CRIMTORTS, CLASS ACTIONS, AND THE EMERGING MASS TORT METHOD

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I. INTRODUCTION

In their relatively recent article, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*,[1] Professors Thomas Koenig and Michael Rustad describe an increasingly bleak future for plaintiffs in torts litigation and the public generally. According to Professors Koenig and Rustad, tort and criminal law had in the past combined forces to provide potent "crimtorts" remedies, including punitive damages and multiple damages, that would deter tortious and polluting defendants.[2] Able to recoup

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[1] Thomas H. Koenig & Michael L. Rustad, *Toxic Torts, Politics, and Environmental Justice: The Case for Crimtorts*, 26 LAW & POL'Y 189 (2004).

[2] Professors Koenig and Rustad stated that they

> coined the term "crimtorts" to describe the emergence of a legal hybrid that blends elements from the civil and criminal sides of law. Crimtort remedies serve as powerful weapons against defendants who threaten the environment through irresponsible disposal of toxic substances. The distinctive feature of crimtorts is that private litigants contribute to the societal goal of protecting the public interest while, at the same time, receiving compensation for their own personal injury or property damage.

Id. at 190 (internal citation omitted); *see also* Thomas Koenig & Michael Rustad, *"Crimtorts" as Corporate Just Deserts*, 31 U. MICH. J.L. REFORM 289, 294 (1998) ("[C]rimtorts are an explicit recognition that the criminal law principles of punishment and deterrence have been assimilated into tort remedies."); *id.* at 295 ("[P]unitive damages should be viewed as the ideal remedy to control crimtorts because it is a civil sanction fulfilling a public purpose."); Koenig & Rustad, *supra* note 1, at 192 ("[T]he remedy of punitive

their considerable legal expenses via punitive damages,[3] plaintiffs' attorneys served as "private attorneys general" who, alongside vigorous regulatory enforcement, forwarded the public good.[4]

Professors Koenig and Rustad lament that the effectiveness of crimtort remedies has recently been undercut. Professors Koenig and Rustad point to regulatory entities that have had their purview and budgets cut by prevailing political powers.[5] Moreover, Professors Koenig and Rustad argue that punitive damages have been defanged by Supreme Court decisions and state reform that undercut the ability to punish a defendant based on wealth.[6] Indeed, since Professors Koenig and Rustad wrote their article, the

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damages is the key incentive for toxic tort claimants who bring lawsuits against corporate polluters.").

[3] Koenig & Rustad, *supra* note 1, at 196 (noting the "considerable litigation expenses" and stating that "[f]ew plaintiffs would be able to bring toxic torts actions without the prospect of being awarded punitive damages").

[4] Koenig & Rustad, *supra* note 2, at 342-43; Koenig & Rustad, *supra* note 1, at 191 (noting crimtorts "utiliz[es] private individuals to vindicate the public interest, a practice that commonly is referred to as the use of the 'private attorney general'"); *see also* Associated Indus. of N.Y. State, Inc. v. Ickes, 134 F.2d 694, 704 (2d Cir.) (noting ability of Congress to authorize "non-official person" to "institute a proceeding involving . . . a controversy, even if the sole purpose is to vindicate the public interest" and stating that "[s]uch persons, so authorized, are, so to speak, private Attorney Generals"), *vacated*, 320 U.S. 707 (1943).

[5] *See* Koenig & Rustad, *supra* note 1, at 193 ("The anti-regulatory policies of the George W. Bush administration and the decisions of a growing number of neo-conservative judges are severely undermining civil and criminal sanctions against environmental despoilment."); *id.* ("[E]ven critics of the environmental justice movement acknowledge that the EPA lacks the resources to carry out even a fraction of [its] colossal mission.").

[6] *Id.* at 197 (discussing State Farm Mut. Auto. Ins. Co. v. Campbell's presumptive limit of a single-digit ratio between punitive and compensatory damages and stating "Justice Kennedy's single-digit multiplier test comes perilously close to removing wealth from the punitive damages equation."); *see also* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003) ("The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award."); Koenig & Rustad, *supra* note 1, at 190 ("Crimtort penalties are feared by giant corporations because the magnitude of the award can be directly calibrated to the wealth of the polluter."). In addition to the loss of punitive damages, Professors Koenig and Rustad oppose the Supreme Court's restrictions on standing in environmental cases and imposition of scientific-evidence gatekeeping. Koenig & Rustad, *supra* note 1, at 198 (discussing Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993)).

Supreme Court has issued another opinion, *Philip Morris USA v. Williams*,[7] in which the Court continued its trend limiting punitive damages and clarified that the defendant may not be punished for acts committed against anyone other than the plaintiff.[8]

Does the class action provide any help for crimtorts remedies? Class actions have been regarded as vehicles for the empowerment of plaintiffs' lawyers against well-financed and well-organized defense counsel.[9] And indeed, plaintiffs in their early efforts in the 1980s used class actions successfully.[10] But over the last fifteen years, courts have increasingly rejected class actions for tort claims, finding that the individualized issues in tort claims render them unsuitable for class certification.[11] For example, the repeated rejection of class treatment for tobacco litigation in numerous courts across the country, notwithstanding ever more-refined plaintiffs' theories for certification, provides an object lesson in the unsuitability of mass torts for class certification.[12]

Thus, the increasing disappearance of class actions might be viewed by some as part of the pessimistic story told by Professors Koenig and Rustad, part of an anti-plaintiff trend that includes the

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[7] 127 S. Ct. 1057 (2007).

[8] *Id.* at 1065; *see, e.g.*, Byron G. Stier, *Now It's Personal: Punishment and Mass Tort Litigation After* Philip Morris v. Williams, 2 CHAS. L. REV. 433, 435-40 (2008). The Court, however, did note that the extent of injuries to others may be considered by the jury with regard to the blameworthiness of the act committed by the defendant. *Williams*, 127 S. Ct. at 1059 ("[E]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk to the general public, and so was particularly reprehensible."). Nevertheless, the jury must apportion its punishment so that plaintiff only receives the share due to plaintiff alone. *Id.* at 1064 (holding juries "may not . . . use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties").

[9] *See, e.g.*, David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561 (1987).

[10] *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762, 790-91 (E.D.N.Y. 1980) (certifying Rule 23(b)(3) class action of Vietnam War veterans seeking compensation for injuries allegedly caused by Agent Orange defoliant sprayed during the war).

[11] *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (rejecting asbestos settlement class certified under Rule 23(b)(3)).

[12] *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (reversing certification of a nationwide smoker class).

loss of regulatory scrutiny and expansive punitive damages. And indeed, the tort system must be mindful that tort reform not become merely the tipping of the scales in favor of defendants' interests. Justice is more than the interest of the stronger.[13]

With lesser regulatory scrutiny, delimited punitive damages, and a diminished role for class actions, the concern of Professors Koenig and Rustad that plaintiffs may not have adequate incentive to bring suit and tortious defendants may be undeterred might seem greater than ever. I would argue, however, that for large-value claims adequate incentives remain for bringing individual suit, notwithstanding recent limitations on punitive damages. A serious personal injury such as cancer or death will still generally be of sufficient value to interest a plaintiff's lawyer on a contingency fee. And as I have detailed elsewhere, mass tort litigation today involves networks of counsel and courts that use information technology to represent their clients more effectively and efficiently by coordinating strategy, pooling resources, and sharing information.[14] Moreover, to avoid further fees and expenses and obtain closure, litigants use claim values developed in individual trials to negotiate large-scale settlements that greatly reduce the transaction costs for society and the courts.[15]

As a result, the most significant systemic concern comes not from large-value claims, but from small-value claims.[16] A small-

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[13] Koenig & Rustad, *supra* note 1, at 200. "Some conservatives assert that criminal penalties backed up by regulatory agencies should replace private lawsuits. This argument is disingenuous. President George W. Bush's Republican Party is gutting environmental regulation at the same time as it is advocating the weakening of toxic tort rights and remedies." *Id.*; *see also* Plato, *The Republic*, *in* 2 THE DIALOGUES OF PLATO 338 (B. Jowett, trans. 1907) (discussing Thrasymachus's proclamation that "justice is nothing else than the interest of the stronger").

[14] Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 867-68 (2005).

[15] *See* Byron G. Stier, *Jackpot Justice: Verdict Variability and The Mass Tort Class Action*, TEMP. L. REV. (forthcoming 2008); Stier, *supra* note 14, at 868.

[16] Indeed, Professors Koenig and Rustad discuss the benefits of punitive damages to make feasible the bringing of lower-value claims. *See* Koenig & Rustad, *supra* note 2, at 309 n.88 (describing case where "[i]n the absence of punitive damages, no single farmer would find it worthwhile to prosecute his small claim"); Koenig & Rustad, *supra* note 2, at 325 (relating need for punitive

value claim may not be sufficient to interest a plaintiff's attorney in taking the case on contingency fee, and so, the case may not be brought at all, risking underdeterrence, as well as problems for other tort goals of corrective justice and compensation.[17] Recent restrictions on the scope of permissible punitive damages—in not allowing consideration of wealth of the defendant and not allowing damages to be awarded for harm to others—have expanded the purview of such small-value claims. And the greater scrutiny afforded class actions means that small-value class actions may not be certified because of individualized issues not susceptible to class treatment.

