Initial Comments
on
American Law Institute's
PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION
Discussion Draft No. 2 (April 6, 2007)

May 11, 2007

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Introduction

by James M. Beck[1]

As it has in response to several previous projects undertaken by the American Law Institute ("ALI"), the Product Liability Advisory Council, Inc. ("PLAC") is submitting herewith a set of substantive comments concerning the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, Discussion Draft No. 2. PLAC is a nonprofit association that brings together the expertise of more than one hundred American and international product manufacturers (identified in the Appendix) as well as several hundred leading product liability defense attorneys who are sustaining PLAC members. PLAC seeks to contribute to the improvement and reform of law affecting product liability in the United States and elsewhere. One way of doing this is to offer the expertise of its sustaining members—many of whom are also members of ALI—when the work of the Institute impacts product liability.

PLAC's current comments are organized into ten discrete chapters, some of which address particular aspects of Discussion Draft No. 2 and some of which address aggregate litigation generally. These are:

Chapter 1: The Importance of Preserving the Requirements of Predominance, Superiority, and Manageability in Rule 23(b)(3) Class Actions. This chapter discusses what PLAC views as troubling and unnecessary departures not only from settled law, but also from the express terms of the procedural rules that govern class actions in most American jurisdictions. The fundamental problem goes beyond the abandonment of a mature body of law. Rather PLAC is concerned with the perception permeating the Discussion Draft that increased aggregation of litigation is something to be encouraged. PLAC believes that the existing requirements of predominance, superiority, and manageability should be reconfirmed and strengthened where monetary relief (however styled) is sought in aggregated litigation. PLAC's skepticism towards aggregated litigation in general, and the class action vehicle in particular, accords with current trends of federal procedural law over the last decade, with the evolution of the law in most states, as well as with Congress' adoption of the Class Action Fairness Act.

Chapter 2: Finality, Fidelity and Feasibility. This chapter critiques the concepts of finality, fidelity and feasibility that the Discussion Draft utilizes in preference to the existing language of Federal Rule 23 and parallel rules of most states. PLAC points out that the Discussion Draft's utilization of these new concepts is different from, and much looser than, the Erbsen law review article from which they were borrowed. In particular, the Draft's wedding of these concepts to an ill-conceived "material advancement" test would result in a far lower threshold for aggregation, a result directly contrary to the manner in which Professor Erbsen envisioned his criteria being used.

Chapter 3: Issue Certification. This chapter addresses another area in which the Discussion Draft would diverge from the weight of existing precedent to encourage a vastly expanded use of aggregate litigation. The Draft recognizes that current law views the concept of

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issue certification in "more limited" fashion, i.e., that issue certification works "within the larger constellation" of the matter as a whole to limit class certification only to the common issues. § 2.04, Comment b. The Draft, however, proposes to abandon this view and expand issue certification into a way to evade predominance and allow partial issue certification even where the action as a whole is unsuitable for class certification. This approach would permit issue-only certifications in cases where even a single significant issue was "common," a profound expansion of issue certification at variance with recent United States Supreme Court precedent and current legal practice.

Chapter 4: The "Perfect Plaintiff" Problem. This chapter is directed to a recurrent problem in the trial of aggregated litigation, where courts permit a class to put forward a "perfect" plaintiff—one who relied upon every claimed misstatement, purchased every product, suffered every possible injury, and is subject to no affirmative defenses. The Draft does nothing to ameliorate this problem, and if anything exacerbates it by emphasizing efficiency and statistical proof at the expense of defendants' rights to Due Process. The Draft needs to be strengthened in this area so that aggregate litigation does not deprive defendants of the opportunity fully to defend against plaintiffs' claims.

Chapter 5: Reexamination Under the Seventh Amendment. This chapter takes issue with the position of the Discussion Draft that current interpretations of the Seventh Amendment should be junked in order to allow multiple juries to pass upon various portions of aggregated claims. No current case law supports the Draft's position that the *Castano* and *Rhone-Poulenc* decisions were wrongly decided or that *Gasoline Products* should be abandoned. PLAC's basic position is that constitutional rights should not be trifled with in an effort to expand the circumstances under which litigation can be aggregated.

Chapter 6: The Constitutional Impediments to Aggregating Punitive Damages. This chapter discusses why it is impermissible to determine punitive damages in the context of aggregated litigation. The Supreme Court's recent *Williams* and *Campbell* constitutional precedents in the punitive damages area establish that defendants have the right to present individualized defenses in opposition to punitive damages and that punitive damages awards must be proportionate to each plaintiff's individual damages. The Discussion Draft should be amended to remove all references to punitive damages, except to state that such punishment cannot constitutionally be meted out in an aggregated fashion.

Chapter 7: Conflicts of Law. This chapter examines conflict of law as an impediment to aggregate litigation encompassing more than one jurisdiction. In it, PLAC takes the position that manageability and predominance issues arising from multi-jurisdictional litigation pose greater restraints upon the aggregation of litigation than recognized in the Discussion Draft. The Draft also should recognize that the defendant's principal place of business as a single body of substantive law is distinct minority position. *See* § 2.06, Comment c. It is also PLAC's position that the Draft should—as the law almost uniformly does—always impose the burden of establishing choice of law on the party seeking to change the status quo by aggregating the litigation.

Chapter 8: Why Change the Law? The Canadian Perspective. In this chapter PLAC seeks to put aggregation issues into a broader perspective by comparing and contrasting the

approach to aggregation taken in Canada, the country whose legal system probably most closely resembles that of the United States. Canada does not require predominance for class actions, and the Canadian experience demonstrates that, without this limitation, product liability class actions become commonplace with significant social, legal and business consequences.

Chapter 9: Why Change the Law? The Economic Perspective. This chapter examines the economic consequences of aggregated litigation. In it, PLAC's research shows how aggregated litigation results in a misdirection of judicial and litigant resources towards relatively minor matters that are more properly resolved by administrative fiat or statutory litigation initiated by responsible governmental authorities. PLAC also discusses how the economic incentives of mass litigation are distorted in favor of the lawyers conducting such litigation, either without regard to or even in detriment of the clients they represent. Finally, PLAC addresses the often extortionate nature of class action settlements.

Chapter 10: Medical Monitoring. This chapter acknowledges that Discussion Draft No. 2 is an improvement over earlier drafts in that it recognizes that certain medical monitoring lawsuits are inappropriate for aggregation consideration. However, the new terminology that the latest Draft proposes to be used when considering the aggregation of medical monitoring claims would only confuse both the law of medical monitoring and the law of certifying medical monitoring claims.

PLAC appreciates the evolving nature of the ALI's Aggregate Litigation Principles project. PLAC has thus designated its comments as an "initial" offering. As this project continues to evolve, so undoubtedly will PLAC's position. PLAC recognizes and appreciates that, in some respects, the current draft is notably improved. In particular, PLAC wishes to acknowledge: (1) the addition of § 1.02, Comment w, concerning the "disfavor" in which mass-tort class actions are held; (2) the substantial modifications in the medical monitoring discussion in § 2.05—although given these modifications PLAC questions how medical monitoring any longer "illustrates" anything; (3) improvements to §§ 3.01 and 3.18; and (4) the addition of a new section, § 3.10, separately addressing the futures problem. PLAC also applauds the useful addition, at the end of each section, of an explicit discussion of the "effect on current law."

As with its participation in prior ALI initiatives, PLAC is grateful for the opportunity to collaborate with the Institute on the Aggregate Litigation Principles project. We look forward to continuing to work with ALI.

Chapter 1

The Importance of Preserving the Requirements of Predominance, Superiority, and Manageability in Rule 23(b)(3) Class Actions

by Terri S. Reiskin and Eric C. Tew[2]

One of the most troubling aspects of Discussion Draft No. 2 is the proposal to eliminate the familiar principles of predominance, superiority, and manageability in Rule 23(b)(3) class actions in favor of the heretofore unknown and untested—but plainly less rigorous—principles of fidelity, finality, and feasibility.[3] Predominance, superiority, and manageability have been part of the class action lexicon since 1966, when subsection (b)(3) was first added as part of the amendments to Rule 23. In the 40 years since, a mature body of case law has developed in the federal courts, as well as in the many state courts that have enacted class action rules identical, or very similar, to Rule 23(b)(3). Predominance, superiority, and manageability provide a limiting check on Rule 23(a)'s far less demanding requirements and to eliminate them would be an unwarranted and destabilizing change to established law that would almost certainly lead to increased class litigation. Such a result would dilute potentially meritorious claims in favor of marginal or even purely frivolous claims, would strain judicial resources, and would place an unfair and expensive burden on defendants.

This chapter discusses why predominance, superiority, and manageability should be retained, their particular importance in products liability cases and putative nationwide class actions, and the deleterious affects that would result from eliminating these requirements.

I. THERE SHOULD BE NO "ASPIRATION" IN FAVOR OF CLASS ACTIONS, PARTICULARLY BECAUSE OF THE POTENTIAL FOR ABUSE BY SELF-INTERESTED PLAINTIFFS' COUNSEL

The central theme of the Discussion Draft—that courts should aspire to certify more class actions and that certification should occur at an early stage of the proceedings—could have devastating consequences on businesses and the economy if adopted, for it ignores the practical realities of class litigation. Indeed, the very notion of increasing the aggregate treatment of

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[3] As discussed below in Chapter 2, the principles of fidelity, finality, and feasibility were first proposed in a law review article by Professor Allan Erbsen that was published in May 2005, which underscores just how new and untested these principles are. *See* A. Erbsen, *From "Predominance" to "Resolveability": A New Approach to Regulating Class Actions*, Vanderbilt L. Rev. 995 (May 2005).

litigation runs contrary to ALI's goal to not only "promote the efficient use of litigation resources" but to do so "in the pursuit of justice under the law" and while simultaneously "protect[ing] the interests of parties, represented persons, claimants, and respondents."[4] The reality is that, in many class action lawsuits, the benefits of class certification run entirely in one direction: in favor of the plaintiffs and their counsel. This is true because

> [C]ertification dramatically affects the stakes for defendants. Class certification magnifies and strengthens the number of unmeritorious claims. Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards. 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.[5]

In short, once a class is certified, businesses (*i.e.*, defendants) are confronted with the Hobson's choice of settling—often on terms favorable to the plaintiffs, who have the leverage created by the certification decision—or rolling the dice and fighting the lawsuit to conclusion. The latter choice could very well result in bankruptcy if judgment is entered in the plaintiffs' favor and, thus, is really no choice at all.[6]

Given the enormous stakes, courts should apply a rigorous and detailed standard of review to class certification decisions—an approach that is being embraced by an increasing number of courts.[7] Indeed, recent developments at the state and federal levels appear to reflect a

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[4] Discussion Draft No. 2 § 1.03.

[5] *Castano v. American Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (citations omitted); *see also Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000) ("Aggregating claims can dramatically alter substantive tort jurisprudence. Under the traditional tort model, recovery is conditioned on defendant responsibility. The plaintiff must prove, and the defendant must be given the opportunity to contest, every element of a claim. By removing individual considerations from the adversarial process, the tort system is shorn of a valuable method for screening out marginal and unfounded claims. . . . If claims are not subject to some level of individual attention, defendants are more likely to be held liable to claimants to whom they caused no harm.").

[6] *See* L. Hensler, *Class Counsel, Self-Interest and Other People's Money*, 35 Memphis L. Rev. 65-68 (2004) (discussing how the class certification decision often forces defendants "to settle meritless claims for large sums").

[7] The Supreme Court has long directed federal district courts to conduct a "rigorous analysis" before certifying a class. *See General Tel. Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982); *see also In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1078-79 (6th Cir. 1996) ("The Supreme Court has required district courts to conduct a 'rigorous analysis' into whether the prerequisites of Rule 23 are met before certifying a class.").

greater recognition of the inherent abuses and inefficiencies of class actions. Even jurisdictions that once favored early certification of class actions based on a relatively minimal showing of commonality and with little regard for whether the claims could actually be tried in a manageable and efficient manner, have now rejected this approach. The Texas Supreme Court, for example, has held that "a cautious approach to class certification is essential," rejecting the old "approach of certify now and worry later."[8] Trial courts in Texas must now perform a "rigorous analysis" of the class certification requirements and "[i]f it is not determinable from the outset that individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate."[9]

Other jurisdictions have adopted a similar approach. In Alabama, a recent survey revealed that from 1997 to 2005 there were 39 appellate decisions overturning class certification orders, versus just six in favor of class certification, reflecting a stark change in previous Alabama jurisprudence that tended to favor class actions.[10] Among the reasons cited for this result was the fact that many cases lacked a predominance of common issues and the Alabama appellate courts were applying "a much more rigorous review of certification orders on appeal (especially those orders which appear to defer difficult management issues until later in the litigation)."[11]

Similarly, in Illinois in a recent case that attracted national attention, *Avery v. State Farm Mut. Auto. Ins. Co.*,[12] the state supreme court sent a clear signal that Illinois' reputation as a favorable forum for class actions is changing when it reversed the certification of a nationwide class and threw out the billion dollar judgment entered in favor of the class. The Illinois supreme court ruled that the trial court had erred when it declined to decide at the certification stage whether certain key common issues predominated.[13] The supreme court flatly rejected the trial

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8 *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 435 (Tex. 2000); *see also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 690 (Tex. 2002) (hereinafter "*Schein*") (same); *Nissan Motor Co. v. Fry*, 27 S.W.3d 573, 589 (Tex. App. – Corpus Christi 2000) (recognizing that *Bernal* "overturns" case law favoring certification, including certification at early stages of the litigation).

9 *Bernal*, 22 S.W.3d at 435; *see also Schein*, 102 S.W.3d at 694 ("The question the court must decide before certifying a class, after rigorous analysis and not merely a lick and a prayer, is whether the plaintiffs have demonstrated that they can meet their burden of proof in such a way that common issues predominate over individual ones.").

10 *See* G. Cook, *The Alabama Class Action: Does It Exist Any Longer? And Does It Matter?*, 66 Ala. Lawyer 289, 290 (July 2005).

11 *Id.*

12 835 N.E.2d 801 (Ill. 2005).

13 *Id.* at 820-21 ("In our view, the circuit court was incorrect in concluding, in the first instance, that the question of uniform contractual interpretation should be decided at trial rather than at the class certification stage. . . . The reason why this question should have been resolved during the certification stage is that, had the court answered the question in the negative rather than the affirmative, the class could not have been certified [because it would not have satisfied the predominance requirement].")

court's holding that such issues could be determined at trial, and stressed the importance of conducting—at the class certification stage—a detailed analysis of the claims at issue to determine whether common issues predominated.[14] Within the past year, the Illinois Supreme Court has built on *Avery* in declaring that, generally "the class action device is unsuitable for mass tort personal injury cases."[15]

Congress has also weighed in on the class action debate with passage of the Class Action Fairness Act of 2005 ("CAFA").[16] In enacting CAFA, Congress specifically found that "[o]ver the past decade, there have been abuses of the class action device that (A) harmed class members with legitimate claims and defendants that have acted responsibly; (B) adversely affected interstate commerce; and (C) undermined public respect for the judicial system."[17] Congress further found that "[a]buses in class actions undermine the national judicial system, the free flow of interstate commerce, and the concept of diversity jurisdiction as intended by the framers of the United States Constitution."[18]

One of the primary reasons for the abuses identified by Congress and many courts is the absence of a "real" client in class action litigation. As stated in the legislative history of CAFA:

> The problem of inconsistent and inadequate judicial involvement is exacerbated in class actions because the lawyers who bring the lawsuits effectively control the litigation; their clients—the injured class members—typically are not consulted about what they wish to achieve in the litigation and how they wish to proceed. In short, the clients are marginally relevant at best. . . . To make matters worse, current law enables lawyers to "game" the procedural rules

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[14] *Id.* at 820-21. The concerns driving these opinions are not new and, in fact, stretch back 30 years or more. *See, e.g.*, *City of San Jose v. Super. Ct.*, 12 Cal. 3d 447, 459 (1974) ([D]espite this court's general support of class actions, it has not been unmindful of the accompanying dangers of injustice or of the limited scope within which these suits serve beneficial purposes. Instead, it has consistently admonished trial courts to carefully weigh prospective benefits and burdens and to allow maintenance of the class action only where substantial benefits accrue both to litigants and the courts. It has also urged that the same procedures facilitating proper class actions be used to prevent class suits where they prove nonbeneficial."); *see also General Motors Corp. v. Bloyed*, 916 S.W.2d 949, 953 (Tex. 1996) (noting that "class actions are extraordinary proceedings with extraordinary potential for abuse"). Thus, many courts have long recognized that class certification decisions require a careful and deliberate approach—even if they have not always followed their own admonitions.

[15] *Smith v. Illinois Central R.R. Co.*, 860 N.E.2d 332, 340 (Ill. 2006).

[16] Pub. L. No. 109-2, 119 Stat. 4 (2005).

[17] *Id.* § 2(a)(2).

[18] *Id.* § 2(a)(4). CAFA sought to address these abuses by expanding federal diversity jurisdiction under 28 U.S.C. § 1332 so that more class actions—particularly nationwide class actions—are heard in federal court, thereby reducing the ability of putative class counsel to shop for a favorable state court forum.

> and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests.[19]

Discussion Draft No. 2 recognizes this problem, but seeks to explain it away by applying the corporate governance model to aggregate litigation. The draft considers aggregate litigation no different than other economic arrangements, such as publicly-traded corporations, in which ownership and control rest in different hands. In the context of aggregate litigation, it is suggested that the plaintiffs have "ownership" of the returns generated by the litigation, but the class counsel "control" the litigation.[20] The report identifies the plaintiff's lack of control as a significant problem with class actions[21]—an observation that is undoubtedly correct, but one that recognizes only half the problem. Indeed, the corporate governance model is fundamentally flawed in the class action context because class counsel not only "controls" the litigation, but, in fact, also has the greater "ownership" interest. This is reflected in the vastly disparate "returns" that class counsel and the class members can expect to receive in a successful lawsuit or settlement. Class counsel may receive millions of dollars in fees, exponentially more than any award that class members are likely to receive.[22] Of course, it is class counsel who also invests the greater "capital"—*i.e.*, time and resources—but that only further reinforces the point; it is class counsel, not the class members, who are the true "owners" of the litigation based on their greater investment and the potential for realizing greater returns on that investment. Ultimately, the class representative and class members are plaintiffs in name only; the "real party in interest" is most often the class counsel.[23]

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19 S. Rep. No. 109-14, at 4 (2005), *reprinted in* 2005 U.S.C.C.A.N. 3, 5-6; *see also Buford v. American Fin. Co.*, 333 F. Supp. 1243, 1251 (N.D. Ga. 1971) (denying class certification and noting that "many claims which simply did not exist have been brought to life by our courts through the judicial act of allowing a class action" and "the plain truth is that in many cases [the class action] is being used as a device for the solicitation of litigation").

20 Discussion Draft No. 2 § 1.04 and § 1.04 Comment a.

21 Discussion Draft No. 2 § 1.04 Comment c.

22 *See, e.g.*, L. Hensler, *Class Counsel, Self-Interest and Other People's Money*, 35 Memphis L. Rev. 53, 72-80 (2004) (providing several examples of cases where class counsel has received large fee awards, while class members have received minimal compensation).

23 *See Hefty v. Certified Settlement Class*, 680 N.E.2d 843, 849 (Ind. 1997) ("Class actions differ from ordinary lawsuits in that the lawyers for the class, rather than the clients have all the initiative and are close to being the real parties in interest. This fundamental departure from the traditional pattern in Anglo-American litigation generates a host of problems."); *see also Blue Chip Stamps v. Super. Ct.*, 18 Cal. 3d 381 (1976) ("[B]ecause group action is also capable of injustice, the representative plaintiff must show substantial benefit will result both to the litigants and to the court. . . . [W]hen the individual's interests are no longer served by group action, the principal—if not the sole—beneficiary then becomes the class action attorney. To allow this is 'to sacrifice the goal for the going,' burdening if not abusing our crowded courts with actions lacking proper purpose.").

Given the very real potential for abuse in class actions, any proposal that seeks to lessen the requirements for class certification should be rejected. Indeed, in addition to promoting further abuse of the class action device, weakening certification requirements will harm judicial economy because it will encourage more putative class action suits to be filed. More of these cases will, of course, also be certified as class actions, forcing courts to deal with the attendant motions practice and trials of large, complex cases—a time-consuming prospect for already over-burdened courts.

Ironically, such a result runs contrary to a central premise of the Discussion Draft, which is to promote judicial efficiency through more class actions, based on the theory that it "will materially advance the disposition of multiple civil claims."[24] But here again, the theory is not supported by reality. Indeed, the theory wrongly presumes that there are, in fact, multiple civil claims that require resolution. As discussed above, however, class actions are largely the creation of entrepreneurial plaintiffs' lawyers who pick their clients. They are not the result of thousands of plaintiffs knocking down the courthouse doors with similar individual claims, where aggregate treatment might well promote efficiency. As the Fifth Circuit explained in *Castano*, "[u]ntil plaintiffs decide to file individual claims, a court cannot . . . presume that all or even any plaintiffs will pursue legal remedies."[25] Weakening class action requirements will in essence promote litigation where there likely would not have been any.[26]

Class certification requirements should instead be strengthened to ensure that the ideals espoused by ALI of protecting all of the parties' interests and enhancing judicial efficiency are achieved. At the very least, the current requirements of predominance, superiority, and manageability must be preserved because they are the only real check against frivolous and abusive class actions.

II. THE PREDOMINANCE, SUPERIORITY, AND MANAGEABILITY REQUIREMENTS OF RULE 23(B)(3) ENSURE THAT "SUBSTANTIAL BENEFITS" ACCRUE TO THE COURT AND THE LITIGANTS, THUS LIMITING THE POTENTIAL FOR ABUSE AND INJUSTICE

Under current law, it is well-settled that a class action should be certified only if it is "superior to other available methods for the fair and efficient adjudication of the controversy."[27] Thus, certification is properly denied where "the individual questions to be decided may prove too complex, numerous and substantial to allow the class action . . . or the benefits to be gained

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24 Discussion Draft No. 2 § 2.03(a) and § 2.03 Comment a.

25 84 F.3d at 748.

26 *See Elster v. Alexander*, 76 F.R.D. 440, 443 (N.D. Ga. 1977) (denying class certification and noting "[t]his Court is unwilling to breathe the spirit of judicial combat into 8,500 persons who, so far, have shown no desire to litigate this matter").

27 Fed. R. Civ. P. 23(b)(3). *See also Linder v. Thrifty Oil Co.*, 23 Cal. 4th 429, 435 (2000) (class should be certified only if it will provide "substantial benefits" both to the courts and the litigants).

may not be significant enough to justify imposition of a judgment binding on absent parties."[28] Whether certification is proper is usually determined under Rule 23(b)(3). Indeed, while a plaintiff must first satisfy each of the Rule 23(a) requirements—*i.e.*, numerosity, commonality, typicality, and adequacy of representation—the class certification decision most often (by far) turns on the related questions of predominance, superiority, and manageability under Rule 23(b)(3).[29]

The predominance, superiority, and manageability requirements are not merely "formalistic" as the Discussion Draft states.[30] To the contrary, these requirements are essential to furthering the very purpose of the class action rule and must be preserved. As the Supreme Court has explained, by adding these requirements to the rule in 1966, the Advisory Committee "sought to cover cases 'in which a class action would achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results.'"[31]

A. Predominance

The predominance requirement is similar to the commonality requirement of Rule 23(a), but "more stringent" and "far more demanding."[32] In order to satisfy the predominance requirement, "a plaintiff must establish that the issues in the class action that are subject to generalized proof, thus applicable to the class as a whole . . . predominate over those issues that are subject only to individualized proof."[33] Moreover, "[t]he test for predominance is not whether common issues outnumber uncommon issues."[34] Rather, "[c]ourts determine if common issues predominate by identifying the substantive issues of the case that will control the outcome of the litigation, assessing which issues will predominate, and determining if the predominating issues are, in fact, those common to the class."[35] Common issues do not

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28 *Osborne v. Subaru of Am., Inc.*, 198 Cal. App. 3d 646, 653 (1988) (citations omitted).

29 This is not to suggest that the Rule 23(a) requirements are wholly unimportant or automatically satisfied in every case. Indeed, ensuring that the class is adequately represented is particularly important, and this requirement was strengthened by the 2003 amendments to Rule 23, which added subsection (g) to detail the issues the court must consider when appointing class counsel.

30 Discussion Draft No. 2 § 1.02, Comment u.

31 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 615 (1997).

32 *Id.* at 609, 623; *see also Bernal*, 22 S.W.3d at 433 (holding that the "predominance requirement . . . is one of the most stringent prerequisites to class certification").

33 *Id.* at 623; *see also* FED. R. CIV. P. 23(b)(3) (plaintiff must prove "that questions of law or fact common to the members of the class predominate over any questions affecting only individual members").

34 *Bernal*, 22 S.W.3d at 434.

35 *Id.*

predominate if "presenting and resolving individual issues is likely to be an overwhelming or unmanageable task for a single jury."[36]

The fundamental purpose of the predominance requirement is to "test[] whether proposed classes are sufficiently cohesive to warrant adjudication by representation."[37] Such cohesion is essential, for as one learned treatise has explained:

> [I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate. There is a sound basis for this conclusion. Since all members of a Rule 23(b)(3) class who do not exercise their right to be excluded from the action will be bound by the judgment, it is essential that their interests be connected closely. Otherwise, inaction on the part of an absentee, which in many cases will not represent acquiescence, may result in a binding judgment in an action in which the absentee's interests were not presented effectively. Moreover, when individual rather than common issues predominate, the economy and efficiency of class-action treatment are lost and the need for judicial supervision and the risk of confusion are magnified.[38]

In short, the predominance requirement is intended "to prevent class action litigation when the sheer complexity and diversity of the individual issues would overwhelm or confuse a jury or severely compromise a party's ability to present viable claims or defenses."[39]

The importance of the predominance requirement, while not limited to any particular type of case, is clearly illustrated in cases involving product defect allegations. Claims alleging "product defects" take many shapes, including, among others, claims for strict liability, negligence, common law fraud and negligent misrepresentation, statutory fraud (*i.e.*, deceptive trade practices and consumer protection statutes), and breach of warranty. Such claims invariably involve a myriad of individual issues that require resolution, and, therefore, courts have repeatedly recognized that such claims are ill-suited for class certification.

