

Defense Strategies for Opposing Plaintiffs' Use of Collateral Estoppel in Mass Tort Product Liability Actions

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In mass tort product liability litigation, the plaintiffs' bar often has hundreds—if not thousands—of opportunities to secure a single jury verdict finding that the product at issue is somehow defective in its design, manufacture, and/or warnings. And if/when such a verdict is reached, some plaintiffs have sought to offensively invoke the doctrine of collateral estoppel in a non-mutual setting to establish that the product is now defective as a matter of law—thereby precluding manufacturers from re-litigating the issue of defect in all subsequent cases. If successful, the only remaining issues to litigate in future cases would be specific causation and damages.

Fortunately for manufacturers, plaintiffs must overcome several obstacles before the doctrine of collateral estoppel can be judicially enforced in this manner. This article discusses strategies manufacturers can assert to defeat attempts by plaintiffs to establish the existence of a product defect as a matter of law.

The Doctrine of Offensive Collateral Estoppel—In General

While the elements required to offensively invoke the doctrine of collateral estoppel may vary by jurisdiction, in general, the plaintiff must show that: (1) the issues in both proceedings are identical; (2) the issues in the prior proceeding were actually litigated and actually decided; (3) there was a full and fair opportunity for litigation in the prior proceeding; and (4) the issues previously litigated were necessary to support a valid and final judgment on the merits.

The Issues Are Not Identical

To invoke collateral estoppel, plaintiffs must establish that the issues in the current proceeding are identical to those litigated in the prior proceeding. In the context of product liability actions, this showing can present practical problems for plaintiffs for several reasons.

Are the products at issue truly identical? This point is obvious, but even small differences in the products at issue have the potential to have a meaningful impact on whether

the issues between the prior case and the present case are identical to warrant application of collateral estoppel. For example, in the context of medical device litigation, manufacturers should point out if the products treat different medical conditions, are made with different materials, have different design features, are implanted with different techniques, or are associated with different risks, among other potential distinctions. The more differences that exist between the products at issue, the less likely the issues between the prior and present cases are identical.

Did the prior proceeding apply different state law?

Product liability laws differ from state to state, both in terms of the types of claims that are actionable and the showing necessary to prevail on a given cause of action. If plaintiffs are invoking collateral estoppel based on a verdict that applied different state law, manufacturers should distinguish such law from the state law at issue in the present case—whether by claim, the elements necessary to prove such claims, or the factors considered to satisfy a given element. If the law applied in the prior proceeding is different from the law to be applied in the present case, the issues are arguably not identical.

Are the defect and causation theories identical?

Manufacturers should look for differences in the product defect and causation theories (usually offered by expert witnesses) to illustrate why the issues in the prior verdict are not identical to those in the present case. Differences in the expert witnesses themselves and nuanced differences in their experience, opinions, and bases for their opinions may also provide a basis to argue that the issues are not identical.

Are the factual circumstances the same? Unless the subsequent action truly arises out of the same set of facts and occurrences between the same parties, the case-specific facts will almost certainly differ in some respect between plaintiffs. For instance, in the context of an implantable medical device, each plaintiff will present with different symptoms, medical histories, and health conditions, and they will have consulted at different times with different physicians who are associated with varying degrees of experience, training, and knowledge of the device at issue. Each plaintiff will also have their own unique post-operative course, including different alleged injuries that vary in

duration, degree, and effect. These types of differences in the factual circumstances underlying each case may provide enough support to show that the issues are not truly identical.

Force Plaintiffs to Prove that the Identical Issues Were Actually Decided

Even if the issues in the prior proceeding are identical to those in the present case, manufacturers should point to ambiguities in the verdict itself to question which issues were actually decided in the prior case. To be litigated and decided, an issue must be properly raised in the pleadings, argued at trial, submitted for determination, and determined by the trier of fact. But verdict forms often do not seek detailed information on which defect theories were accepted and rejected by the jury. Rather, they ask only whether a defect exists and, if so, whether such defect caused the plaintiffs' injuries. Thus, if plaintiffs advance more than one product defect theory, the prior verdict form might not specify which defects the jury actually found to exist. In these instances, such uncertainty may be sufficient to overcome a collateral estoppel challenge.

Plaintiffs Lack Privity

In some jurisdictions, plaintiffs may be required to establish that privity exists between themselves and the plaintiffs in the prior proceeding. To do this, plaintiffs must show that an identification of interests exists such that both sets of plaintiffs represent the same legal rights so as to justify preclusion. Where applicable, manufacturers should identify case-specific facts that undercut plaintiffs' ability to establish that such privity exists.

Highlight the Fundamental Unfairness

Even if a plaintiff could state a prima facie case for the application of collateral estoppel, they still must demonstrate that preclusion is fair. In *Parklane Hosiery Co., Inc. v. Shore*, the U.S. Supreme Court stated that courts should not permit the use of offensive collateral estoppel when doing so would be unfair to the defendant. 439 U.S. 322, 331 (1979) (“[T]he general rule should be that in cases where . . . the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.”).

Unfairness may exist if prior *defense* verdicts have been rendered that involve the product at issue. In *Parklane Hosiery*, the Supreme Court held that the application of offensive collateral estoppel may be unfair to a defendant

“if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.” *Id.*; see also *State Farm Fire & Cas. Co. v. Century Home Components, Inc.*, 275 Or. 97, 109 (1976) (“[W]here outstanding determinations are actually inconsistent on the matter sought to be precluded, it would be patently unfair to estop a party by the judgment it lost. . . where there are extant determinations that are inconsistent on the matter in issue, it is a strong indication that the application of collateral estoppel would work an injustice.”).

Furthermore, invoking offensive non-mutual collateral estoppel in the context of a product liability action would likely have a broad, substantial, and prejudicial impact on the defendant. Taken to its logical conclusion, such a ruling “could result in a single jury, sitting in review of certain limited facts, entering a verdict which could establish safety standards for a given product for the entire country.” *Goodson v. McDonough Power Equip., Inc.*, 443 N.E.2d 978, 987 (Ohio 1983) (“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 underlying factual circumstances are judged.”). In this regard, it would be “contrary to public policy to allow a single jury verdict to brand an entire product defective throughout the country, particularly when there exists a significant and ongoing debate in the scientific and medical community” about the issues involved in the current proceeding. *Coburn v. SmithKline Beecham Corp.*, 174 F. Supp. 2d 1235, 1240–41 (D. Utah 2001).

Invoking Offensive Non-Mutual Collateral Estoppel Is Not Appropriate In Mass Tort Product Liability Actions

If every plaintiff could invoke collateral estoppel against a product manufacturer based on a single, prior adverse verdict, mass torts and federal multidistrict litigation (“MDL”) would not exist in their current form. Offensive use of the doctrine would obviate the need for coordinated proceedings once a verdict in favor of a single plaintiff is reached. As the U.S. Supreme Court observed:

In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

See, e.g., *Parklane Hosiery Co.*, 439 U.S. at 330 n.14. For these reasons, some state and federal courts throughout

the country have rejected the use of collateral estoppel in the context of a product liability action. See, e.g., *Coburn*, 174 F. Supp. 2d at 1238–41, *Rogers v. Ford Motor Co.*, 925 F. Supp. 1413, 1419 (N.D. Ind. 1996); *Sandoval v. Superior Court*, 140 Cal. App. 3d 932, 944 (1983); *Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982). Despite this authority, manufacturers should remain vigilant to attempts by plaintiffs to establish the existence of a product defect as a matter of law.

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