One possible solution to the negative-value claim is the loser-pays system, in which the prevailing party receives payment of reasonable attorneys' fees from the unsuccessful litigant. Indeed, Professors Koenig and Rustad themselves note the importance for plaintiffs of statutory provisions allowing fee-shifting in favor of plaintiffs,[18] decrying their decline.[19] The loser-pays solution, prevalent outside the United States, may provide a balanced approach that empowers meritorious small-value claims by plaintiffs and therefore warrants further consideration and scrutiny.

Part II of this article discusses the growing rejection of mass tort class actions. In particular, I discuss the many failed attempts at class certification in the tobacco litigation. Part III then discusses the emergent alternative to class actions in non-class aggregate litigation and group settlement, focusing on the recurrent problem of negative-value-suit financing, and suggesting that adopting a loser-pays fee approach may provide a solution. In Part IV, I conclude that the demise of class actions as a tort

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damages because "[a] nursing home's decision to short-staff its facility is unlikely to be prosecuted by private attorneys general because the elderly residents have such low imputed economic value").

[17] *See, e.g.*, Stier, *supra* note 15 (discussing tort goals).

[18] Koenig & Rustad, *supra* note 1, at 196 ("[Plaintiffs'] considerable litigation expenses can only be recouped through the awarding of *attorneys' fees* or punitive damages.") (emphasis added).

[19] *Id.* at 195 (noting that the Supreme Court has "weakened" private environmental lawsuits for disparate impact on minority neighborhoods "by ruling that plaintiffs' attorneys who prevailed in a pre-trial settlement rather than a court decision were not entitled to reimbursement of attorneys' fees and costs").

management tool need not undercut the goals of crimtorts or effective tort goals, provided that the problem of lawsuit financing of negative-value claims is adequately addressed.

II. CRIMTORTS AND CLASS ACTIONS—NO HELP HERE

With the 1966 amendments to Rule 23 of the Federal Rules of Civil Procedure, plaintiffs' counsel gained a potentially powerful ally to bring mass tort class actions: the Rule 23(b)(3) provision, which allows class aggregation of monetary claims based largely on commonality of issues.[20] Provided that the Rule 23(a) requirements for certification—which included numerosity,[21] commonality,[22] typicality,[23] and adequacy[24]—are met, plaintiffs can gain certification of a class under Rule 23(b)(3) by proving that "questions of law or fact common to class members predominate over any questions affecting only individual members" (predominance),[25] and that "a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" (superiority).[26] Factors pertinent to the superiority

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[20] FED. R. CIV. P. 23(b)(3); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 614 (1997) ("In the 1966 class-action amendments, Rule 23(b)(3) . . . was 'the most adventuresome innovation.'"). Other class action provisions that would also be used by plaintiffs' counsel in mass torts include the limited-fund provision of Rule 23(b)(1)(B), which allows certification if "adjudications with respect to individual class members that, as a practical matter, would be dispositive of the interests of the other members not parties to the individual adjudications or would substantially impair or impede their ability to protect their interests," FED. R. CIV. P. 23(b)(1)(B); and the injunctive-class provision of Rule 23(b)(2), which provides for certification if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole," FED. R. CIV. P. 23(b)(2).

[21] FED. R. CIV. P. 23(a)(1) (requiring that "the class is so numerous that joinder of all members is impracticable").

[22] FED. R. CIV. P. 23(a)(2) (requiring that "there are questions of law or fact common to the class").

[23] FED. R. CIV. P. 23(a)(3) (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class").

[24] FED. R. CIV. P. 23(a)(4) (requiring that "the representative parties will fairly and adequately protect the interests of the class").

[25] FED. R. CIV. P. 23(b)(3).

[26] FED. R. CIV. P. 23(b)(3).

finding include "the class members' interests in individually controlling the prosecution or defense of separate actions";[27] "the extent and nature of any litigation concerning the controversy already begun by or against class members";[28] "the desirability or undesirability of concentrating the litigation of the claims in the particular forum";[29] and "the likely difficulties in managing a class action."[30]

But unfortunately for plaintiffs' counsel interested in a tort class action, the Advisory Committee added a detailed comment stating the general inapplicability of Rule 23(b)(3) to tort actions. In particular, the Committee noted that "[a] 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."[31] As a result, "In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried."[32] Moreover, while the Committee noted that varying damages alone should not prevent certification of fraud issues,[33] the Committee also stated that "a fraud case may be unsuited for treatment as a class action if there was material variation in the representations made or in the kinds or degrees of reliance by the persons to whom they were addressed."[34]

Such comments by the Advisory Committee and the historic lack of use of class actions for personal injury claims led to the potential for tort class actions lying dormant for years. But ultimately, enterprising and creative plaintiffs' counsel attempted

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[27] FED. R. CIV. P. 23(b)(3)(A).

[28] FED. R. CIV. P. 23(b)(3)(B).

[29] FED. R. CIV. P. 23(b)(3)(C).

[30] FED. R. CIV. P. 23(b)(3)(D).

[31] FED. R. CIV. P. 23 Advisory Committee's note (note to Subdivision (b)(3)).

[32] *Id.*

[33] *Id.* ("[A] fraud perpetrated on numerous persons by the use of similar misrepresentations may be an appealing situation for a class action, and may remain so despite the need . . . for separate determination of the damages suffered by individuals within the class.").

[34] *Id.*

class certification of tort claims, and in the 1980s, they found some success notwithstanding the Committee's comments.[35] Experimenting with class certification as an enticing method to resolve the numerous claims in mass torts, a few courts certified class actions. Perhaps most prominent was the *In re "Agent Orange" Products Liability Litigation* class action that involved a defoliant chemical to which soldiers were exposed in Vietnam and that was overseen first by Judge Pratt, and then by Judge Weinstein, in the Eastern District of New York.[36] After class certification, the litigants reached a then-civil-litigation-record $180 million settlement[37] that Judge Weinstein approved and that the Second Circuit upheld based on the centrality of the military-contractor defense.[38] Interestingly, however, Judge Weinstein later

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[35] *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 1013-30 (1993); Barry F. McNeil & Beth L. Fancsal, *Mass Torts and Class Actions: Facing Increased Scrutiny*, 167 F.R.D. 483, 487-88 (1996); Judith Resnik, *From "Cases" to "Litigation*," 54 LAW & CONTEMP. PROBS. 5, 6-45 (1991); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 947 (1995); Georgene M. Vairo, Georgine*, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution*, 31 LOY. L.A. L. REV. 79, 80-110 (1997); Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1338 (1999) ("A historical aversion to mass tort class actions had shifted in the mid- to late-1980s in response to the emerging 'crisis' of mass torts.").

[36] *In re* "Agent Orange" Prod. Liab. Litig., 506 F. Supp. 762 (E.D.N.Y. 1980); *see also* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS (1986).

[37] SCHUCK, *supra* note 36, at 5 (noting *Agent Orange* produced the "largest tort settlement in history").

[38] *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166, 174 (2d Cir. 1987); *see also* FED. R. CIV. P. 23(e) (requiring for approval, that the judge determine the settlement to be "fair, reasonable, and adequate"). With potential class wide liability and damages over defendants, Judge Weinstein actively promoted settlement discussions between plaintiffs and defendants. SCHUCK, *supra* note 36, at 143-67. Other early plaintiff mass tort class action certifications included *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468 (5th Cir. 1986), and *In re School Asbestos Litigation*, 789 F.2d 996, 998 (3d Cir. 1986). But courts later reined in asbestos class actions, finding asbestos litigation unsuitable for class treatment in myriad settings. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999) (overturning asbestos settlement class under Rule 23(b)(1)(B)); Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997) (rejecting proposed asbestos settlement class under Rule 23(b)(3)); Cimino v. Raymark

dismissed the claims of *Agent Orange* class members who had opted out of the class settlement on the grounds that they had not been able to prove medical causation[39]—which raised questions as to whether the prior class settlement was appropriate.

Plaintiffs' 1980s class action success set the stage for numerous filings of putative class actions in the 1990s. But increasing court scrutiny and intense litigation of class certification by defendants led to a turning back of the trend for class certification.[40] Across the state and federal courts, jurists recognized that the individualized issues of tort litigation did not allow for classwide treatment. The course of class actions in the tobacco litigation are emblematic of that trend.[41] Begun in earnest

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Indus., Inc., 151 F.3d 297 (5th Cir. 1998) (reversing asbestos class trial utilizing statistical sampling); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996) ("*In re School Asbestos* . . . upheld the certification . . . explicitly on the ground that [the] case involved only *property* damages . . . . [T]he commonality barrier is higher in a personal injury damages class action . . . ."), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[39] *In re* "Agent Orange" Prod. Liab. Litig., 611 F. Supp. 1223, 1259-62 (E.D.N.Y. 1985), *aff'd*, 818 F.2d 187 (2d Cir. 1987).

[40] *See* Richard A. Nagareda, *In the Aftermath of the Mass Tort Class Action*, 85 GEO. L.J. 295, 302 (1996) (recent rejection of class actions "sharply undercut the legal support for the class action as a vehicle for pathbreaking litigation"); Kearns, *supra* note 35, at 1348 ("[A]s district courts . . . certified nationwide classes increasingly incongruous with the requirements of Rule 23, federal appellate courts reasserted their opposition to a liberalized certification process and sought to enforce compliance with Rule 23.") (citing Nagareda, *supra*).