For example, a product defect claim necessarily raises individual questions concerning causation and the particular circumstances under which the product failed, as well as product variations and how and where the product was manufactured.[40] Other individualized issues

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36 *Id.*

37 *Amchem*, 521 U.S. at 623.

38 7A Wright, Miller & Kane, *Fed. Prac. & Proc.*, § 1788 (3d ed. 2005) (footnotes omitted); *see also* Advisory Committee Notes ("It is only where this predominance exists that economies can be achieved by means of the class-action device.").

39 *Bernal*, 22 S.W.3d at 434.

40 *See, e.g., Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-18 (D.C. Cir. 1986) (reversing class certification order because, *inter alia*, the allegedly defective transmission had undergone

include whether the product was maintained and used properly, or whether it was subject to misuse or abuse, or was used for an unintended or improper use.[41]

Claims alleging breach of express or implied warranties raise individualized factual questions concerning numerous issues, including the existence and terms of the warranty, privity, and whether the defendant was provided timely notice of the breach. A recent case from the Texas Court of Appeals, *Polaris Indus., Inc. v. McDonald*,[42] discusses in depth the many individual questions facing a court in a breach of warranty action. In *Polaris*, plaintiff sought to represent a class of individuals who had purchased a personal watercraft ("PWC") that was manufactured and marketed by the defendant. Plaintiff alleged that the PWC's lack of certain features—specifically, brakes and a means of steering or maneuvering without the use of the throttle—rendered the PWC "defective, unmerchantable and unfit for their ordinary purposes" and asserted a claim for breach of the implied warranty of merchantability.[43] The court of appeals reversed the trial court's order granting class certification, explaining that:

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numerous design changes and plaintiffs had not offered any evidence that the same defect existed in all of the class vehicles); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 221 (E.D. Pa. 2000) (holding that the relevant product variations "necessitate a more individualized factual inquiry, a factor weighing against certification"); *In re Ford Motor Co. Bronco II Prods. Liab. Litig.*, 177 F.R.D. 360, 372-73 (E.D. La. 1997) (denying certification of claims alleging defect in vehicle stability because vehicles had varying characteristics affecting stability and varying failure rates); *In re Ford Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 491-92 (D.N.J. 2000) (denying certification of putative class claiming deceptive trade practices and breach of warranty as a result of alleged automobile ignition switch defect because resolution of claims required "detailed claimant-specific investigations and jury trials in order to determine whether the subject switches actually caused the damage alleged"); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 455 (D.N.J. 1998) (denying certification of putative class claiming fraud, breach of warranty and violation of the Magnuson-Moss Act as a result of alleged automobile braking system defect because "[p]roving a class-wide defect where the majority of class members have not experienced any problems with the alleged defective product, if possible at all, would be extremely difficult."); *Quacchia v. DaimlerChrysler Corp.*, 122 Cal. App. 4th 1442 (2004) (denying class certification in case involving allegations of defective seat belt buckles because the risk of accidental release of the buckles "would vary from model to model, and from year to year" and thus the jury would be required "to look separately at the buckle's installation and operation in each vehicle").

41 *See, e.g., Sanneman v. Chrysler Corp.*, 191 F.R.D. 441, 449 (E.D. Pa. 2000) ("Courts are hesitant to certify classes in litigation where individual use factors present themselves, such as cases involving allegedly defective motor vehicles and parts."); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 220 (E.D. La. 1998) (denying certification of class in case alleging paint defect because, among other reasons, "failure rates vary based on how individual drivers used their vehicles and on the environmental factors to which the vehicles were exposed").

42 119 S.W.3d 331 (Tex. App. Ct. 2003).

43 *Id.* at 335.

> [F]or the court to determine whether an implied warranty exists, there has to be an individualized inquiry of each consumer as to his particular circumstances and knowledge when he purchased the jet ski. The actions and the knowledge of each buyer and the actions of the seller determine whether or not the product even has an implied warranty. Every aspect of the transaction must be considered, and these factors would vary from individual to individual. For example, was the consumer given the opportunity to fully inspect the PWC? Did the salesperson insist that the consumer inspect the PWC before purchasing it? Did the consumer refuse to inspect? Were there warning decals on the PWC at the time the consumer inspected it? Had a putative class member already owned or used a PWC in the past, and become aware of the lack of an off-throttle steering and braking system? Did the salesperson carefully explain to the buyer that he would have to use the throttle in order to steer?
>
> Before a court determines if there is a defect in a product which breached an implied warranty, it must first decide if there is an implied warranty to be breached. All of the questions above, plus many more, are crucial to the determination of the existence of an implied warranty of merchantability. Where a key question is the actual knowledge of each class member at the time of the transaction in dispute, so that the 'state of mind of every single class member' must be considered at trial, then individual issues will always predominate and preclude certification. We have recently held that such a subjective and individualized inquiry is a constitutional prerequisite to the maintenance of many individualized claims brought in the class action context. . . . Therefore, a court must receive individual evidence regarding each individual sale. An implied warranty claim is individual to each person; thus, common issues rarely predominate over individual issues and the predominance requirement is not satisfied.[44]

Finally, courts throughout the country have held that cases involving claims for common law and statutory fraud, negligent misrepresentation, and false advertising—whether in product defect or other types of cases—cannot be certified as class actions because they require individualized proof of the statements at issues, how and when they were made, whether they were material to each putative class members' decision to purchase the product, and whether

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[44] *Id*, at 343-44 (citations omitted); *see also Kaczmarek v. Int'l Bus. Machines Corp.*, 186 F.R.D. 307, 312 (S.D.N.Y. 1999) (holding that class certification is inappropriate for warranty claims where "plaintiffs received different representations and different warranties when they purchased their different [products] from different sources").

they were relied upon by each individual putative class member.[45] Requiring such individualized proof is not merely an exercise in legal formalism. To the contrary, it is essential to protecting the defendant's due process rights and prevents plaintiffs with particularly weak claims—*i.e.*, plaintiffs who would not be able to prove their claims on an individual basis—from bootstrapping their claims to the class. As the Texas Supreme Court recently held:

> [T]he 20,000 class members in the present case are held to the same standards of proof of reliance—and for that matter all the other elements of their claims—that they would be required to meet if each sued individually. . . . [E]vidence insufficient to prove reliance in a suit by an individual does not become sufficient in a class action simply because there are more plaintiffs. Inescapably individual differences cannot be concealed in a throng. The procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions; it does not lessen the quality of evidence

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[45] *See, e.g.*, *Castano v. American Tobacco Co.*, 84 F.3d 734, 745 (5th Cir. 1996) ("[A] fraud class action cannot be certified when individual reliance will be an issue."); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1081 (6th Cir. 1996) (decertifying class for, *inter alia*, lack of commonality where court would have to examine oral representations made to each individual plaintiff as well as examine varying 'issues of reliance, causation and damages"); *In re General Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 783 (3d Cir. 1995) (decertifying class because "plaintiffs would likely have had to prove individual reliance on the allegedly misleading materials under the various state laws applicable to most of these claims"); *Marcial v. Coreonet Ins. Co.*, 880 F.2d 954, 957-58 (7th Cir. 1989) (affirming denial of class certification of fraud-based RICO claim when oral representations varied); *Sprague v. General Motors Co.*, 133 F.3d 388, 398 (6th Cir. 1988) (holding that claims that "require[] proof of what statements were made to a particular person, how the person interpreted those statement, and whether the person justifiably relied on those statements to his detriment" are not susceptible to class-wide treatment); *Young v. Ray Brandt Dodge, Inc.*, 176 F.R.D. 230, 233 (E.D. La. 1997) ("The simple doctrine the case literature supports is that fraud cases are counterintuitive to Rule 23(b)(3) even if fraud is common to all cases."); *Martin v. Dahlberg, Inc.*, 156 F.R.D. 207, 216 (N.D. Cal. 1994) (denying class certification in case based on defendant's national advertising because "each class member [would need] to narrate a story which includes individualized proof of which advertisements he saw"); *Jankousky v. Jewel Cos.*, 538 N.E.2d 689, 692 (Ill. App. Ct. 1989) ("Actions based on fraud are not generally appropriate subjects for class treatment."); *Debbs v. Chrysler Corp.*, 810 A.2d 137 (Pa. Super. Ct. 2002) (vacating class certification because "reasonable consumers could come to different conclusions about the materiality of the withheld information"); *Ford Motor Co. v. Sheldon*, 113 S.W.3d 839, 847-51 (Tex. App. Ct. 2003) (denying class certification under state unfair trade practices act in case alleging defective paint process on various vehicles because questions relating to defect, the defendant's knowledge, and causation all presented individualized issues); James Wm. Moore et al., *Moore's Federal Practice* § 23.47[2], at 23-234 (3d ed. 1999) ("[C]ourts have generally denied class certification in private consumer fraud actions brought under state law . . . because individual questions predominate in such cases.").

required in an individual action or relax substantive burdens of proof.[46]

In sum, the predominance requirement ensures that the proposed class will protect the interests of all the parties and further judicial economy—the principles that are at the very core of the class action rule. Elimination of the predominance requirement would open the courts to unwieldy class actions involving numerous, disparate, individual issues and would infringe upon the defendants' due process rights. Moreover, it would do nothing to address the abuses of the class action device caused by the absence of a real client, but will instead only encourage further abuse. For these reasons, it is essential that predominance remain a requirement of Rule 23(b)(3) class actions.

B. Manageability

Closely related to the principle of predominance is the requirement that class actions be manageable. Where common issues do not predominate, of course, it is unlikely that a class action can be managed in an efficient manner that fully respects all of the parties' rights to a fair trial. Manageability concerns are at the heart of the move away from the old approach of "certify now and worry later." In rejecting this outdated approach, courts have held that "[i]f it is not determinable from the outset that the individual issues can be considered in a manageable, time-efficient, yet fair manner, then certification is not appropriate."[47] Moreover, a court considering class certification "cannot simply rely on [plaintiff] counsel's assurances of manageability."[48] Rather, the plaintiff must present a realistic trial plan at the certification stage.[49]

Problems with manageability are illustrated most vividly in putative nationwide class actions, where conflicts among states' laws almost invariably preclude certification. Indeed, courts have overwhelmingly rejected the notion that a class can be certified when multiple states' laws will apply.[50] Discussion Draft No. 2 appears to accept this well-settled law,[51] but argues

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46 *Schein*, 102 S.W.3d at 693-94 (emphasis added).

47 *Bernal*, 22 S.W.3d at 436.

48 *Washington Mutual Bank, FA v. Superior Court*, 24 Cal. 4th 906, 915 (2001); *see also Bernal*, 22 S.W.3d at 435 ("Given the plaintiffs' burden, a court cannot rely on mere assurances of counsel that any problems with predominance or superiority can be overcome.").

49 *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996) (reversing certification where "[t]here has been no showing by Plaintiffs of how the class trial could be conducted."); *Chin*, 182 F.R.D. at 454 (noting that "the principal reason for denying class certification is Plaintiffs' failure to demonstrate a suitable and realistic plan for trial of the class claims").

50 *See In re Bridgestone/Firestone*, 288 F.3d at 1018 (reversing class certification and holding "[b]ecause these claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable"); *Szabo v. Bridgeport Machs., Inc.*, 249 F.2d 672, 674 (7th Cir. 2001); *Andrews v. American Tel. & Telegraph Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996) (reversing certification of nationwide class because it would necessitate the application of 50 states' laws); *In re American Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more

that aggregate treatment can still be achieved under one of three possible scenarios, each of which is problematic.

Discussion Draft No. 2 first suggests in § 2.06(b)(1) that aggregation is appropriate if a single body of law applies to all claims, an argument that is a favorite of plaintiffs' lawyers, but one that is hardly, if ever, permissible because of due process constraints. In *Phillips Petroleum Co. v. Shutts*, the Supreme Court held that a court cannot apply one state's law to an entire class *unless* that state has a "'significant contact or significant aggregation of contacts' to the claims asserted by each member of the plaintiff class."[52] Based on this language, it is difficult to imagine applying a single state's laws to a multi-state or nationwide class action without violating due process. Indeed, for this reason—as well as substantive choice-of-law principles—

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than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action."); *Castano*, 84 F.3d at 741-44 (reversing certification of nationwide class based on trial court's inadequate consideration of the numerous variations among all the state laws); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 501 (S.D. Ill. 1999) (denying class certification because court would have to apply the laws of 47 states); *Kaczmarek v. International Bus. Mach. Corp.*, 186 F.R.D. 307, 312-13 (S.D.N.Y. 1999) (denying class certification and holding that the "prospect of determining the law of all fifty states and then applying the materially different laws that exist for some of the claims in this case would make this class action too complicated and unmanageable. Common questions of law do not predominate in this case."); *Chin*, 182 F.R.D. at 465 (denying motion to certify nationwide class that implicated the laws of 52 jurisdictions); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 225 (W.D. Mich. 1998) (refusing to certify nationwide class because of the variances in the laws of the 49 jurisdictions implicated); *O'Brien v. J.I. Kislak Mortgage Corp.*, 934 F. Supp. 1348, 1359 (S.D. Fla. 1998) ("state-by-state analysis of the unfair and deceptive trade practices statutes as they might apply to [defendants] would make . . . a [nationwide] class wholly unmanageable"); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371-72 (E.D. La. 1997) (hereinafter *Bronco II*) (denying class certification because applying the law of 51 jurisdictions makes it clear that "common questions of law cannot be said to predominate"); *Ford Ignition Switch*, 174 F.R.D. at 351 (refusing to certify nationwide class implicating laws of 50 jurisdictions and noting that variations in state laws "exponentially magnified" differences among members of the class and "eclipse[d] any common issues"); *Carroll v. Cellco P'ship*, 713 A.2d 509, 518 (N.J. Super. Ct. App. Div. 1998) (reversing and remanding class certification in case implicating the laws of 17 states).

[51] Discussion Draft No. 2 acknowledges in § 2.06 that the trial court must, as a threshold matter, determine which states' laws applies to each class member's claim, a principle of law that is well-settled. *See, e.g.*, *Spence v. Glock*, 227 F.3d 308, 311 (5th Cir. 2000) (noting that choice of law determination is "[t]he threshold question" in putative nationwide class action); *Castano*, 84 F.3d at 741 (holding that district court must determine "which law will apply before making a predominance determination"); *Chin*, 182 F.R.D. at 457 ("At the outset the Court must determine which law to apply to this action."); *Ford Ignition Switch Prods. Liab. Litig*, 174 F.R.D. at 347 (same).

[52] 472 U.S. 797, 821 (1985).

courts have frequently held that it is impermissible to apply a single state's laws to multi-state class actions.[53]

Discussion Draft No. 2 also sets forth two other situations in which aggregation would be appropriate: if "different claims are subject to different bodies of law that are substantially identical in relevant respects," or if "different claims are subject to different bodies of law that are not substantially identical but do present a limited number of patterns that . . . can be managed."[54] These are really two sides of the same coin, for the premise in each scenario is essentially that the differences in the laws would not be significant enough to render the class action unmanageable. The problem with such an approach, however, is that state law variances cannot simply be glossed over as insignificant. This is well-illustrated in the area of consumer protection laws—a type of claim frequently asserted in class actions—because the various states' consumer protection statutes involve divergent standards of proof, procedure, substance, and remedies.

Variations in the state consumer protection statutes include: (1) varying substantive requirements, including whether a showing of scienter or reliance is necessary; (2) different statutes of limitations, which accrue at different times and may be subject to different tolling

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[53] *In re Bridgestone/Firestone*, 288 F.3d 1012 (7th Cir. 2002) (reversing certification of a nationwide class because choice of law rules do not permit application of the law of a single state to the claims of all class members, even if state in question is the defendant's state of incorporation or principle place of business); *Ford Ignition Switch*, 174 F.R.D. at 348 (noting the due process concerns of applying Michigan law to all class members' claims simply because "Ford's headquarters are located in Michigan, the vehicles in question were manufactured there, decisions relating to the allegedly defective ignition switches were made there, and any misrepresentations, statements or advertisements regarding the Ford vehicles originated in Michigan"); *In re Jackson Nat'l Life Ins. Co. Premium Litig.*, 183 F.R.D. 217, 223 (W.D. Mich. 1998) (rejecting argument that court could simply apply law of state where defendants were headquartered in nationwide class action and holding that "the choice-of-law analysis is a matter of due process and is not to be altered in a nationwide class action simply because it may otherwise result in procedural and management difficulties" (citing *Shutts*, 472 U.S. at 821-822)); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 371 (E.D. La. 1997) (holding that "constitutional restraints" prevented application of Michigan law to nationwide claims against Ford Motor Company solely because "Ford has its principal place of business in Michigan and design decisions concerning the Bronco II were made in Michigan" and holding that plaintiffs failed to show "how Michigan's contacts are more significant than the contacts of the states in which the Bronco IIs were manufactured, where the alleged defect manifested itself, where plaintiffs' purchased their vehicles, where plaintiffs entered the complained-of transactions, and/or where the allegedly fraudulent conduct occurred"); *Feinstein v. Firestone Tire and Rubber Co.*, 535 F. Supp. 595, 606 (S.D.N.Y. 1982) (rejecting plaintiffs' argument that Ohio law should apply to nationwide class because defendant's principal place of business was in Ohio); *Duvall v. TRW, Inc.*, 578 N.E.2d 556, 559 (Ohio App. 1991) (holding that Ohio law could not apply to nationwide class simply because defendant was "incorporated and headquartered in Ohio").

[54] Discussion Draft No. 2 § 2.06(b)(2) and (3).

requirements; (3) procedural preconditions to the initiation of private actions, such as a showing of actual damage or notice to the defendant; (4) whether there is a right to a jury trial; and (5) the types of remedies available.[55] These differences are not mere technicalities that can be pushed aside in the quest for certification. Rather, such differences represent each state's individual balancing of the competing interests of business and commerce, on the one hand, and consumer protection on the other hand. As the Supreme Court held in a case involving an automobile manufacturer's alleged failure to disclose pre-sale damage and repairs:

> No one doubts that a State may protect its citizens by prohibiting deceptive trade practices and by requiring automobile distributors to disclose presale repairs that affect the value of a new car. But the States need not, and in fact do not, provide such protection in a uniform manner. Some States rely on the judicial process to formulate and enforce an appropriate disclosure requirement by applying principles of contract and tort law. Other States have enacted various forms of legislation that define the disclosure obligations of automobile manufacturers, distributors, and dealers. The result is a patchwork of rules representing the diverse policy judgments of lawmakers in 50 States.[56]

Because of the significant variations in consumer protection statutes, courts have held that a "state-by-state analysis of the unfair and deceptive trade practices statutes as they might apply to [defendants] would make . . . a [nationwide] class wholly unmanageable."[57] Similar variations in state law exist for claims based on other legal theories, such as common law fraud, negligence, and strict liability.[58] Even breach of warranty claims brought under the Uniform

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[55] *See* Jonathan Sheldon and Carolyn L. Carter, *Unfair and Deceptive Acts and Practices*, §§ 4.2 – 8.4 (6th Ed. 2004).

[56] *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568-69 (1996); *see also In re Bridgestone/Firestone*, 288 F.3d at 1015 ("State consumer protection laws vary considerably, and courts must respect these differences rather than apply one state's law to sales in other states with different rules.").

[57] *O'Brien*, 934 F. Supp. at 1359; *see also Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493 (N.D. Ill. 1998) (denying class certification because the plaintiffs failed "to meet their burden and demonstrate that the nuances of 50 consumer fraud statutes and 50 common laws are manageable."); *Gross v. Johnson & Johnson-Merck Consumer Pharm. Co.*, 696 A.2d 793, 796 (N.J. Super. Ct. Law Div. 1997) (refusing to certify class alleging "violations of the New Jersey Consumer Fraud Act and those of all other states").

[58] *See, e.g.*, *Castano*, 84 F.3d at 743 ("In a fraud claim, some states require justifiable reliance on a misrepresentation, while others require reasonable reliance. States impose varying standards to determine when there is a duty to disclose facts. Products liability law also differs among states. Some states do not recognize strict liability. . . . Differences in affirmative defenses also exist."); *Ford Ignition Switch*, 174 F.R.D. at 344 ("[R]egarding plaintiffs' strict liability claim alone, defendants point to at least five different approaches to defining a 'design defect;' differing positions as to whether the 'economic loss doctrine' precludes strict liability

Commercial Code are not suitable for nationwide class treatment because of variations in the way jurisdictions have adopted and interpreted the U.C.C.[59]

Regardless of the legal theory, the plaintiff and the trial court must respect differences among state law, even if those differences appear minor or "nuanced."[60] Moreover, it is unlikely in the vast majority of cases that differing state laws can be grouped into "a limited number of patterns." Such "patterns" are often overly simplistic[61] and amount to little more than a veiled attempt to gloss over important differences among the various states' laws. In sum, the conflicts among states laws present intractable management problems that preclude certification in virtually every nationwide or multi-state class action.

Manageability concerns are not, of course, limited to conflict of laws issues. Indeed, any case that presents individual factual or legal issues could present management problems that will preclude class certification. But the fact that manageability problems may preclude class certification is certainly not a reason to eliminate this requirement from Rule 23(b)(3). To the contrary, the manageability requirement must be preserved because, like predominance, it ensures that the parties' right to a fair trial is respected and that judicial economy of resolution does not supplant substance as the primary concern of the court. To eliminate this requirement would allow for the certification of class actions where the only means for "dealing with" the

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actions; differing views as to whether physical harm is a prerequisite to bringing a cause of action; different warning requirements; and different affirmative defenses.").

[59] *See* Walsh, 807 F.2d at 1016 ("The Uniform Commercial Code is not uniform."); *Christian v. Sony Corp. of Am.*, 22001 U.S. Dist. LEXIS 9858, *5 (D. Minn. June 26, 2001) ("[T]he U.C.C. is far from uniform"); *Fisher v. Bristol-Myers Squibb Co*., 181 F.R.D. 365, 369 n.3 (N.D.Ill. 1998) ("[T]he treatment of warranty claims from state to state is far from uniform"); *Osborne*, 243 Cal. Rptr. at 820 ("While the nationwide adoption of the Uniform Commercial Code provides the [implied warranty] cause of action in virtually all states, it is not applied in the same fashion everywhere").

[60] *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) ("The law of negligence, including subsidiary concepts such as duty of care, foreseeability, and proximate cause, may as the plaintiffs have forcefully argued to us differ among the states only in nuance . . . . But nuance can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formations of the meaning of negligence."); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 423-24 (E.D. La. 1997) (denying certification due to "varying nuances" in state law negligence claims, "different definitions of defectiveness," and differences in presumptions, triggering conditions and burdens of proof such that "[e]ven in a liability-only trial, composite instructions accounting for all these differences would hazard a chaos that seems counterintuitive to the spirit of Rule 23").

[61] *See, e.g., Carpenter v. BMW of N. Am., Inc.*, 1999 WL 415390 (E.D. Pa. 1999) (rejecting plaintiff's attempt to group all 50 state consumer protection laws into three categories, explaining that while "[p]laintiff concludes, based on her division into [three] groups, that the consumer fraud laws 'can easily be divided into subclasses' and [charged] to the jury . . . such a proffer . . . is 'overly simplistic'").

manageability problems would be to take shortcuts—*e.g.*, ignoring conflicts in relevant laws, allowing class members to recover damages without proving each element of their claims, preventing defendants from presenting all applicable affirmative defenses to individual class members' claims, *et cetera*. Such a result would violate due process and run afoul of the Rules Enabling Act, which provides that procedural rules like Rule 23 "cannot abridge, enlarge, or modify any substantive right."[62] Thus, the manageability requirement of current Rule 23 must be preserved.

C. Superiority

The superiority requirement requires the plaintiff to prove that class litigation is "superior to other available methods for the fair and efficient adjudication of the controversy."[63] It is not sufficient that class litigation may be equally as good as other available alternatives; rather, class litigation must be clearly superior.[64] To determine whether class treatment is superior, the court should "balance, in terms of fairness and efficiency, the merits of a class action against those of alternative available methods of adjudication."[65] In balancing fairness and efficiency, the court must consider the interests of the judicial system, the putative class, the named plaintiffs, and the defendant.[66]

In many cases, there are far more fair, efficient, and effective means of adjudicating disputes than a class action, aside from the obvious alternative of individual litigation. One alternate route is administrative proceedings, which can achieve much the same ends with far greater efficiency. For example, in putative class actions against automotive industry defendants, it is frequently claimed that judicial action is needed to ensure the safety of consumers who own the allegedly defective vehicles. Such cases often include a request for injunctive relief in the form of a judicially-ordered recall or the equivalent. Whether under the doctrine of primary jurisdiction or otherwise, courts applying the superiority requirement have held that plaintiffs should first petition the National Highway Traffic Safety Administration, which is the federal agency charged with ensuring automotive safety and conducting automotive

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62 28 U.S.C. 2072(b). States have also recognized that the class action rule is merely a procedural device and cannot be used by a plaintiff to obtain relief where such relief would not be available in an individual case. *See, e.g.*, *Bernal*, 22 S.W.3d at 437 (holding that the class action is merely a "procedural device" and "is not meant to alter the parties' burdens of proof, right to a jury trial, or the substantive prerequisites to recovery under a given tort").

