that raise serious due process concerns. Yet in making his argument, Justice Thomas makes three points that overstate his position. Even if some of the points he raises are exaggerated, however, the risks MDL defendants face are very real.

E.I. du Pont de Nemours v. Abbott, 601 U.S. ___ (2003) arose out of an MDL involving exposure to perfluorooctanoic acid which DuPont had discharged into the Ohio River and the air. The Judicial Panel on Multidistrict Litigation created an MDL, and three bellwether trials resulted in plaintiff verdicts. When additional plaintiffs filed suit, the district court held DuPont estopped from challenging that it had a duty, it had breached it, and that the resulting injuries were foreseeable; thus, it was left to contest only specific causation and damages. After the Abbots won a jury trial following these rulings, the court awarded them approximately $40 million and a divided panel of the Sixth Circuit affirmed.

As Justice Thomas's dissent illustrates, the initial trials in an MDL are of critical importance and present significant risks to defendants. Should a defendant lose the initial trial(s), it is possible that—as here—it will be barred from challenging certain critical aspects of a case in subsequent litigation, including a breach of duty, aspects of proximate causation, and even general causation. Decades ago, the Supreme Court held that the use of offensive nonmutual collateral estoppel (what the district court applied here) is permissible, and it unhelpfully placed an exceedingly vague limit on that ruling by noting that courts should not use this form of preclusion when doing so "would be unfair to a defendant." *Parklane Hosiery v. Shore*, 439 U.S. 322, 331 (1979). And as opposed to MDL defendants, MDL plaintiffs do not have to worry about this form of collateral estoppel. Because different plaintiffs would be involved in each subsequent trial, it would run afoul of due process to apply collateral estoppel to an individual who was not a party to the earlier litigation. *See Blonger-Tongue Labs., Inc. v. Univ. of Ill. Foundation*, 402 U.S. 313, 329 (1971) ("Due process prohibits estopping" litigants "who never appeared in a prior action."). Thus, if an MDL defendant wins an initial trial, it receives no estoppel benefit in subsequent trials. As Justice Thomas correctly noted, "DuPont had all the downside without any potential for upside." *DuPont* at *5.

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Despite Justice Thomas's correctly flagging this unfairness, three additional points he raised about this unfairness do not stand up. First, although he correctly notes that an MDL "is not designed to fully resolve the merits of large batches of cases in one fell swoop," *id.* at *2, MDL courts have done so at times, including to the benefit of defendants, for example, in the Zantac MDL. And despite what Justice Thomas argues, many MDL courts do more than just "pretrial proceedings," by, for example, selecting cases for initial trials in which venue is proper in the MDL court, pressuring defendants to waive their *Lexecon* rights to have cases tried in the MDL court, or coordinating with federal judges around the United States to have particular cases tried first. MDL courts, in both theory and practice, have much broader power than just pretrial proceedings.

Second, Justice Thomas fixates on the claim that trials in the MDL court are "nonbinding." *Id.* at *3. He does not fully explain what he means by this, but there is no doubt that the initial trials were binding on the particular trial plaintiffs and DuPont. Had these merely been "trials" that did not bind the parties involved (created just to get a sense of what a "real" jury might do), such a determination could not bind subsequent parties, but to the extent offensive nonmutual collateral estoppel should be permitted at all, this is not a real distinction between an MDL trial and a non-MDL trial.

Finally, Justice Thomas argues that "[i]t would make no difference if other MDL plaintiffs have material differences that would prevent them from making their required showing on that element—once nonmutual offensive collateral estoppel has been applied, a defendant's hands are tied." *Id.* at *3. But that too is too broad. If material differences exist—either in the applicable law or facts—a court should not apply collateral estoppel. For example, a jury determining that a defendant owed a duty to plaintiff A does not mean that that defendant owed a duty to plaintiff B when material differences exist between the two plaintiffs. Likewise, as even the district court in *DuPont* recognized, issues like specific causation must be tried on a case-by-case basis.

In the end, Justice Thomas has pointed out the problems of nonmutual collateral estoppel—risks that are magnified in an MDL which will, by definition, have serial trials—and his dissent flags a few very important issues:

- The first trial in an MDL is of critical importance to a defendant because of the potential risk of the application of nonmutual collateral estoppel should it lose.
- If a defendant does lose the first trial, it should fight tooth and nail against the application of the doctrine in subsequent trials, noting every possible difference between the first plaintiff and subsequent plaintiffs.
- Defendants, if they lose on this issue, should continue to raise it on appeal. At least two Justices wanted to grant *certiorari* (Justice Kavanaugh also would have granted the petition), and Justice Alito recused himself. There appear to be at least several Justices willing to reexamine or at least narrow *Parklane Hosiery*.

So even though Justice Thomas raised arguments that he did not need to, his dissent flags an issue of critical importance to any defendant that finds itself in an MDL.