NOW IT'S PERSONAL: PUNISHMENT AND MASS TORT LITIGATION AFTER *PHILIP MORRIS V. WILLIAMS*

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I. INTRODUCTION

May a jury punish a defendant for harms that the defendant's actions caused not just to the plaintiff before the court, but also to other persons not before the court? In *Philip Morris v. Williams*,[1] the United States Supreme Court answered that question in the negative, holding that due process requires that a defendant not be punished for harm the defendant caused to anyone other than the plaintiff before the court.[2] The *Philip*

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1. Philip Morris v. Williams, 127 S. Ct. 1057 (2007).

2. *Id.* at 1063 ("[T]he Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts

Morris Court grounded its decision in concerns about the inability of a defendant to present defenses against those not present in the litigation,[3] as well as the arbitrariness and immeasurability of harms to others not in the courtroom.[4]

Philip Morris, however, specifically addressed only a plaintiff suing individually, not even commenting on the effect of the personalized punitive damages requirement upon class actions, with its emphasis on representation of one by another.[5] Does *Philip Morris'* prohibition on awarding punitive damages to those not before the court destroy the mass tort punitive damages class action? If not, what is the effect of *Philip Morris* on class actions and the chief emergent mass tort, class-action competitor for procedural superiority[6]—pre-trial consolidation, individual litigation, and group settlement?

Philip Morris provides new due process grounds for the denial of class certification for mass tort classes involving punitive damages: where injuries and defenses vary among class members, due process prohibits any adjudication of punitive damages that does not allow the defendant to explore those differences and present all defenses. Plaintiffs' counsel might attempt to utilize statistical sampling of class members' attributes as a way to take into account individual differences under *Philip Morris* without descending into an unmanageable, individualized inquiry that dooms the class action. I conclude, however, that any use of statistical sampling to adjudicate claims raises additional problems under due process, right to jury trial, and state law on causation. Thus, *Philip Morris* provides a potent due process argument against certification of mass tort punitive damages class actions where injuries or liability issues are not

upon nonparties or those whom they directly represent . . . ."). The Court also held, however, that a jury might hear evidence of harm to other plaintiffs in order to gauge the wrongfulness of the act with regard to the plaintiff. *Id.* at 1064.

3. *Id.* at 1063.

4. *Id.*

5. *See, e.g., id.* at 1060 ("This lawsuit arises out of the death of Jesse Williams, a heavy cigarette smoker.").

6. *See* FED. R. CIV. P. 23(b)(3) (requiring for class certification "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy").

uniform throughout the class.

With regard to non-class methods of mass tort adjudication, *Philip Morris* enhances the efficacy of an already attractive procedural route. The emerging consensus approach to mass tort adjudication involves individual litigation, whose verdicts are used by litigants to price pending claims and assess potentially far-reaching settlements. *Philip Morris* improves this approach in two ways. First, by clarifying that each individual verdict's punitive damages are based only on harm to that plaintiff, *Philip Morris* assists litigants in ascertaining individual claim values based on the verdicts in individual litigation. Second, in limiting each punitive damages award to the harm to each plaintiff, *Philip Morris* eliminates the multiple-punishment problem, under which theoretically early plaintiffs could be awarded punitive damages for harm to others and ultimately the entire amount of permissible punitive damages could be used up before all the plaintiffs sued.

Part II of the article details the *Philip Morris* litigation, including the landmark United States Supreme Court decision. Part III then examines the effect of *Philip Morris* on the mass tort class action. Next, Part IV addresses the implications of *Philip Morris* for non-class mass tort litigation. In particular, Part IV scrutinizes the pricing of claim values in mass tort litigation after *Philip Morris*, as well as the elimination of the multiple-punishment problem by *Philip Morris*. Finally, in Part V, I conclude that *Philip Morris* will assist courts in turning back from class-action experimentation to individual litigation of mass torts.

II. *PHILIP MORRIS V. WILLIAMS*

The *Philip Morris* litigation arose from the death of Jesse Williams, who smoked cigarettes heavily.[7] In particular, Jesse Williams smoked Marlboro, a cigarette brand manufactured by Philip Morris.[8] Williams' widow, on behalf of Williams' estate, sued Philip Morris, claiming its negligence and deceit caused

7. *Philip Morris*, 127 S. Ct. at 1060.

8. *Id.*

Williams' death.[9]

At trial, the jury found for the plaintiff on both the negligence and deceit claims.[10] Philip Morris proffered a jury instruction that the jury could not punish Philip Morris for injuries to others not before the court.[11] For the plaintiff's attorney in the *Philip Morris* trial argued to the jury that they should

> think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. . . . In Oregon, how many people do we see outside, driving home . . . smoking cigarettes? . . . [C]igarettes . . . are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third *[i.e.*, one of every three killed].[12]

The trial judge rejected the defendant's proposal.[13]

On the deceit claim, the jury awarded $821,000 for compensatory damages,[14] and $79.5 million in punitive damages, a punitive-to-compensatory ratio of more than ninety-six to one.[15] The trial judge deemed the $79.5 million punitive damages award "excessive" and reduced the award to $32 million.[16]

On appeal, the Oregon Court of Appeals restored the punitive

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9. *Id.*

10. *Id.* at 1061.

11. *Id.* Specifically, Philip Morris requested that the jury be informed as follows:

> [Y]ou may consider the extent of harm suffered by others in determining what [the] reasonable relationship is between any punitive award and 'the harm caused to Jesse Williams' by Philip Morris' misconduct, '[but] you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims . . . .

Id.

12. *Id.*

13. *Id.* (stating that instead the judge told the jury that "'[p]unitive damages are awarded against a defendant to punish misconduct and to deter misconduct,' and 'are not intended to compensate the plaintiff or anyone else for damages caused by the defendant's conduct'").

14. *Id.* (noting that $21,000 were economic damages and $800,000 were non-economic damages).

15. *Id.*

16. *Id.*

damages award to $79.5 million.[17] Although the Oregon Supreme Court denied Philip Morris further review, the United States Supreme Court granted certiorari and remanded the case for further consideration in light of the Court's recent punitive damages decision, *State Farm Mutual Automobile Insurance Co. v. Campbell*.[18] On remand, the Oregon Court of Appeals again upheld the $79.5 million punitive damages jury award.[19]

The Oregon Supreme Court then accepted review.[20] Among other arguments, Philip Morris made two of particular interest. First, Philip Morris pointed to the trial judge's rejection of Philip Morris's proffered instruction that the jury could not award punitive damages based on injuries to others not before the court.[21] In particular, Philip Morris argued that the likelihood that much of the $79.5 million award was based on harm to others violated due process.[22] In addition, Philip Morris argued that the more than ninety-six to one punitive-compensatory ratio was "grossly excessive" under United States Supreme Court due process precedent.[23] In *BMW of North America, Inc. v. Gore*, the United States Supreme Court had required that punitive damages under due process (1) be based upon the "reprehensibility" of defendant's conduct, (2) bear a "reasonable relationship" to the harm suffered by the plaintiff, and (3) be assessed in light of "sanctions" such as criminal penalties under state law for similar conduct.[24] Moreover, in *State Farm Mutual Automobile Insurance Co. v. Campbell,* the United States Supreme Court had noted that punitive damages multipliers of two to four times compensatory damages were "instructive," and that "[s]ingle digit multipliers are more likely to comport with

17. *Id.*

18. *Id.*; *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

19. *Philip Morris*, 127 S. Ct. at 1061.