63 Fed. R. Civ. P. 23(b)(3).

64 *See T.R. Coleman v. Cannon Oil Co.*, 141 F.R.D. 516, 529 (M.D. Ala. 1992) ("In deciding whether to certify the class, 'a primary determination to be made is whether the class action is superior to, and not just as good as, other available methods for handling the controversy . . . .'"); 5 *Moore's Federal Practice* § 23.48 (stating that for superiority to exist, "a class action must be better than, not merely as good as, other methods of adjudication."

65 *Georgine*, 83 F. 3d at 632.

66 *See Arch*, 175 F.R.D. at 492.

recalls.[67] If a safety issue is truly present, NHTSA has the authority to order a nationwide recall to correct the problem at no cost whatsoever to consumers.

While the superiority requirement is often considered by courts in the same breath as manageability and predominance, and the concepts do intertwine conceptually, it is not a throwaway. Rather, by requiring class actions to be the superior means of adjudication, the requirement helps to ensure that class actions remain the exception to the usual method of individual litigation. This is important because, as the Supreme Court has held, "[t]he class-action device was designed as an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only."[68] Discussion Draft No. 2 appears to eliminate this presumption in favor of individual litigation in the name of judicial efficiency. The reasoning is circular: more class actions are being filed, and the courts must find some way to respond to aggregate claims without being inundated with litigation, so judicial economy should trump all other factors and courts could certify more classes. This only has the effect of encouraging more class actions. The reality is that more stringent application of the requirements already in place in Rule 23 and its correlative jurisprudence has the effect of weeding out non-meritorious class actions. CAFA has had a similar effect, as plaintiffs' lawyers who might previously have filed a class action in a friendly state court in the hopes of reaching a quick settlement are now precluded from doing so. This results in greater care being taken to ensure that a case will stand up to scrutiny and merit the time and effort that must go into litigating it. Class actions are not as easy a leveraging tool for entrepreneurial plaintiffs' attorneys. And this is as it should be.

By eliminating the superiority requirement and facilitating more class actions, Discussion Draft No. 2 is directly contrary to the dictates of due process, and would effectively allow the class action to become the primary means of adjudication in many cases. Such a result was never intended by Rule 23. While there is a clear need for aggregate action in some situations, a class action is only superior to other means of adjudication in a limited subset of the cases that

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[67] *See Ford Ignition Switch I*, 174 F.R.D. at 353 ("[T]he administrative remedy provided by NHTSA, including recall of vehicle[s] for inspection and/or repair, is more appropriate than civil litigation seeking money damages in a federal court. The court concludes that there is insufficient justification to burden the judicial system with plaintiffs' claims while there exists an administrative remedy that has been established to assess the technical merits of such claims and that can handle those claims in a more efficient manner by ordering further recall and replacement of the ignition switch, if appropriate."); *Chin*, 182 F.R.D. at 464-65 ("The Court is convinced that in such situations, the administrative remedy provided by NHTSA, including recall of vehicles for inspection and/or repair, is more appropriate than civil litigation seeking equitable relief and money damages in a federal court."); *Frank*, 2002 WL 471048, at *7 ("It is our finding herein that the remedy which will not only best promote consumer safety, but will also address the parties' concerns regarding the possible consequences of a rear-end collision if the purported defect is not remedied, is to petition the NHTSA for a defect investigation."); *Rice*, 726 So. 2d at 631 (same); *American Suzuki*, 44 Cal. Rptr. 2d at 531 (dismissing class action seeking "cost of repair" damages related to the alleged rollover propensity of the Suzuki Samurai because the appropriate remedy should have been sought through NHTSA).

[68] *General Tel Co.*, 457 U.S. at 155.

are currently being brought as class actions. The superiority requirement is a useful tool to weed out the cases that merit class treatment from those that do not, and it should be preserved.

III. CONCLUSION

There is little doubt that more class action cases would be certified if the predominance, manageability, and superiority requirements are eliminated as suggested in Discussion Draft No. 2. Given the well-known abuses of the class action rule, however, now is not the time to encourage more class litigation. Indeed, in recent years, the trend has been toward certifying fewer classes, not more. The predominance, manageability, and superiority requirements are essential to limiting the certification of frivolous or otherwise clearly inappropriate class actions. Eliminating these requirements would likely convert many ordinary cases into class actions without any corresponding benefit to the plaintiffs, while imposing substantial and unnecessary burdens on the courts and defendants. For these reasons, predominance, manageability, and superiority must be preserved.

Chapter 2

Finality, Fidelity and Feasibility

by Jonathan Hoffman[69]

Discussion Draft No. 2 adopts the terminology of "finality, fidelity, and feasibility" as principles for aggregation.[70] The Discussion Draft takes these principles from a recently-published article by Professor Allan Erbsen of the University of Minnesota Law School, "From Predominance to Resolvability: A New Approach to Regulating Class Actions," 58 Vand. L. Rev. 995 (2006). ("Erbsen"), *cited in* Discussion Draft No. 2, § 1.03, Comment b and § 1.03 Reporters' Notes, Comment b.

However, there is a key distinction between Erbsen's use of this terminology and that of the Discussion Draft. Erbsen focused specifically on class actions and, even more specifically, class actions for money damages. In that context, Erbsen proposed this terminology to assure that the certification rules in class actions properly measure and assess dissimilarity within putative classes. Thus, even though the Federal Rules of Civil Procedure provide stricter standards for class certification than for aggregation generally (compare, e.g., Fed. R. Civ. P. 23 with Fed. R. Civ. P. 14, 20, 42), Erbsen's terminology sought to articulate clearer principles limiting the certification of class actions for money damages.

By contrast, the Discussion Draft proposes a set of one-size-fits-all rules for aggregation generally. It recognizes different types of aggregated proceedings, but fails to differentiate the criteria for each type. The draft's attempt to fit all aggregated proceedings into the same structure results in distortion of Erbsen's meaning of finality, fidelity, and feasibility. In so doing, the Discussion Draft strays from Erbsen's stated purpose of these principles in the first place; namely, to establish a "resolvability" test under Rule 23 which would combine the existing Rule 23(b)(3) superiority and 23(a)(2) commonality tests to require a four-step analysis of how similarity and dissimilarity among putative class members' claims should affect certification. Erbsen states:

> First, the court would have to determine if there is a question of law or fact common to all class members that if answered would materially facilitate entry of judgment for or against the class. Second, assuming that such a common question exists, the court would have to determine if any questions of law or fact unique to individual class members could affect the propriety of entering judgment for or against them. Third, assuming that material

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70 Discussion Draft No. 2, § 1.01, Comment a.

> individualized questions exist, the court would have to determine if it could feasibly resolve the individual questions consistent with applicable substantive law governing claims and defenses before entering judgment. Finally, assuming that there is a feasible way to resolve individualized issues, the court would have to decide if doing so within a class action would be superior to using available alternative remedies. Class actions seeking damages under Rule 23(b)(3) would thus be permissible only if they were a superior method of feasibly adjudicating both the similar and dissimilar aspects of class members' claims to judgment under the substantive law governing claims and defenses.[71]

Furthermore, Erbsen suggests that finality, fidelity, and feasibility should set a minimum threshold for class certification. The three principles "set minimum parameters for rules guiding judicial discretion in assessing the similarity and dissimilarity of individual claims in a putative class action."[72]

By contrast, the Discussion Draft uses finality, fidelity, and feasibility to encourage aggregation of common issues when aggregate treatment of those issues will materially advance the disposition of multiple civil claims.[73] The draft defines "materially advance" to mean the resolution of common issues in the aggregate proceeding, such that other proceedings need not revisit those issues with regard to all or substantially all similarly situated claimants.[74] Contrary to Erbsen, the Discussion Draft expresses little if any concern over aggregating claims that fail to satisfy all three principles. Rather, the draft's "materially advance" standard suggests just the opposite by setting a far lower threshold for aggregation. Whereas Erbsen cites numerous illustrations that raise red flags concerning class certification (*see, e.g.,* Erbsen, pp. 1028-1030), the Discussion Draft ignores these illustrations and cites few cautionary illustrations in which aggregation is inappropriate.

I. FINALITY

Erbsen defines the finality principle in the context of class actions for money damages. A certified class action for money damages "should eventually result in an enforceable judgment resolving the claims of all class members."[75] The benefits of adjudication "do not fully accrue in cases where the court would be unable to enter a judgment resolving the dispute or ruling on the propriety and consequences of the contested conduct."[76] From this starting point, it logically

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71 Erbsen, p. 1081.

72 Erbsen, p. 1024.

73 Discussion Draft No. 2, § 2.03.

74 Discussion Draft No. 2, § 2.03, Comment a.

75 Erbsen, p. 1024.

76 Erbsen, p. 1025.

follows that "issue classes should be understood as injunction classes rather than damages classes."[77] It is important to understand the rationale for Erbsen's finality principle. He states:

> Similarity among claims facilitates crafting a judgment that specifies the rights of all class members, while dissimilarity may necessitate fact-intensive case-by-case inquiries into the propriety of judgment that would make class litigation difficult, if not impossible. Certification criteria must therefore assist the court in determining which proposed class actions can be litigated to judgment and which cannot, and which can be settled fairly based on the expected value of a final judgment and which cannot.[78]

Erbsen adds:

> [C]ourts should certify class actions seeking damages only when the individual questions of law and fact that remain after resolution of common questions can be definitively resolved in a final judgment establishing the rights and responsibilities of the plaintiffs and defendants.[79]

And:

> [W]hen a plaintiff asks a court to certify her as a representative of absent class members seeking damages, the court may do so only if it has a feasible plan for resolving factual and legal disputes regarding each element and defense applicable to each class member's claim and for eventually entering judgment for or against each class member. There must either be an opportunity for the parties to litigate individual claims or defenses, or a reason to believe that such an opportunity is not necessary to reach a judgment that accurately values class members' claims. . . . In practice, however, certification will not be possible when there is no manageable way of reaching a final judgment that resolves all factual and legal disputes relevant to each class member's entitlement to relief under applicable substantive law, and when one or more parties are unwilling to settle voluntarily.[80]

The Discussion Draft pays lip service to the same concept. The draft states that:

> [T]he goal of materially advancing the disposition of multiple civil claims thus relates closely to the aspiration behind aggregate

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77 Erbsen, p. 1031.

78 Erbsen, pp. 1027-1028.

79 Erbsen, p. 1033.

80 Erbsen, p. 1049.

> treatment in its ideal form—namely, that the determination of a common issue as to one claimant should resolve the issue as to all other claimants.[81]

Notwithstanding the foregoing, the Discussion Draft ignores the central thrust of Erbsen's analysis. Although the Discussion Draft notes that "there is no point to the aggregate treatment of common issues if such treatment will not alleviate the need to revisit the same issues in other proceedings",[82] it dilutes the finality principle by redefining the central question as whether, in exercising judicial discretion, "aggregate treatment of a common issue will materially advance the disposition of multiple civil claims."[83] Even as issue-based aggregation, the Discussion Draft further waters down the finality principle by defining it as no more than "aspiration" which, "in its ideal form—mainly, that the determination of a common issue as to one claimant should resolve the same issue as to all other claimants."[84] Furthermore, other language in the draft could be used to justify the opposite result, i.e., class certification of money damages claims in which aggregation does not guarantee finality. Section 2.03(c) says that in adopting a trial plan for the aggregate proceeding, the court should explain "how aggregate treatment will resolve fairly and efficiently the *common* issues identified" (emphasis added), but fails to discuss the importance of identifying the dissimilar issues, how the aggregated proceeding will resolve those issues, and how the existence of the dissimilar issues will affect the judgment to be entered at the conclusion of the case.[85] In this respect, the Discussion Draft ignores Erbsen's explanation of why the finality principle generally renders issue classes unsuitable in damages actions. Indeed, the draft's language, cited above, would completely subvert Erbsen's finality principle if it were applied to class actions for money damages.

II. FIDELITY

The Discussion Draft pays lip service to Erbsen's concept of fidelity, but then undermines the principle elsewhere. Erbsen defines the principle as follows:

> [A] class member may not receive a judgment in his or her favor unless he or she proves the substantive elements for the applicable cause of action and survives any applicable defenses.[86]

Erbsen argues persuasively that the procedural posture in which a claim is adjudicated should not alter the content of the elements of claims or defenses or the outcome of their application. This is the core of his fidelity principle:

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81 Discussion Draft No. 2, § 2.03, Comment a.

82 Discussion Draft No. 2, § 2.03, Comment d.

83 Discussion Draft No. 2, § 2.03, Comment a.

84 *Id.*

85 Erbsen, p. 1081.

86 Erbsen, p. 1024.

> [T]he procedural context in which a claim is adjudicated should not alter the content of these elements and defenses or the outcome of their application. . . . the merit of claims presented in a class action should be assessed using the same substantive rules that would apply if plaintiffs litigated their claims separately.
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> Class actions do not alter the basic proof-and-defense structure of adjudication. A class action merely changes the manner in which class members and defendants present the evidence and argument needed to prove or refute each of their claims for defenses. . . . Class actions do not—or should not—change the substantive elements of a claim, relieve classmembers of their burden of proof, or deprive defendants of their right to raise applicable defenses.[87]

Erbsen explains why the fidelity principle should be an essential prerequisite to class certification of claims for money damages: "dissimilarity creates subtle distortions in the presentation and assessment of claims and defenses that either inflate or dilute the perceived value of the overall class claim and are a significant source of inaccuracy in class adjudication and settlement."[88] He provides three important examples of such dissimilarities that are likely to distort the presentation and assessment of claims and defenses, which he describes as "cherry picking,"[89] "claim fusion,"[90] and "ad hoc lawmaking".[91]

Cherry picking enables plaintiffs to distort the value of cases by picking a "representative" case which is not representative of the whole. Claim fusion can distort the outcome by ratifying the invention a hypothetical aggregate plaintiff who does not in fact exist, thereby negating the effect of any distinctive characteristics of actual living plaintiffs. Ad hoc lawmaking occurs when courts ignore or distort inconvenient rules of law that pose impediments to aggregation of dissimilar claims. As Erbsen notes, "allowing class actions to modify substantive laws as an ad hoc incident to the convenient resolution of a particular case is not consistent with the customary detachment between rule-formation and rule-application in a democracy."[92]

> Allowing courts to bend substantive rules to the procedural needs of particular cases is thus inconsistent with the normal process of rulemaking and prone to prioritize the welfare of litigants over

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87 Erbsen, p. 1035.

88 Erbsen, p. 1003; *see also id.*, pp. 1009-1014.

89 Erbsen, pp. 1009-1011.

90 Erbsen, pp. 1011-1012.

91 Erbsen, pp. 1012-1014.

92 Erbsen, p. 1037.

> broader social welfare with undesirable distributive consequences.[93]
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> [A]llowing certification of a class to alter the substantive law applicable to claims and defenses arguably raises due process concerns by inhibiting defendants' ability to raise defenses that would be valid if plaintiffs pursued their claims individually rather than as a class.[94]
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> [C]lass certification should not transform an individual class member's losing claim into a winning claim, except in the sense that it may level the procedural playing field by giving class members access to better counsel and more resources with which to develop and pursue their claims."[95]

Erbsen also notes that, even when a class action is likely to settle, fidelity remains an essential constraint on class certification. "[I]f a settlement occurs solely because one or more parties fears the outcome of a trial that would be conducted in violation of the fidelity principle, the contractual law that the settlement creates might not be voluntary in any meaningful sense, and the negotiated contractual law would be no more legitimate than the ad hoc law whose threatened application motivated the settlement."[96]

Erbsen observes:

> A class should not be certified unless either: (1) proof of the named plaintiff's individual claim would also prove the claims of the absent class members based on the similarity between the representative and absentees, such that there is no need to inquire separately into the merit of each individual class member's claims; or (2) there is an appropriate litigation or negotiation mechanism for resolving individual questions unique to particular class members at some point between resolution of common questions and entry of judgment. Either way, the procedural device of certification should not circumvent resolution of individual issues

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93 Erbsen, p. 1039.

94 Erbsen, pp. 1039-1040.

95 Erbsen, p. 1041.

96 Erbsen, p. 1044.

> that would be salient under applicable substantive law if each class member's claim were tried separately.[97]

Here too, the Discussion Draft pays lip service to Erbsen's fidelity principle. The draft states:

> [Section 2.03] envisions the aggregation of common issues as operating seamlessly with substantive law in the sense of removing impediments to the fair and efficient resolution of those issues without altering their substantive content.
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> Aggregation must respect these substantive choices, for procedural rules generally exist to describe the available modes for adjudication of civil claims without themselves altering the content of substantive rights.[98]

Notwithstanding these statements, however, the draft subverts the fidelity principle by limiting fidelity to the substantive law pertaining to any "common issue". It states that aggregate treatment is possible "when a trial would allow for the presentation of evidence sufficient to demonstrate the validity or invalidity *of all claims with respect to a common issue under applicable substantive law,* without altering the substantive standards that would be applied were each claim to be tried independently."[99]

The Discussion Draft further undermines the very meaning of "fidelity" by saying simply that the content of substantive law should "influence" the decision whether to afford aggregate treatment.[100] Thus, fidelity becomes a mere discretionary factor, of uncertain significance, in deciding whether aggregation is appropriate. This is underscored by the inconsistency between Comments b and c to § 2.03. The latter says that aggregation "must" respect substantive law, whereas the former merely counsels that it "should". Under this reasoning, if a court were to decide that the efficiency of aggregated proceedings justifies aggregation even though the legal principles underlying the aggregated cases resulted in different outcomes in an aggregated proceeding, the Discussion Draft would presumably authorize aggregation notwithstanding the utter lack of fidelity to substantive law.

Erbsen and the Discussion Draft both should have confronted one other issue relating to the fidelity analysis. Both treat fidelity as relevant only with respect to "substantive law". It is not clear whether this also encompasses evidentiary or even procedural issues that may profoundly affect the outcome of a lawsuit. Erbsen notes that class actions "do not alter the basic proof-and-defense structure of adjudication." and "do not—or should not—change the

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97 Erbsen, p. 1045.

98 Discussion Draft No. 2, § 2.03, Comment c.

99 Discussion Draft No. 2, § 2.03, Comment c (emphasis added).

100 Discussion Draft No. 2, § 2.03, Comment c.

substantive elements of a claim, relieve class members of their burden of proof, or deprive defendants of their right to raise applicable defenses."[101]

However, aggregation of claims may create risks of unfair prejudice, either to plaintiffs or defendants, wholly apart from the rules of substantive law. *See, e.g., Zicherman v. Korean Airlines, Inc.*, 146 F.R.D. 61, 64 (S.D.N.Y. 1992) (plaintiff would be prejudiced by allowing another plaintiff to intervene in the same air crash lawsuit); *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 351-352 (2nd Cir. 1993) (evidentiary prejudice to defendants arising from consolidation of 48 asbestos claims where, for example, asbestosis sufferers who may live close to normal life spans were paired for trial with those suffering from terminal cancers such as mesothelioma and lung cancer). In order for fidelity to have any practical meaning in product liability cases, aggregation must take into account the possibility that evidence probative to an issue in one case could be highly prejudicial in another case; indeed, it is for this reason that some courts have bifurcated or even trifurcated issues in the same individual lawsuit. *See*, *Webster v. Boyett*, 269 Ga. 191, 496 S.E.2d 459 (1998); *General Motors Corp. v. Moseley*, 213 Ga. App. 875, 447 S.E.2d 304 (1994), *abrogated in part on other grounds* by *Webster, supra.*

Finally, the Discussion Draft contains a vague discussion about where "joints" at which courts may "carve" out issues for aggregate treatment.[102] The Draft states that aggregate treatment of common issues should be permitted "where applicable substantive law creates a 'joint' at which to separate a common issue concerning liability from issues of remedy."[103] The Draft further states:

> Substantive law defines the relationships among legal and factual issues — sometimes intertwining them and sometimes separating them cleanly so as to create a 'joint' at which aggregate treatment may carve.[104]

The Reporters' Notes in an earlier draft cited two Seventh Circuit decisions, both authored by Judge Posner, in support of this statement. *Hydrite Chemical Co. v. Calumet Lubricants Co.*, 47 F.3d 887 (7th Cir. 1995); and *Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995). The current draft cites only the latter case. Neither of the cases that employed the "carve at the joint" imagery supports the draft's attempt to liberalize the rules of aggregation of allegedly common issues. Indeed, *Hydrite Chemical* involved but a single claim, and the issue involved bifurcation, not aggregation. The court suggested that, notwithstanding the court's discretion in bifurcating issues the trial court had engendered confusion by bifurcating the issues of injury and damages. In *Rhone-Roulenc Borer*, the Seventh Circuit reversed the district court's certification of a nationwide class to decide negligence in one trial on behalf of all class members. Reversal was required because the trial court's attempt to "carve

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101 Erbsen, p. 1036.

102 Discussion Draft No. 2, § 2.03, Comment c.

103 Discussion Draft No. 2, § 2.04, Comment a.

104 Discussion Draft No. 2, § 2.03, Comment c.

out" the negligence issue would have required the same issues to be re-examined by subsequent juries before a judgment could be rendered.

The Discussion Draft appears to argue for an outcome at odds with the above cases. The draft states:

> Identity of a legal or factual inquiry across all claimants gives rise to the potential for aggregate treatment to serve the general goals of aggregation identified in § 1.03 while leaving issues of remedy for treatment on an individual basis.[105]

In other words, finality in terms of obtaining a final judgment from the aggregated proceedings is unnecessary as long as "aggregate treatment of a common liability issue would make the aggregate proceeding a riskier proposition for all interested persons, as compared to serial litigation of that issue in multiple individual lawsuits."[106] The Discussion Draft explains:

> Liability issues suitable for aggregate treatment under subsection (a) might encompass the entire range of elements necessary to establish the defendant's liability to all claimants or only particular elements of claims.
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> [T]he court should consider whether substantive law separates cleanly the common issues from remedial questions and from other issues concerning liability.[107]

The bottom line is that the Discussion Draft's treatment of the fidelity principle is inconsistent with Erbsen's and contains language of which could be used to justify aggregation even when aggregation would not be faithful to the legal standards applicable to the claim and defense of each case. The Discussion Draft therefore undercuts Erbsen's sensible assertion that class actions (or other aggregated proceedings, for that matter) "do not—or should not—change the substantive elements of a claim, relieve class members of their burden of proof, or deprive defendants of their right to raise applicable defenses."[108]

III. FEASIBILITY

Erbsen recognizes that there is a potential tradeoff between a court's administrative desire for efficient case management and the principles of finality and fidelity. It is the tension between these potentially conflicting forces that all too frequently causes courts to try to stuff dissimilar cases into a single aggregated proceeding by trivializing the dissimilarities. Erbsen thus

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105 Discussion Draft No. 2, § 2.04, Comment a.

106 Discussion Draft No. 2, § 2.04, Comment a.

107 Discussion Draft No. 2, § 2.04, Comment b.

108 Erbsen, p. 1035.

characterizes feasibility as requiring courts "to adjudicate class actions in conformity with principles 1 and 2 . . . within resource and management constraints."[109] He observes:

> The burdens of class litigation are particularly acute when cases involve both common and individualized questions of fact and law and the court respects the finality and fidelity principles. . . . if review of individual questions requires a mini-trial on thousands or millions of claims, doing so may be practically impossible.[110]

His proposed solution is to offer six factors for determining whether a management plan is feasible. These are:

> (1) the time necessary to implement the plan; (2) the ability of the parties to adduce the evidence necessary to resolve disputed questions; (3) the extent to which the plan relies on questionable predictions or assumptions about how various stages of the litigation are likely to proceed; (4) the cost of resolving claims relative to available resources; (5) the consistency of the plan with applicable constraints on procedure, such as constitutional or statutory requirements for a jury trial; and (6) the likelihood that certification would facilitate a voluntary settlement (as opposed to a settlement negotiated in fear of a trial conducted in violation of the principles discussed in this Part) that would obviate an extensive use of extensive judicial resources.[111]

The Discussion Draft diverges from Erbsen's proposal in several important respects. First, it focuses on the aggregate treatment of "common issues" rather than class actions, or civil actions in general. In so doing, it overlooks a central problem in issue-based aggregation; namely, whether aggregated treatment of "issues" in dissimilar cases can or will undermine the finality and fidelity principles as to the cases themselves.

Second, Erbsen couples the feasibility principle with the finality and fidelity principles, whereas the Discussion Draft simply says that aggregate treatment should occur only "with due regard for the institutional capacity of courts."[112] By decoupling the feasibility principle from the other two, the Discussion Draft would permit aggregation even when doing so might severely undermine or eradicate the equally important, but often countervailing principles of finality and fidelity.

The Discussion Draft offers three broad factors for the feasibility analysis in lieu of Erbsen's six. The draft's three factors are strikingly more nebulous than those proposed by Erbsen. Section 2.13 of the Discussion Draft states:

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109 Erbsen, p. 1024.

110 Erbsen, pp. 1046-1047.

111 Erbsen, p. 1048.

112 Discussion Draft No. 2, § 2.03, Comment e.

> (a) In ordering the aggregate treatment of a common issue or of related claims, the court should adopt a trial plan that explains
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> (1) the justification for aggregate treatment, as compared to the realistic procedural alternatives for treatment of the common issues;
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> (2) the specific procedures to be used in the aggregate proceeding to determine the common issue, insofar as aggregate treatment is so confined; and
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> (3) the anticipated effect that a determination of the common issue will have upon other proceedings on individual issues.
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> (b) In developing the trial plan described in subsection (a), the court should resolve any pertinent disputes concerning the feasibility of aggregate treatment.[113]

The principal difference between the Discussion Draft's three factors and Erbsen's six is the draft's elimination of any explicit recognition of the factors that might counsel against aggregation in the first place. Indeed, the draft's factors are couched in such a fashion that virtually any court could justify the feasibility of aggregating any "common issue" under almost any circumstance.