[41] *See* Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 355 (2001) ("[T]he class action tort litigation has foundered . . . on relatively straightforward considerations of applying rule 23(b)(3) . . . to a class consisting of anywhere between hundreds of thousands and millions of alleged tobacco victims, depending on whether the aggregation is statewide or nationwide."); Brian H. Barr, Note, Engle v. R.J. Reynolds*: The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 FLA. ST. U. L. REV. 787, 804 (2001) ("[S]tate and federal courts followed the lead of the Fifth Circuit [in *Castano*] and either refused to certify these class actions or decertified them on appeal."); Melodie C. Hahn, Note, *Smokers' Chances of a Fair Fight Against the Tobacco Companies Go Up in Flames: A Study of* Philip Morris Inc. v. Angeletti *and Its Effect on the Viability of Class Action Lawsuits in Maryland Tobacco Litigation*, 31 U. BALT. L. REV. 103, 103 (2001) ("[M]any courts at both the state and federal levels have expressed great reluctance in certifying class action lawsuits involving mass tort

in the early 1990s, tobacco class litigation progressed through various stages with courts' widespread rejection of each class theory prompting plaintiffs to try ever more sophisticated attempts at class certification. While every mass tort involves its own factual and legal particularities, tobacco class litigation uncovered much of the vast difficulties in mass tort class certification and provided a potent example of courts' stubborn rejection of class certification in the face of numerous actions filed in numerous jurisdictions over more than a decade.

During the 1990s and beyond, in numerous opinions, both federal[42] and state[43] courts facing tobacco class actions reasoned

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claims."); Kearns, *supra* note 35, at 1337 ("[T]he very concept of a tobacco class action is an oxymoron and that such suits should not be certified by state or federal courts."); Donald R. Richardson, Note, *"Want Fries With That?" A Critical Analysis of Fast Food Litigation*, 107 W. VA. L. REV. 575, 586-89 (2005) (discussing the failure of tobacco class certification); Andrei Sirabionian, Comment, *Why Tobacco Litigation Has Not Been Successful in the United Kingdom: A Comparative Analysis of Tobacco Litigation in the United States and the United Kingdom*, 25 NW. J. INT'L L. & BUS. 485, 494 (2005) ("[B]oth state and federal courts have been extremely reluctant to certify classes for mass tort claims regarding tobacco litigation."); Andrew Soltes, Comment, *Milking the Tobacco Cash Cow Dry – Certification of the* Engle *Class Under a Limited Fund Class Action*, 18 T.M. COOLEY L. REV. 201, 202 (2001) ("One by one, each proposed [tobacco] class was either denied certification or decertified by the courts."). From 1997 to 2001, I served as counsel for R.J. Reynolds Tobacco Company, which was a defendant in various smoking-related class actions.

[42] *See In re* Simon II Litig., 407 F.3d 125 (2d Cir. 2005); Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996); Estate of Mahoney v. R.J. Reynolds Tobacco Co., 204 F.R.D. 150 (S.D. Iowa 2001); Guillory v. Am. Tobacco Co., No. 97 C 8641, 2001 WL 290603 (N.D. Ill. Mar. 20, 2001); Aksamit v. Brown & Williamson Tobacco Corp., No. C.A. 6:97-3636-24, 2001 WL 1809378 (D.S.C. Dec. 29, 2000); Clay v. Am. Tobacco Co., 188 F.R.D. 483 (S.D. Ill. 1999); Thompson v. Am. Tobacco Co., 189 F.R.D. 544 (D. Minn. 1999); Barreras Ruiz v. Am. Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998); Insolia v. Philip Morris Inc., 186 F.R.D. 535 (W.D. Wisc. 1998); Emig v. Am. Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997); Arch v. Am. Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997); Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997); Tijerina v. Philip Morris Inc., No. Civ.A. 2:95-CV-120-J, 1996 WL 885617 (N.D. Tex. Oct. 8, 1996).

[43] *See* Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (per curiam); Philip Morris Inc. v. Angeletti, 752 A.2d 200, 235 (Md. 2000); Small v.

through the many individualized issues in mass torts that precluded certification. For example, determining medical causation required an inquiry into whether a particular defendant's cigarettes caused an illness in the plaintiff, including personalized examination of alternative risk factors such as family history, lifestyle, or other exposures.[44] Individual decision causation issues underlay resolution of comparative fault, assumption of risk, and fraudulent reliance, requiring attention to each plaintiff's awareness of the risks of smoking.[45] Furthermore, statutes of limitations required assessment of when each plaintiff had sufficient information of his or her injury and potential claim against one or more tobacco companies so as to begin the running of the statute.[46] Moreover,

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Lorillard Tobacco Co., 720 N.E.2d 892 (N.Y. 1999); Geiger v. Am. Tobacco Co., 277 A.D.2d 420 (N.Y. App. Div. 2000); Taylor v. Am. Tobacco Co., No. 97 715975 NP, 2000 WL 34159708 (Mich. Cir. Ct. Jan. 10, 2000); Avallone v. Am. Tobacco Co., No. MID-L-4883-98, slip op. (N.J. Super. Ct. Law Div. Apr. 12, 1999); Cosentino v. Philip Morris Inc., No. Civ. A. MDL-L-5135-97, 1998 WL 34168879 (N.J. Super. Ct. Law Div. Oct. 22, 1998); Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997).

[44] *See, e.g.*, *Mahoney*, 204 F.R.D. at 157 ("No one seriously doubts the general premise that smoking causes lung cancer . . . . [A] plaintiff must necessarily eliminate all *other* risk factors as possible causes of *his* lung cancer."); Stier, *supra* note 14, at 881.

[45] *See, e.g.*, *Barnes*, 161 F.3d at 146-47 (noting individualized issues of comparative fault and contributory negligence); *Castano*, 84 F.3d at 745 ("[A] fraud class action cannot be certified when individual reliance will be an issue."); *Arch*, 175 F.R.D. at 491 (finding assumption of risk and comparative fault for smoker claims to require individualized analysis); *Smith*, 174 F.R.D. at 97 (noting express-warranty claims were "permeated with individual issues because" such claims "require proof that purchasers were induced to make purchases based on affirmative representations" and "the role those representations played in individual purchasing decisions" varied among proposed class members); *Angeletti*, 752 A.2d at 235 ("One need only read the depositions of the named class representatives to recognize that reliance will vary from plaintiff to plaintiff."); Stier, *supra* note 14, at 879-81; Kearns, *supra* note 35, at 1337 ("Individual questions permeate all aspects of plaintiffs' claims—from proof of addiction and reliance on misrepresentations to assumption of risk and statute of limitations defenses.").

[46] *See, e.g.*, *Barnes*, 161 F.3d at 149 ("[D]etermining whether each class member's claim is barred by the statute of limitations raises individual issues that prevent class certification."); Stier, *supra* note 14, at 881.

determining damages[47] and addiction, whether as injury or means to explain failure to stop smoking in light of increasing awareness of risk,[48] also required individual diagnosis for each plaintiff. Choice of law generally required application of law where the plaintiff's injury occurred, leading not only to individual determination of injury site, but also potential application of multiple tort laws by a jury.[49] Moreover, product defect required inquiry into each of the many designs of cigarettes with their varying ingredients and filters.[50]

If the court undertook litigation of all these individual issues before the jury, the class action would degenerate into perhaps thousands or millions of unmanageable mini-trials.[51] Such mini-

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[47] *See, e.g.*, *Castano*, 84 F.3d at 750 ("This class action is permeated with individual issues, such as . . . compensatory damages."); Stier, *supra* note 14, at 882.

[48] *See, e.g.*, *Arch*, 175 F.R.D. at 488 ("Unless it is proven that cigarettes always cause or never cause addiction, 'the resolution of the general causation question accomplishes nothing for any individual plaintiff.'") (quoting Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 677 (N.D. Ohio 1995)).

[49] *See, e.g.*, *Castano*, 84 F.3d at 742 n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."); *id.* at 741 ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); Stier, *supra* note 14, at 883. Indeed, even when the plaintiff class is limited to a particular state, a proper choice-of-law analysis may require individualized inquiries, because of the "transient" nature of the class. *See* Emig v. Am. Tobacco Co., 184 F.R.D. 379, 393-94 (D. Kan. 1998); *Smith*, 174 F.R.D. at 94-96 (stating that it was "inconceivable" that Missouri law would apply to all Missouri residents' smoking claims); Tijerina v. Philip Morris Inc., No. Civ.A. 2:95-CV-120-J, 1996 WL 885617, at *5 (N.D. Tex. Oct. 8, 1996) ("The latest definition of the proposed class-limiting it to residents of Texas-by no means eliminates difficult questions concerning which state law is applicable. With a transient population, the alleged tort could have occurred anywhere."); *Angeletti*, 752 A.2d at 230-32; Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *14 (D.C. Super. Ct. Aug. 18, 1997); Stier, *supra* note 14, at 883; Kearns, *supra* note 35, at 1370 ("[C]ourts . . . have found that the laws of multiple states may even apply to a class including all residents of a single state alleging addiction to nicotine.").

[50] *See, e.g.*, *Emig*, 184 F.R.D. at 391; *Smith*, 174 F.R.D. at 98; *Arch*, 175 F.R.D. at 489; Stier, *supra* note 14, at 879-83.