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 1061-62.

24. *Id.* at 1061 (quoting *BMW of N. Am. Inc. v. Gore*, 517 U.S. 559, 575-85 (1996)).

due process."[25] The Oregon Supreme Court rejected all of Philip Morris' arguments, and decided that the $79.5 million punitive damages award was not "grossly excessive."[26]

The United States Supreme Court then granted certiorari.[27] Although the United States Supreme Court granted certiorari to review both the putatively unconstitutional award of punitive damages for injured parties not before the Oregon courts, as well as whether the punitive damages were "reasonably related" to the plaintiff's harm, the Court addressed in its opinion only the former issue.[28] The United States Supreme Court initially noted that a court must "avoid an arbitrary determination of a [punitive damages] award's amount."[29] Without "proper standards that will cabin the jury's discretionary authority," a punitive damages award may deprive a defendant of "fair notice . . . of the severity of the penalty that a State may impose,"[30] may "threaten 'arbitrary punishments,' i.e., punishments that reflect not an 'application of the law' but 'a decisionmaker's caprice,'"[31] and may "impose one State's (or one jury's) 'policy choice,' say as to the conditions under which (or even whether) certain products can be sold, upon 'neighboring States' with different public policies."[32]

In addressing the punitive damages procedures required of due process, the Court focused on the unacceptability of punishing a defendant for putative harm to those not before the jury. The Court stated that the Constitution's "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those

25. *Philip Morris*, 127 S. Ct. at 1061-62 (quoting *State Farm*, 538 U.S. at 425).

26. *Philip Morris*, 127 S. Ct.at 1062 (quoting *Williams v. Philip Morris*, 127 P.3d 1165, 1181-82 (Or. 2006)).

27. *Id.*

28. *Id.*; *see also id.* at 1063 ("Because we shall not decide whether the award here is 'grossly excessive,' we need now only consider the Constitution's procedural limitations.").

29. *Id.* at 1062.

30. *Id.* (quoting *BMW*, 517 U.S. at 574).

31. *Philip Morris*, 127 S. Ct. at 1062 (quoting *State Farm*, 538 U.S. at 416, 418).

32. *Philip Morris*, 127 S. Ct. at 1062 (quoting *BMW*, 517 U.S. at 571-72).

whom they directly represent, *i.e.*, injury it that inflicts upon those who are, essentially, strangers to the litigation."[33] That is because a defendant has a due process right to "an opportunity to present every available defense,"[34] but "a defendant threatened with punishment for injuring a nonparty victim has no opportunity to defend against the charge."[35] Such defenses could include, for example in a tobacco case, "showing . . . that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary."[36] In addition, allowing punishment for nonparty victims would "add a near standardless dimension."[37] Without grounded knowledge of the number of victims or the seriousness or circumstances of their injuries, the jury "will be left to speculate," aggravating the "risks of arbitrariness, uncertainty and lack of notice."[38]

The Court did, however, note that a jury could consider evidence of harm to others for the limited purpose of gauging the reprehensibility of a defendant's act. According to the Court, "[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible."[39] But a jury "may not go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on non-parties."[40] Accordingly, due process "requires States to provide assurance

33. *Philip Morris*, 127 S. Ct. at 1063; *see also id.* at 1065 ("We did not previously hold explicitly that a jury may not punish for harm caused others. But we do so hold now.").

34. *Id.* (quoting Lindsey v. Normet, 405 U.S. 56, 66 (1972)).

35. *Philip Morris*, 127 S. Ct. at 1063

36. *Id.*

37. *Id.*

38. *Id.* ("How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims.").

39. *Id.* at 1059; *see also id.* at 1065 ("[W]e recognize that conduct that risks harm to many is likely more reprehensible than conduct that risks harm to only a few. And a jury consequently may take this fact into account in determining reprehensibility.").

40. *Id.* at 1064.

that juries are not asking the wrong question, *i.e.*, seeking not simply to determine reprehensibility, but also to punish for harm caused strangers."[41]

As a result, the Court held that the Oregon Supreme Court "applied the wrong constitutional standard," vacated its judgment, and remanded the case for further review.[42] Because the Court expected that on remand, either a new trial would occur or the punitive damages would be adjusted, the Court did not proceed to consider whether the $79.5 million award was "grossly excessive."[43]

Several Justices dissented. In his dissenting opinion, Justice Stevens argued that no reason prevented a jury from punishing the defendant for harm to others, and noted that "punitive damages are a sanction for the public harm the defendant's conduct has caused or threatened."[44] In addition, both Justice Stevens's opinion and Justice Ginsburg's dissenting opinion, which was joined by Justices Scalia and Thomas, criticized the majority's purported distinction between punishing for harm to others (which was forbidden) and considering harm to others for purposes of judging the reprehensibility of the action (which was permissible).[45] In particular, Justice Ginsburg stated that the requested instruction informing the jury that it may consider harm to others for gauging reprehensibility, but not to punish for

41. *Id.* The Court's opinion noted the problem of determining "whether a jury, in taking account of harm caused others under the rubric of reprehensibility, also seeks to *punish* the defendant for having caused injury to others[.]" *Id.* at 1065. But the Court stated in answer that "state courts cannot authorize procedures that create an unreasonable and unnecessary risk of any such confusion occurring." *Id*. And indeed, where there is a "significant" risk of misunderstanding, the court must provide "*some* form of protection" against that risk. *Id*

42. *Id.*

43. *Id.*

44. *Id.* at 1066 (Stevens, J., dissenting). Justice Stevens also noted that the "retribution and deterrence" goals of punitive damages "ha[ve] even greater salience when, as in this case . . . the award is payable in whole or in part to the State rather than to the private litigant." *Id.*