One example of the vagueness of the draft's three factors concerns the breadth of the weighing process courts should use in deciding whether an aggregated proceeding, such as a class action, is feasible. The Draft's first factor refers to "the justification for aggregate treatment as compared to the realistic procedural alternatives." However, greater specificity should be provided as to the "alternatives". For example, in some cases plaintiffs have brought class actions seeking to order a recall of a range of products that are regulated by a federal agency. In deciding the feasibility of the proposed aggregated proceeding, the court should explicitly consider issues such as primary jurisdiction; i.e., whether they should defer to a regulatory agency charged with the specific duty of making such judgments and which have the technical expertise to do so. *cf. In re Bridgestone/Firestone Inc., Tires Products Liability Litigation*, 153 F. Supp.2d 935 (S.D. Ind. 2001). Such factors are not acknowledged, either in Erbsen's article or in the Discussion Draft.

IV. CONCLUSION

The finality, fidelity and feasibility factors as articulated by Erbsen provide a lucid and fairly workable set of principles for deciding whether to certify class actions for money damages. It is regrettable that the Discussion Draft did not explicitly consider whether these same principles should extend to other kinds of class actions and to aggregated proceedings generally. Even as to consolidation of mass tort claims, it has been observed that the supposed efficiency of

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[113] Discussion Draft No. 2, § 2.13.

trying common issues is not cost-free, and results in 'bifurcation, trifurcation, and beyond' as to individual case issues. *See* Richard L. Marcus, Confronting the Consolidation Conundrum, 1995 B.Y.U. L. Rev. 879, 915-916 (1995).

Unlike the detailed criteria for aggregation for class actions under Fed. R. Civ. P. 23, the consolidation rule, Fed. R. Civ. P. 42 is extremely general. Rule 42 permits consolidation, "When actions involving a common question of law or fact are pending before the court" and when consolidation may "tend to avoid unnecessary costs or delay." Assuming *arguendo* that additional specificity and clarity is warranted for Rule 42, however, it is less clear that the same rules and principles should apply to both class actions and all other forms of aggregated proceedings. If different principles should apply, why does the draft use Erbsen's terminology? Conversely, if the same principles should apply, why does the draft consistently soften Erbsen's clear statement of those principles?

By watering down each of the three principles, the Discussion Draft has traded Erbsen's clear tripartite analysis for a nebulous, standardless set of rules with a far greater reach. Before adopting this draft, adequate justification should be given for making this giant leap. Thus, for example, Erbsen notes that even when there is a common question of law or fact in a proposed class action, it is important for the court to determine whether answering that question in an aggregated proceeding will materially facilitate entry of judgment for or against the class. He further notes that, even if such a common question exists, the court should determine if any question or law or fact unique to individual class members could affect the propriety of entering judgment for or against them and, assuming that material individualized questions exist, whether the court can feasibly resolve the individual questions consistent with applicable substantive law governing claims and defenses before entering judgment.[114] As Erbsen further notes:

> The existence of individualized issues of fact and law unique to the circumstances of particular class members thus does not *necessarily* preclude certification if the court has a plan for coping with individual factual and legal inquiries. In *practice,* however, certification will not be possible when there is no manageable way of reaching a final judgment that resolves all factual and legal disputes relevant to each class member's entitlement to relief under applicable substantive law, and when one or more parties are unwilling to settle voluntarily.[115]

Unfortunately, the Discussion Draft's focus on issue-based aggregation sabotages Erbsen's worthwhile objectives of finality and fidelity, and it renders feasibility devoid of any practical meaning.

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[114] Erbsen, p. 1081.

[115] Erbsen, p. 1049.

Chapter 3

Issue Certification

by Benjamine Reid and Matthew Allen[116]

This chapter comments on Discussion Draft No. 2 inasmuch as it endorses "issue certification." We note that Principles, under the Institute's policy, "assume the stance of expressing the law as it should be, which may or may not reflect the law as it is." We further understand that the purpose of a Principles project is to promote greater predictability and fairness by setting out broad principles of sufficient generality to command widespread assent. We respectfully suggest that Discussion Draft No. 2 and its treatment of "issue certification" do not promote greater predictability and fairness and do not set forth principles that command widespread assent. In short, they do not set forth the law as it is or should be. To the contrary, the draft Principles adopt an unwarranted and expansive view of the notion of "issue certification" that permits the certification of classes that ought never be certified. That in turn leads to unfairness and inefficiency and contributes to the phenomenon of "blackmail litigation."

I. ISSUE CERTIFICATION IN THE ALI DISCUSSION DRAFT

Chapter 1 of the Discussion Draft states that the "central purpose of aggregation" is to promote the "efficient use of litigation resources in the pursuit of justice under law." § 1.03(a). It then sets forth four "general principles" which should under gird any procedures for handling aggregate litigation. They are: (a) "respect the rights and remedies delineated by applicable substantive law"; (b) "facilitate legally binding resolutions"; (c) "protect the interests of parties, represented persons, claimants, and respondents"; and (d) "respect the institutional capacities of courts." § 1.03(b). Comment b to this section states that sometimes, the pursuit of efficiency advances these objectives and sometimes, these considerations require that the pursuit of efficiency be tempered.

In Chapter 2, the Discussion Draft identifies "common issues" as "those legal or factual issues that are identical or substantially identical in content across multiple civil claims, regardless of whether their disposition would resolve all contested issues in the litigation." § 2.02. It then states that "[p]rinciples for the aggregate treatment of common issues in litigation guide the exercise of judicial discretion to afford aggregate treatment of those issues, such that the resolution as to one claimant ideally will resolve the common issues as to all other claimants." It further states that "[C]ourts accordingly should consider whether the aggregate treatment of common issues will materially advance the disposition of multiple civil claims by comparison to other realistic procedural alternatives." § 2.03(a). The Discussion Draft states that "the court should determine whether common issues warrant aggregate treatment" and then "identify the scope of the preclusive effect of the aggregate proceedings." § 2.03(c).

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By framing the inquiry as to whether aggregate treatment is justified in terms of whether resolution of "common issues" will "materially advance the disposition of multiple civil claims," the Discussion Draft appears to have abandoned the present requirement of rules like Fed. R. Civ. P. 23(b)(3) that a court should decide whether aggregate treatment is warranted by engaging in a careful balancing of whether the common issues outweigh the individual issues.

This suspicion is confirmed by Comment a to § 2.03. It states that, by "materially advance," § 2.03(a) means "the resolution of common issues in the aggregate proceeding, such that other proceedings need not revisit those issues with regard to all or substantially all similarly situated claimants." Comment a to § 2.03. Likewise, the Discussion Draft's note emphasizes the aggregate resolution of common issues irrespective of the influence of individualized issues on the overall resolution of the dispute.

The Discussion Draft claims not to abandon the predominance requirement of existing law; it purports merely to "elaborate[], in a richer and more systematic fashion, current practices." Nonetheless, by framing the aggregation inquiry solely in terms of whether common questions materially advance the resolution of the litigation, rather than in terms of the present balancing between common and individualized issues, the draft sufficiently undermines the predominance requirement as to make it virtually superfluous. This is evident in the disparaging way the draft frames the predominance balancing test: [A]ggregation of liability and remedy issues in civil litigation should turn not upon a piling up of the common issues favoring aggregation and the individual issues to the contrary." Comment c to § 2.04.

The Discussion Draft admirably acknowledges certain "constraints" on aggregation:

> This Section posits that the inquiry into the appropriateness of aggregation in current practice is best understood in terms of the constraints that aggregation must respect. Aggregation generally should not serve as a backdoor method to alter the content of substantive law; it should have finality as to the common issues addressed; it should respect limitations of feasibility arising from the nature of courts as institutions; and it should protect the interests of all affected persons and parties.

At the same time, the basic thrust is in favor of aggregate treatment of common issues in the face of the logic that common issue certification would eviscerate the predominance requirement and compel certification of many cases that presently would not be certified. The Discussion Draft even contends that present law need not be changed to reach the desired goal. But this is only because the Discussion Draft comes down squarely on one side of a dispute among the courts as to the relationship between the predominance requirement of Rule 23(b)(3) and Rule 23(c)(4)(A).

The Discussion Draft's comment correctly states that the "precise relationship between the predominance requirement of Rule 23(b)(3) and the authorization for issue classes in Rule 23(c)(4)(A) has given rise to considerable confusion" in the courts and among commentators. It gives particular prominence, and apparent approval, to the Florida Supreme Court's decision to

afford issue-preclusive effect to classwide determinations of various common issues in future individual actions filed by members of the decertified class.[117]

In sum, while the Discussion Draft contains certain salutatory cautions and caveats, the basic thrust of the draft appears to be in favor of virtually unbridled aggregate treatment. As the draft more transparently puts it in the comment to § 2.04: "§ 2.03 lends greater precision to the predominance inquiry and coordinates it with the authorization for issue classes."

II. THE PRESENT STATE OF THE LAW OF ISSUE CERTIFICATION

Fed. R. Civ. P. 23(c)(4)(A), as presently structured, authorizes a court to allow a class action to be maintained with respect to particular issues. It simply states that "[w]hen appropriate, an action may be brought or maintained as a class action with respect to particular issues." As the Discussion Draft acknowledges, what this provision means is not nearly as clear.[118]

Does Rule 23(c)(4)(A) permit the certification of an "issue class" in a case that would not otherwise satisfy the Rule 23(b)(3) predominance requirement? Courts and commentators are split on the subject. On the one hand, the Fifth and Seventh Circuits, and several district courts, have responded that the rule does not permit certification of an "issue class" if the 23(b) requirements are not otherwise satisfied.[119] The Second, Fourth and Ninth Circuits, and other district courts, on the other hand, have ruled that certification of an "issue class" can occur even in the absence of (b)(3) predominance.[120] The Florida Supreme Court has embraced issue

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117 *See Engle v.* Liggett *Group, Inc.*, 945 So. 2d 1246 (Fla. 2006).

118 *See Rink v. Cheminova, Inc.*, 203 F.R.D. 648, 669-70 (M.D. Fla. 2001) (noting that Rule 23(c)(4)(A) is "less than clear" and that courts are "not in agreement on the relationship between" (b)(3) and (c)(4)(A)).

119 *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 744-46 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Cohn* v. *Massachusetts Mutual Life Ins. Co*., 189 F.R.D. 209, 217-218 (D. Conn. 1999) (adopting *Castano's* view of (c)(4)(A)); *Arch* v. *Am. Tobacco Co*., 175 F.R.D. 469, 496 (E.D. Pa. 1997) ("Plaintiffs cannot read the predominance requirement out of (b)(3) by using (c)(4) to sever issues until the common issues predominate over the individual issues."); *In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, -- F.R.D. --, 2007 WL 5223000 (S.D. Ill. 2007) (rejecting "relaxed view" of predominance); *Blain v. Smithkline Beecham Corp.*, 240 F.R.D. 179 (E.D. Pa. 2007) (same).

120 *See Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227 (9th Cir. 1996); *Gunnels v. Healthplan Servs.*, 348 F.3d 417 (4th Cir. 2003); *In re Nassau County Strip Search Cases*, 461 F.3d 219 (2d Cir. 2006); *Simon* v. *Philip Morris, Inc*., 200 F.R.D. 21, 28-31 (E.D.N.Y. 2001) (adopting *Valentin*o's approach); *Emig* v. *Am. Tobacco Co*., 184 F.R.D. 379, 394-395 (D. Kan. 1998) (embracing *Valentin*o's approach to (c)(4)(A) as authorizing "certification even if common issues do not predominate" but declining to certify on other grounds); *In re Tetracycline Case*s, 107 F.R.D. 719, 727 (W.D. Mo. 1985) ("What defendants decry as a dilution of the predominance requirement, however, appears to this court to be precisely what Rule 23(c)(4)(A) allows in the interests of flexibility and economies of adjudication.").

certification in a limited context, but—unnoted by the Discussion Draft—it is unclear whether that decision has broad precedential value.[121]

III. THE DISCUSSION DRAFT'S EXPANSIVE VIEW OF ISSUE CERTIFICATION SHOULD BE REJECTED

Admittedly, the debate over how (b)(3) and (c)(4)(A) should be applied does create uncertainty in the law. However, the Discussion Draft's approach of resolving the debate by taking an expansive view of (c)(4)(A) certification would make the law unfair by reading the predominance and manageability requirements of (b)(3) out of Rule 23. The Fifth Circuit recognized this potential for mischief in *Castano*, ordering the decertification of a sprawling issue class. The court explained:

> A district court cannot manufacture predominance through the nimble use of subdivision (c)(4). 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 house-keeping rule that allows courts to sever the common issues for a class trial. Reading rule 23(c)(4) as allowing a court to sever issues until the remaining common issue predominates over the remaining individual issues would eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.[122]

Under the expansive interpretation of Rule 23(c)(4)(A) advocated by the Discussion Draft, virtually all issue class actions may well satisfy the requirements for certification by definition, because non-predominating questions will have been sliced away. This is problematic for a number of reasons.

First, the expansive view of (c)(4)(A) certification allows courts to sidestep the carefully constructed safeguards built into Rule 23, certifying classes of individuals with disparate interests and values, who cannot reliably be ensured of adequate class representation. By focusing on certification in terms of issues rather than claims, the draft changes the calculus of jury decisions in class cases. For example, in an individual product liability action, a jury will consider issues of defect and general causation together with specific causation in reaching its verdict. In a certified issue class, these issues will not be considered together, but will be bifurcated into common and individual trials. Surely this is readily recognized as a change in the

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121 *Engle v. Liggett Group, Inc.*, 945 So. 2d 1246 (Fla. 2006). The Florida court noted that its decision to permit issue certification came after a lengthy phase 1 trial had been conducted and called it a "pragmatic solution" in a "unique" procedural posture "unlikely to be repeated." *Id.* at 1269-70 & n.1.

122 *Castano,* 84 F.3d at 745 n. 21.

substantive law requirements of the claim. But the teaching of the Supreme Court in *Amchem*[123] eschews such an approach.

The expansive view of issue certification perhaps embodied in the draft carries with it an additional Seventh Amendment Reexamination Clause right to jury trial concern. A bifurcation into common and individual elements would violate the Seventh Amendment if it required a second jury (the jury in the individual phases) to reexamine findings of the first jury (the jury deciding common issues).[124] The draft pays lip service to this notion in § 2.11 but admittedly casts these constitutional constraints more narrowly than some courts that have regarded the Reexamination Clause as a significant constitutional barrier to aggregation. Indeed, it views a concern in this regard to be "properly understood as a pragmatic one, not a constitutional one." Comment a to § 2.11.

An expansive view of issue certification in the name of efficiency also elevates the concern that a one-time, one-jury, one-roll-of-the-dice adjudication of an issue that might reasonably be found for or against the class could be erroneous. The Fifth Circuit noted in *Allison v. Citgo Petroleum Co.*[125] that "piecemeal certification" creates "unfairness to all" because of "increased uncertainties in what is at stake in the litigation." In the context of an immature tort, this would be particularly imprudent. According to the Manual for Complex Litigation, "[f]airness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units . . . until general causation, typical injuries, and levels of damages are established."[126] As a policy matter, it is a risky proposition to take the chance that "[g]etting things right the first time would be an accident."[127] As the Seventh Circuit observed in *Bridgestone/Firestone*, markets, unlike the single adjudication, central planning model of class adjudication, use "diversified decisionmaking to supply and evaluate information," and although this method looks inefficient from the planner's perspective, "it produces more information [and] more accura[cy]."[128]

Finally, also as a policy matter, an expansive view of issue certification contributes to the problem of "blackmail litigation." A number of courts have noted that "[c]lass certification significantly increases the number of unmeritorious claims and dramatically affects the stakes for defendants."[129] Even when claims are not meritorious, defendants are more likely to be found liable in class action litigation and the damages awards in such proceedings are significantly

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123 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997).

124 *Castano*, 84 F.3d at 751; *Cohn v. Mass. Mut. Life Ins. Co.*, 189 F.R.D. 209 (D. Conn. 1999); *In re Jackson Nat. Life Ins. Co. Premium Litig.*, 183 F.R.D. 217 (W.D. Mich. 1998).

125 151 F.3d 402, 442 n.17 (5th Cir. 1998).

126 Manual for Complex Litigation, Third § 33.26 (1995).

127 *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

128 *Id.*

129 *Liggett Group, Inc. v. Engle*, 853 So. 2d 434, 470 n.51 (Fla. 3d DCA 2003).

higher—simply by virtue of the class action device.[130] Even weak claims, if they survive a motion to dismiss, are usually settled for a premium because of the high risk of a jury verdict in a large class action.[131] As the Seventh Circuit has observed, however meritless a company may judge such a claim, defendants typically cannot "stake their companies on the outcome of a single jury trial."[132]

It is, therefore, for good reason that settlements in these cases have been referred to by a number of courts and commentators as "judicial blackmail."[133] The presence of these "blackmail settlements" is an abuse of the class action device which has led to public and business disapprobation of large class action lawsuits[134] and the passage of the Class Action

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130 *Id.* (citing Manual for Complex Litigation § 33.26 n.1056; Kenneth S. Bordens and Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 *Judicature* 22 (1989).

131 See Thomas Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules*, 184 table 40 (Federal Judicial Center 1996); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspectiv*e, 80 Cornell L. Rev. 941, 958 (1995) (noting that the costs and risks of trial induce settlement of more than 95% of all civil claims).

132 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); *see also In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768 (3d Cir. 1995).

133 *See, e.g., Rhone-Poulenc Rorer*, 51 F.3d at 1298; *Liggett*, 853 So. 2d at 470 n.5; Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973); Fed. R. Civ. P. 23(f), 1998 Committee Note ("An order granting certification . . . may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability"); *Parker v. Time Warner Entertainment C*o., 331 F.3d 13, 22 (2d Cir. 2003); *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc*., 259 F.3d 154, 192 (3d Cir. 2001). Even obviously frivolous filings are often settled, simply because they are "as costly to litigate as legitimate claims." *Developments in the Law—The Paths of Civil Litigation: IV. Class Action Reform: An Assessment of Recent Judicial Decisions and Legislative Initiative*s, 113 Harv. L. Rev. 1806, 1812 (2000); H.R. Conf. Rep. No. 104-369, at 32 (1995) (explicitly noting the high incidence of frivolous securities filings as a justification for the passage of the Private Securities Litigation Reform Act ["PSLRA"]).

134 *See, e.g*., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigatio*n, 100 Colum. L. Rev. 370, 371-372 (2000) ("Correspondingly, where 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."); Eric D. Green, *What Will We Do When Adjudication Ends? We'll Settle in Bunches: Bringing Rule 23 into the Twenty-First Centur*y, 44 UCLA L. Rev. 1773, 1775 (1997) ("More practically, from the defendants' perspective, class actions are the ultimate weapon of legal terrorism, launched by litigation-mad, bottom- feeding, money-hungry, professional plaintiffs' lawyers."); James A. Henderson, Jr., *Comment: Settlement Class Actions and the Limits of Adjudicatio*n, 80 Cornell L. Rev. 1014, 1021(1995) ("Rather than creating the appearance of a public confession of guilt, which might deliver a

Fairness Act. The draft does not take into account these public policy implications of its over-emphasis on the aggregation of claims. There is no articulated reason to disturb the careful balance struck by the authors of Fed. R. Civ. P. 23. Nor is there any stated reason for overturning over forty years of jurisprudence under the present structure of Fed. R. Civ. P. 23, a mature and well-developed body of case law, in favor of a controversial and disputed procedure which imposes no clear constraints on class certification.

In sum, liberalization of the requirements for aggregation of claims would have distinctly negative consequences not only for defendants, but for the integrity of our judicial system as a whole.

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lesson in morality, settlement class action agreements more closely resemble the payment of blackmail by a corporation whose very survival is threatened by what might well, if taken to trial, prove to be groundless claims.").

Chapter 4

The "Perfect Plaintiff" Problem

by Troy M. Yoshino[135]

In *Broussard v. Meineke Discount Muffler Shops, Inc.*, the United States Court of Appeals for the Fourth Circuit referred to a district court's de-emphasis of certain class action prerequisites as creating a "perfect plaintiff" problem; an issue that harmed the due process rights of both absent class members and defendants, as well as the integrity of the judicial system generally.[136]

Although ALI's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION is a noble effort, in its present draft form it also gives rise to the "perfect plaintiff" problem. This is primarily because the proposal in many sections of Discussion Draft No. 2 is to apply similar treatment to various forms of aggregate litigation. That is, although the Discussion Draft recognizes some distinctions between class actions and other forms of aggregate litigation,[137] it advocates the disregard of a number of well-established class action prerequisites when it addresses class action issues.

It would be a mistake to treat all forms of aggregate litigation the same. Joinder actions and class actions are very different, for example. Under the Federal Rules of Civil Procedure, joinder of parties is allowed wherever "feasible,"[138] and joinder of claims requires only commonality of limited issues.[139] For a class action to exist, however, several independent requirements must be established: (1) numerosity; (2) commonality of issues; (3) typicality; (4) adequacy of representation; and, in Rule 23(b)(3) class actions, (5) predominance of common issues and answers; and (6) superiority of the class action device. Thus, for example, established authorities such as the federal *Manual for Complex Litigation (Fourth)* give distinct treatment to class actions and other forms of aggregate litigation.

There are good reasons for this distinct treatment. It is a proven fact that joinder principles offer insufficient controls for class actions—and, perhaps most significantly, insufficient protections for absent class members who have no say in how their claims are litigated. As the Mississippi Supreme Court has now repeatedly affirmed, that state's practice of substituting joinder rules for more stringent prerequisites of the type seen in Fed. R. Civ. P. 23

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136 155 F.3d 331, 344 (4th Cir. 1998).

137 Discussion Draft No. 2 § 1.02 comments a & b, 1.04.

138 Fed. R. Civ. P. 19.

139 Fed. R. Civ. P. 20.

has been a miserable failure, often leading directly to the "perfect plaintiff" problem described in *Broussard*.[140]

Simply stated, without rigorous adherence to the class action requirements of Rule 23, there is a "real risk" that the "perfect plaintiff" problem will occur.[141] Thus, the Discussion Draft should be changed to reinforce the well-established requirements for class action litigation.

I. THE "PERFECT PLAINTIFF" PROBLEM, AS DEFINED IN *BROUSSARD*

Broussard was a putative class action in which ten current owners of Meineke Discount Muffler franchises sought to represent a class of "all persons or entities throughout the United States that were Meineke franchisees operating at any time during or after May of 1986."[142] Plaintiffs alleged a "raft of tort" and contract claims, arising from "Meineke's handling of franchise advertising."[143]

The district court granted class certification as plaintiffs had requested, but the Fourth Circuit reversed. The problem with the lower court's order was that

> plaintiffs enjoyed the practical advantage of being able to litigate not on behalf of themselves but on behalf of a "perfect plaintiff" pieced together for litigation. . . . [C]ourts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk, realized here, of a composite case being much stronger than any plaintiff's individual action would be.[144]

The facts of *Broussard* demonstrate that the "perfect plaintiff" problem can arise in three different ways:

1. Focusing on common issues, as opposed to also ensuring that those common questions have common answers that can be reached through common proof;

2. *De facto* claim shaving, leading to inadequate representation for segments of the class; and

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140 Mississippi has no equivalent to Fed. R. Civ. P. 23 or other class action rule, so it has used joinder rules similar to Fed. R. Civ. P. 20 to achieve a quasi-class action device. The Mississippi Supreme Court has recently observed on more than one occasion that the liberality of general joinder rules often leads to "the 'perfect plaintiff' problem." *Illinois Central R.R. Co. v. Gregory*, 912 So. 2d 829, 835 (Miss. 2005); *Janssen Phramaceutica, Inc. v. Armond*, 866 So. 2d 1092, 1101 (Miss. 2004)

141 *Broussard*, 155 F.3d at 345.

142 *Id.* at 334.

143 *Id.*

144 *Id.* at 344-45.

3. Isolated issue certification/consideration that diminishes defenses.

As discussed in more detail below, the Discussion Draft invites each of these problems.

II. THE DISCUSSION DRAFT GIVES RISE TO THE "PERFECT PLAINTIFF" PROBLEM IN CLASS ACTIONS

A. Focusing on Common Questions, as Opposed to Also Ensuring That Those Common Questions Have Common Answers That Can Be Reached Through Common Proof

1. Strict Enforcement of the "Common Answers Through Common Proof" Requirement Is Necessary to Avoid the "Perfect Plaintiff" Problem

As a general mater, the Discussion Draft focuses on common questions, disconnected from any requirement that a class action be predicated on the ability to obtain common answers through common proof on a class-wide basis. The Discussion Draft establishes a framework in which common questions are defined as those that "recur across multiple civil claims and are identical, or substantially identical, in the sense of calling for the same legal and factual determinations for their resolution."[145] There is no mention of common answers reached through common proof.

Even more troubling, the Discussion Draft suggests that courts should use a "comparative" analysis to come up with the best way to resolve any common questions that fall into the definition quoted above.[146] That is, the Discussion Draft could be interpreted to allow class actions whenever "efficiency" arguments can be made. The ambiguity in the Discussion Draft could be used as a license to certify class action cases, even where plaintiffs have not proven that due process safeguards and Rule 23 protections can be maintained.[147]

While some of the Discussion Draft's provisions may work in joinder cases, in the class action context, the framework espoused by the Discussion Draft will often lead to the "perfect plaintiff" problem. *Broussard* itself provides an example. In that case, there were numerous commonalities between the putative class members—*e.g.*, they were all franchisees of the defendant, and therefore all had been subject to defendants' policies; they had all signed a Franchise and Trademark Agreement ("FTA"); and they had all been subject to some alleged misrepresentations about franchise advertising. These commonalities gave rise to a number of important common questions, such as: (a) were class members defrauded; and (b) was the FTA breached? If a court believed that a class action was the "best" way to resolve these questions on an aggregate basis, the Discussion Draft's framework would allow for class certification.

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145 *See, e.g.*, Discussion Draft No. 2 § 2.02 & Comment c.

146 *Id.* § 2.03 & Comment a.

147 *Cf., e.g., id.* § 1.01 (promoting "efficiency" as an objective, but failing to preserve procedural due process protections, Rule 23-type protections, or other procedural rights).