[51] *See* FED. R. CIV. P. 23(b)(3) (stating manageability requirement for class actions); *see also Arch*, 175 F.R.D. at 488 n.19 (stating that class trial could require 250 years); Stier, *supra* note 14, at 888; Kearns, *supra* note 35, at 1349

trials would have arisen to explore the particular circumstances surrounding a plaintiff's decision to start and keep smoking, as well as the details and possible causes of each plaintiff's alleged illness.[52]

On the other hand, if courts attempted to adjudicate these individualized issues on a class basis, courts were led into radical trial plans that ran afoul of due process, the Seventh Amendment right to a jury trial, or state substantive law.[53] For example, attempts to address common issues before one jury and individualized issues before subsequent juries ran afoul of the Seventh Amendment jury trial requirement that one jury not reexamine the findings of another—for example, in assessing comparative fault between plaintiff and defendant.[54] And courts rejected attempts to avoid these individual issues through abbreviated methods, such as claim forms that abrogate cross-examination, finding such trial plans to violate due process, or the Seventh Amendment right to a jury trial.[55] Furthermore, attempts

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(noting the "thousands or millions of individual minitrials that result from class certification").

[52] *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127, 149 (3d Cir. 1998) ("[A] class action will devolve into a lengthy series of individual trials."); *Castano*, 84 F.3d at 748 (raising concern of "[s]evere manageability problems"); *Emig*, 184 F.R.D. at 393 ("[P]roposed trial plan does not overcome the management problems that would arise if the action was certified."); Barreras Ruiz v. Am. Tobacco Co., 180 F.R.D. 194, 198 (D.P.R. 1998) ("Managing such a fluid class would undoubtedly overwhelm this district court."); *Arch*, 175 F.R.D. at 492 ("The manageability problems which would be encountered in litigating and trying this case are staggering."); *Smith*, 174 F.R.D. at 98 (stating "proposed trial plan is not workable or feasible").

[53] *See, e.g.*, Stier, *supra* note 14, at 884-88.

[54] *See, e.g.*, *Arch*, 175 F.R.D. at 491 (finding that because of the Seventh Amendment, "[t]he Court could not possibly bifurcate the issue of defendants' negligence and plaintiffs' comparative negligence"); Stier, *supra* note 14, at 887-88.

[55] *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," because these methods "abrogate the constitutional rights of defendants"); Stier, *supra* note 14, at 884-85; Kearns, *supra* note 35, at 1364 ("[D]ue process rights of defendants are implicated by trial management techniques encouraged by the magnitude of tobacco class actions."). Moreover, creative plans to avoid individualized issues by statistical sampling have been held to violate due process and state law requiring individual proof of causation.

to address punitive damages via class action ran against growing Supreme Court precedent requiring that any punitive award be closely tethered to the compensatory damages, which itself could be determined only by adjudication of the many individualized issues.[56] In addition, courts held that bringing only certain claims in an attempt to tailor a class permissible for certification could lead to waiver of those claims on behalf of the class, and therefore called into question the adequacy of class representatives and counsel.[57] As each theory was rejected, plaintiffs proposed more sophisticated theories that also were generally denied certification.[58]

See, e.g., Cimino v. Raymark Indus., Inc., 151 F.3d 297, 300 (5th Cir. 1998); Stier, *supra* note 14, at 884. *But see* Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996) (using a representative sample to determine the percentage of valid claims).

[56] *See* Philip Morris USA v. Williams, 127 S. Ct. 1057 (2007); State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); *In re* Simon II Litig., 407 F.3d 125 (2d Cir. 2005); Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006) (per curiam); *see also* Stier, *supra* note 14, at 885-86; Stier, *supra* note 8, at 442-43.

[57] *Cf. Arch*, 175 F.R.D. at 480 (noting that "named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class," but rejecting defendants' challenge because plaintiffs could bring claims subsequent to class suit). Courts also held that Rule 23(c)(4), which allows for certification of particular issues, did not enable courts to evade the requirements of Rule 23(b)(3). *See, e.g.*, *Castano*, 84 F.3d at 745 n.21; *Arch*, 175 F.R.D. at 496. Moreover, court decisions in tobacco class certification also recognized the potentially coercive effect class certification can have on settlement, given the tremendous risk of having the entire tobacco industry's potential bankruptcy rest upon a single jury. *See, e.g.*, *Castano*, 84 F.3d at 746 ("In addition to skewing trial outcomes, class certification creates insurmountable pressure on defendants to settle, whereas individual trials would not. 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.") (citations omitted); *see also In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) ("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.'"); Stier, *supra* note 15 (discussing problems of potential outlier jury verdict extrapolated via class action to entire mass tort).

[58] *See, e.g.*, Clay v. Am. Tobacco Co., 188 F.R.D. 483 (S.D. Ill. 1999) (rejecting certification of putative nationwide class of persons who bought and smoked cigarettes when children).

Significant tobacco class action litigation might meaningfully be traced to an initial victory for plaintiffs.[59] In *Castano v. American Tobacco Co.*, a group of plaintiffs' counsel called the "Castano PLC" brought a putative nationwide class action of all addicted smokers in the United States,[60] bringing numerous tort-related claims including fraud, negligent misrepresentation, intentional and negligent infliction of emotional distress, negligence, breach of express and implied warranties, and strict products liability—all based on the defendants' allegedly addicting plaintiffs to nicotine through false representations and intentional manipulation of nicotine levels.[61] Plaintiffs sought "restitution and refunds" for the purchase of cigarettes, disgorgement of profits, creation of a medical monitoring fund, and punitive damages.[62] Breathtaking in its purview, the class consisted of tens of millions

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[59] Although *Castano* is likely the most influential early class action, the first tobacco class action appears to be not *Castano*, but *Broin v. Philip Morris Inc.*, 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), a secondhand-smoke class brought on behalf of flight attendants. *See* Rabin, *supra* note 41, at 342 ("Surprisingly, the earliest tobacco class action effort, commenced near the end of 1991, was an action filed on behalf of nonsmoking flight attendants alleging second-hand smoke injuries."). In addition, the tobacco mass tort litigation, of course, encompassed far more than class actions, such as, many individual lawsuits, and also Medicaid reimbursement actions by state Attorneys General that lead to a $206 billion settlement between the states and the tobacco-company defendants. *See, e.g.*, Kearns, *supra* note 35, at 1340-41. A description of all facets of the tobacco litigation is beyond the scope of this article.

[60] *Castano*, 84 F.3d at 737 (noting the putative class was perhaps the "largest class action ever attempted in federal court"); *see also* Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, 8 STAN. L. & POL'Y REV., Winter 1997, at 63, 86 (stating that of the over sixty plaintiff's law firms involved in *Castano*, most pledged $100,000 a year to finance the case); Kearns, *supra* note 35, at 1354 (noting "consortium of attorneys that had invested millions of dollars in the [*Castano*] litigation").

[61] *See, e.g.*, Castano v. Am. Tobacco Co., 160 F.R.D. 544, 548 (E.D. La. 1995) (stating also that plaintiffs brought claims based on "violation of consumer protection statutes" and "redhibition pursuant to the Louisiana Civil Code"), *rev'd*, 84 F.3d 734 (5th Cir. 1996); Kearns, *supra* note 35, at 1341.

[62] *Castano*, 160 F.R.D. at 548. Plaintiffs, however, did not seek damages for personal injury. *Id.*

of persons.[63] The trial court certified a class under Rule 23(b)(3) and (c)(4), the latter of which addressed certification of particular issues.[64] In particular, the trial court certified for trial purportedly common liability and punitive damages issues,[65] including defendants' alleged knowledge of the addictiveness of nicotine, failure to apprise smokers of this fact, and other steps to addict smokers.[66] The trial court, however, did not certify apparently individual issues such as injury, proximate cause, reliance, affirmative defenses, and compensatory damages.[67]

On appeal, however, the Fifth Circuit reversed class certification.[68] Notwithstanding plaintiffs' threat to "inundate" the courts with cases should they reverse class certification,[69] the Fifth Circuit held that individual issues such as choice of law[70] and fraudulent reliance[71] overwhelmed common issues, requiring reversal of certification.[72] In addition, the court noted that the Seventh Amendment prohibited use of a second group of juries for individual issues, because such juries would necessarily reexamine

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[63] *Castano*, 84 F.3d at 737 (noting the putative class was perhaps the "largest class action ever attempted in federal court"); Kearns, *supra* note 35, at 1342 (*Castano* "proposed transforming tobacco litigation from the seventy-five individual lawsuits then pending against the industry to tens of millions of claimants alleging a novel theory of liability before a single jury. *Castano* threatened to create a mass tort class action unprecedented in scope and magnitude.") (citation omitted).

[64] *Castano*, 160 F.R.D. at 558-59; *see also* FED. R. CIV. P. 23(c)(4) ("When appropriate, an action may be brought or maintained as a class action with respect to particular issues.").

[65] *Castano*, 84 F.3d at 739.

[66] *Id.*

[67] *Id.* at 740.

[68] *Id.* at 752.

[69] *Id.* at 748.

[70] *Id.* at 741 ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.").

[71] *Castano*, 84 F.3d at 745.