45. *Id.* at 1067. Justice Stevens further remarked, "[t]his nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm." *Id.*

harm to others, would be "resist[ed]" by "[a] judge seeking to enlighten rather than confuse."[46] Justice Stevens also counselled restraint in expanding substantive due process.[47] Justice Thomas dissented separately "to reiterate [his] view that 'the Constitution does not constrain the size of punitive damages awards.'"[48]

III. THE EFFECT OF *PHILIP MORRIS* ON THE MASS TORT CLASS ACTION

Philip Morris strengthens the reasons mass tort class actions have been increasingly rejected over the last decade. Mass tort class actions have been rejected because of numerous individual issues that may vary between class members and class representatives, such as decision causation,[49] medical causation,[50] choice of law,[51] and compensatory damages.[52] As a

46. *Id.* at 1069 (Ginsburg, J., dissenting). Moreover, Justice Ginsburg's dissent, joined by Justices Scalia and Thomas, argued that the Oregon Supreme Court's decision was not inconsistent with the pronouncements of the majority opinion, in that the jury could consider harm to others to gauge the reprehensibility of Philip Morris' conduct. *Id.* at 1068 (Ginsburg, J., dissenting). In addition, Justice Ginsburg argued that Philip Morris did not adequately preserve its objections at trial. *Id.*

47. *Id*. at 1067.

48. *Id.* (Thomas, J., dissenting) (quoting *State Farm*, 538 U.S. at 429-430).

49. *See* Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 879-81 (discussing individual issues pertaining to reliance, comparative fault, assumption of the risk, and statutes of limitations).

50. *See id.* at 881 (stating that "individual issues relate to whether a particular plaintiff's disease or injury is caused by defendant's manufactured product, another defendant's product, or another causative agent").

51. *See id.* at 883-84 (noting that "[d]etermining which state's law applies to each plaintiff's claims also requires individual determinations"). Apart from due process concerns, applying punitive damages in a multistate class action involves individualized choice-of-law questions that can undermine commonality under Rule 23(a) and predominance under Rule 23(b)(3). *See* Laura J. Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 891 (2001) ("[I]f class punitive damages claims require application of different state standards for determining punishable conduct, a court might conclude that defendant's liability for punitive damages does not constitute a common issue."); *see also id.* (noting that commonality may not exist "if the factual circumstances that give rise to liability for punitive damages involved multiple acts of misconduct that changed over time"); Stier,

result, class representatives may not be adequate or typical representatives of the class, as required under Rule 23, and the individual issues create problems for commonality, predominance, and manageability.[53] Under *Philip Morris,* these same individual differences between class representatives and class members now provide clear grounds for a due process challenge to any class punitive damages award.

The United States Supreme Court's punitive damages jurisprudence has increasingly required that punitive awards be tailored to the precise circumstances surrounding the harm to the litigant before the court. For example, in *BMW*, the Court stated that to ensure due process, courts must determine if there is a reasonable relationship between the punitive award and the

supra note 49, at 883-84 ("[S]tate laws vary significantly on numerous products-liability claims, defenses, and damages, preventing certification," and "attempting to address these conflicts through subclassing or special jury instructions results in baffling complexity for the jury."). Variability on choice of law includes differences in state law with regard to punitive damages. *See* Hines, *supra* note 51, at 917 ("[C]ommonality also may be undermined to the extent that class claims arise under state laws containing different legal standards for determining liability for punitive damages"); *see also* Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts,* 38 EMORY L.J. 457, 470 (1989) ("Because of varying standards in state laws governing punitive damages, a mass-tort class may have difficulty satisfying the commonality requirement.").

52. *See* Stier, *supra* note 49, at 882 (reviewing precedent and noting that "[i]ndividualized issues appear in assessing each plaintiff's past lost wages, future lost wages, medical expenses, and pain and suffering").

53. *See id.* In more detail:

> The presence of such issues may mean that (1) the claims of class representatives are not typical, because class members' claims rely on varying factual information or a different legal standard; (2) class representatives are not adequate representatives, because their claims differ factually or legally from the class members; (3) there may be no common issue among representatives and absent class members; (4) common issues may not predominate over individual issues; or (5) a class action may not be superior, because the adjudication of individual issues may make the class action unmanageable. Avoiding such individual issues ensures the furtherance of judicial efficiency, accuracy, and procedural fairness, which underlie the class action's exception to the general rule that one's claims cannot be adjudicated by another.

Id. at 878.

harm or potential harm suffered by the plaintiff.[54] More recently, in *State Farm*,[55] the Court limited the type of conduct for which a defendant may be punished, consistent with due process. The Court stated that under due process, a state may not punish for harm in other states, where the harm may have been lawful.[56] The Court, however, did note that out-of-state conduct may illuminate the assessment of the reprehensibility of the defendant, if the conduct has "a nexus to the specific harm suffered by the plaintiff."[57] The Court was particularly concerned that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business."[58] In addition, the *State Farm* Court suggested that punitive damages must be individual to the plaintiff, stating that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis . . . ."[59] After *State Farm*, though, plaintiffs still sought class actions based on similar claims, mindful of not punishing for conduct outside a state.[60]

54. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 575, 580 (1996) (listing as a guidepost "the disparity between the harm or potential harm suffered by Dr. Gore and his punitive damages award").

55. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003).

56. *Id.* at 421.

57. *Id.* at 422; *see also id.* at 422-23 ("A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages.").

58. *Id.* at 423.

59. *Id.*

60. *See, e.g.*, Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1509 (2005) ("The *State Farm* decision contains the seed of a solution to the problem created by a convergence of the holdings in *Gore*, *Leatherman Tool Group*, and *State Farm* itself: the 'inclusion,' in a single proceeding, of all victims of a specific defendant's common course of conduct."); Elizabeth J. Cabraser, *The Effect of* State Farm v. Campbell *on Punitive Damages in Mass Torts and Class Action Litigation: What Does the Immediate Post-*State Farm *Jurisprudence Reveal*, SJ035 ALI-ABA 1163, 1173-74 (Feb. 2004); Semra Mesulam, Note, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 COLUM. L. REV. 1114, 1128 (2004) ("*State Farm* . . . supports an expansive reading of harm, interpreting the [*BMW*] calculus to encompass factors that extend beyond an individual plaintiff."); Sheila B. Scheuerman, *Two Worlds Collide: How the*

With regard to class actions seeking punitive damages, *Philip Morris* now provides additional due process requirements that any punitive damages class action must respect.[61] In particular, *Philip Morris* provides that due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation."[62] Where do absent class members fit in that paradigm? As Professor Keith Hylton has observed, one could conceivably argue that absent class members are not parties to the litigation, and thus *Philip Morris* renders unconstitutional any punitive damages award to absent class members.[63] But assuming the Supreme Court did not intend such a draconian result—after all, absent class members are not "strangers to the litigation," but participate through class representatives and the protections of Rule 23—what is required of absent class members to make an award of punitive damages that comports with due process? Here, the *Philip Morris* Court gives further guidance: a defendant must have an "opportunity to

Supreme Court's Recent Punitive Damages Decisions Affect Class Actions, 23 (2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1087782 ("Despite the suggestion that it was improper to punish for harm to others, plaintiffs still found support for class wide treatment of punitive damages by narrowly reading *State Farm*.").