In *Broussard*, however, the Fourth Circuit held that class certification was improper. Due process requires more than common questions; it also requires that plaintiffs demonstrate that common questions can be resolved with ***common answers proven through common evidence***.[148] Any lesser standard results in the "perfect plaintiff" problem. In *Broussard*, because the district court ignored the need for common answers proven through common evidence:

> Plaintiffs were allowed to draw on the most dramatic alleged misrepresentations made to Meineke franchisees . . . . And plaintiffs were allowed to stitch together the strongest contract case based on language from various FTAs . . . .[149]

The objective set forth in section 2.03(a) of the Discussion Draft—urging resolution of common questions by the "best" method of aggregate litigation—is particularly dangerous because such ambiguities in the Discussion Draft could be construed as a directive to come up with the most "efficient" way to resolve common issues, regardless of due process requirements or other well-established class actions prerequisites.

Even where common questions are present, class action litigation is sometimes precluded by due process and other protections, as common questions alone are not enough to protect the interests of absent class members and defendants. To provide an example: in *Sikes v. Teleline, Inc.*, the district court assumed that each plaintiff who played a fraudulent telephone game by dialing a 900 number was "injured."[150] Despite the common fraudulent practice, however, the Eleventh Circuit held that no class could be certified because some class members might have received a refund or credit, or otherwise refused to pay the fraudulent charges.[151] The Court of Appeals held that, to avoid the perfect plaintiff problem described by *Broussard*, absent class members must offer individualized proof of injury (*e.g.*, their telephone bills). The common practice was ***not*** enough to allow for creative resolution of the class claims on an aggregate basis.

In *Sikes*, the Eleventh Circuit held that "presumptions" employed by the lower court could ***not*** be used as to "shortcut" the class action requirement for common answers reached through common proof.[152] *Thorn v. Jefferson-Pilot Life Ins. Co.* is similar.[153] In that case, the federal court of appeals recognized the existence of common questions and the possibility that

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148 *See, e.g.*, *Thorn v. Jefferson-Pilot Life Ins. Co.*, 445 F.3d 311, 327 (4th Cir. 2006) (although it was theoretically possible for common questions presented in the case to have common answers proven through common evidence, plaintiffs were required to demonstrate that such circumstances actually existed).

149 155 F.3d at 344.

150 281 F.3d 1350, 1365 (11th Cir. 2002).

151 *Id.*

152 *Id.* at 1365-66.

153 445 F.3d 311 (4th Cir. 2006).

such questions might theoretically have common answers reached through common proof. But the court would ***not*** presume that what was theoretically possible would actually occur. To avoid the "perfect plaintiff" problem discussed in Broussard, the court required plaintiffs to actually prove the existence of common answers that could be reached through common proof.[154]

Under the Discussion Draft's framework, where focus on common answers through common proof is disavowed, the ruling on the class certification motions in *Sikes* and *Jefferson-Pilot* might have been markedly different—and, of course, contrary to the statutory and constitutional requirements for class actions that have been established in numerous cases.[155]

2. Statistical Evidence Gives Rise to the "Perfect Plaintiff" Problem Because It Is Not Common Proof.

The "perfect plaintiff" problem inherent in the Discussion Draft's disregard of the "common answers through common proof" requirement are exemplified by its ambiguous endorsement of statistical evidence as "common proof" meeting class certification requirements on liability issues and/or complex damage issues.[156] The current draft of the Discussion Draft would allow the use of statistical evidence if it "facilitate[s] . . . efficient handling [of a common question] on an aggregate basis."[157]

When statistics are used in class action cases, they often set up a particularly invidious "perfect plaintiff" problem. The Discussion Draft's commentary could open the floodgates to significant due process violations because statistical evidence is almost always more "efficient," as it provides a way of estimating answers without analyzing each piece of evidence. For this same reason, however, statistics cannot be a proper basis for class certification. At their very best, statistical studies indicate that many—but not all—class members fall within a certain group. As the Fifth Circuit has observed:

> It is evident that these statistical estimates deal only with general causation for [statistical studies] do not speak to a probability of causation in any one case; the estimate of relative risk is a property of the studied population, not of an individual's case. This type of

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154 *Id.* at 327.

155 *See also, e.g., Rollins, Inc. v. Butland*, --- So. 2d ---, 2006 WL 3686484, at *9 (Fla. Ct. App. Dec. 15, 2006) ("perfect plaintiff" problem arises if plaintiffs are allowed to proceed with class action simply by showing allegedly unlawful practice because defendants "will be unable to defend again individual claims where there may be liability); *Lott v. Westinghouse Savannah River Co.*, 200 F.R.D. 539, 564 (D.S.C. 2000) (despite common practice of discrimination, class could not be certified because putative class members were subject to different programs; the district court held that any other ruling would lead to a "perfect plaintiff" problem, as it would cause the jury to assume that every plaintiff had been subjected to every discriminatory policy that had been implemented in the different programs).

156 *Cf., e.g.*, Discussion Draft No. 2 § 2.02, Comment d; *id.* § 2.04, Comment c.

157 Discussion Draft No. 2 § 2.02, Comment e.

> procedure does not allow proof that a particular defendant's asbestos "really" caused a particular plaintiff's disease; the only "fact" that can be proved is that in most cases, the defendant's asbestos would have been the cause.[158]

Bluntly stated, "determining causation as well as damages by inferential statistics instead of individualized proof raises more than 'serious questions' of due process."[159] Among other things, statistical studies obviate a defendant's right to offer proof of individualized defenses and result in a situation where "there will inevitably be individual class members whose recovery will be greater or lesser than it would have been if [their claims] were tried alone."[160] Statistics often confuse the search for the truth because they substitute estimates for factual evidence and the truth regarding specific, individual claims. Stated in the words of Broussard, using an average or some other statistical composite allows plaintiffs "to strike [defendants] with selective allegations" and creates a "fictional composite" that masks "the disparate individuals behind the composite creation," thereby giving rise to the "perfect plaintiff" problem.[161]

Statistical evidence and other tools that some may view as authorized by the Discussion Draft's aspiration for efficiency are at the heart of the "perfect plaintiff" problem. The Discussion Draft's goal, while laudable in some senses, cannot become a basis to shortcut the fundamental principle that each plaintiff must prove his or her claim: "Even in the context of a class action, individual causation and individual damages must still be proved individually."[162] Courts have ***rejected*** the notion that "so long as [plaintiff's] mode of proof enables the jury to decide the total liability of defendants with reasonable accuracy, the loss of one-to-one engagement infringes no right of defendants."[163]

A defendant has a due process right to "an opportunity to present every available defense," including individualized defenses such as comparative fault and reliance.[164] The Discussion Draft should make these fundamental principles of due process clear. Class actions

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158 *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990).

159 *Presbyterian Church of Sudan v. Talisman Energy, Inc*., 226 F.R.D. 456, 473 (S.D.N.Y. 2005).

160 *Fibreboard*, 893 F.2d at 709.

161 155 F.3d at 345; *see, e.g.*, *Wagner v. Taylor*, 836 F.2d 578 (D.C. Cir. 1987) (statistics cannot be used where they "furnish[] merely a fragmentary picture which makes it difficult to comprehend the situation facing [each of the individual] members of [plaintiff's] proposed class").

162 *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319 (5th Cir. 1998) (rejecting judgments based upon statistical extrapolations because causation issues must be resolved individually in toxic tort class action); *Talisman Energy*, 226 F.R.D. at 473.

163 *Fibreboard*, 893 F.3d at 709.

164 *Phillip Morris v. Williams*, ___ U.S. ___, 127 S. Ct. 1057, 1063 (2007). *Williams* was a punitive damages case, but the due process precedent the Court relied upon, *Lindsey v. Normet*, 405 U.S. 56, 66 (1972), establishes that this right is in no way limited to that context.

can never be used to circumvent the rule requiring substantive proof—not merely a statistical estimation—of each plaintiff's claim. As numerous courts have held, class actions do "not create new substantive rights" or alter "substantive prerequisites to recovery under a given tort."[165] "Class actions are provided only as a ***means*** to enforce substantive law. Altering the substantive law to accommodate procedure [or aspirations of efficiency] would be to confuse the means with the ends—to sacrifice the goal for the going."[166] The Discussion Draft contradicts established due process principles to the extent it implies that statistical evidence, presumptions, or other shortcuts could be used as a substitute for common proof where a class action is the most "efficient" way—or even "the only realistic way"—of adjudicating claims on an aggregate basis.[167]

B. *De Facto* Claim Shaving Leads to Inadequate Representation for Segments of the Class

Although the "perfect plaintiff" problem is often perceived as a defense issue (since it short circuits due process protections in the class certification process),[168] many absent class members are also harmed by the "perfect plaintiff" problem—sacrificed in pursuit of larger attorneys' fee awards and headline-grabbing verdicts. Through the process of *de facto* claim shaving, stronger claims belonging to certain class members are de-emphasized, in favor of weaker claims that appear to be more uniform across the entire "perfect plaintiff" class and thus easier to certify for class treatment.

To take an example from *Broussard* again, that case involved several different categories of persons within the improperly certified class: former Meineke franchisees; current Meineke franchisees; and Meineke franchisees who had signed up for an Enhanced Dealer Program ("EDP"), which precluded damage claims but did not disallow certain restitutionary remedies.[169]

In constructing their "perfect plaintiff," class counsel pursued a damages remedy that disregarded the concerns of both (1) the current franchisees, who had an interest in "Meineke's continued viability [that] tempered their zeal for damages"; and (2) the EDP franchisees, who

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165 *Blaz v. Belfer*, 368 F.3d 501, 504 (5th Cir. 2004); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (class action device "shall not abridge, enlarge, or modify any substantive right"); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997); *Broussard*, 155 F.3d at 345.

166 *Washington Mut. Bank v. Superior Ct.*, 15 P.3d 1071, 1080 (Cal. 2001) (emphasis in original) (quoting *City of San Jose v. Superior Ct.*, 525 P.2d 701 (Cal. 1974)).

167 *Fibreboard*, 893 F.2d at 712.

168 *See, e.g.*, *Waste Mgmt. Holdings v. Mowbray*, 208 F.3d 288, 296 & n.4 (1st Cir. 2000) (criticizing *Broussard*, but focusing only on predominance issues and failing to recognize that "perfect plaintiff" problem is also driven by concerns about the adequacy of representation provided to absent class members).

169 *Broussard*, 155 F.3d at 338.

could not obtain the damages remedy.[170] Thus, many of the absent class members were harmed by class counsel's "perfect plaintiff" strategy.

In a "perfect plaintiff" situation, plaintiffs' counsel is allowed to obfuscate differences between putative class members. *De facto* claim shaving is a particular problem in "perfect plaintiff" cases because the obfuscation tactic is most common where individualized affirmative defenses exist. For example, in a case where some class members are subject to a contributory negligence defense, strict liability claims might be emphasized—even if those claims would be more difficult to prove and have a lesser probability of success, and even if some absent class members would (factually speaking) ***not*** be subject to the contributory negligence defense.

Thus, on numerous occasions, the Seventh Circuit "has indicated that the presence of even an arguable defense peculiar to the named plaintiff of a small subset of the plaintiff class may destroy the required typicality of the class as well as bring into question the adequacy of the named plaintiff's representation."[171] Many other examples abound.[172] In *Talley v. Arinc, Inc.*,[173] for example, plaintiffs argued for a class action by claiming a common practice and policy of employment discrimination. The court rejected class certification, however, because it recognized that putative class members were often claiming rights to the same position, or otherwise claiming discrimination when other putative class members were favored over them.[174] Stated another way, for some class members to win, other class members would have to lose. A "perfect plaintiff" certification would obfuscate this fact, and thus obviate the due process rights of many absent class members.

The Discussion Draft itself recognizes that class actions are fundamentally different than other forms of aggregate litigation, but is problematic because it buys into the theoretical ideal that class counsel are "agents" of absent class members and always act consistent with their interests.[175] In the real world, however, claim shaving is a real problem that arises because absent class members have very limited control over the litigation that is adjudicating their rights. Because of this limited control, greater protections for absent class members are needed in the next draft of the PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION.

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170 *Id.* at 338-39.

171 *J.H. Cohn & Co.*, 628 F.2d 994, 999 (7th Cir. 1980) (citing *Koos v. First Nat'l Bank of Peoria*, 496 F.2d 1162, 1164-65 (7th Cir. 1974)).

172 *See also, e.g., Gilpin v. American Fed'n of State, Cty., and Municipal Employees AFL-CIO*, 875 F.2d 1310, 1313 (7th Cir. 1989) (class action improper where claim pressed was "consistent with—and only with—the aims" of certain absent class members); *City of San Jose*, 525 P.2d at 712-13 (class action improper where certain types of nuisance damages were not pled to make stronger case for class action treatment).

173 222 F.R.D. 260 (D. Md. 2004).

174 *Id.* at 269-70.

175 Discussion Draft No. 2 § 1.02 & Reporters' Notes; *see also, e.g., id.* § 1.01, Reporters' Notes, Comment c (suggesting that absent class members should not have "party" status for any purpose).

C. Isolated Issue Certification/Consideration That Diminishes Defenses

As *Broussard* indicates, the "perfect plaintiff" problem is also particularly acute in the situation where isolated issues are adjudicated on an aggregate basis.[176] In many cases, isolated consideration of a particular issue results in the disregard of individualized defenses or issues. This manifestation of the "perfect plaintiff" problem is discussed in more detail in Chapter 3.

III. CONCLUSION

In the words of *Broussard*, "courts considering class certification must rigorously apply the requirements of Rule 23 to avoid the real risk . . . of a composite case being much stronger than any plaintiff's individual action would be."[177] To the extent, the Discussion Draft advocates anything less (or different) than rigorous application of Rule 23's requirements, it creates a substantial danger that the "perfect plaintiff" problem will arise in class action cases and fails to provide adequate protections for constitutional rights.

While ALI's aspiration to promote efficient resolution of aggregate litigation is generally laudable, efficiency can never be prioritized over justice, due process, and "the particular interests of the person whose possessions are" at issue in a lawsuit—*i.e.*, defendants and absent class members (who suffer through claim preclusion) in the class action context.[178] As the U.S. Supreme Court has repeatedly observed: "due process is not intended to promote efficiency or accommodate all possible interests . . . . [T]he Constitution recognizes higher values than speed and efficiency."[179]

Because use of "perfect plaintiff" certification harms absent class members, defendants, and the judicial system itself, the Discussion Draft should be changed to advocate rigorous adherence to requirements along the lines of those contained in Rule 23 of the Federal Rules of Civil Procedure and the United States Constitution.

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176 155 F.3d at 344.

177 *Id.* at 345.

178 *Fuentes v. Shevin*, 407 U.S. 67, 91 n.22 (1972).

179 *Id.*; *see, e.g.*, *United States v. Ross*, 456 U.S. 798, 842 n.13 (1982) ("Of course, efficiency and promptness can never be substituted for due process and adherence to the Constitution.") (Marshall, J., dissenting).

Chapter 5

Reexamination Under the Seventh Amendment

by Roswell Page III[180]

Section § 2.11 of Discussion Draft No. 2 is founded upon Reporters' Notes which reject the treatment of the Reexamination Clause of the Seventh Amendment by courts in two prominent cases, *In re Rhone-Poulenc* and *Castano*. The Reporters' Notes accept the premise that either the Reexamination Clause prohibits only the use of a subsequent jury on appeal, a limitation of no surviving practical significance, or that the clause is so meaningless that the Supreme Court may resolve the dispute on pragmatic utilitarian grounds in favor of aggregation of claims. The authorities cited in the Reporters' Notes provide thin support for these propositions while resort to a wider review of the available evidence reveals that the reporters are mistaken.

I. THE TEXT OF THE SEVENTH AMENDMENT

The Seventh Amendment provides:

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

Because the Reporters' Notes are premised upon rejection of the relevant holdings of *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995), and *Castano v. American Tobacco Co.*, 84 F.3d 734, 757 (5th Cir. 1996), it would be appropriate to enquire first how the text of the Seventh Amendment relates to the issue presented in those cases. In both cases, the trial court had approved a class action plan calling for one jury to determine some, but not all, facts necessary for a finding of liability, while subsequent juries would determine how the conduct considered by the first jury, if resolved against the defendant, should interact with other evidence in arriving at a final determination of liability, and, if appropriate, damages. Although follow-on juries would presumably be instructed to honor the determination of the initial jury, a resolution of comparative negligence by subsequent juries as envisioned by the trial court in *Rhone-Poulenc* and *Castano* would necessarily have required a reevaluation of the original evidence, with a reweighing of it in light of information not available to the first jury. In this circumstance, while it might be maintained that the verdict of the first jury remained in full force and effect in some formal sense, that could not be so in actual practice. Because to reexamine simply means a reexamination, and a reexamination is merely a second or new examination,

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Webster's Third New International Dictionary at 1907 (Merriam-Webster, Inc., Springfield, Mass. 1981), plans of aggregation involving multiple juries would contravene the literal text of the Reexamination Clause.

II. PRECEDENT

Recent circuit court precedent also fails to support the bold assertions of the Discussion Draft. The Reporters' Notes do not adequately describe the extent to which existing precedent under Rule 23 is contrary to the proposed position that reexamination prohibited by the Seventh Amendment can occur only on appeal. The Reporters' criticism of *Rhone-Poulenc* and *Castano* does not alter the fact that those cases represent the law of the circuit in two instances. Wright and Miller, Federal Practice and Procedure § 2390 (2d ed. 1999) (recognizing that several courts have found that it is a violation to submit the same issue to two juries) (citing, *inter alia*, *Castano* and *Rhone-Poulenc*).

Furthermore, no circuit has held that bifurcation of liability issues in class action litigation with proceedings before different juries would fail to even implicate the Seventh Amendment. Instead, the opposite proposition has been recognized. *See, e.g.*, *In re Simon II Litigation*, 407 F.3d 125, 140 (2d Cir. 2005) (unnecessary to reach Seventh Amendment argument in bifurcated class action); *Cooper v. Southern Co.*, 390 F.3d 695, 722 (11th Cir. 2004) ("Finally, as the district court noted, since the plaintiffs demanded a jury trial in this case, the parties were entitled under the *Seventh Amendment* to have all matters at law determined by a single jury before having decisions concerning equitable relief made before the trial court."); *Olden v. La Farge Corp.*, 383 F.3d 495, 509 n.6 (6th Cir. 2001), ("The defendant is concerned that bifurcation 'may deprive [it] of its Seventh Amendment right to jury trial.'…Indeed it might.") (*citing Rhone-Poulenc)*; *Bacon v. Honda of America Mfg., Inc.*, 370 F.3d 565, 569 (6th Cir. 2004) (denial of class certification which was based in part upon Seventh Amendment concerns upheld without separate discussion of that issue.); *Blyden v. Mancuso*, 186 F.3d 252, 271 (2d Cir. 1999) (bifurcated class action consideration of liability and damages violated Seventh Amendment reexamination clause because second jury would not be able to tell for what violations it was granting compensation.); *In re Paoli*, 113 F.3d 444, 452 (3d Cir. 1997) ("The Seventh Amendment requires that, when a court bifurcates a case, it must divide between separate trials in such a way that the same issue is not reexamined by different juries.'") (citing *Rhone-Poulenc*). *Robinson v. Metro-North Commuter R.R. Cos.*, 267 F.3d 147, 169 n.13 (2d Cir. 2001), cited by the Discussion Draft, is not to the contrary because that case presented no issue of successive jury verdicts on overlapping proof.

Thus, although the Reporters' Notes to Discussion Draft No. 2 § 2.11 make an unequivocal statement of constitutional law, that statement is contrary to text and to substantial recent circuit authority. The Discussion Draft rejects this authority by claiming to know the original intent underlying the Reexamination Clause. We should therefore turn to those historical claims.

III. HISTORY, TRADITION, CONTEXT AND INTENT.

Contrary to the repeated suggestion in the Comment, the term "on appeal" is nowhere to be found in the text of the Reexamination Clause. Although Article III of the Constitution

excited suspicion among anti-federalists by providing that "the Supreme Court shall have appellate jurisdiction, both as to law and fact," there is no robust evidence that the prohibitions lodged in the examination clause were intended to be limited to the use of a second jury on appeal. This is true in large measure because "[w]e have almost no direct evidence concerning the intention of the framers of the seventh amendment itself." Edith Henderson, *The Background of the Seventh Amendment*, 80 Harv. L. Rev. 289, 291 (1966). Furthermore, the ratification controversy which gave rise to the amendment simply revealed "that a general guarantee of the civil jury as an institution was widely desired, but that there was no consensus on the precise extent of its power." *Id.* at 299. While Justice Storey's opinion in *U.S. v. Wonson*, 28 F. Cas. 745, 750 (1812), does advert to concerns about appellate review of facts on appeal as providing a partial motivation for the Seventh Amendment, a broader principle is also recognized: "Now, according to the rules of the common law the facts once tried by a jury *are never reexamined*," except upon the grant of a new trial or following reversal on a writ of error. 28 F. Cas. at 750 (emphasis added).

Although cited in the Reporters' Notes, Professor Woolley's Iowa Law Review article did not argue that the Seventh Amendment's Reexamination Clause should be consigned to irrelevance by limiting its sweep to a simple prohibition of jury retrial on appeal. Patrick Woolley, *Mass Tort Litigation and the Seventh Amendment Reexamination Clause*, 83 Iowa L. Rev. 499, 510 (1998). While he did go so far as to claim that *Rhone-Poulenc* and *Castano* were wrongly decided, and "that the Reexamination Clause should not pose a serious obstacle to the use of issue classes," at 500, Woolley acknowledged, contrary to the position of the Comments and Reporters' Notes, that there are constitutional limits which must be respected:

> I do not contend that the use of issue classes is always constitutional. I agree that bifurcation violates the Seventh Amendment whenever it leads to "confusion and un-certainty," a possibility that should be considered case-by-case before overlapping issues are separated for trial. … I simply reject the view that the reexamination clause imposes an inflexible rule forbidding the separate trial of overlapping issues.

Id. at 502.

While we do not agree with Professor Woolley that the confusion and uncertainty problem can be as easily avoided as he thinks, it should be noted that the strongest advocate for a view of the Amendment as permitting consideration of overlapping proof cited in the Reporters' Notes does not fully support the sweeping treatment of the issue contained in the most recent Discussion Draft.

A confusion and uncertainty standard has been employed, however, in a separate context by the Supreme Court in *Gasoline Prods. Co. v. Champlin Co*., 283 U.S. 494 (1930). There the Court considered the extent to which the Seventh Amendment permits a retrial on remand following reversal of a jury verdict to be limited to the single issue of damages on which the first jury had been misinstructed.

The Court began its analysis by noting "that at common law there was no practice of setting aside a verdict in Part." 494 U.S. at 497. It then recognized that "[t]he Massachusetts courts early modified it to permit trial of less than all the issues of fact when they were clearly separable" and that this rule had grown to prevail "in the New England states." 283 U.S. 497-98. Quoting Lord Mansfield for the proposition that the common law rule was one of form, the Court declared that "the Constitution is concerned, not with form, but with substance," and approved the Massachusetts practice for use in the Federal Courts, 283 U.S. at 498-99, subject to an important qualification:

> where the practice permits a partial new trial, it may not properly be resorted to unless it clearly appears that the issue to be retired is so distinct and separable from the others that a trial of it alone may be had without injustice. Here the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial.

283 U.S. at 500. This rule is a well established tradition which can significantly limit class action bifurcation if it is held to inform the judiciary on the limits of Rule 42(b), as held by the Fifth Circuit in *State of Alabama v. Blue Bird Body Co*., 573 F.2d 309, 318 (1978). Judge Posner clearly tied *Rhone-Poulenc* to this line of authority. 51 F.3d at 1303 (citing, *Gasoline Products Co.* and *Blue Bird*).

If, as should be the case, this rule represents an element of the substantial right to a civil jury under the Seventh Amendment, there is no principled reason why State decisions on the subject do not provide evidence concerning the contours of the right despite the fact that the Seventh Amendment does not itself apply to the States. *See, e.g*., *Gray v. Green Constr. Co. of Indiana, Inc*., 263 S.C. 554, 211 S.E.2d 871 (1975) (partial reversal not appropriate where, for example, a different verdict might have been rendered against the remaining defendant if the jury knew that defendant would be solely liable.).

IV. PRAGMATIC CONSIDERATIONS

Comment d of § 2.11 of Discussion Draft No. 2 rests upon a theory that the appeal to "Functional Considerations" in *Markman v. Westview Instruments, Inc*., 517 U.S. 370, 388 (1996), "[w]here history and precedent provide no clear answers," may warrant a conclusion that the Seventh Amendment should be interpreted to permit the supposed efficiencies of aggregation. It is a matter of some doubt that the unanimous decision in *Markman* takes us much beyond its own patent law context. *See* Arthur J. Miller, *The Pretrial Rush to Judgment: Are "The Litigation Explosion," "Liability Crisis," and "Efficiency" Clichés Eroding Our Day in Court and Jury Trial Commitments,* 78 N.Y.U. L. Rev. 982, 1088-1089 (2003) (agreeing that *Markman* "is essentially a patent case.").

It should first be noted that history and precedent are in accord on three points: (1) the substance of jury trial is to be preserved; (2) the Reexamination Clause applies to successive *nisi* juries and not only to juries on appeal; and (3) partial jury retrial is limited to severable issues.

All three conclusions are supported by *Gasoline Products* and that case itself rested upon a strong judicial tradition in insisting on the third point.

Furthermore, the "Functional Considerations" relied upon in *Markman* do not consist of defuse notions of efficiency; nor should they. Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 Minn. L.R. 639, 671 ("clearly the anti-federalists were not arguing for jury trial on the ground that it was more efficient"). Instead, they rest upon perceptions of the relative expertise and competence of judges and juries, which suggest that permitting a judge to discharge the traditional role of construing a document contributes to the reliability of the process. There is no reason to believe that atomizing issues traditionally submitted together under the general issue and then having the same evidence reexamined by successive juries would increase the reliability of the jury system.