[72] *Id.* at 752. The court also noted that "[a] district court cannot manufacture predominance through the nimble use of subdivision (c)(4)." *Id.* at 745 n.21. Rather, "The proper interpretation of the interaction between subdivisions (b)(3) and (c)(4) is that a cause of action, as a whole, must satisfy the predominance requirement of (b)(3) and that (c)(4) is a housekeeping rule that allows courts to sever the common issues for a class trial." *Castano*, 84 F.3d at 745 n.21.

the holding of a common-issues jury in adjudicating issues, such as comparative fault.[73] Moreover, the court suggested that certification of an "immature tort" is not appropriate and remained concerned about certifying plaintiffs' addiction-as-injury claim without the benefit of prior precedent on its viability and contours.[74]

Subsequently, the Castano PLC and others filed "son of *Castano*" class action cases across the country, attempting to avoid the individual issues that accompanied choice of law for a nationwide class.[75] Again, however, courts found numerous other individual issues that precluded certification.[76] One tobacco class action that pushed further than many others was the *R.J. Reynolds Tobacco Co. v. Engle* class action in Florida.[77] Plaintiffs in *Engle*

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[73] *Id.* at 751 ("There is a risk that in apportioning fault, the second jury could reevaluate the defendant's fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.").

[74] *Id.* at 747 (noting "specific concern . . . that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by rule 23."); *id.* at 749 ("Determining whether the common issues are a 'significant' part of each individual case has an abstract quality to it when no court in this country has ever tried an injury-as-addiction claim."); *id.* at 752 ("The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury.").

[75] *See, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 474 (E.D. Pa. 1997) ("This case follows hard and fast on the heels of the United States Court of Appeals for the Fifth Circuit's decertification of a nation-wide class of nicotine-addicted cigarette smokers."); Kearns, *supra* note 35, at 1354 ("Plaintiff's counsel thus shifted their sights to what were quickly labeled 'son of *Castano*' class actions . . . . [T]he battleground opened up from a single courtroom in Louisiana to state and federal courts across the nation as plaintiffs sought certification of statewide tobacco classes.").

[76] *See, e.g.*, Rabin, *supra* note 41, at 335 ("As of mid-2001, class certification of post-*Castano* cases had been granted and upheld only in . . . Louisiana, but denied or remained in doubt in twenty-five other states.").

[77] R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40-42 (Fla. Dist. Ct. App. 1996) (ordering certification of tobacco class); Stier, *supra* note 15; Stier, *supra* note 14, at 889-90. Another Florida class action that went to trial was the *Broin* nationwide class on behalf of flight attendants who claimed injuries stemming from secondhand-smoke exposure. Broin v. Philip Morris Cos., 641 So. 2d 888, 889 (Fla. Dist. Ct. App. 1994). During trial, the court expressed its

brought a class action against tobacco defendants on behalf of all smokers in the United States, alleging injury from addiction to cigarettes with nicotine.[78] Plaintiffs alleged claims for strict liability, fraud and misrepresentation, conspiracy to commit fraud and misrepresentation, breach of implied and express warranties, negligence, and intentional infliction of mental distress.[79] The trial court certified the class, and the Florida District Court of Appeal for the Third Circuit affirmed the certification in 1996, prior to the Fifth Circuit's decision in *Castano* and the many other decisions that would counsel rejection of class certification.[80] To address manageability concerns, the appellate court limited the class to Florida smokers only.[81]

After more than a year of trial, the *Engle* six-person jury found in Phase I that cigarettes caused various illnesses, including lung cancer and heart disease; that smoking is addictive; and that plaintiffs should receive punitive damages.[82] In Phase II, the jury then heard the claims of representative plaintiffs in the first phase, and in finding for plaintiffs, also determined a lump-sum award of

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concern that after six years of litigation, the case would require "years of additional litigation to adjudicate the individual issues as to all class members," and stated that "the mind boggles at the thought of Jury Instructions, and the attendant hearings thereto." Broin v. Philip Morris Cos., Inc., No. 91-49738, slip op. at 22 (Fla. Cir. Ct. Feb. 5, 1998). *Broin* was settled before verdict, based on a $300 million research fund and various trial benefits for retained claims by class members, who waived punitive damages. *Id. See* Ramos v. Philip Morris Cos., 743 So. 2d 24, 27 (Fla. Dist. Ct. App. 1999). Both the trial court and the Florida District Court of Appeal for the Third District subsequently approved the settlement. *See id*. at 27, 34.

[78] *Id.* at 40 (certifying class defined as, "All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine.").

[79] *Id.*

[80] *Engle*, 672 So. 2d at 41 ("Although certain individual issues will have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues.").

[81] *Id.* at 42.

[82] Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1256-57 & n.4 (Fla. 2006) (per curiam).

$145 billion of damages on behalf of the entire class.[83] Contemplating the necessary individual proceedings that would follow with regard to each class member, the trial court noted that trial would last until "the 23rd century."[84]

Seeking appeal, defendants were first confronted by the Florida appellate bond requirement, which required that defendants post a bond equal to 120% of the verdict, or in this case $174 billion, to appeal, which may have bankrupted the entire industry.[85] The Florida Legislature then passed a law under which appellate bonds were limited to $100 million, which *Engle* defendants posted.[86]

After the intermediate appellate court—again the Florida District Court of Appeal for the Third Circuit, now with a different panel of judges—reversed and ordered decertification of the class based on the numerous individual issues, the Florida Supreme Court accepted the case.[87] In its opinion, the Florida Supreme Court ordered decertification of the class and overturned the punitive damages verdict, but retained the general findings already ruled upon by the class jury.[88] Trial courts are now attempting to

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[83] *Id.* at 1257.

[84] Engle v. R.J. Reynolds Tobacco Co., No. 94-08273 CA-20, at 33 (Fla. Cir. Ct. Jan. 15, 1998).

[85] Michael Finch, *Giving Full Faith and Credit to Punitive Damages Awards: Will Florida Rule the Nation?*, 86 MINN. L. REV. 497, 499 (2002).

[86] *Id.* at 500 & n.17 (citing FLA. STAT. § 768.733 (2000)).

[87] Liggett Group Inc. v. Engle, 853 So. 2d 434, 450 (Fla. Dist. Ct. App. 2003) ("As now demonstrated by the two-year trial, even though there is a common nucleus of facts concerning the defendants' conduct, this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment. . . . Florida's class action rules, substantive tort law, and state and federal guarantees of due process and a fair trial, require class decertification.").

[88] *Engle*, 945 So. 2d at 1254. Other courts have rejected classwide adjudication of punitive damages without detailed information as to class members' harm. *See In re* Simon II Litig., 407 F.3d 125, 138 (2d Cir. 2005) ("In certifying a class that seeks an assessment of punitive damages prior to an actual determination and award of compensatory damages, the district court's Certification Order would fail to ensure that a jury will be able to assess an award that, in the first instance, will bear a sufficient nexus to the actual and potential harm to the plaintiff class, and that will be reasonable and proportionate to those harms."); Smith v. Brown & Williamson Tobacco Corp.,

implement the Florida Supreme Court's attempt to salvage some utility from a year-long class trial that was ultimately deemed misguided.

Seeking to avoid the wave rejecting tobacco class actions exemplified by *Castano* and later *Engle*, plaintiffs' counsel across the country pressed innovative approaches, such as focusing on a class-wide medical monitoring program. Plaintiffs sometimes characterized medical monitoring relief as injunctive relief suitable for certification under Rule 23(b)(2),[89] which courts analyzed with reference to whether other damages were also requested.[90] Again, however, courts generally rejected certification of such claims, because courts found individualized issues even in medical monitoring, including for example, inquiry into the alleged increased risk in each plaintiff and present injury and the extent of medical monitoring previously required for each plaintiff.[91] In

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174 F.R.D. 90, 97 (W.D. Mo. 1997) ("Plaintiff's proposal to have liability for punitives established in Phase I, then wait until Phase III to see if class members have suffered damages so they can 'keep' the award, . . . radically alters appropriate consideration of the issue . . . . Furthermore, the amount of punitives must bear a relationship to the actual damages suffered . . . ." (citations omitted)); Philip Morris Inc. v. Angeletti, 752 A.2d 200, 249 (Md. 2000) ("Allowing 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.").

[89] *See, e.g.*, Arch v. Am. Tobacco Co., 175 F.R.D. 469, 484 (E.D. Pa. 1997) ("Plaintiffs' medical monitoring claim is merely a thinly disguised claim for future damages. As such, plaintiffs' medical monitoring claim cannot be certified under Rule 23(b)(2).").

[90] *See, e.g.*, *id.* ("Additionally, plaintiffs' medical monitoring claim cannot be certified under Rule 23(b)(2) because the overwhelming majority of relief sought by plaintiffs in their entire complaint is monetary in nature.").

[91] *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (holding no certification for proposed 23(b)(2) medical-monitoring class of Pennsylvania smokers); *Arch*, 175 F.R.D. at 489-90; Avallone v. Am. Tobacco Co., No. MID-L-4883-98, slip op. (N.J. Super. Ct. Law Div. Apr. 12, 1999). One medical monitoring class that did make it to trial was *Scott v. American Tobacco Co.*, which was brought in state courts in Louisiana. Scott v. Am. Tobacco Co., 725 So. 2d 10 (La. Ct. App. 1998); *see also* Scott v. Am. Tobacco

addition, named representatives and plaintiffs' counsel who sought to bring only medical-monitoring claims on behalf of the class risked waiving related claims on behalf of the class and thereby jeopardized their adequacy of representation.[92]

Undaunted, plaintiffs tried still other theories, including consumer-fraud allegations. Though consumer-fraud statutes may not explicitly require reliance, as does common-law fraud, courts still found that individualized decision-causation issues arise because litigants must prove that the fraud caused them to buy the product.[93] Initially, plaintiffs brought, and courts rejected, consumer-fraud claims for alleged general misrepresentations about smoking and health by the tobacco industry.[94] Plaintiffs then focused particularly on consumer-fraud claims based on light cigarettes, claiming they misrepresented the dangerousness of the cigarettes because smokers compensate for the cigarettes' lower tar by smoking them differently. While these claims are still being litigated, many courts have rejected class certification of these light cigarette consumer-fraud class actions.[95] Particularly significant

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Co., 949 So. 2d 1266 (La. Ct. App. 2007), *writ denied*, 973 So. 2d 740 (La. 2008).