61. *See* Philip Morris v. Williams, 127 S. Ct. 1057, 1062 (2007) ("Unless a state insists upon proper standards that will cabin the jury's discretionary authority, its punitive damages system may deprive a defendant of 'fair notice . . . of the severity of the penalty that a State may impose . . . .'") (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996)); *id.* at 1063 (punishment for harm to nonparties "would add a near standardless dimension to the punitive damages equation."); Scheuerman, *supra* note 60, at 26 ("*Philip Morris* confirmed what *State Farm* suggested: Procedural due process protections are necessary to guarantee a defendant's right to a reasonable punitive damages award based on proper considerations.").

62. *Philip Morris*, 127 S. Ct. at 1063; *see also id.* at 1065 ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

63. *See* Keith N. Hylton, *Reflections on Remedies and* Philip Morris v. Williams, 15 (Boston University School of Law Working Paper Series, Law and Economics Working Paper No. 07-06, 2007), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id= 977998.

present every available defense,"[64] and the punitive damages award must be based on the proven harm to the plaintiffs before the court, and the reprehensibility of the defendant's act, examining the potential harm such an act may have caused.[65]

Two of plaintiffs' proposals for class-wide punitive damages awards likely fail the due process requirements set forth by the United States Supreme Court. Because determining the compensatory harm involves individual assessments of liability and compensatory damages for each class members, some courts have turned to trial plans that first sought to determine punitive damages for the entire class after hearing evidence only as to the class representatives.[66] Similarly, other plantiffs' counsel have proposed that the class action jury create a punitive damages multiplier based only on the evidence of class representatives, and that the multiplier subsequently be applied to compensatory damage awards determined for class members.[67] By stating that

64. *Philip Morris*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)). In the tobacco litigation, for example, the defendant has a right to present defenses based on a smoker's knowledge of the dangers of smoking, or failure to rely on any alleged fraudulent statements. *Id.* (defendant has right to show "that the other victim was not entitled to damages because he or she knew that smoking was dangerous or did not rely upon the defendant's statements to the contrary"). According to the Court, awarding punitive damages for nonparties begs questions such as "How many such victims are there? How seriously were they injured? Under what circumstances did injury occur?" *Id.*

65. *Philip Morris*, 127 S. Ct. at 1063 ("[I]t may be appropriate to consider the reasonableness of a punitive damages award in light of the *potential* harm the defendant's conduct could have caused. But we have made clear that the potential harm at issue was harm potentially caused *the plaintiff*."); *id.* at 1064 ("Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible—although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.").

66. *See, e.g.*, Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 2007 WL 1494775 (U.S. Oct. 1, 2007) (No. 06-1545) (disapproving class-action trial plan for punitive damages); Scheuerman, *supra* note 60, at 43 ("Courts . . . have rejected due process challenges to trial plans that calculate a lump sum punitive damages award before consideration of the compensatory damages.").

67. *See*, *e.g.*, *In re* Tobacco Litigation, 624 S.E.2d 738, 741 (W. Va. 2005) ("[N]othing in *Campbell* . . . per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of

due process requires punitive damages to be based on the harm to particular plaintiffs whose evidence is before the jury, *Philip Morris* suggests that these punitives-first class trial plans will offend due process—neither the multiplier nor lump-sum approach allows the defendant to offer every available defense, nor provides sufficient information on the extent of harm to those other than the class representatives, such that the punitive award can be said to bear a "reasonable relationship" to compensatory damages.[68] Criticized by defendants as putting the "cart before the horse," the lump-sum approach has been rejected by the Florida Supreme Court in the *Engle* tobacco class action.[69]

individual compensatory damages"); Scheuerman, *supra* note 60, at 41-43.

68. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-81 (1996); Philip Morris Inc. v. Angeletti, 752 A.2d 200, 249 (Md. 2000) (rejecting multiplier punitive damages trial plan and noting that "[a]llowing a single jury to set irrevocably the amount of punitive damages to be imposed relative to and on behalf of several, let alone thousands of individuals, whose actual damages are themselves determined separately from each other, does not enable the jury to properly assess the amount of punitive damages that are appropriate in specific relation to differing amounts of—and reasons for—actual damages."); Hines, *supra* note 51, at 892 ("The relative order of damage assessments . . . may be affected by recent Supreme Court jurisprudence regarding due process limitations on the imposition of punitive damages, specifically the requirement of a 'reasonable relationship' between a punitive damages award and the harm caused by defendant's misconduct."); Scheuerman, *supra* note 60, at 29 ("Permitting class-wide recovery of punitive damages before the defendant can challenge the elements of each individual claim allows punitive damages award to be based on non-injured parties."); *id.* at 48 ("The Supreme Court was unambiguous that the amount of punitive damages must be tied to the harm to the plaintiff. But in a lump sum or multiplier proceeding, the extent of each class-member's harm remains an abstract, unanswerable question until the conclusion of the individual phase."); *id.* at 50 ("[T]hese bifurcated trial plans violate the most basic procedural due process guarantees—the defendant's right to present defenses to claims against them.").

69. *See Engle*, 945 So. 2d at 1265 ("[T]he amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness."); *see also* S.W. Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000) ("[T]he jury would decide punitive damages for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs. . . . [T]he modified trial plan is . . . prejudicial because it fails to ensure that punitive damages have some understandable relationship to compensatory damages and are not grossly out of proportion to the severity of the offense for each of the 885 plaintiffs."); Hines, *supra* note 51, at 892 ("[D]etermining punitive damages prior to assessment of

One way, of course, to satisfy the *Philip Morris* requirements for punitive damages is to have all absent class members appear in court to adjudicate plaintiff-specific defenses and award compensatory damages.[70] Compensatory damages would also then be awarded individually, and punitives awarded afterwards.[71] That approach, however, would doom the class action.[72] The Seventh Amendment right to a jury trial requires that all interrelated issues be tried together before one jury, lest one jury re-examine the finding of another.[73] Assessing comparative fault, for example, requires a comparison of defendants' and plaintiffs' conduct, and thus would require under the Seventh Amendment a single jury to hear the entire class trial.[74] That would likely require a single jury to sit for many years, which would be unmanageable under Rule 23.[75] Second,

class compensatory damages may violate state law, as some courts recently have concluded.").