It should also be remembered that any claim that successive jury consideration of overlapping evidence actually results in greater efficiency is extremely weak. As the Fifth Circuit noted in *Castano*, trying the same issues over "may be a waste, not a savings, in judicial resources." 84 F.3d at 749. Any increase in efficiency would occur only if the plaintiffs proposed an issue class which defendant had a reasonable chance of winning and defendant then won it or if the certification of an issue class compelled defendant to settle without regard to the merits of its defense. The latter circumstance is a disquieting form of efficiency which *Castano* notes has been called "judicial blackmail." Interpreting a constitutional provision whose overreaching purpose is the preservation of the substance of trial by civil jury as at common law to accommodate such a result seems perverse.

In the end, the only approach which is faithful to the purpose, and precedent is to decide what the substantial right to a civil trial by jury at common law necessarily and minimally entails. *See In re Fiberboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (at some point innovation in procedure alters substantive principle.). When facts are not individually submissible by special interrogatory, but must be submitted on the general issue they were tried to one jury at common law. It is difficult to maintain that the substance of that experience has been preserved if various facts which are interwoven in such a way that they may affect how a jury evaluates the general issue as a whole are separated for decision in isolation by more than one jury or are considered more than once. As a consequence, it should be concluded that multiple juries "may not decide factual issues that are common to both trials and essential to the outcome." *Houseman v. United States Aviation Underwriters*, 171 F.3d 1117, 1126 (7th Cir. 1999). If this is true, the requirement to cut at the joint is not simply a matter of prudence within the informed discretion of the trial court but is constitutionally compelled just as Judge Posner thought.

Chapter 6

The Constitutional Impediments to Aggregating Punitive Damages

by E. Paul Cauley, Jr.[181]

Much has been written about the problem of multiple awards of punitive damages against a defendant, arising from a single course of conduct affecting many plaintiffs. By combining, or, to use the favored term, "aggregating," all potential punitive damages claims, some courts and commentators have offered the mandatory class action as a solution to this multiple-punishment problem.[182] They argue that aggregation ensures the defendant is punished only once for its entire course of conduct. The procedure is also said to benefit plaintiffs by eliminating wide variations in punitive damage awards whereby the first claimants to sue reap large windfall verdicts, depleting the resources needed to satisfy the claims of later plaintiffs.[183]

At the outset, however, one is compelled to wonder just how serious the multiple-punishment problem really is. Repeated awards of punitive damages, though raising serious theoretical concerns, have not, in reality, operated to limit the award of punitive damages in any particular case. Few, if any, litigants have been denied punitive damages *because* the defendant's punishment has reached its constitutional maximum for the entire course of conduct. Moreover, recent Supreme Court authority now limits the jury's ability to punish. Punitive damages may be assessed only for the harm suffered by the particular plaintiff. That largely eliminates the danger of repeated, excessive punishment.

But whether or not multiple punishment is, practically speaking, a real concern, the aggregation of punitive awards is not the solution. Aggregation not only fails to correct the perceived danger of multiple punishment, it would create insurmountable constitutional difficulties in the bargain, violating the constitutional rights of the very defendants the solution was designed to protect. Indeed, aggregation of punitive damages raises a spate of due process and other constitutional questions for defendants, and even threatens the rights of class members.

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182 See *In re Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000); Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 Cal. R. Rev. 114 (May 2004); 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, 465-72 (1989); Richard B. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 Fordham L. Rev. 37, 61 (1983).

183 See generally, Semra Mesulam, *Collective Rewards and Limited Punishment: Solving the Punitive Damages Dilemma with Class*, 104 Cal. L. Rev. 1114 (May, 2004).

Mandatory, aggregated punitive damages schemes divorce the award of punitive damages from the merits of the individual case. Indeed, in order to function as intended, they must do so. This profoundly changes the nature of the litigation, impermissibly altering the parties' substantive rights, both by eliminating defenses that would normally be available and by ignoring the real differences among punitive damages claims, even those claims arising from the same course of conduct.

Moreover, mass litigation of punitive damages issues makes it impossible for the courts to perform the individualized analysis necessary to evaluate whether a punitive damages award is excessive under state and, especially, federal constitutional law. Under recent Supreme Court authority, the defendant has a due process right to effective and meaningful review of a punitive damage award because such verdicts serve the same purposes as criminal punishment. This alone should preclude class or other aggregate litigation of the punishment issue.

In addition to these due process concerns, class litigation/aggregation of punitive damages raises a number of other constitutional issues. As the Supreme Court's recent opinions make clear, there are limits to every state's regulatory authority. States may not punish actions outside their borders not directed to their residents. Most nationwide class actions would violate this principle. Further, the Constitution limits a state's ability to apply its law to a dispute with which it has insufficient contacts. Accordingly, most state court nationwide class actions would, necessarily, run afoul of settled constitutional law.

Finally, any aggregation scheme would violate the Reexamination Clause of the Seventh Amendment. The issue of defendant's liability to a particular claimant is so intertwined with the imposition of punitive damages that the same jury likely will be required to decide both issues. As a practical matter, this makes constitutional classwide litigation of punitive damages impractical, if not impossible, in virtually every case.

In short, even assuming that multiple punishment is more than just a theoretical problem, aggregation is not the answer.

I. AGGREGATION DEPRIVES LITIGANTS OF THEIR DUE PROCESS RIGHTS

A. The Aggregation Model Violates the Right to Present Individual Defenses

Procedure is the servant of the substantive law, not its master. Thus, any procedural innovation must leave the rights of the parties intact. The Supreme Court has cautioned that the class action form may not function to alter the substantive law.[184] Similarly, the Rules Enabling Act[185]—which guarantees the availability of defenses in a class action to the same extent they are permissible in an individual case—does not allow procedural devices to enlarge or restrict the parties' rights. This subordination of procedure to substantive law has a constitutional dimension as well. Aggregate litigation that effectively dispenses with the proof necessary for any

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184 *Amchem Prods. v. Windsor*, 521 U.S. 591, 613 (1997); see also *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999).

185 28 U.S.C. 2072(b).

individual to recover "infringes … upon the separation of powers between the judicial and legislative branches."[186]

By definition, the aggregation of punitive damages through class actions or similar devices operates to change the parties' substantive rights. Current law permits recovery of punitive damages only where the claimant proves his or her specific, substantive claim. Although punitive damages serve the social function of a punishment and deterrence,[187] they are not awarded in the abstract. The plaintiff is required to prove the defendant committed the underlying tort, and punitive damages are only available for wrongs done, and harm inflicted upon, a particular claimant:[188]

> Under the historical conception, punitive damages are punishment for the wrong done, and the harm caused, to a particular individual. Punitive damages for harming an individual are not, however, recoverable in every instance in which that individual suffered harm as the result of the defendant's wanton conduct. Rather, they are punishment for the legal wrong—for the individual tort, and not for the wrongful conduct in the abstract—they remain to this day recoverable only when the plaintiff can successfully establish the underlying tort. That is to say, they are recoverable only when the plaintiff can prevail on the underlying cause of action for compensatory damages.[189]

In other words, punitive damages are an additional remedy rather than a separate cause of action.[190] Accordingly, courts do not award punitive damages unless the plaintiff prevails on the merits of the underlying claim. And a claim for punitive damages will be defeated even if the defendant prevails on a non-substantive defense unrelated to its own conduct, such as a statute of

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186 *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990). The court also noted that a federal court procedure which operates to alter state law substantive law would violate the *Erie* doctrine. See also, Martin H. Redish, *Class Actions and the Democratic Difficulty, Rethinking the Intersection of Private Litigation and Public Goals*, 2003 U. Chi. Legal F. 71, 73 (noting that class litigation that alters the substantive law undermines American democracy by amending the law without democratic processes).

187 *State Farm Mutual Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW North America, Inc. v. Gore*, 517 U.S. 559, 568 (1996).

188 See generally, Thomas Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 652-53 (February, 2003).

189 *Id*. at 652. Indeed, under the Supreme Court's most recent decision, the jury may not punish a defendant for harm to others who have been harmed by the course of conduct, because those others are not before the court and the defendant has no effective way to defend against the non-plaintiffs' claims. *Philip Morris U.S.A. v. Williams*, 127 S. Ct. 1057, 1063 (2007).

190 *Hassoun v. Cimmino*, 126 F. Supp. 2d 353, 372 (D.N.J. 2000); *Moskovitz v. Mt. Sinai Med. Ctr.*, 635 N.E.2d 331, 342 (Ohio 1994); *Schippel v. Norton*, 16 P. 804, 807 (Kan. 1888).

limitations bar[191] or contributory negligence.[192] Indeed, almost all jurisdictions require the claimant to recover some compensatory damages to sustain a punitive damages award.[193]

Hence, permitting punitive damages to be assessed *before* a determination of liability to particular claimant places "the cart before the horse."[194] The entitlement of any claimant to punitive damages has yet to be established. Even if the defendant's conduct is reprehensible enough to merit punishment, the law does not impose punishment except in favor of an individual claimant who has prevailed on his or her individual, underlying, tort claim. Any aggregation scheme that ignores this basic rule changes the substantive law.

Indeed, many aggregation schemes are proposed precisely because defendants would not be punished—or as often or severely as the proponent would like—were each claimant required to establish his or her individual right to recover. Abolishing the need to prove individual entitlement to punitive damages is regarded as an advantage of such schemes. For instance, Judge Weinstein's opinion in *Simon II*[195] expressly *recognized* that, in many cases brought by individual smokers, tobacco companies had *prevailed* on the merits. He nonetheless ordered a "free-floating" punitive damages class without the need for any plaintiff to show he or she had been the victim of the underlying tort or was entitled to recover compensatory damages.[196] Presumably, even those class members who had *lost* their individual lawsuits would have been entitled to share in the punitive damages recovery. Similarly, the *Engle* trial plan proposed to award over $100 billion in punitive damages to the class, though only two of the named plaintiffs had proven their right to a tort recovery.[197]

Judge Weinstein attempted to justify this approach reasoning that punitive damages "need not in theory be tied to any specific monetary harm" because "their purpose is primarily deterrence and compensation to society for uncompensated external costs of the defendants' delicts."[198] The rationale blithely ignores the fact that punitive damages do not stand alone, nor "float" by themselves under any body of law.[199] Inevitably, they are tied to the fate of the

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191 *Terry v. Tyler Pipe Indus. Inc.*, 645 F. Supp. 1194, 1198 (E.D. Tex. 1986); *Fisher v. Space of Pensacola, Inc.*, 483 So.2d 392, 395-96 (Ala. 1986).

192 *Tucker v. Marcus*, 418 N.W.2d 818, 823-29 (Wis. 1988); *Williams v. Carr*, 565 S.W.2d 400, 402 (Ark. 1978).

193 *Liggett Group Inc. v. Engle*, 853 So.2d 434, 451-452 (Fla. App. 2003).

194 *Engle*, 853 So.2d at 450.

195 *In re Simon II Litigation*, 211 F.R.D. 86 (E.D.N.Y. 2002).

196 *Id*. at 109.

197 *Engle*, 853 So.2d at 441-442.

198 *Simon II*, 211 F.R.D. at 109.

199 And an expansive reading of the "potential harm" that the defendant's conduct could have caused will not save an aggregation scheme. The potential harm that can constitutionally anchor a punitive damages award is additional, unmaterialized, harm to persons who have

individual claimant's claim. Punitive damages rise or fall with the underlying tort being pursued by that claimant.

Therefore, the Weinstein model is constitutionally infirm. If the substantive law provides defenses that might defeat the punitive damages claim, the court may not foreclose those defenses through the vehicle of mass litigation or other aggregation procedure. "Basic to the right to a fair trial … is that each party have the opportunity to adequately and vigorously present any material claims and defenses."[200] Hence, "Due process requires that there be an opportunity to present every available defense. If parties were barred from presenting defenses and affirmative defenses to claims which have been filed against them, they would … be unconstitutionally deprived of their opportunity to be heard … ."[201]

Most recently, in *Williams*, the Supreme Court held a State cannot impose punitive damages to punish a defendant for injuries to non-parties. *Williams* involved a single plaintiff suing a tobacco defendant. The jury awarded $79 million in punitive damages, based in part on plaintiff's urging the jury to punish the company for all the harm it caused plaintiff's decedent. The high court roundly condemned this 'informal' or 'phantom' class action for punitive damages, in which the plaintiff exhorted the jury to punish the defendant for harm to Oregon smokers injured by the conduct. *Williams*'s rationale categorically forbids classwide litigation of punitive damages claims when that procedural mechanism deprives the defendant of its due process rights, creating the risk of arbitrariness, uncertainty and lack of notice.[202] In particular, *Williams* held defendants cannot be deprived of the opportunity to present every available *individualized* defense to the claims of the various plaintiffs.[203] "[A] defendant threatened with punishment for injuring a non-party victim has no opportunity to defend against a charge, by 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."[204]

A punitive damages aggregation scheme creates the very result that *Williams* condemned: it permits the award of punitive damages even to those class members whose claim could be defeated by individualized defenses. As *Williams* observed:

> [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 upon nonparties or those whom they directly represent, i.e.,

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actually been injured by the defendant's conduct. *Philip Morris U.S.A. v. Williams*, 107 S. Ct. 1057, 1063 (2007); *State Farm v. Campbell*, 538 U.S. at 424.

200 *Southwestern Refining Co. v. Bernal*, 22 S.W.3d 425, 437 (Tex. 2000).

201 *Philip Morris U.S.A. v. Williams*, 127 S. Ct. 1057, 1063 (2007); *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (quoting *American Am. Sur. Co. v. Baldwin*, 287 U.S. 156, 168 (1932)). See also *Arch v. American Tobacco Co.*, 175 F.R.D. 469, 489 (E.D. Pa. 1997).

202 *Id.*

203 *Philip Morris U.S.A. v. Williams*, 127 S. Ct. 1057 at 1063.

204 *Id.*

> injury that it inflicts upon those who are, essentially, strangers to the litigation. For one thing, the Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'[205]

Williams' condemnation of the *informal* or 'one-way' punitive damages class action applies with equal force to the vast majority of formal, classwide punitive damage claims. Under the aggregation model, which by definition streamlines the lawsuit, individualized defenses become impossible. In effect, defendants are required to defend against phantom, hypothetical plaintiffs rather than actual people in specific fact situations. Defenses tailored to a specific claimant, such as lack of reliance, the limitations bar, and other claimant-specific questions are effectively eliminated, depriving the defendant of due process of law. If a 'phantom class action' such as *Williams*, brought by a single plaintiff, is constitutionally improper, so too is its big brother, the formalized aggregation model, because it suffers from the identical flaws. Any procedural model that operates to eliminate defenses is constitutionally infirm.

But there are additional reasons why *Williams* sounds the death knell for aggregation of punitive damages:

> [T]o permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did the injury occur? The trial will not likely answer such questions as to nonparty victims. And the fundamental due process concerns to which our punitive damages cases refer—risks of arbitrariness, uncertainty and lack of notice—will be magnified.[206]

Moreover, even before *Williams*, appellate courts reviewing certification and other aggregation orders generally rejected attempts to allow classwide litigation of punitive damages issues when that procedure relieves each claimant from the requirement of proving entitlement to relief. In *Engle*, for example, the court reversed a $145 billion punitive award predicated on a finding of "general liability" and compensatory damages awarded to two class members. The court noted that Florida law and federal due process require a defendant to be found *liable* to the claimant *before* punishment is imposed.[207] Similarly, *Allison v. Citgo Pet. Corp.*,[208] rejected the plea that punitive damages could be assessed based upon a pattern or practice of discrimination against a group as a whole, because actual liability to individual class members had yet to be established:

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205 *Id.*, citations omitted.

206 *Id*., citations omitted.

207 *Id*. at 451.

208 151 F.3d 402 (5th Cir. 1998).

> [B]ecause punitive damages must be reasonably related to the reprehensibility of the defendant's conduct to the compensatory damages awarded to the plaintiff, recovery of punitive damages must necessarily turn on the recovery of compensatory damages.[209]

There may be no particular constitutional objection to including punitive damages in an ordinary class action for money damages that keeps "the cart before the horse" by requiring individual claimants to prevail in their actual damages claims and to overcome individualized defenses. But in most cases, class actions taking this approach would be unlikely to satisfy the class certification requirements of Rule 23(b)(3). That is a real, and largely insoluble, dilemma.

B. The Aggregation Model Eliminates Important Differences Among Claims and Thereby Deprives Defendants of Substantive Defenses

Not all punitive damages claims are created equal. In most cases, classwide or aggregate imposition of punitive damages will violate due process rights by failing to recognize variations in the quality of the various punitive damages claims. Even when an entire class allegedly has been injured by the same course of conduct, the "entitlement"[210] of individual class members to punitive damages, and the *amount* of permissible damages (under state law or constitutional standards), is not usually uniform.

> It is often the case that the blameworthiness of the defendant's actions varies among particular victims. In product liability cases, for example, a defendant's conduct toward customers who purchased its product at a time when the defendant knew and concealed evidence that the product was defective is far more culpable than its conduct toward customers who purchased the product either before the company was aware of the defect or after the dangers associated with the product became common knowledge. Similarly, where a defendant is accused of engaging in a course of fraudulent conduct, its actions toward some victims may be far more reprehensible than its actions toward others. A bogus telephone psychic, for example, commits a much more

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209 *Id.* at 417-18 (citations omitted). *See also Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 97 (W.D. Mo. 1997); *Philip Morris Inc. v. Angeletti*, 752 A.2d 200 247 (Md. 2000). A notable recent exception is *Wal-Mart Corp. v. Dukes*, 474 F.3d 1214 (9th Cir. 2007) where the court affirmed the certification of a class action and permitted adjudication of the punitive damages claims on a class-wide basis. The opinion's disregard for the possibility that individual defenses might defeat a claim for punitive damages arguably violates *Williams*.

210 "Entitlement" is used loosely in the sense of "ability to recover. Under most States' punitive damages law, a plaintiff has no "right" to punitive damages even if the defendant is found to have committed the underlying tort. By definition, the award of compensatory damages fully compensates plaintiff for all the harm caused. See *State Farm Mut. Auto. Inc. Co. v. Campbell*, 538 U.S. at p. 416, 419. Punitive damages, by contrast, serve the *State's* interest in punishing especially egregious conduct and deterring its repetition. *Id*. at 416.

> culpable act by telling a desperate and exploitable victim of domestic violence that, according to the stars, her abuser will change his ways, than by telling a lovelorn college student that someday he will meet a tall, dark stranger. Thus, even if the defendant's conduct toward one plaintiff calls for punitive damages, it may not follow the defendant should be punished (or punished to the same degree) for the wrongs done to all of those who were harmed by its actions.[211]

A one-size-fits-all approach prevents the parties from exploring the very real differences that typically exist among the claims of the various class members. Thus, the court in *In re Copley Pharm. Inc.*[212] refused to permit a punitive damage class, rejecting the suggestion that whether defendant acted with the requisite mental state could be litigated on a class-wide basis:

> As attractive as this proposition is, punitive damages are measured, in part, by how outrageous such punitive conduct is *relative to a particular plaintiff*. Therefore, it is necessary for the jury which is to determine the amount of punitive damages, if any, to consider how outrageous a particular defendant's conduct may be.[213]

For instance, in rejecting an attempt to certify a punitive damages class in a discrimination suit, the Fifth Circuit noted that:

> Some plaintiffs may have been subjected to more virile discrimination than others: with greater public humiliation, for longer periods of time, or based on more unjustifiable practices, for example. Particular discriminatory practices may have been gradually ameliorated year by year over the 20-year period.[214] (Emphasis added.)

Similarly, *Engle* concluded defendants are entitled to a jury determination on an individual basis concerning whether *each* class member was entitled to punitive damages: "one class member's circumstances cannot serve as a proxy for another."[215]

The punitive damages laws of the several states compel consideration of the particular claimant's individual circumstances. Texas jurors, for example, are instructed to evaluate, among other things, the "situation and sensibilities of the parties concerned."[216] State statutes typically

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211 Colby, 87 Minn. L. Rev. at 600-601. See also, Laura Hines, *Obstacles to Determining Punitive Damages in Class Actions*, 36 Wake Forest L. Rev. 889, 915-16 (Winter 2001).

212 161 F.R.D. 456 (D. Wyo. 1995).

213 *Id*. at 467-68, citations omitted.

214 *Allison v. Citgo Pet. Corp.*, 151 F.3d 402, 417 (5th Cir. 1998).

215 853 So.2d at 453.

216 TEX. CIV. PRAC. & REM. CODE § 49, 011(a)(4).

require considering factors such as the duration of the challenged conduct and the degree of the defendant's awareness—all factors that are subject to change over time.[217] It would be the unusual case indeed where the jury, applying these factors, may permissibly assess the same amount of punitive damages to each claimant.

Nor can class litigation or other aggregate procedures adequately accommodate differences among the claims. Indeed, they proceed on the assumption that an identical award to each class member is appropriate.[218] But, as the Maryland Supreme Court recognized in *Philip Morris v. Angeletti*,[219] the imposition of a single punitive damages ratio to the entire class of smokers would not satisfy the state's interest in assuring that punitive damages amounts are appropriate in specific relation to differing amounts of—and reason for—actual damages.[220]

Likewise, aggregate schemes deprive defendants of defenses that might mitigate the punitive damages claim. Defendants would not be allowed to show, for example, that a particular plaintiff's claim arose at a time when the defendant's conduct was relatively less reprehensible. Moreover, under the aggregation model, the jury is precluded from considering circumstances unique to the claimant that might affect the entitlement to punitive damages or the amount of such damages that are assessed.

There is another, closely related constitutional problem. In *Campbell*, the Supreme Court held that due process permits courts to punish defendants only for conduct that is causally related to the act directed against the plaintiff. The *Campbell* trial court allowed the two bad faith plaintiffs to offer evidence regarding State Farm's nationwide conduct on a variety of subjects, including employment discrimination, and other bad faith acts unrelated to the insurer's failure to settle on their behalf. *Campbell* concluded that the defendant's punishment must be based upon harm to the plaintiffs, and, if evidence of acts directed towards others is to be admissible on the degree of reprehensibility of the conduct, it must be substantially similar to the offense committed against the plaintiffs at the case at bench:

> The court awarded punitive damages to punish and deter conduct that bore no relation to the Campbells' harm. A defendant's dissimilar acts, independent from the acts upon which liability was premised, may not serve as the basis for punitive damages. A defendant should be punished for the conduct that harmed plaintiff, not for being an unsavory individual or business. Due process does

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217 See, e.g. KS St. § 60-3701(b), 60-3702(b); KRS § 411.186(2); N.S.A. § 349.20(3); Miss. Code Ann. § 11-1-65(e); N.C.G.S.A. § 10-35; 23 Okl. St. Ann. § 9.1.

218 See, e.g., *In re Simon II*, 211 F.R.D. at 100 (proposing to distribute class punitive damages award on a disease-by-disease basis). A variation of the information-award approach sometimes encountered in aggregate litigation is the determination of an application of a single multiplier of compensatory damages to serve as the basis for each punitive damages award. See, e.g., *In re Tobacco Litigation*, 624 S.E.2d 738 (W.Va. 2005).

219 752 A.2d 200 (Md. 2000).

220 *Id.* at 49.

> 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, but we have no doubt that the Utah Supreme Court did that here.[221]

Before an act of the defendant that is directed towards others can be considered substantially similar to that committed against the plaintiff, it must be nearly identical. *Campbell* condemned evidence of types of bad faith *other* than that committed against the plaintiff as too dissimilar to qualify for consideration in setting the defendant's punishment.[222] *Campbell* shows it is constitutionally improper to consider a defendant's entire course of conduct over an extended period under the guise of evaluating the relative reprehensibility of that conduct.[223] If the defendant's other acts, directed at strangers to the litigation, are to be considered at all, they must bear a close causal relationship to the acts committed against the particular plaintiff in the case at bench.

Classwide punitive damages determinations likely would violate this rule. Defendants can be punished for conduct directed against *particular plaintiffs*, and which *harmed* those plaintiffs. Punishment is not permitted based on the jury's assessment of its overall conduct that is, or may be, insufficiently related to the harm caused a particular individual. Taken together, *Williams*, which precludes punishing for harm to non-plaintiffs, and *Campbell*, which limits the admissible evidence of other acts, render the aggregation approach not only impractical but constitutionally impermissible.

Some courts have offered a solution, suggesting that punitive damages may be 'grouped' according to sub-classes of claimants. They reason that litigating punitive damages on a classwide basis may be permissible as long as courts categorize entitlement to punitive damages according to type of plaintiff, even though all claims arise from the same general course of conduct. But grouping does not solve the constitutional dilemma. There is no way for evidence that may be admitted in such a case to meet *Campbell*'s causal connection requirement. Unless the defendant's conduct affected every class member in *precisely the same way*, the trier of fact would necessarily hear evidence that would be admissible as to part of the particular class, but inadmissible with respect to the remainder. This problem troubled the Second Circuit in *Simon II*. The District Court's order suggested that evidence of harm to persons outside the class could be considered. Though it reversed the certification order on other grounds, the Second

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221 538 U.S. at 422-423.

222 The *Campbell* jury was allowed to hear evidence that State Farm had been found to have committed *first-party* bad faith in other states. *Campbell*, *supra*, 538 U.S. at 423-24. The majority condemned use of this other acts evidence, apparently because the plaintiffs were pursuing a claim for *third*-party bad faith. Thus, when the majority opinion limits the permissible evidence to that which is substantially similar to the conduct that harms plaintiffs, the other defendant's acts must be virtually identical to those directed at the plaintiff.

223 *Id*. at 424.