[92] *See, e.g.*, *Arch*, 175 F.R.D. at 480 (noting that "named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class," but rejecting defendants' challenge because plaintiffs could bring claims subsequent to class suit).

[93] *See, e.g.*, Guillory v. Am. Tobacco Co., No. 97 C 8641, 2001 WL 290603, at *8 (N.D. Ill. Mar. 20, 2001); Thompson v. Am. Tobacco Co., 189 F.R.D. 544, 552-53 (D. Minn. 1999); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 HARV. J. ON LEGIS. 1 (2006) (arguing that proof of individual reliance should be required for private class actions involving consumer fraud).

[94] *See, e.g.*, Philip Morris Inc. v. Angeletti, 752 A.2d 200, 239-40 (Md. 2000) (reversing class certification on consumer fraud because of issues of reliance); Small v. Lorillard Tobacco Co., 252 A.D.2d 1, 8 (N.Y. App. Div. 1998) ("[I]ndividualized proof of reliance is essential to the causes of action for false advertising under General Business Law § 350 . . . ."), *aff'd*, 720 N.E.2d 892 (N.Y. 1999).

[95] Mulford v. Altria Group, Inc., 242 F.R.D. 615 (D.N.M. 2007); Marrone v. Philip Morris USA, Inc., 850 N.E.2d 31 (Ohio 2006); *In re* Tobacco II Cases, 47 Cal. Rptr. 3d 917 (Cal. Ct. App. 2006), *petition for review granted*, 146 P.3d 1250 (Cal. 2006); Philip Morris USA Inc. v. Hines, 883 So. 2d 292 (Fla. Dist. Ct. App. 2003); Davies v. Philip Morris U.S.A., Inc., No. 04-2-08174-2 SEA,

for such actions is the potential preemption of such claims by the Federal Trade Commission's cigarette testing regime and the Illinois Supreme Court's reversal of a $10.1 billion consumer-fraud class verdict on that ground.[96] An appeal before the Supreme Court of the United States is pending from an opinion of the First Circuit holding that plaintiffs could sue in similar circumstances.[97]

Notwithstanding these many class losses, plaintiffs have still pressed claims with trial-court-level success in front of Judge Weinstein, who oversaw the *Agent Orange* litigation in the eastern district of New York, but the Second Circuit has not so far been receptive. In the *In re Simon II Litigation* tobacco class action, Judge Weinstein certified a class under Rule 23(b)(1)(B) based on a limited fund of punitive damages available.[98] The Second Circuit, however, reversed, noting inter alia that the punitive damage award would not be sufficiently related to the plaintiff class members to comport with Supreme Court of the United

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2006 WL 1600067 (Wash. Super. Ct. May 26, 2006); Pearson v. Philip Morris, Inc., No. 0211-11819, 2006 WL 663004 (Or. Cir. Ct. Feb. 23, 2006); Cocca v. Philip Morris Inc., No. CV 1999-008532, 2001 WL 34090200 (Ariz. Super. Ct. July 24, 2001); Oliver v. R.J. Reynolds Tobacco Co., No. 9803-0268, 2000 WL 33598654 (Pa. Ct. Com. Pl. Dec. 19, 2000). *But see* Aspinall v. Philip Morris Cos., 813 N.E.2d 476, 487-89 (Mass. 2004) (not requiring proof of reliance); Craft v. Philip Morris Cos., 190 S.W.3d 368 (Mo. Ct. App. 2005) (affirming certification of Missouri light-cigarette class); Curtis v. Philip Morris Cos., No. PI 01-018042, 2004 WL 2776228, at *3-*5 (Minn. Dist. Ct. Nov. 29, 2004); Collora v. R.J. Reynolds Tobacco Co., No. 002-00732, 2003 WL 23139377 (Mo. Cir. Ct. Dec. 31, 2003) (certifying Missouri light tobacco class action).

[96] Price v. Philip Morris, Inc., 848 N.E.2d 1, 6 (Ill. 2005), *cert. denied*, 127 S. Ct. 685 (2006). In *Aspinall v. Philip Morris Cos.*, the Supreme Judicial Court of Massachusetts affirmed class certification of a consumer-fraud class based on defendants' alleged misrepresentations for light cigarettes. *Aspinall*, 813 N.E.2d at 492. So far, the preemption argument accepted in *Price* has been rejected by Massachusetts courts in the *Aspinall* litigation. Aspinall v. Philip Morris Cos., No. Civ.A. 98-6002, 2006 WL 2971490 (Mass. Super. Ct. Aug. 9, 2006) (denying defendants' motion for summary judgment); *see also* Dahl v. R.J. Reynolds Tobacco Co., 742 N.W.2d 186 (Minn. Ct. App. 2007) (rejecting preemption of light claims for proposed class action).

[97] Good v. Altria Group, Inc., 501 F.3d 29 (1st Cir. 2007) (holding fraud claims were not preempted), *cert. granted*, 128 S. Ct. 1119 (2008).

[98] *In re* Simon II Litig., 211 F.R.D. 86, 190 (E.D.N.Y. 2002), *rev'd*, 407 F.3d 125 (2d Cir. 2005).

States' precedent.[99] Subsequently, Judge Weinstein certified a nationwide tobacco class action, in *Schwab v. Philip Morris USA, Inc.*, based on light cigarettes and fraud under the Racketeer Influenced and Corrupt Organizations Act.[100] Again, however, the Second Circuit reversed, noting the need for individualized proof of reliance and individual determination of statute of limitations.[101] In both *Simon II* and *Schwab*, to address individual issues via class treatment, Judge Weinstein relied on expert use of statistical aggregate evidence,[102] an approach that had been rejected by the Fifth Circuit and was ultimately rejected by the Second Circuit on the appeal of *Schwab*.[103]

Thus, going beyond the 1990s and into the new century, tobacco class actions provide a potent example of the broader trend against mass tort class action use. Indeed, widespread precedent

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[99] *In re* Simon II Litig., 407 F.3d 125, 134-39 (2d Cir. 2005). The Second Circuit also held that the proposed limited-punishment fund did not satisfy the requirements set forth by the Supreme Court of the United States in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999). *Simon II*, 407 F.3d at 134-37.

[100] Schwab v. Philip Morris USA, Inc., 449 F. Supp. 2d 992, 1278 (E.D.N.Y. 2006), *rev'd sub nom.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215 (2d Cir. 2008).

[101] *McLaughlin*, 552 F.3d at 225 ("[I]n this case, reliance is too individualized to admit of common proof."); *id.* at 233-34 (discussing statute of limitations).

[102] *Schwab*, 449 F. Supp. 2d at 1246, 1247-48; *In re* Simon II Litig., 211 F.R.D. at 153-54.

[103] *McLaughlin*, 522 F.3d at 232 (discussing use of statistics to calculate damages and noting that "[t]his kind of disconnect offends the Rules Enabling Act which provides that federal rules of procedure, such as Rule 23, cannot be used to 'abridge, enlarge, or modify any substantive right'") (quoting 28 U.S.C. § 2072(b)); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 (5th Cir. 1998) (rejecting statistical sampling in asbestos setting and noting that "'this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs'") (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978)); *see also* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'") (citation omitted). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 784-85 (9th Cir. 1996) (accepting statistical sampling for human rights class action, but rendering its decision without briefing on Seventh Amendment issues and relying on the subsequently reversed trial court opinion in *Cimino*).

now exists across both federal and state courts that mass torts are not certifiable for class actions, effectively removing class actions from plaintiffs' arsenal in the mass tort wars.[104] Moreover, the Supreme Court of the United States assisted the trend in tobacco litigation by rejecting a Rule 23(b)(3) class settlement in *Amchem Products, Inc. v. Windsor*, emphasizing individual issues by noting that "class members . . . were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time."[105]

The recent decision of the Supreme Court of the United States in *Philip Morris USA v. Williams*[106] will add another argument for defendants seeking to defeat mass tort class actions. In *Williams*, the Court held that punitive damages must be awarded only for the plaintiff before the jury, not for others who are not before the court.[107] In particular, the Court emphasized the need for the defendant to present "every available defense."[108] While *Williams* involved an individual, not class, plaintiff, the class litigation implications of *Williams* are significant: punitive damages may not be awarded consistent with due process, unless defendants are given an opportunity to present all individualized defenses of all class members; that lengthy process would make the mass tort

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[104] *See, e.g.*, *Amchem*, 521 U.S. at 628-29; Ball v. Union Carbide Corp., 385 F.3d 713, 727-28 (6th Cir. 2004); *In re* Bridgestone/Firestone, Inc., 288 F.3d 1012, 1020-21 (7th Cir. 2002); Zinser v. Accufix Research Inst., Inc., 253 F.3d 1180, 1196-97, *amended by*, 273 F.3d 1266 (9th Cir. 2001); *Cimino*, 151 F.3d at 311-12; Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 343-44 (4th Cir. 1998); Barnes v. Am. Tobacco Co., 161 F.3d 127, 143 (3d Cir. 1998); *In re* Am. Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (rejecting nationwide class action for penile prosthesis); Castano v. Am. Tobacco Co., 84 F.3d 734, 750-51 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634 (3d Cir. 1996), *aff'd sub nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591; Andrews v. Am. Tel. & Tel. Co., 95 F.3d 1014, 1024, 1027 (11th Cir. 1996); Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1229-32 (9th Cir. 1996); *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (reversing certification of hemophiliac blood class action); Sw. Ref. Co. v. Bernal, 22 S.W.3d 425, 443 (Tex. 2000).