70. *See* Scheuerman, *supra* note 60, at 3 ("[J]udicial treatment of a punitive damages claim in class actions . . . have been fundamentally flawed by the failure to recognize that, as a matter of due process, punitive damages claims require an individualized inquiry where class members allege disparate harms.").

71. *See id.* at 30 ("A punitive damages claim should be treated as an individual issue where compensatory damages involve individual issues.").

72. *See id.* at 53 (noting that punitive damages based on individual testimony of class members "would devolve into a series of individual trials, and would lose any administrative efficiency").

73. U.S. CONST. amend. VII; *see also In re* Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995) (stating that a "judge must not divide issues between separate trials in such a way that the same issue is reexamined by different juries."); Stier, *supra* note 49, at 887 ("If separate juries decide commingled factual questions, one jury may reexamine the first jury's findings, thus violating the plaintiff's or defendant's Seventh Amendment right to a jury trial.").

74. *See, e.g.*, Scheuerman, *supra* note 60, at 53 (noting "potential Seventh Amendment issues"). *But see Engle*, 945 So. 2d at 1271 (stating that "although the jury decided issues common to all class members, none involved whether, or the degree to which, the defendants' conduct was the sole or contributing cause of the class members' injuries, which is the pertinent question in applying the doctrine of comparative negligence").

75. FED. R. CIV. P. 23(b)(3); Engle v. R.J. Reynolds Tobacco Co., No. 94-08273, slip op. at 33 (Fla. Cir. Ct. Jan. 15, 1998); Broin v. Philip Morris Inc., No. 91-49738, slip op. (Fla. Cir. Ct. Feb. 5, 1998) (contemplating after six years of class action litigation, "years of additional litigation to adjudicate the individual issues as to all class members," and stating that "the mind boggles at the

the emphasis on individual issues in such a class action would undermine commonality[76] and predominance,[77] and call into question the efficiency of the class method as a superior method of litigation.[78]

So is there no path for plaintiffs' counsel seeking a middle ground where class members are present enough to satisfy due process purposes under *Philip Morris*, but not individually testifying, which would swamp the class action in individual issues and unmanageability?[79] One possible solution might be the use of statistical sampling and expert testimony on the aggregate attributes of absent class members. For example, in *Cimino v. Raymark Industries, Inc.*, the Eastern District of Texas tried a sample of plaintiffs' damage claims, and then applied an average damages figure to the rest of class members in that disease category.[80] Similarly, in *Hilao v. Estate of Marcos*, the special master compiled the results of trial of a sample of class members' damage claims, and the class-action jury used the report to adjudicate the claims of the rest of the class.[81] Several scholars have proposed the use of statistical sampling, as well as trial by expert testimony as to group attributes, to apply not only to issues of damages, but liability as well.[82]

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thought of Jury Instructions, and the attendant hearings thereto"); Stier, *supra* note 49, at 888 ("[W]ith regard to multiple-incident, personal-injury class actions, a class action trial that preserves due process rights will devolve into unmanageable mini-trials.").

76. FED. R. CIV. P. 23(a); *see also* Hines, *supra* note 51, at 916-17 (noting that "differing factual bases for punitive liability may prevent a finding of commonality or predominance");

77. FED. R. CIV. P. 23(b)(3) (predominance requirement).

78. *Id.* (setting forth the "superiority" requirement).

79. *Id.* (manageability requirement).

80. Cimino v. Raymark Indus., Inc., 751 F. Supp. 649 (E.D. Tex. 1990), *rev'd in part,* 151 F.3d 297 (5th Cir. 1998); *see also* Byron G. Stier, *Jackpot Justice: Verdict Variability and the Mass Tort Class Action*, TEMPLE L. REV. (forthcoming 2007).

81. Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996), *aff'g In re* Estate of Ferdinand E. Marcos Human Rights Litig, 910 F. Supp. 1460, 1461-62 (D. Haw. 1995).

82. *See* David Friedman, *More Justice for Less Money*, 39 J.L. & ECON. 211 (1996); Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377 (2000); Michael J. Saks & Peter David Blanck, *Justice Improved: The*

In championing the superiority of class actions via statistical sampling, plaintiffs might also argue that their approach better informs juries of the reprehensibility of defendants' activities. Even after *Philip Morris*, juries in individual cases are permitted to consider evidence of harm to others to gauge the reprehensibility of a defendant's act from the perspective of its potential harmfulness, even though the jury may not punish for the actual harm to others.[83] A class action using statistical sampling potentially provides additional information for the jury as to the harm to others and therefore might be argued to better ground the reprehensibility analysis.

While neither statistical sampling nor class expert aggregate testimony has been widely ruled upon—providing plaintiffs with an opening for class-wide punitive damages—appellate court review so far has been mixed. The Fifth Circuit, for example, reversed the trial court's efforts in *Cimino*.[84] But the Ninth Circuit upheld the approach taken in *Hilao,* although without the benefit of full briefing of the pertinent concerns.[85] Notably, the Second Circuit has not yet ruled on such class action statistical sampling, despite the ongoing experimentation with the notion by Judge Weinstein in the Eastern District of New York.[86]

Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 STAN. L. REV. 815 (1992); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405 (2002); Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545 (1998); Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329 (1999); *see generally* Stier, *supra* note 80 (discussing proposals for class-action statistical sampling).

83. *See* Philip Morris v. Williams, 127 S. Ct. 1057, 1065 (2007).

84. *See* Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998), *rev'g,* 751 F. Supp. 649 (E.D. Tex. 1990).

85. *See* Arch v. American Tobacco Co., 175 F.R.D. 469, 493 (E.D. Pa. 1997) ("The [*Hilao*] Court noted that 'degree of injury' would have affected the computation of damages in that case but defendants could not raise this issue because they waived any challenge to the computation of damages."); Stier, *supra* note 80 (discussing appellate review of *Cimino* and *Hilao*); Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 377 (1999) ("The procedure used by the *Hilao* court had elements of jury activity that differed from *Cimino*, but those elements of *Hilao* have not been reviewed by courts faced with a Seventh Amendment challenge or evaluated by commentators.").