Circuit observed that such an approach appeared inconsistent with *Campbell's* individualized treatment requirement.[224]

C. The Opt-Out Dilemma

The claimed benefit of a mandatory class is that it would permit assessing a single dollar amount of punishment against the defendant, in one proceeding, for the entire course of that defendant's conduct. The model supposedly eliminates the multiple punishment problem and assures equitable distribution of the proceeds among class members. But the aggregation model presents a Sophie's Choice. To avoid the problem of multiple punishments of a defendant, *all claimants* must be bound by a single adjudication. If claimants are allowed to opt-out of the class, then, by definition, the goal of avoiding excessive punishment of defendants is no longer achievable. But *imposing* a mandatory class on all potential plaintiffs may deny the claimants' rights, depriving them of their day in court.

A class member dragooned into a mandatory class gives up many substantive rights. He or she loses the right to representation by counsel of choice and a voice in the conduct of the case. The class member forfeits the right to a jury trial on his or her particular claim, the ability to select the forum, and, above all, the right to be free from a binding judgment in which the claimant had no say. The class action binds the claimant regardless of whether the individual approves of the action, participates, and irrespective of how the proceedings are conducted.[225]

Consequently, in virtually all situations, due process requires that class members be permitted to opt-out of the class, at least when the right to compensatory damages is at issue. *Phillips Petroleum Co. v. Shutts*[226] held that while a court may exercise jurisdiction over nonresident class members without showing that they had minimum contacts with the forum state, the class members in a money damages case must be provided the right to opt-out of the case and pursue their own claims.[227] In *Ortiz*, the Supreme Court recognized that creating mandatory classes, especially in money damages cases, implicate important due process and Seventh Amendment rights.[228] A punitive damages class forcing all claimants to be bound by a single mass proceeding violates these rights.

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224 407 F.3d at 138-39: "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."

225 See generally, William B. Rubenstein, *A Transactional Model of Adjudication*, 89 Geo. L.J. 371, 473 (2001).

226 472 U.S. 797 (1985).

227 *Id*. at 812.

228 *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846-47 (1999). See also, *In re Orthopedic Bone Screw Prods. Liability Litig.*, 176 F.R.D. 158 (E.D. Pa. 1997).

> [M]andatory class action aggregating damages claims implicate the due process "principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process," it being "our 'deep-rooted historic tradition that everyone should have his day in court.'"
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> Although "'[W]e recognized an exception to the general rule when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,'" or "where a special remedial scheme exists expressly foreclosing successive litigation by non-litigants, as for example in bankruptcy or probate," the burden of justification rests on the exception.[229]

The surrender of litigant autonomy is justified only in extraordinary circumstances where all claims must be combined into a single proceeding. An example is the true limited fund class action. It is based on the theory that the defendant's available resources are insufficient to satisfy all claimants. Consequently, a mandatory class is necessary to permit equitable distribution of the limited resources available.

But the contingency justifying the mandatory class must be real, not contrived. In *Ortiz*, the Supreme Court rejected a proposed class action settlement encompassing present and future asbestos claimants where the "limited fund" consisted of the insurance coverage available to the defendant, but little of the defendant's own assets. According to *Ortiz*, the fund must be actually limited, not subject to an artificial constraint created by the parties' own agreement.[230] The court held that three elements are presumptively necessary for a Rule 23(b)(1)(B) limited fund class: (1) an insufficient fund; (2) the entire fund must be devoted to pay the claims; and (3) equitable treatment of the claims within the class. The equitable-treatment requirement encompasses both the inclusiveness of the class and the fairness of the distribution scheme.[231]

The Supreme Court rejected the proposed settlement in *Ortiz* because, among other reasons, there were inherent conflicts of interest among and between the various class members. Future claimants had far different interests from those of present claimants. Claimants exposed while the loss was insured had different interests from those exposed after the insured period.[232]

Thus, assuming that any plaintiff has any "right" to punitive, as distinct from compensatory, damages, a punitives class could be constitutional only when the parties show the pool of defendant's resources, available to pay claims, is truly a "limited" fund. Absent such a

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229 *Id*. at 846 (citations omitted).

230 *Id.* at 838.

231 *Id*. at 855-59.

232 *Id*.

showing, there is no constitutional basis for restricting class members' opt-out rights. And therein lies the Sophie's Choice: permitting opt-outs protects the rights of all claimants, but it vitiates the reason for aggregating punitive damages claims in the first place: eliminating the multiple punishment problem. Where opt-outs are allowed, the defendant still may be subject to multiple, excessive punishment. Where opt-in is mandatory, the process would violate the claimant's right to a day in court, save only in situations where the fund is truly, demonstrably, limited.

Proponents of punitive damages class actions sometimes argue that the total amount of punitive damages that may be assessed for the defendant's course of conduct is limited by the operation of state law caps, the imposition of constitutional standards constraining the amount, or both.[233] Yet such theoretical limits are insufficient to justify the sharp limitations on party autonomy inevitable in a mandatory class action.

First, it is doubtful that claimants could meet their burden of establishing the limits of the fund, or adequately describe how they attempt to do so. Determining the purported limitation of the fund would have to be determined in a vacuum, in advance of litigation on the merits. At the certification stage, before trial, courts lack any factual basis for determining the total amount of punitive damages that constitutionally may be imposed.

And the Supreme Court's ratio analysis will not solve the problem. The high court consistently has refused to set a ratio applicable to all cases.[234] Instead, it dictates an examination of "guidepost" factors, including the reprehensibility of the defendant's conduct.[235] But it is impossible to assess the degree of reprehensibility of the defendant's conduct in advance of any fact-findings by the court. Moreover, it would be extremely difficult to establish that the plaintiff's punitive damages claims would exhaust the "fund" without some notion of how many plaintiffs would prevail in the individual suits and the amount of damages these individuals would be awarded. Further, the limit on punitive damages for the entire course of conduct is theoretical only. "The decentralized structure of the tort system defies efforts to enforce in any meaningful way the constitutional limit."[236]

Not surprisingly, the Second Circuit rejected the *Simon II* certification order for precisely these reasons, noting that the district court lacked sufficient proof to conclude that a valid limited- fund situation existed. The proposed "fund" in that case— the constitutional cap on punitive damages—was *theoretical only*: "It is not easily susceptible to proof, definition, or even estimation by any precise figure."[237] Not only was it impossible to determine the proposed fund's upper limit, there was no evidence before the court to indicate the number of punitive damages awards that would be constitutionally excessive, either individually or in the aggregate.

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233 *See e.g. Simon II*, 211 F.R.D. at 184-86.

234 *BMW v. Gore*, 517 U.S. at 582; *State Farm v. Campbell*, 538 U.S. at 424-25.

235 *Gore*, 517 U.S. at 575.

236 Richard Nagareda, *Punitive Damages Class Actions and the Baseline of Tort*, 36 Wake Forest L. Rev. 943, 954 (2001).

237 *In re Simon II Litigation*, 407 F.3d 125, 138 (2nd Cir. 2005).

Lacking such evidence, the class representatives did not establish that the individual plaintiffs would be prejudiced by being required to pursue punitive damages in separate actions.[238] Other mandatory punitive damages class are unlikely to fare better.

Finally, the one-size-fits-all remedy of class litigation of punitive damages does not permit equitable distribution among plaintiffs of any fund created. As indicated, the "entitlement" to punitive damages will vary among class members. To treat dissimilar cases alike is just as inequitable as treating identical cases differently. For example, Judge Weinstein proposed to compensate the class members according to disease groups,[239] but this approach ignored variations *within* disease groups. Even he conceded that the claim of smokers who took up the habit after the 1960s was weaker than those who began smoking before it was common knowledge that cigarettes were harmful. Under the *Simon II* approach, a lung cancer class member who began smoking in the 1950s would receive the same amount of punitive damages as one who began in the 1970s after the dangers were widely known.

Moreover, it is virtually certain that the same conflict-of-interest problems described in *Ortiz* would surface in any mandatory punitive damages class. Indeed, a plaintiff with a viable compensatory damages claim might not want the defendant's resources to be exhausted through payment of a large punitive damages award to the class as a whole.

D. The Aggregation Model Impairs the Right to Effective Appellate Review

Defendants have a constitutional right to meaningful appellate review of their punishment. In *Haslip*, the Supreme Court upheld the common law approach to punitive damages precisely because it contemplated procedural safeguards such as the right of appeal.[240] Subsequently, in *Honda Motor Co. v. Oberg*,[241] the Court held States must provide appellate procedures to examine whether punitive damages are excessive. Finally, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[242] the high court expanded these protections, concluding appellate courts are required to *independently* review the award for constitutional excessiveness, no longer constrained by the deferential abuse-of-discretion standard of review.

At worst, aggregation schemes make this vital review impossible. At best, they render the review task highly problematic. A proper evaluation of any particular punitive damages award requires consideration of factors that are individual to particular claimants. The Supreme Court has identified three guideposts that reviewing courts must consider in evaluating if a particular punitive damages award transcends constitutional limits: (1) the degree of reprehensibility of

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238 *Id*.

239 211 F.R.D. at 139.

240 499 U.S. 1 (1991).

241 512 U.S. 415 (1994).

242 532 U.S. 424 (2001).

defendant's conduct; (2) the ratio between the punitive damages award and the harm inflicted upon the plaintiff; and (3) civil or criminal penalties that may be assessed for similar conduct.[243]

Some of the guidepost elements may be evaluated broadly and generally, e.g., whether the defendant's conduct involved the risk of physical harm or only economic loss. But other components of the reprehensibility analysis, such as the plaintiff's vulnerability and defendant's knowledge of same, can only be determined on an individual basis. Moreover, where the defendant's conduct unfolds over a time and may be affected by various events, the degree of reprehensibility can vary. A manufacturer that sells an allegedly dangerous product after preliminary information suggests a potential problem acts less reprehensibly than one that continues to sell a product once its harmful nature has been conclusively established.

Reviewing courts are also required to evaluate the punitive award for gross excessiveness under the ratio guidepost. The aggregation approach would impose a single, 'lump sum' amount of punitive damages, with the amount supposedly representing total punishment for an entire course of conduct. But courts cannot evaluate whether the punishment is excessive in a vacuum, divorced from actual harm and actual damages to real people. The ratio guidepost requires appellate review of the *proportionality* of the punishment in relation to the harm. The constitutional propriety of the ratio depends, of course, on the actual harm (and in some cases additional threatened harm[244]) to each particular claimant. A punitives-only class action would impose a total amount of punishment before the actual harm has been determined. Accordingly, it would function as a Looking-Glass rule: punishment first, trial afterwards. In very few cases will the compensatory damages be uniform across an entire class, certainly not sufficiently uniform to conduct a meaningful analysis of the propriety of the ratio. Without knowledge of the facts of each claimant's damages and particular situation, it would be impossible to determine whether a given award passes constitutional muster or even complies with limits imposed by state law. The aggregation model thereby prevents meaningful appellate review of the ratio.

Proponents of class litigation argue it is possible to perform the constitutionally-mandated ratio review even when the amount of punitive damages has been aggregated. In essence, their solution is to perform what amounts to an 'averaging' analysis: e.g., while some plaintiffs receive greater punitive damages than the *BMW* guideposts would permit, others receive less, and thus, supposedly, everything balances out in the long run. But this answer begs the question. Courts cannot meaningfully review the constitutionality of the ratio in a vacuum divorced from actual harm to real people. Using the averaging approach to review, courts have no way to evaluate factors peculiar to individual claimants, even though such factors specifically affect the constitutionality of the amount of punishment.

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243 *BMW v. Gore*, 517 U.S. at 575-585.

244 As noted, however, not just any threatened harm may be considered. Potential harm can help justify a ratio of punitive to compensatory damages only where it is additional potential harm to those who have *already been actually injured. Williams*, 127 S. Ct. at 106-64 . For example, in evaluating the punitive award for constitutional excessiveness, courts may consider the added harm that was "likely to result" had the defendant's wrongful scheme fully succeeded. *Tx. Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460-61 (1993).

Moreover, the Supreme Court has repeatedly criticized the process by which courts impose punitive damages as imprecise, creating an acute danger of arbitrary deprivation of property without due process of law, and, essentially, a standardless process vesting the jury with virtually unbridled discretion.[245] Averaging, which purports to "balance" excessive punitive awards against those which are not, suffers from those same flaws. It is no answer to say that a criminal defendant punished excessively for one crime got off too lightly on another charge. Because they are pure punishment, defendants subject to punitive damages are entitled to constitutional protections, including the right to review of *each* award.[246] Even assuming that the *total* sum of punitive damages is not excessive with respect to an entire course of conduct (though it would be impossible to make that determination in the abstract), that does not mean each individual award passes constitution muster. Plaintiffs cannot withstand a constitutional excessiveness claim by arguing that some other claimant revealed *less* than the constitutional maximum.

In short, there is no way to accurately perform an 'averaging' analysis without sweeping aside the defendant's important constitutional rights. Thus, the aggregation model vitiates the defendant's constitutional protection of meaningful appellate review of the punishment imposed.

E. Doubts Must Be Resolved Against Aggregation

In balancing the due process concerns of defendants and plaintiffs in punitive damages litigation, the rights of defendants must be weighed more heavily. The reason is simple. By definition, punitive damages are designed to punish and deter particularly egregious conduct. Also by definition, claimants have no *right* to punitive damages. A plaintiff is fully compensated by the compensatory damages award.[247] "Punitive awards are windfalls and not compensation; courts should place less emphasis on plaintiffs' rights when evaluating due process arguments. Plaintiffs' are made whole by compensatory damages."[248] Indeed, regardless of the egregiousness of the defendant's conduct, the trier of fact is not required to award punitive

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245 See, e.g., *Campbell, supra*, 538 U.S. at 417-418.

246 See *Oberg*, 512 U.S. at 432.

247 Thus, the vast majority of states to consider the issue have upheld statutes requiring plaintiffs to give the State a share of the punitive damages award: plaintiffs have already been fully compensated by the award of actual damages, and thus they have no vested right to any punitive damages; exemplary damages are designed solely to serve the public's interest in punishing and deterring especially egregious conduct. See, *e.g., Evans v. State*, 56 P.3d 1046 (Alaska 2002) ; *State v. Moseley*, 436 S.E.2d 632 (Ga. 1993); *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993); *Cheatham v. Pohle*, 764 N.E.2d 272 (Ind. App. 2002); *Monroe Guar. Ins. Co. v. Magwerks Corp*., 796 N.E.2d 326 (Ind. App. 2003); *Shepherd Components, Inc. v. Brice Petrides-Donohoe & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991); *Fust v. Attorney Gen.*, 947 S.W.2d 424 (Mo 1997); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002).

248 *Dunn v. HOVIC*, 1 F.3d 1371 (3rd Cir. 1993).

damages at all.[249] Defendants, by contrast, have a *constitutionally*-protected property right to avoid excessive punishment.[250]

The Supreme Court has recognized that:

> Punitive damages pose an acute danger of arbitrary deprivation of property since jury instructions typically leave the jury with wide discretion in choosing amounts and since evidence of the defendant's net worth creates the potential that juries will use their verdict to express biases against big business.[251]

Moreover, the stakes for defendants are immeasurably higher. It is well established that mass aggregation creates tremendous pressure on defendants to settle regardless of the action's merits. Few defendants dare run the risk of such major, aggregated, liability in a single proceeding.[252] In short, the defendant's interests are both substantial and at risk in punitive damages litigation. By contrast, the plaintiff's interest is minimal, even assuming plaintiffs have some vested "right" to punitive damages. True, the State may legitimately be said to have some interest in punishing and deterring reprehensible conduct. But the State's interest in punishment has never outweighed the defendant's constitutional right to be free of arbitrary punishment, inflicted without adequate notice or a fair hearing to assess that punishment. And the State's interest is relatively slight when, as is typical, its interests are pursued by private citizens, who may elect not to pursue punitive damages at all, who enjoy total control over settlement decisions, and whose claims may have unique defenses that completely defeat the State's interest in punishment and deterrence.

Finally, aggregation of punitive damages represents a radical solution to a problem when a far simpler answer is available. The multiple punitive damages problem will largely be solved by taking *Campbell* and *Williams* seriously, i.e., by recognizing that punitive damages awards are individual in nature, that the evidence supporting such awards must have a casual connection to the particular claimant's case, and that the punitive award must be proportional to the actual injury sustained. If courts adhere to those principles, windfalls to the first successful plaintiffs are avoided and each claimant may assert an individual claim for punishment limited to the harm done him or her.

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249 See, e.g., *Juarez v. Menard Inc.*, 366 F.3d 479, 482 (7th Cir. 2004); *Kocher v. Oxford Life Ins. Co.*, 602 S.E.2d 499, 504 (W. Va. 2004); *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002).

250 *Cooper Indus. v. Leatherman Tool Group, Inc.*, 532 U.S. at 424; *BMW of North America, Inc. v. Gore*, 517 U.S. 562.

251 *Honda Motor Co. v. Oberg*, 527 U.S. 415, 432 (1994).

252 *In re Rhone Polenc Rorer*, 51 F.3d 1293, 1298 (7th Cir. 1995); Peter Schunk, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941 (1995).

II. AGGREGATING PUNITIVE DAMAGES TRANSCENDS THE TERRITORIAL LIMITATIONS OF THE STATE'S AUTHORITY

In *BMW v. Gore*,[253] the Supreme Court held that a state may not, in assessing punitive damages, punish conduct that is lawful where it occurs. In *State Farm v. Campbell*,[254] the Court significantly broadened this prohibition, holding that a state lacks the authority to punish acts that do not occur in, or are not directed to, the forum, irrespective of the legality of those acts.

> A basic principle of federalism is that each state may make its own reasoned judgment about what conduct is permitted or proscribed within its borders and each state alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.[255]

The Supreme Court held that such an attempt violated federalism and comity principles by impinging upon the regulatory prerogatives of the other states.[256] Most nationwide state-law punitive damages class actions would run afoul of the limits of any one State's regulatory authority. It is difficult to see how most nationwide state-court punitive class actions could survive the holdings in *Gore* and *Campbell*. In each of those cases, the state sought to punish conduct occurring outside its borders and not directed to its own citizens. As the Court noted in *Campbell*, each state has a prerogative to determine the punishment, if any, that would be assessed for conduct occurring within its borders or directed to its citizens.[257]

Nationwide class actions are also inhibited by limitations on the law that may be applied. The choice-of-law problem is most frequently litigated as part of the predominance inquiry in class actions, but it also has a constitutional dimension. In *Allstate Ins. Co. v. Hague*,[258] the Supreme Court held that due process in the Full Faith and Credit Clause limits any state's ability to apply its law to a given controversy. A state may only apply its law if it has significant contacts, or a significant aggregation of contacts, with the controversy.[259] *Shutts* applied the principle to overturn a class action judgment where the Court sought to apply Kansas law to the claims of absent class members from other states. Kansas lacked significant contacts to permit applying its laws to the claims of the absent class members.[260] Moreover, a state cannot extend

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253 517 U.S. 559 (1996).

254 538 U.S. 408 (2003).

255 *Id*. at 422.

256 *Id*. at 421-22.

257 *Id*.

258 449 U.S. 302 (1981).

259 *Phillips Petroleum Co. v. Shutts*, 473 U.S. 797 (1985).

260 *Id*. 821-822.

its law to claims over which it has little interest merely because the case before it is a class action. *Shutts* rejected this type of "bootstrapping."[261]

In punitive damages cases, the choice of law problem is likely to be particularly acute. Both the substantive requirements for recovering such damages and the procedures for assessing them vary substantially among the states. Indeed, some states do not permit the recovery of punitive damages at all. Some allow recovery on a finding of gross negligence; others require a showing the conduct was wanton or malicious. Some states require proof by clear and convincing evidence, while others use a preponderance of the evidence standards. Many impose statutory caps on punitive damages, with the caps themselves varying widely: some are geared to a specific monetary amount, whereas others impose a sliding scale that varies based on, among other things, the nature of the defendant's conduct. A minority of states require that a portion of the punitive damages be paid to the State itself. Under the circumstances, it is difficult to imagine how a court could fashion an adjudication plan that would permit application of every concerned state's substantive laws on punitive damages.

In *Simon II*, Judge Weinstein attempted to finesse the choice of law problem, finding New York law could be applied to the claims of all plaintiffs because some defendants were headquartered in New York and some of the underlying content occurred there.[262]. While the validity of this ruling is questionable, few cases would permit such an easy answer. Almost without exception, courts have rejected applying the law of the seller state to all class claims in products liability litigation.[263] Rarely will a single state have such overwhelming contact with a controversy to permit its law to be applied for all claims and to the exclusion of the law of other states. Further, the defendant has a due process right to fundamental fairness when it comes to resolving choice of law questions. A court may not employ a different choice of law calculus in a class action than it would in an individual suit.[264] These choice of law concerns persuasively show that a single mandatory class simply is not feasible. And multiple class actions, each confined to an individual State, would not resolve the multiple punishment problem. Hence, it appears that aggregation is, ultimately, futile.

III. AGGREGATION SCHEMES VIOLATE THE SEVENTH AMENDMENT'S REEXAMINATION CLAUSE

As noted in the previous Chapter, under the Reexamination Clause of the Seventh Amendment, a verdict may not be "reexamined by another tribunal.[265] The Clause incorporates a "right to have juriable issues determined by the first jury impaneled to hear them.[266] The clause

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261 *Id*. at 821; see also Note, *Rethinking Place of Business as Choice of Law in Class Action Lawsuits*, 58 Vand. L. Rev. 1925, 1933 (2005).

262 *Simon II*, 211 F.R.D. at 174-75.

263 See *Spence v. Glock*, 227 F.3d 308 (5th Cir. 2000); *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002).

264 *Shutts*, 473 U.S. at 821.

265 U.S. Const. Amdt. VII.

266 *In re Matter of Rhone-Poulenc Rorer*, 51 F.3d 1293, 1300 (7th Cir. 1995).

prohibits schemes whereby subsequent juries are permitted to overturn the factual findings of previous juries. For example, in C*imino v. Raymark*,[267] the Fifth Circuit rejected a trial plan in a mass tort case that would have assessed the defendant's general liability in a separate proceeding from that of specific liability in the given individual cases. Since the individual cases necessarily would have involved a comparison of the plaintiff's responsibility with that of the defendant's, the initial negligence determination by the first jury would no longer be final and the Reexamination Clause was violated.[268] Similarly, in *Rhone-Poulenc Rorer*, the court noted that a trial plan seeking to determine general liability first, leaving issues of comparative negligence for a subsequent jury, likely violated the Reexamination Clause.[269]

Of course, the Reexamination Clause does not prohibit all forms of bifurcated proceedings, or even reconsideration of the same evidence. It does constrain, however, subsequent trials that would have the effect of potentially undoing the initial fact-finding.

Punitive damages cannot be divorced from the compensatory damages case. Inevitably, the subsequent jury would have to revisit and reexamine the facts found in the prior litigation. Even when a punitive damages trial is bifurcated—with liability and compensatory damages issues tried first, followed by punitive damages—a key issue in both phases is the defendant's conduct. Since evidence relating to liability is largely the same as that used to demonstrate reprehensibility, the issues are so intertwined that they cannot be separated into different proceedings.[270] Most punitive damages aggregation schemes contemplate a generic determination of punitive damages, with issues relating to individual liability confirmed in subsequent trials. This approach seemingly involves the reexamination of the issue by different juries and, under the Seventh Amendment, is impermissible.

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267 151 F.3d 297 (5th Cir. 1998).

268 *Id*. at 320.

269 51 F.3d at 1300.

270 *See Hardin v. Caterpillar Inc.*, 227 F.3d 268, 272 (5th Cir. 2000) (Because jury's decision on punitive damages was intertwined with its view on the liability facts and damages, court could not remand care for new trial as punitive damages only).

Chapter 7

Choice of Law

by James K. Leader[271]

Discussion Draft No. 2 acknowledges in § 2.06(a) that a court must consider which substantive law applies to multiple claims to determine whether these claims involve common issues. However, § 2.06(b) appears to endorse aggregate treatment of claims subject to different laws. Such an approach is contrary to established conflicts of law principles.

I. DISCUSSION DRAFT § 2.06(A)

Discussion Draft § 2.06(a) simply states that "to determine whether multiple claims involve common issues, the court must ascertain the substantive law governing those claims." The subsection does not explicitly acknowledge that, in so doing, a court engages in a choice of law analysis constitutionally limited by the Due Process Clause of the Fourteenth Amendment and the Full Faith and Credit Clause of Article IV, §1. *See Phillips Petroleum Co. v. Shutts*.[272] Thus, a court first ascertains whether the law of the forum conflicts "in any material way" with any other law which could apply.[273] If a true conflict exists, the Due Process and the Full Faith and Credit Clauses restrict the application of forum law to the claims in question to instances where "that State must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair."[274]

A court that fails to engage in the conflicts of law analysis set out in *Shutts* when certifying a class action will see that certification reversed. *See In re St. Jude Medical, Inc.*[275] In *St. Jude Medical*, the trial court certified a class of 11,000 Silzone heart valve recipients, residing in numerous states, who asserted claims under various Minnesota consumer protection statutes. The Court of Appeals for the Eighth Circuit found that the district court did not conduct a thorough conflicts of law analysis before applying Minnesota law, as is required by *Shutts*. Because the lower court did not analyze the contacts between Minnesota and each plaintiff class member's claims, the appellate court could not determine whether the lower court's choice of Minnesota law was arbitrary or unfair. Consequently, it reversed the decision to certify the class,

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272 472 U.S. 797 (1985).

273 472 U.S. at 816.

274 472 U.S. at 818, *quoting Allstate Ins. Co. v. Hague*, 449 U.S. 302, 312-313 (1981).

275 425 F.3d 1116 (8th Cir. 2005).

and remanded the case with instructions to the lower court to conduct the proper choice of law analysis.[276]

The proposed § 2.06(a) fails to acknowledge these requirements, as does the comment to this subsection, "*Comment a. Obligation to Undertake a Choice-of-Law Analysis*." These constitutional principles are touched upon only in passing in the Reporters' Notes. In contrast, the substantial body of law developed under the application of Fed. R. Civ. P. 23 expressly respects due process and full faith and credit principles through the application of the predominance, manageability and superiority standards.