[105] *Amchem*, 521 U.S. at 609.

[106] 127 S. Ct. 1057 (2007).

[107] *Id.* at 1063.

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

class action unmanageable, and hence, lead to class denial.[109] Moreover, if class counsel seeks to waive punitive damages in an effort to obtain class certification, both counsel and proposed representatives may not be seen to be adequate, because their waiver of punitive damages may surrender those claims completely on behalf of class members who may not split their causes of action and remedies into different lawsuits.[110]

III. NON-CLASS MASS TORT LITIGATION AND GROUP SETTLEMENT

So without class actions is there no cause for optimism for plaintiffs? Is the system, as Professors Koenig and Rustad suggest,[111] abandoning the ability to deter corporate tortfeasors and polluters? First, I would agree with Professors Koenig and Rustad[112] that the regulatory option is not cause for optimism. Professors Koenig and Rustad discuss the decline of funding of regulatory agencies and despair of their ability to police corporate misconduct.[113] Regardless of the current state of funding, I would argue that the vicissitudes of public financing and elections will always leave in doubt the budgets of such agencies and the accomplishment of their statutory missions. In addition, as governmental agencies, regulatory bodies are themselves not subject to market competition and do not benefit from the awards they obtain in contrast to plaintiffs' attorneys. Thus, regulatory bodies may be systemically hampered by the absence of adequate incentives for them to zealously and efficiently pursue corporate tortfeasors.

And indeed, recent reports by the agencies themselves give grounds for concern. The Food and Drug Administration ("FDA") recently released a detailed report that concluded it was significantly understaffed and under budgeted to tackle its

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[109] *Williams*, 127 S. Ct. at 1063; *see* Stier, *supra* note 8.

[110] *See, e.g.*, FED. R. CIV. P. 23(a) (adequacy requirement); FED. R. CIV. P. 23(g) (requirements for class counsel); *see also* sources cited *supra* note 57.

[111] Koenig & Rustad, *supra* note 1, at 193.

[112] *Id*.

[113] *Id.*

congressional mandate.[114] Moreover, the FDA determined that the staff it did have lacked adequate expertise for its mission[115] and its information technology was disturbingly ineffective, utilizing, for example, handwritten inspectors' reports.[116] Moreover, the Consumer Products Safety Commission has also been subject to vast criticism for its recent inability to prevent the influx of lead-paint tainted toys from China.[117]

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[114] STAFF OF SUBCOMM. ON SCI. & TECH., 110TH CONG., FDA SCIENCE AND MISSION AT RISK 3 (2007), *available at* http://www.fda.gov/ohrms/dockets/ac/07/briefing/2007-4329b_02_01_FDA%20Report%20on%20Science%20and%20Technology.pdf ("FDA's inability to keep up with scientific advances means that American lives are at risk.").

[115] *Id.* at 5 ("FDA's failure to retain and motivate its workforce puts FDA's mission at risk. Inadequately trained scientists are generally risk-averse, and tend to give no decision, a slow decision or, even worse, the wrong decision on regulatory approval or disapproval."); *see also id.* ("The lack of a trained workforce means that the FDA is ineffective in responding to emerging fields that require individuals and work teams with multidisciplinary skills built on very complex, highly specialized, often esoteric bodies of knowledge.").

[116] The FDA's report warrants quoting at length:

> The IT situation at FDA is problematic at best — and at worst it is dangerous. Many of the FDA systems reside on technology that has been in service beyond the usual life cycle. Systems fail frequently, and even email systems are unstable — most recently during an *E.coli* food contamination investigation. More importantly, reports of product dangers are not rapidly compared and analyzed, inspectors' reports are still hand written and slow to work their way through the compliance system, and the system for managing imported products cannot communicate with Customs and other government systems (and often miss significant product arrivals because the system cannot even distinguish, for example, between road salt and table salt).
>
> There are inadequate emergency backup systems in place: recent system failures have resulted in loss of FDA data. Critical data reside in large warehouses sequestered in piles and piles of paper documents. There is no backup of these records, which include valuable clinical trial data. The FDA has inadequate extramural funding programs and collaborations to accelerate the development of critical health information exchanges in order to support clinical trials and pharmacovigilance activities.

Id. at 5-6.

[117] *See, e.g.*, Eric S. Lipton & David Barboza, *As More Toys are Recalled, The Trail Ends in China*, N.Y. TIMES, June 19, 2007, at A1 ("Julie Vallese, a spokeswoman for the Consumer Product Safety Commission [("CPSC")], said the agency recognizes that more must be done to prevent the importation of hazardous toys and other products from China."); *see also id.* ("[The CPSC] has only about 100 field investigators and compliance personnel nationwide to conduct inspections at ports, warehouses and stores of $22 billion worth of toys

Excluding the regulatory method and without a class action option, the possibility of non-class litigation remains as an adequate deterrent of corporate misconduct. Here, pessimism is not warranted. In recent years, individual litigation has become vastly more efficient and effective. Over the past two decades, significant advances in information technology have enabled counsel, courts, and clients to coordinate strategy, share information, and pool resources so as to render individual litigation more effective and efficient.[118] As a result, the plaintiffs' bar has been able to organize itself almost as an ad hoc law firm for each mass tort.[119] As one court suggested with regard to plaintiffs' counsel and defense counsel, it is no longer "David versus Goliath," but "Goliath versus Goliath."[120] In addition, courts have used the federal multidistrict statute to transfer federal cases to a federal multidistrict court, which acts as a hub of information and coordination for state courts as well.[121]

As class actions have receded, what has instead emerged is a process that still adequately serves the deterrence goals that Professors Koenig and Rustad articulated for crimtorts. Typically, mass tort litigations now pursue the following course. First, after a number of cases are filed, all federal cases are centralized in a particular multidistrict litigation court.[122] That court then takes the lead in coordinating nationwide and exploring scientific discovery issues and expert-opinion admissibility under *Daubert*.[123] In the PPA (phenylpropanolamine) litigation, for example, Judge

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and tens of billions of dollars' worth of other consumer products sold in the country each year."). Indeed, as a result of CPSC's recent difficulties, Congress has sought to overhaul the agency. *See* Annys Shin, *Senate Votes for Safer Products; Enforcement Would Get Major Boost*, WASH. POST, Mar. 7, 2008, at A01 (noting passage in both Senate and House of bills that would increase the CPSC budget, "upgrade the CPSC's antiquated testing facilities," and raise the amount of fine able to be imposed by the CPSC).

[118] *See* Stier, *supra* note 14, at 892-96.

[119] *See id.* at 905.

[120] Arch v. Am. Tobacco Co., 175 F.R.D. 469, 496 n.28 (E.D. Pa. 1997).

[121] *See* Stier, *supra* note 14, at 921-30 (discussing coordination efforts of Judge Barbara Rothstein in the PPA litigation).

[122] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 921-30.

[123] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 926-30; *see also* Daubert v. Merrell Dow Pharms., Inc., 509 U.S. 579 (1993).

Rothstein invited state court judges to attend the federal multidistrict litigation *Daubert* hearing, and the transcript was used for state-admissibility decisions.[124]

Then, courts try the individual cases.[125] The results of each case, of course, resolve the case of the plaintiff before the court. But the verdicts and motion practice judgments also yield valuable information about the value of the pending claims for other plaintiffs.[126] Thus in the Vioxx cases, counsel and media nationwide focused on the results of each trial with *The Wall Street Journal* updating its litigation scorecard record, keeping track of the win-loss victories of plaintiffs and defendants in state and federal court, as well as the amounts of any verdicts and their appellate review.[127]

Ultimately, the endgame for mass tort litigation generally involves three possible outcomes: (1) plaintiffs litigate the defendant into bankruptcy;[128] (2) defendants rebuff plaintiffs' claims by litigating and generally winning;[129] or (3) defendants and

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[124] *See* Stier, *supra* note 14, at 928-29.

[125] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

[126] *See, e.g.*, John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358 (1995) (noting that a mass tort has "high case interdependency so that litigated outcomes in any mass tort area quickly impact on the settlement value of other pending cases in that same field"); Kearns, *supra* note 35, at 1352 ("[A]n adverse judgment negatively affects pending claims and a favorable judgment increases the value of pending claims . . . .").

[127] *See, e.g.*, Heather Won Tesoriero et al., *Trial Scorecard*, *in Merck's Tactics Largely Vindicated As It Reaches Big Vioxx Settlement*, WALL ST. J., Nov. 9, 2007, at A1 (recording four federal-court Merck Vioxx trial wins and one loss, and seven state-court Merck Vioxx trial wins and four losses, with two mistrials).

[128] Many asbestos defendants have fallen into bankruptcy. *See* STEPHEN J. CARROLL ET AL., RAND INST. FOR CIVIL JUSTICE, ASBESTOS LITIGATION 109-10 (2005), *available at* http://www.rand.org/pubs/monographs/MG162/.