86. *See In re* Simon II Litig., 407 F.3d 125, 140 (2d Cir. 2005) ("Because we

In the evolving litigation over these issues, attempts to rescue the mass tort, punitive damages class action by statistical sampling should be rejected for numerous reasons that have been supported by various courts.[87] First, due process rejects trial by expert without testimony of the plaintiffs.[88] Second, courts have held that aggregate proof violates state law requiring individualized causation.[89] Third, resting responsibility for adjudicating an entire mass tort on a single jury is, in light of the documented variability of jury verdicts, not a superior method of adjudication.[90] Last, while statistical sampling may provide more detailed evidence of harm to others for purposes of the reprehensibility analysis, incorporating that information may ultimately be more prejudicial than probative to a jury likely to mistakenly infer they can punish for harm to others.[91] Thus, without statistical sampling to rely on, the mass tort class action involving individualized issues and punitive damages will encounter new due process strictures that may warrant class denial or decertification.

have held that certification is incompatible with *Ortiz*, we need not address whether the district court's proposed statistical aggregation of proof . . . would have been appropriate for a class-wide approximation of compensatory liability in this case."), *rev'g* 211 F.R.D. 86 (E.D.N.Y. 2002) (Weinstein, J.).

87. *See Cimino*, 151 F.3d at 297; *In re* Fibreboard Corp., 893 F.2d 706, 712 (5th Cir. 1990) (stating that "the procedures here called for comprise something other than a trial. . . [i]t is called a trial, but it is not").

88. *See, e.g., Arch*, 175 F.R.D. at 493 (rejecting "use of claim forms, statistical random sampling, depositions, expert opinion and court-appointed special masters" in lieu of cross-examination, and stating that these approaches "abrogate the constitutional rights of defendants").

89. *See, e.g., Fibreboard*, 893 F.2d at 711 (stating that causation "focuses upon individuals, not groups," as do "wage losses, pain and suffering, and other elements of compensation").

90. *See* Stier, *supra* note 80 (discussing verdict variability's undermining of tort goals of deterrence, corrective justice, and compensation).

91. *See, e.g.,* FED. R. EVID. 403 (excluding evidence that is more prejudicial than probative); Philip Morris v. Williams, 127 S. Ct. 1057, 1069 (2007) (Ginsburg, J., dissenting) (noting that a judge would "resist" such a charge if the judge were "seeking to enlighten rather than confuse").

IV. *PHILIP MORRIS* AND MASS TORT LITIGATION AS NETWORK

Philip Morris makes more attractive the non-class alternatives in mass tort litigation. The growing, potent alternative to the mass tort class action utilizes networks of judges, counsel, and plaintiffs that increasingly use information technology to share information, coordinate efforts, and pool resources.[92] In addition to increasing efficiency, such networks also enhance the effectiveness of representation and help equalize the representation between defendants and plaintiffs in a trial.[93] With the aid of such networks, judges often take the following procedural route: pre-trial consolidation (perhaps via

92. *See* Stier, *supra*, note 49, at 892-96 (discussing mass tort litigation as network).

93. *See Arch*, 175 F.R.D. at 496 n.28 (rejecting "David versus Goliath" analogy in tobacco litigation, noting that "Goliath versus Goliath" is more appropriate, and stating that there "does not appear to be a significant financial disparity in the parties' ability to finance these putative litigations"); Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 131 (2001) (stating that because of information sharing, pooling of resources, and coordination among plaintiffs' counsel, "the systematic defendant advantage" in mass tort litigation is dead); Mitchell A. Lowenthal & Howard M. Erichson, *Modern Mass Tort Litigation, Prior-Action Depositions and Practice-Sensitive Procedure*, 63 FORDHAM L. REV. 989, 1007-08 (1995) ("With the involvement of a plaintiffs' litigation group, steering committee or other central authority, plaintiffs enjoy (or suffer) the same litigation control structure for centralized strategizing and information-gathering as that practiced by the defense."); Lawyrence T. Hoyle & Edward W. Madeira, Jr., *"The Philadelphia Story": Mass Torts in the City of Brotherly Love*, 2 SEDONA CONF. J. 119, 122 (2001) ("The parties on both sides of the courtroom are represented by highly-financed and competent lawyers who specialize in mass torts. Both plaintiffs' and defendants' counsel network among themselves, coordinating cases throughout the nation."); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 956 (1995) (stating that as a result of coordination and innovation, plaintiffs' lawyers "have achieved a level of parity with their corporate opponents that was unimaginable as recently as twenty years ago"); Stier, *supra* note 49, at 894 ("As a result of litigation networks lowering the cost of litigation, sharing information, and harmonizing approaches, plaintiffs' lawyers are not outgunned by defense counsel, and the argument that class certification is required to equalize resources may no longer be pertinent."); Stephen C. Yeazell, *Re-Financing Civil Litigation*, 51 DEPAUL L. REV. 183, 207 (2001) ("The plaintiffs' bar is professionally and economically on a par with their defense counterparts in the litigation that forms the great bulk of the caseload.").

multidistrict litigation process), individual trials (perhaps using non-binding bellwether plaintiffs), efforts at alternative dispute resolution,[94] and group settlement using claim values developed from previous trial results.[95] This method not only forwards an efficient and effective representation that forwards the goals of tort law, but also honors litigant autonomy.[96] I have previously referred to this decentralized method of managing mass torts as "mass tort litigation as network."[97] *Philip Morris* assists the further use of this approach by improving the method's price-setting function for possible settlement of pending claims, and also by eliminating the multiple-punishment problem in individual litigation.

94. *See* Stier, *supra* note 49, at 921-31 (describing the PPA litigation as an example of mass tort litigation as network); *see also* Elizabeth J. Cabraser, *The Class Action Counterreformation*, 57 STAN. L. REV. 1475, 1484-85 (2006) ("[I]f procedures could be harnessed to mimic the marketplace in a more cost-effective and efficient fashion—if litigation could reach maturity before killing off or bankrupting the litigants—plaintiffs and defendants alike would certainly be interested in the opportunity. There are, fortunately, a number of procedures, many of them developed as alternative dispute resolution mechanisms, that may be employed."); Cabraser, *supra* note 94, at 1485 (noting use of summary-jury trial in Telectronics litigation that "provided both sides with sufficient information to enable them to negotiate . . . settlement").

95. *See* Stier, *supra* note 49, at 931-37 (describing the claim pricing advantages of mass tort litigation as network over class action litigation). *But see* Cabraser, *supra* note 94, at 1484 ("[T]he conduct of many trials in many courts throughout the country takes too long, costs too much, and is too disrespectful of the rights of litigants for reasonably cost-effective and expeditious determinations of their claims to be truly feasible, especially in an era in which each side may spend in excess of $1 million in out-of-pocket costs alone, discovery and trial preparation consumes several years, and the trial itself may take weeks or months in each individual case.").

96. *See* Stier, *supra* note 80. *But see* Cabraser, *supra* note 94 at 1496 ("Judicial experience with large mass torts . . . taught an early lesson that such 'individual control' is largely mythical. The utilization of multidistrict coordination and transfer (now candidly termed 'centralization' by the Judicial Panel on Multidistrict Litigation); the practical need to consolidate, de jure or de facto, multiple filings within each court; and the move to coordinate across state lines, and between federal and state courts, means that there is no longer (if indeed there ever was) true autonomy or self-determination with respect to the prosecution of claims arising from either a mass disaster or a diffuse mass tort.").

97. *See* Stier, *supra* note 49, at 892.

A. *Philip Morris* and Pricing of Individual Claims

Prior to *Philip Morris*, the litigants examining a punitive damages verdict in an individual case would have been unsure to what extent the verdict was based only on the harm to that plaintiff and to what extent the verdict included payment for harm to other plaintiffs. If the latter, then in valuing other similar claims, the litigants would have needed at some point to discount the amount of the verdict as applied to other plaintiffs.[98] Moreover, because of this unclarity about the meaning of a punitive damages verdict in an individual case, the gap between plaintiffs' valuation of each claim and defendants' was increased, likely impeding settlement.[99]

Philip Morris clarifies punitive damages awards in individual cases by requiring that the punitive damages award be based only on the plaintiff before the court—not non-enumerated others.[100] As a result, litigants viewing the award to determine settlement values will be assured that the punitive damages are particular to that plaintiff only. Thus, post-*Philip Morris*, a punitive damages award may be interpreted as reflective of what another similar plaintiff would be awarded, easing settlement. Settlement provides advantages in lower transaction costs than individual litigation,[101] as well as honoring the client's autonomy

98. *See infra* Part IV.B., discussing the multiple-punishment problem.

99. Under the rational settlement model, litigants will settle when the transaction costs of proceeding further exceed the difference between the two litigants estimations of settlement value. *See* Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, 53 LAW & CONTEMP. PROBS. 137, 140-41 (1990) ("[P]arties will settle when the difference in their valuations is smaller than the expected cost of litigation.").

100. *See* Philip Morris v. Williams, 127 S. Ct. 1057, 1065 (2007) ("We did not previously hold explicitly that a jury may not punish for the harm caused others. But we do so hold now.").

101. *See* Schuck, *supra* note 93, at 962 ("Global settlements provide strong evidence that contemporary mass tort litigation has evolved into a far more coherent and efficient system than its predecessors."); Stier, *supra* note 80 (discussing efficiency of mass settlements); Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 78 (1989) ("[T]he extent to which a mass trial actually saves judicial resources needs to be discounted greatly by the high probability of settlement if related claims are tried serially.").

in choosing an agreeable settlement payment[102] or instead pushing for a day in court and trial.[103]

That *Philip Morris* improves the procedural alternative to mass tort class actions is important because under Rule 23(b)(3), for a class action to be certified, the class must be found to be "superior" to other available methods of resolution.[104] *Philip Morris* makes even better an alternative to the class action that is already superior to class treatment, at least with regard to claims of sufficient value to warrant individual litigation.[105] *Philip Morris* therefore undermines one important basis for the class action.

B. *Philip Morris* and the Multiple-Punishment Problem

Because under *Philip Morris* punitive damages awards are personal to each plaintiff, there is no risk of multiple punishment of the defendant for the same harm. If a plaintiff can receive

102. *See* Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 575 (1993) ("Parties bargain when they settle, and all must agree to the ultimate resolution. If a party believes that previous case outcomes are not representative of her case, all she need do is reject her opponent's offer and insist on a higher settlement figure."); *id.* ("[S]ampling presents more serious problems than settlement. Settlement always requires consent."); Stier, *supra* note 80 (discussing centrality of consent and litigant autonomy to settlement of mass torts). *But see* Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89 (1989) (arguing that litigants have little contact with their attorneys).

103. *See* Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 749 (2006) (stating that *Agent Orange* plaintiffs were not satisfied with the class action settlement because "the veterans wanted to tell their stories and have them heard by a court of law."); Schuck, *supra* note 93, at 978 ("[W]hatever the distance between ideal and reality, the [client's day in court] retains overwhelming symbolic power. Indeed, the larger the gap, the more enchanting the ideal."); Stier, *supra* note 80 ("[E]ach litigant in individual litigation still retains the meaningful right to press his or her claim to trial before a jury, rather than settle.").

104. *See* FED. R. CIV. P. 23(b)(3).

105. *See*, *e.g.,* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("While the text of Rule 23(b)(3) does not exclude from certification cases in which individual damages run high, the Advisory Committee had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.'") (internal citations omitted).

punitive damages based on harm to others, then theoretically at some point the entire amount of permissible punitive damages would be reached before every plaintiff brought suit.[106] If after this point, additional plaintiffs sue and are awarded punitive

106. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 423 (2003) (noting concern of "multiple punitive damages awards for the same conduct"); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered to avoid overkill."); *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); *In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) ("Repetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair" and "arguably unconstitutional"); Hines, *supra* note 51, at 895 ("If . . . the jury imposed punitive damages calculated to achieve the goals of deterrence and punishment in light of the total harm caused, any additional punitive awards in later cases would seem excessive, if not constitutionally so, at least as a matter of sound policy."); Hines, *supra* note 51, at 894 (noting that if all plaintiffs are able to recover punitive damages for the entire mass tort, "it seems clear that defendant would be over-deterred and over-punished for the same conduct"); Dennis Neil Jones et al., *Multiple Punitive Damage Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 3-4 (1991) ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause."); Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 423-31 (1994) (arguing that due process concerns apply to multiple punitive damages awards that each are based on harm to all mass tort plaintiffs). *But see* Hines, *supra* note 51, at 895-96 ("While recent Supreme Court opinions may well suggest due process limitations on the aggregate amount of punitive damages that may be imposed on a mass tort defendant, the majority of courts to date have agreed" that no legal principle warrants denial of punitive damages after the first award.). Some jurisdictions have attempted to limit the multiple punishment problem by directing the jury to consider prior punitive damages awards in fashioning its own in the immediate case. *See* Minn. Stat. Ann. § 549.20(3) (2000); Hines, *supra* note 51, at 898 ("Another measure would require juries to consider any earlier punitive damages awards directed at the same misconduct in calculating the appropriate amount of punitive damages in later cases."); Jacqueline Perczek, Comment, *On Efficiency, Punishment, Deterrence and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825 (1993).

damages, then the defendant may argue that its punishment is duplicative and violates due process. Conversely, if after full punishment has been reached, additional plaintiffs sue and they are denied recovery of punitive damages, then one might argue that these plaintiffs are being treated unfairly compared to the prior plaintiffs who had received punitive damages.[107]

The multiple punishment problem has led to criticism of the use of individual litigation, resulting in the certification of class actions.[108] In the *Simon II* litigation, for example, Judge