[129] For example, defendants in the tobacco litigation have had significant success in litigating individual smoker cases, and have not offered any broad settlement for smokers with illness allegedly caused from smoking. *See, e.g.*, Nancie L. Katz, *Jury Clears Cig Makers Rules That Smoke Killed Plaintiff, Who Accepted Risk*, N.Y. DAILY NEWS, Jan. 17, 2001, *available at* 2001 WLNR 11865562 (discussing Apostolou defense trial verdict in the Supreme Court of New York, Kings County).

plaintiffs agree upon a non-class settlement.[130] The last settlement-oriented approach has increasingly become the favored route for mass tort resolution. In that approach, litigants use the claim values that have been developed in individual verdicts, motion practice, and appellate review to haggle over the proper settlement valuation of remaining claims.[131] Settlement valuations are often then included in grids that assess an amount for a plaintiff based on the variables agreed upon.[132] If the litigants disagree as to the amounts or the variables, then they can further litigate.[133] Similarly, because the resulting settlement is not implemented through a mandatory class[134] or even an opt-out class,[135] each individual's autonomy rights are preserved by the litigant's need to individually sign onto the agreement for him or her.[136] And if any particular plaintiff rejects the valuation offered, or instead desires a day in court (perhaps to impose responsibility on the defendant more publicly), that plaintiff retains his or her right to press his or her claims onward to trial.[137]

Importantly, the process harnesses adequately incentivized plaintiffs and their counsel to serve public goals of deterrence. Unlike regulatory actors, plaintiffs are personally injured and thereby given incentives to seek damages for their own compensation, as well as desire for corrective justice. Moreover, plaintiffs' counsel reap the benefits of maximizing recovery for plaintiffs because their contingency fees leave their recovery tied to the rise or fall of their plaintiffs' payments. The damages imposed on defendants, however, also serve as a powerful

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[130] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37; *see also, e.g.*, Heather Won Tesoriero, *Merck's Vioxx Settlement Moves Ahead*, WALL ST. J., Mar. 4, 2008, at B2 (noting that for the proffered Vioxx settlement by Merck, "more than 44,000 of the 47,000 claimants who registered injuries eligible for compensation have submitted some or all of the documentation required to seek a share of the settlement").

[131] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

[132] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

[133] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

[134] *See* FED. R. CIV. P. 23(b)(1)-(2).

[135] *See* FED. R. CIV. P. 23(b)(3), (e)(4) (requiring opt-out notice for settlement of class certified under Rule 23(b)(3)).

[136] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

[137] *See* Stier, *supra* note 15; Stier, *supra* note 14, at 931-37.

deterrent to other potential tortfeasors, thereby preventing future harm.[138] Indeed, given jury verdict variability and the possibility that an outlier verdict might arise in a class action, the decentralized process of multiple juries deciding plaintiffs' claims may produce a more balanced assessment of the overall amount of recoverable harm, and thus better deter tortfeasors than a less-predictable single jury in a class action.[139] Indeed, Professor Coffee has long advocated the recognition that plaintiffs' lawyers are entrepreneurs[140]—their entrepreneurialism on behalf of individual clients may also serve the public good. In general, I would argue that this emergent approach to mass tort litigation well serves the deterrence goals that Professors Koenig and Rustad sought in detailing remedies in crimtorts.[141]

There remains, however, a problem to which Professors Koenig and Rustad advert—negative-value claims.[142] Negative-value claims are those claims that, even if won, will not produce sufficient money to warrant the transaction costs in attorneys' fees and costs.[143] Often, negative-value claims are thought of as micro-claims, perhaps involving only a few dollars each. But a small personal injury claim might also be considered a negative-value claim, even though the damages might add up, for example, to the low thousands of dollars. Class actions traditionally were conceived of as a method to address negative-value claims,[144] but

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[138] *See* Stier, *supra* note 15.

[139] *Id.*

[140] *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371-72 (2000) ("[W]here the plaintiffs' attorney was once seen as a public-regarding private attorney general, increasingly the more standard depiction is as a profit-seeking entrepreneur, capable of opportunistic actions and often willing to subordinate the interests of class members to the attorney's own economic self-interest.").

[141] *See* Stier, *supra* note 15.

[142] *See supra* note 16 and accompanying text.

[143] *Cf.* FED. R. CIV. P. 23(b)(3) Advisory Committee's note (note to Subdivision (b)(3)) (noting that "the amounts at stake for individuals may be so small that separate suits would be impracticable").

[144] *See id.*; *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (stating that class certification is facially more appropriate for "individual suits [that] are infeasible because the claim of each class member is tiny relative to the expense of litigation"); Kearns, *supra* note 35, at 1347, 1347 n.65.

individualized issues have precluded the certification of mass tort negative-value claims.[145] And the difficulties attending regulatory enforcement provide concern for adequate deterrence of corporate tortfeasors who have inflicted injuries deemed negative-value claims.[146] In addition, the emergent mass tort litigation approach is at risk for not adequately deterring negative-value claims because it relies on individual litigation.[147]

One reform of individual litigation that might overcome these transactions costs and empower all tort plaintiffs with otherwise viable claims is the adoption of the loser-pays model for attorneys fees. Most of the world outside the United States follows the loser-pays model, in which the loser in a litigation must pay the prevailing party's costs.[148] Loser-pays is often thought of as a pro-defense method to prevent the bringing of frivolous claims by plaintiffs in hopes of a nuisance-value settlement.[149] Indeed, loser-pays was included in the Republican's *Contract with America* in 1994, and so is perhaps associated with the pro-defense tort reform

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[145] *See supra* notes 89-92 (discussing rejection of tobacco medical-monitoring class actions).

[146] *See supra* notes 114-17 (discussing regulatory difficulties).

[147] Interestingly, however, recent decisions tailoring punitive damages to individuals generally do not in net increase negative-value claims. *See, e.g.*, Philip Morris USA v. Williams, 127 S. Ct. 1057, 1063, 1065 (2007). That is because if some people were able to benefit from punishment imposed on defendant on behalf of its harm to other people, then at some point the maximum level of punishment would be reached before all people brought suit. *See* Stier, *supra* note 8. Under this limited-punishment theory, later plaintiffs might receive no punitive damages, because they had already been used up. Perhaps the only situation in which less negative-value claims would have been previously created is if the lumping of others' punitive damages to a plaintiff enabled that plaintiff to surpass the negative-value amount, whereas an even distribution of punitive damages would have left everyone with a negative-value claim. Realistically, however, most tort claims with punitive damages will likely surpass the negative-value threshold.

[148] Walter Olson & David Bernstein, *Loser-Pays: Where Next?*, 55 MD. L. REV. 1161, 1161 (1996) ("The [loser-pays] rule appears to be in effect in most if not all jurisdictions outside the United States.").

[149] *See id.* at 1167-68 n.33 (discussing a 1995 letter from Attorney General Janet Reno and White House Counsel Abner J. Mikva to House Speaker Newt Gingrich, stating that loser-pays "tilt[s] the legal playing field dramatically to the disadvantage of consumers and middle-class citizens").

that Professors Koenig and Rustad despise.[150] But loser-pays can serve as a sword for plaintiffs as well as a shield for defendants. If the loser must pay the reasonable attorneys' fees of the prevailing party, then meritorious negative-value claims would disappear, and the individual tort litigation market would function completely for all valuations of claims.[151] Perhaps recognizing this possibility, the business community was in fact divided about the benefits of loser-pays after the Republicans proposed it, and the legislation stalled in the United States Senate after passing the House of Representatives.[152] Although significant loser-pays issues would need to be addressed, such as limiting fees after offers of settlement, loser-pays remains a promising possible solution for the problem of negative-value claims that would enhance the functioning of individual litigation and provide the more complete deterrence that Professors Koenig and Rustad seek.

IV. CONCLUSION

Professors Koenig and Rustad laudably worry about the inability of the tort system to serve its deterrent function and take its place along with criminal law as a means to protect individuals from external harm. Notwithstanding plaintiffs' earlier success with mass tort class actions, the recent trend against certification renders class actions an unlikely route for empowerment of plaintiffs' counsel or plaintiffs. That is not cause for pessimism, however, because a sophisticated system of networked and

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[150] *See* Olson & Bernstein, *supra* note 148, at 1164.

[151] *See id.* at 1163 ("By making defendants financially responsible for the legal costs associated with resisting a legitimate claim, the loser-pays rule also helps make legitimate but small claims economically viable for plaintiffs.").

[152] *Id.* at 1171.

> [U]nlike conventional tort reform measures, loser-pays drew little enthusiasm from organized business, which saw it as a drastic step with unpredictable and perhaps disruptive consequences. The practical effect of most tort reform had been pro-defendant, but loser-pays would unleash a wide range of effects, some of which would redound to the benefit of plaintiffs suing business defendants. Washington tort reform lobbyists kept their distance from the loser-pays idea, and, in fact, signaled that they hoped the Republicans would drop it lest it endanger the narrower product liability reforms they sought for their clients.

Id. (citations omitted).

coordinated individual litigation and group settlement in mass torts effectively and efficiently manages mass torts and also forwards public goals of deterrence. The persistence of negative-value claims, created by litigation transaction costs, remains a problem for the complete functioning of this method, and I suggest that a loser-pays regime be given further scrutiny as a possible solution to empower those claims not brought based on the cost of attorneys' fees and other costs.