107. *See In re* Agent Orange, 100 F.R.D. at 728 ("[I]f no class is certified under Rule(b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all."); *In re* N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1193 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982); Hines, *supra* note 51, at 894 (stating that "if the other . . . plaintiffs are not allowed to seek punitive damages, it would also seem unfair: the first plaintiff received an award based in part on the harm done to the other thirteen, but they received none of that award"). Interestingly, however, no plaintiff has a right to punitive damages. *See* Hines, *supra* note 51, at 896-97 ("Because no plaintiff is entitled to punitive damages, the goal of achieving equitable distribution of punitive damages among similarly situated plaintiffs is less compelling than avoidance of excessive punitive damages."); C. Delos Putz, Jr. & Peter M. Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F. L. REV. 1, 24 (1981) (punitive damages claim is "not a 'cause of action' which belongs to any particular individual plaintiff; rather, it is a remedy which the law permits the plaintiff to invoke for the good of society"). Yet plaintiffs do have a right to compensatory damages, and punitive damages awards may exhaust the funds for future plaintiffs' compensatory damages claims. *See* Hines, *supra* note 51, at 897 (noting concern "if early punitive awards undermine the availability of even compensatory damages for future claimants").

108. *See, e.g.,* Elizabeth J. Cabraser, *The Effect of* State Farm v. Campbell *on Punitive Damages in Mass Torts and Class Action Litigation: What Does the Immediate Post-*State Farm *Jurisprudence Reveal*, SJ035 ALI-ABA 1163, 1173 (Feb. 2004); Hines, *supra* note 51, at 899 ("The class action device . . . has emerged as perhaps the most popular solution to the mass tort punitive damages dilemma . . . ."); Cynthia R. Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Damages Awards in Product Liability Lawsuits,* 73 IND. L.J. 187, 236 (1997) ("Courts and litigants agree that a class action suit is the most acceptable alternative for controlling the effects of multiple punitive damage awards."); Scheuerman, *supra* note 60, at 23 (discussing plaintiffs' post-*State Farm* attempts to certify classes based on a multiple-punishment theory). The limited-punishment theory of class actions only truly worked for mandatory classes certified under Rule 23(b)(2) or 23(b)(1), because opt-outs under Rule 23(b)(3) might still result in multiple, duplicative punitive-damage awards. *See*

Weinstein certified a class action in part based on the risk of multiple punishment creating a limited fund, warranting certification under Rule 23(b)(1)(B).[109] The Second Circuit, however, disagreed with Judge Weinstein, holding that the limited-punishment theory did not satisfy the exacting 23(b)(1)(b) requirements set forth by the United States Supreme Court in *Ortiz*.[110]

But by making each punitive award personal to only that plaintiff, *Philip Morris* makes the problem of multiple punishment for the same act impossible. Under *Philip Morris*, each punitive damage award will be made only with regard to the harm to that plaintiff, such that presumably all awards to all harmed plaintiffs would, if added up, present the total permissible award under due process.[111] Thus, post-*Philip*

Hines, *supra* note 51, at 890-91 ("Because the opt-out class permits individuals to eschew the class action and pursue individual litigation, it may result in multiple assessments of punitive damages as well as uneven distribution of punitive damages among those similarly harmed by a defendant'swrongdoing."); *see also* Hines, *supra* note 51, at 891 ("The mandatory class approach . . . better addresses the problem by requiring inclusion of all claimants in a single action . . . ."); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 444-48 (1994); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 83 (1984); Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 508, 511 (1987); Aileen L. Nagy, Note, *Certifying Mandatory Punitive Damages Classes in a Post*-Ortiz *and* State Farm *World*, 58 VAND. L. REV. 599 (2005). Opt-outs are possible, of course, only if the claims are not negative-value claims; that is, the claims are worth enough money to warrant the cost of individual plaintiff counsel. *See* Hines, *supra* note 51, at 900 n.55 (stating that for a negative-value claim, no individual opt-out litigation would occur, and thus "no risk of excessive punishment or inequitable allocation would be posed by Rule 23(b)(3)'s opt-out provision"). Of the mandatory class provisions, only Rule 23(b)(1)(B) is a likely candidate for mass tort cases, as Rule 23(b)(2) requires injunctive relief, not usually present in mass tort cases, and Rule 23(b)(1)(A) has not been applied to the mass tort context. *See* Hines, *supra* note 51, at 903 n.69. Rule 23(b)(2), however, has also been in decline on mass tort cases as well, since the United States Supreme Court in *Ortiz* rejected an asbestos class settlement, noting the stringent requirements of showing a limited fund under Rule 23(b)(2) had not been met. Ortiz v. Fibreboard Corp, 527 U.S. 815, 848 (1999); *see also Dalkon Shield*, 693 F.2d at 852.

109. *In re* Simon II Litig., 211 F.R.D. 86, 183-86 (E.D.N.Y. 2002); *see also In re* Exxon Valdez, 229 F.3d 790, 795-96 (9th Cir. 2000).

110. *In re* Simon II Litig., 407 F.3d at 136-38.

111. As Professor Hines noted after *State Farm*:

Morris, there should not be a risk that individual trials will result in multiple punishment of a defendant for the same harm, clearing a potential hurdle to the use of individual trials to resolve a mass tort.

There remains, however, a practical problem. Under *Philip Morris*, juries may hear evidence of harm to other plaintiffs solely to infer the reprehensibility of defendant's act to the plaintiff before the court; the jury may not punish for the harm to others. If juries continue to award punitive damages for harm to others out of confusion, a practical risk of multiple punishment may result.[112] Judges will therefore have to instruct juries carefully on the law of punitive damages after *Philip Morris* in order to avoid such multiple punishments.

V. CONCLUSION

In sum, while *Philip Morris* does not itself put to death mass tort class actions, it does hasten the continuing demise of those mass tort, punitive damages class actions with individualized issues such as decision causation, medical causation, product use, damages, and choice of law. In the place of class actions, *Philip Morris* further enhances the attractiveness of an individual litigation-based method, used to forward settlement, that effectively and efficiently adjudicates the mass tort.

> [T]o the extent the Court has chosen to limit punishment of a defendant's conduct based solely on the harm to the plaintiff, it may ultimately balk at setting aggregate punitive damages limitations. If every mass tort punitive damages award is properly and constitutionally calculated to punish only the harm to a particular plaintiff, then it would seem every mass tort plaintiff could recover punitive damage awards for the same conduct—because prior plaintiffs would only have been awarded punitive damages based on their own harm.

Laura J. Hines, *Due Process Limitations on Punitive Damages: Why* State Farm *Won't Be the Last Word*, 37 AKRON L. REV. 779, 811 (2004).

112. *See, e.g.,* Philip Morris v. Williams, 127 S. Ct. 1057, 1069 (2007) (Ginsburg, J., dissenting).