The courts have consistently held that predominance is defeated where conflicts of law exist regarding the claims of a group of plaintiffs in multi-state aggregate litigation because individual issues of law outnumber common issues of law in such cases. Furthermore, when "claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable," thereby defeating the superiority requirement of Rule 23 as well. *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.* ("*Bridgestone/Firestone*").[277] In decertifying two nationwide classes consisting of current and former purchasers and lessees of Ford Explorers and Firestone tires asserting financial loss claims sounding in breach of warranty and consumer fraud against the defendant car and tire manufacturers, the *Bridgestone/Firestone* court warned that "[d]ifferences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court," and "only a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass torts."[278]

A review of the reasoning in *Castano v. American Tobacco Co.*[279] is also instructive. *Castano* was filed on behalf of a proposed nationwide class of smokers. Plaintiffs alleged that the defendant cigarette manufacturers (1) fraudulently failed to inform consumers that nicotine is addictive and (2) manipulated the level of nicotine in cigarettes to sustain their addictive nature.

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[276] 425 F.3d at 1121. On remand, the lower court concluded that the application of Minnesota law was constitutionally permissible and conducted a detailed conflict of law analysis before certifying a class. *In re St. Jude Medical, Inc.*, 2006 WL 2943154 (D. Minn. Oct. 13, 2006). The trial court's decision to certify a class is now on appeal before the Eighth Circuit, which recently granted a petition for appeal under Fed. R. Civ. P 23(f).

[277] 288 F.3d 1012, 1018 (7th Cir. 2002); *see also In re Vioxx Prods. Liab. Litig.*, 239 F.R.D. 450, 459 (E.D. La. 2006) ("the application of the laws of fifty-one jurisdictions to the claims of [a] proposed class creates problems for the typicality, adequacy, predominance, and superiority requirements of Rule 23").

[278] 288 F.3d at 1020; *see also In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, 2007 WL 522300, *16 (S. D. Ill. Feb. 16, 2007) ("both *Bridgestone/Firestone* and [*In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995)] make starkly clear that it is not this Court's prerogative to elide important differences in the laws of several states in order to speed the progress of a case to class certification").

[279] 84 F.3d 734 (5th Cir. 1996).

The district court certified the class as to legal issues of fraud, negligence, breach of express/implied warranty, strict liability and violation of state consumer protection statutes, reasoning that "issues of fraud, breach of warranty, negligence, intentional tort, and strict liability do not vary so much from state to state as to cause individual issues to predominate."[280]

The Fifth Circuit Court of Appeals decertified the class because, *inter alia*¸ "[t]he district court abused its discretion by ignoring variations in state law and how a trial on the alleged causes of action would be tried."[281] The court emphasized that "[i]n a multi-state class action, variations in state law may swamp any common issues and defeat predominance,"[282] reasoning that:

> [v]ariations in state law magnify the differences. In a fraud claim, some states require justifiable reliance on a misrepresentation, while others require reasonable reliance. States impose varying standards to determine when there is a duty to disclose facts. Products liability law also differs among states. Some states do not recognize strict liability. Differences in affirmative defenses also exist. Assumption of risk is a complete defense to a products claim in some states. In others, it is a part of comparative fault analysis. Some states utilize "pure" comparative fault; others follow a 'greater fault bar,' and still others use an 'equal fault bar.'"[283]

The *Castano* court pointed out that the existence of complex choice-of-law issues in aggregative litigation, in addition to defeating predominance, also "makes individual adjudication superior to class treatment," [284] thereby defeating yet another class action prerequisite. The court explained that "[p]rior to certification, the district court must determine whether variations in state law defeat predominance. While the task *may not* be impossible, its complexity certainly makes individual trials a more attractive alternative and, *ipso facto*, renders class treatment not superior."[285] As a result, superiority is defeated "[i]n a complicated case involving multiple jurisdictions, [in which] the conflict of law question itself could take decades to work its way through the courts."[286]

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280 84 F.3d at 740.

281 84 F.3d at 751.

282 84 F.3d at 741.

283 84 F.3d at 743 n. 15 (citations omitted).

284 84 F.3d at 750.

285 *Id.* (emphasis in original).

286 84 F.3d at 751. For example, in *In re Asbestos Sch. Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984), *aff'd in part and reversed in part sub nom. School Dist. of Lancaster v. Lake Asbestos of Quebec, Ltd.*, 789 F.2d 996 (3d. Cir.), *cert. denied*, 479 U.S. 852, and *cert. denied*, 479 U.S. 915

A review of the court's analysis in *In re Ford Motor Co. Ignition Switch Prod. Liab. Litig.* ("*Ford Motor*")[287] is also enlightening. In *Ford Motor*, plaintiffs sought certification of two actions brought on behalf of two nationwide classes. Both actions alleged that Ford Motor Co. manufactured and distributed approximately 23 million

vehicles containing defective ignition switches over a nine year period; plaintiffs' complaints included causes of action for strict products liability, fraudulent concealment, violation of state consumer fraud statutes, breach of contract and express warranty, and breach of implied warranty of merchantability. The court denied plaintiffs' motions for class certification on the grounds that the conflicts of law between the 50 states in which the 23 million members of the proposed plaintiff classes resided defeated the predominance requirement of Rule 23 of the Federal Rules of Civil Procedure.

In its determination of whether the actions were appropriate for class certification, the court focused on whether, as required by Rule 23,[288] questions of law or fact common to the members of the classes predominated over questions affecting only individual members. With respect to questions of law, the court explained that "[t]he predominance inquiry must . . . take stock of the applicable law. Common questions of law may be said to predominate when significant legal issues are common to each class member's cause of action or to the defense of such claims."[289] The court indicated that although predominance does not require that individual issues be non-existent, "[w]here the source of law derives from the law of the 50 states . . . differences in state law will 'compound the[ ] disparities' among class members from the different states."[290]

The *Ford Motor* court concluded that because it would be "compelled to apply the law of each plaintiff's home state to that plaintiff's claims . . . class-wide disposition of the claims would essentially be impossible,"[291] and therefore "in the context of the case involving five state-law causes of action, the laws of fifty states, and over twenty-three million[ ] plaintiffs, the court must conclude that this suit cannot be practically and efficiently tried as a class action because plaintiffs have not established a predominance of common legal issues as required by Rule 23(b)(3)."[292]

Significantly, in proposing an alternative test to govern aggregate litigation generally, Professor Erbsen, in his article upon which the Discussion Draft relies, recognizes (although the

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(1986), "[a]lmost nine years after the court of appeals had affirmed certification, the conflict of law issues had yet to be resolved." *Castano*, 84 F.3d at 751.

287 174 F.R.D. 332 (D.N.J. 1997).

288 Specifically, Fed. R .Civ. P. 23(b)(3).

289 174 F.R.D at 340.

290 *Id.* (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 624 (1997), *aff'g Georgine v. Amchem Prods., Inc.*, 83 F.3d 610 (3d Cir. 1996)).

291 174 F.R.D. at 342.

292 174 F.R.D. at 351.

Discussion Draft does not) the constitutional and common law requirements regarding a conflicts of law analysis. Professor Erbsen notes: "If the laws of states with significant contacts to the dispute materially differ, then the court must conduct a conflict of law analysis to select the applicable law for each contested issue, consistent with constitutional and common law constraints."[293] Professor Erbsen also states that a failure to conduct a rigorous conflict of laws analysis before certifying a class would violate the finality, fidelity and feasibility principles he is espousing.[294]

The fact that Discussion Draft § 2.06(a) does not openly address the constitutional requirements which must be observed in a conflicts of law analysis is troubling.

II. DISCUSSION DRAFT § 2.06(B)

Discussion Draft § 2.06(b) states that a court "may afford aggregate treatment of a common issue" when that court determines that one of three situations exists: (1) a single body of law applies to all claims; (2) different claims are subject to different bodies of law, but no true conflict of laws exists; or (3) different claims are subject to different bodies of law that are not substantially identical but do present a limited number of patterns that can be managed by means of identified procedures at trial. This proposed subsection oversimplifies the conflicts of law issues and ignores established law.

While a conflicts of law analysis in simple actions with few parties may be fairly straightforward, more complex multi-jurisdictional actions almost invariably present insurmountable conflicts of law problems. Individual actions typically raise multiple issues (*e.g.*, negligence, comparative negligence, strict liability, assumption of risk, statutes of limitation and repose, damages) and the greater the number of jurisdictions and claims involved, the greater the number conflicts of law issues to address and attempt to resolve. Professor Erbsen observes that "[s]ubstantial management problems arise when the outcome of the choice of law calculus requires applying the varying law of multiple states to class members' claims. For example, each substantive motion would require as many as fifty distinct rulings, the court would need to instruct the jury about the law in each of as many as fifty states, and the court would need to advise the jury about the limited admissibility of evidence that is relevant to claims in some states but not others. Even if the laws of the fifty states cluster into only a few distinct formulations on each issue, the practical burden of identifying, analyzing, and ruling on each cluster for each claim would be daunting."[295]

In fact, courts have routinely recognized that they cannot adequately apply the laws of multiple States in compliance with due process principles. With regard to the predominance inquiry, the necessity to apply the laws of multiple jurisdictions creates such a judicial quagmire as to make any aggregation worthless. As the Fifth Circuit has acknowledged, "variations in

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293 Erbsen, Allan H., "*From 'Predominance' to 'Resolvability': A New Theoretical Approach to Regulating Class Actions,*" 58 Vand. L. Rev. 995, 1077 (2005) (footnotes omitted).

294 *Id.* at 1078.

295 *Id.* at 1077 (footnote omitted).

state law may swamp any common issues and defeat predominance." *Spence v. Glock*.[296] "Furthermore, because we must apply an individualized choice of law analysis to each plaintiff's claims, *see Phillips Petroleum Co. v. Shutts*, 472 U.S. at 823 (constitutional limitations on choice of law apply even in nationwide class actions), the proliferation of disparate factual and legal issues is compounded exponentially." *Georgine v. Amchem Prods., Inc.*[297]

Where the laws of all 50 States may be implicated, the potential for vastly different substantive rules is palpable. For example, there are significant differences even regarding the basic law of negligence:

> The law of negligence, including subsidiary concepts such as duty of care, forseeability, and proximate cause, may as the plaintiffs have argued forcefully to us differ among the states only in nuance, though we think not. . . . But nuance can be important, and its significance is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations on the meaning of negligence and the subordinate concepts. … The voices of the quasi-sovereigns that are the states of the United States sing negligence with a different pitch.[298]

Moreover, other substantive law, such as strict liability rules and affirmative defenses see wide variation:

> Products liability law also differs among states. Some states do not recognize strict liability. … Some have adopted Restatement (Second) of Torts § 402A. … Among the states that have adopted the Restatement, there are variations. … Differences in affirmative defenses also exist. Assumption of risk is a complete defense to a products claim in some states. … In others, it is part of comparative fault analysis. … Some states utilize "pure" comparative fault, … others follow a "greater fault bar."[299] ….

The *Ford Motor* court described the complexity in this way:

> For example, regarding plaintiffs' strict liability claim alone, defendants point to at least five different approaches to defining a "design defect;" differing positions as to whether the "economic loss doctrine" precludes strict liability actions; differing views as

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296 227 F.3d 308, 313 (5th Cir. 2000).

297 83 F.3d at 627; *see also In re American Medical Systems, Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996) ("If more than a few of the laws of the fifty states differ, the district judge would face an impossible task of instructing a jury on the relevant law, yet another reason why class certification would not be the appropriate course of action").

298 *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300-01 (7th Cir. 1995).

299 *Castano*, 84 F.3d at 743 n. 15.

> to whether physical harm is a prerequisite to bringing a cause of action; different warning requirements; and different affirmative defenses. Defendants have likewise demonstrated a multitude of different standards and burdens of proof with regard to plaintiffs' warranty, fraud and consumer protection claims.[300]

In addition, differences in the applicable statutes of limitations and repose and similar rules dramatically impact upon the status of the claims raised and can present enormously complicated analysis and application problems. Take, for example, a property damage/products liability case brought in New York, with plaintiffs from all fifty states. New York's choice of law principles require application of the substantive law, including statutes of limitations and repose, of the jurisdiction in which the injury occurred, here the place of loss. If a plaintiff resided in Alabama, for example, his claim would be barred by Alabama's two-year statute of limitations.[301] Yet, if he actually resided one state over, in Georgia, his case would survive a statute of limitations motion but could be subject to dismissal under Georgia's ten-year statute of repose.[302]

All of these types of differences are more than a court can reasonably be expected to address, and "[d]ifferences of this kind cut strongly against nationwide classes." *Szabo v. Bridgeport Machines, Inc.*[303] As the Fifth Circuit noted, "[w]e find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered."[304]

The Discussion Draft's elaborations in *Comment b.* regarding the "three situations where a substantial consensus has emerged that choice-of-law considerations should pose no insurmountable barrier to aggregation" do not present an accurate portrayal of the established case law. In discussing the situation presented by proposed § 2.06(b)(1), a Single Body of Substantive Law, in *Comment c.* and the Reporters' Notes to *Comment c.*, the Discussion Draft makes the suggestion that applying the law of a common defendant's principal place of business to a group of claims held by persons located in multiple states is appropriate. This suggested approach (almost never seen in individual actions) has been largely rejected.[305]

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300 *Ford Motor Co.*, 174 F.R.D. at 351.

301 *See* Ala. Code § 6-2-38(1).

302 *See Ga. Code Ann.* § 51-1-11.

303 249 F.3d 672, 674 (7th Cir. 2001).

304 *Castano*, 84 F.3d at 743 n. 15.

305 Recent cases from the pharmaceutical area rejecting application of the law of the defendant's principal place of business are only the tip of the iceberg. *See Rowe v. Hoffman-La Roche Inc.*, 917 A.2d 767, 776 (N.J. 2007); *Kelley v. Eli Lilly & Co.*, 2007 WL 1238789, at *2-3 (D.D.C. April 27, 2007); *Bearden v. Wyeth*, ___ F. Supp.2d ___, 2006 WL 4474723, at *4-5 (E.D. Pa. May 5, 2006); *Heindel v. Pfizer Inc.*, 381 F. Supp.2d 364, 376-79 (D.N.J. 2004). Moreover, the Discussion Draft fails to address the constitutional and statutory impediments to such an approach thoroughly described in the law review articles the Preliminary Draft itself

Indeed, the courts have declined to apply the law of a defendant's place of business under a number of the choice of law analyses employed by the various jurisdictions. For instance, under a *lex loci delicti* choice of law analysis, the *Bridgestone/Firestone* court specifically held that the place of a manufacturer defendant's headquarters did not constitute the place of injury for products liability, breach of warranty, or consumer fraud claims.[306] Instead, the Court of Appeals for the Seventh Circuit recognized that "[n]either Indiana nor any other state has applied a uniform place-of-the-headquarters rule to products-liability cases" and determined that products liability claims alleging personal injury and financial loss are governed by the law of the place of the product failure and the place of purchase or sale, respectively.[307] Furthermore, the court indicated that for breach of warranty and consumer fraud claims, "the injury is decidedly where the *consumer* is located, rather than where the seller maintains its headquarters."[308]

In *Spence*, the Court of Appeals for the Fifth Circuit reached a similar conclusion under the Restatement's "most significant relationship" choice of law test in the context of a nationwide class action filed against an Austrian gun manufacturer on behalf of purchasers of allegedly defective handguns. In evaluating the contacts to be taken into account under the Restatement test, [309] the *Spence* court reversed the district court's decision to apply the law of Georgia, the site of the defendant's United States headquarters. The court held that the fact that the defendant's United States domicile was in Georgia was "offset by the fact that the plaintiffs [were] domiciled all over the country," and in any event, the proposition that defendant's headquarters in Georgia were the place of injury was "clearly wrong" and any "economic injury occurred when and where the plaintiffs bought the gun," not at the defendant's headquarters.[310]

Further, the suggestion in *Comment e.* regarding the situation presented by § 2.06(b)(3), Manageable Patterns, that patterns are inherently manageable is too facile. Real world

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references. *See* Gruenwald, Allison M., "Note, Rethinking Place of Business as Choice of Law in Class Action Lawsuits," 58 Vand. L. Rev. 1925 (2005); Nagarda, Richard A., "Bootstrapping in Choice of Law After the Class Action Fairness Act," 74 UMKC L. Rev. 661 (2006). It is equally silent as to the practical implications (*e.g.*, corporate migration) of such an approach.

306 288 F.3d at 1016-17.

307 *Id*. at 1016.

308 *Id.* at 1017 (emphasis in original).

309 The Restatement test evaluates the proposed forum's contacts with the place where the injury occurred; the place where the conduct causing the injury occurred; the domicile, residence, nationality, place of incorporation and place of business of the parties; and the place where the relationship, if any, between the parties is centered. The contacts are evaluated according to their relative importance with respect to the particular issue. Restatement (Second) Conflict of Laws § 145.

310 227 F.3d at 312.

experience teaches that in complex multi-jurisdictional actions, even where patterns exist, manageability is the exception and not the rule.[311]

III. CHOICE OF LAW: "HYPOTHETICAL" CONFLICTS AND PARTIES' BURDENS

Comment a. to § 2.06 states that "[t]he court need not and should not decide a hypothetical choice-of-law question. The failure of a party to offer evidence demonstrating the need to decide a choice-of-law question can provide a basis for the court to determine that a question is hypothetical and, therefore, not pertinent to its decision whether to afford aggregate treatment." The Discussion Draft then "illuminates" this assertion with an Illustration which requires a defendant to "offer evidence" that class members have engaged in conduct which would constitute a defense to their claims under the laws of some states which would apply to their claims. (*See also Comment f.*) This position is quite remarkable—especially in its failure to appreciate plaintiffs' pleading obligations in bringing a lawsuit.

Assume, for example, that the defense a defendant raises is that the statutes of limitations of multiple states would apply to putative class members, barring their claims. The Discussion Draft would put the burden on defendant to "offer evidence" that the applicable statutes of limitations bar certain claims. Shouldn't the plaintiffs have the obligation to plead sufficient facts to permit defendants to establish the applicability of this defense? Why must defendants be put to the expense and burden of discovery? Shouldn't plaintiffs have some threshold obligations to satisfy before they can file suit?

It is well established that the party seeking class certification bears the burden of demonstrating that conflicts of law do not defeat the predominance and superiority tests.[312] Significantly, the Sixth Circuit has even reversed certification where the burden was correctly allocated to the plaintiffs for purposes of written submissions to the court but was shifted to the defendants at the class certification hearing:

> The record reflects that the certification hearing proceeded 'in the reverse:' the district judge ordered defendants to 'show cause why [the court] shouldn't certify a class.' As noted earlier, this is in

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311 As pointed out above, Professor Erbsen observes that "[e]ven if the laws of the fifty states cluster into only a few distinct formulations on each issue, the practical burden of identifying, analyzing, and ruling on each cluster for each claim would be daunting." 58 Vand. L. Rev. at 1077.

312 *See, e.g., O'Brien v. J.I. Kislak Mortgage Corp.,* 934 F. Supp. 1348, 1355 (S.D. Fla. 1996) ("The plaintiff has the burden of establishing the[ ] specific prerequisites for class certification under Rule 23"); *Spence v. Glock,* 227 F.3d at 310 ("The party seeking certification bears the burden of proof"); *see also In re General Motors Corp. Dex-Cool Prods. Liab. Litig.*, 2007 WL 522300 at *13 ("it is Plaintiffs' burden as the proponents of class certification to demonstrate the predominance of common questions and the manageability of the classwide claims at trial, and to show convincingly that variations in state law do not defeat predominance and manageability").

> contradiction to unequivocal pronouncements by the Supreme Court and this court that the burden of establishing the elements of a class action rests on the party seeking certification.[313]

In order to satisfy their burden of proof, the plaintiffs must provide detailed evidence in support of their claim that aggregate treatment is appropriate. Merely representing to the court that the action will prove suitable for aggregation at a later stage in the litigation is not sufficient; rather, the plaintiffs are required to "credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles."[314] Anything less will not warrant approval of aggregate litigation:

> [P]laintiffs have essentially asked the court to certify this class on the basis of mere promises that a manageable litigation plan can be designed in this case for five causes of action under the law of fifty-one jurisdictions as the litigation progresses. The court declines to certify this class action on the basis of such a slender reed. Because the plaintiffs have the burden of designing a workable plan for trial embracing all claims and defenses prior to certification, a court cannot rely on assurances of counsel that any problems with predominance or superiority can be overcome.[315]

Without such an analysis from the plaintiffs, the court cannot rule on whether aggregate treatment is appropriate:

> The burden of proof lies with the plaintiffs; in not presenting a sufficient choice of law analysis [plaintiffs] have failed to meet their burden of showing that common questions of law predominate. … The district court is required to know which law will apply before it makes its predominance determination. … The district court here could not discharge its duty because plaintiffs did not supply adequate information on the policies of other interested states relevant to the choice of law.[316]

The Discussion Draft references the argument of Patrick Woolley that Rule 23 should not preempt state choice-of-law rules.[317] Woolley (and the Discussion Draft) would have the

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313 *In re American Medical Sys.*, 75 F.3d at 1086.

314 *Ford Motor*, 174 F.R.D. at 334 (citations omitted).

315 *Id.* at 350 (citations omitted); see also *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915 (1987) ("nationwide class action movants must credibly demonstrate, through an extensive analysis of state law variances, that class certification does not present insuperable obstacles") (citations omitted).

316 *Spence*, 227 F.3d at 313.

317 "Choice of Law and the Protection of Class Members in Class Suits Certified Under Federal Rule of Civil Procedure 23(B)(3)," 2004 Mich. St. L. Rev. 799 (Fall 2004).

assumption that the law of the forum apply be unassailable. This position again ignores plaintiffs' obligation to have a good faith basis in filing their complaint to represent to the court that the forum law applies, and to allege facts supporting this representation. In so doing, the Discussion Draft sets up numerous possibilities for plaintiffs to extort settlements from defendants—offering the untenable alternatives of paying putative class members and their counsel to end a lawsuit early on, or paying their own lawyers to conduct the discovery to confirm the conflicts of law problems which would preclude class certification.

The Discussion Draft would have courts ignore constitutional protections in favor of the theoretical efficiencies of aggregation, an approach courts have been unwilling to take, and an approach which may ultimately prove far less efficient and more costly than individual trials, as discussed above.

> The systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice, and we must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation.[318]

IV. CASE STUDY: HOW AGGREGATION IN THE NAME OF EFFICIENCY FAILS

Indeed, the potential for abuse of the judicial system in the name of efficiency under the Discussion Draft's procedure for handling conflicts of law is significant. The very real risk inherent in such an approach can be seen by way of illustration:

> A group of plaintiffs from all fifty states brings a property damage/products liability case in New York against multiple defendants, aggregating nearly ten thousand separate claims to the tune of $50 million. Obviously, each individual claim is not worth very much, but collectively, the claims present a great threat against the defendants.
>
> While plaintiffs have identified the dates of loss for each of the subject claims, plaintiffs have provided very little information about the individual products at issue (where and when purchased, etc.) or where the losses occurred.
>
> As Defendant A begins analyzing this latest complaint, it discovers that nearly one thousand of them are barred by New York's Statute of Limitations and another two thousand five hundred could be barred by other states' statutes of limitations and many more could be barred by various Statutes of Repose. Yet, Defendant A cannot move to dismiss the time-barred claims because plaintiffs have failed to provide the necessary information in the complaint to permit Defendant A to identify for the Court what law applies such

318 *In re Brooklyn Navy Yard Asbestos Litigation*, 971 F.2d 831, 853 (2nd Cir. 1992).

> that dismissal would be proper, for example, where a Statute of Limitation in State B applies to claim C. Plaintiffs' response to this is that it will all get worked out in discovery.

This is precisely what the Discussion Draft's approach to conflicts of law is supposed to avoid, but it does not. As can been seen from this illustration, permitting the aggregation of so many claims from so many jurisdictions presents insurmountable obstacles to the proper administration of justice (and this just takes into account simple issues such as Statutes of Limitations and Repose and not the more complex and involved analysis required to address issues such as proximate cause, strict liability, assumption of risk, comparative fault, or other affirmative defenses). Defendants will be unable to extricate themselves from litigations in which they do not belong at an early stage and, instead, will be faced with significant and mounting legal costs or the prospect of paying to settle potentially stale claims.

The aggregation of so many disparate claims in one action both generates and conceals numerous defects in those claims (whether by design or otherwise) and in so doing, interferes with a defendant's right to dispose of individual cases in a timely and efficient manner, thus proving to be less efficient and more costly than individual treatment.

In sum, with no compelling legal or constitutional rationale, Discussion Draft § 2.06 provides numerous opportunities for parties to circumvent established conflicts of laws principles.

Chapter 8

Why Change the Law? The Canadian Perspective

by Peter J. Pliszka[319]

ALI's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION proposes eliminating some of the elements of the test for certification of a class action under Federal Rule 23. Abandoning the existing requirements of predominance and/or typicality could result in a major change in the test for certification of class actions in the United States, particularly for product liability class actions. Ironically, if adopted into law, the effect of the proposal in ALI's Discussion Draft No. 2 would be an expansion of class action litigation in the U.S., in direct conflict with the present trend among American legislatures and courts of seeking to reign in some of the excesses of class actions.

Canadian class action experience illustrates the potential consequences of such a change in the U.S. law. This chapter will describe the Canadian law on certification and highlight the key differences, relative to the test for certification under Fed. R. Civ. P. 23, in respect of the elements of predominance and typicality. Through a discussion of specific case examples, this chapter will show the inevitable effect that such loosening of these two criteria can have on the test for certification of class actions.

I. OVERVIEW OF THE LAW OF CLASS ACTIONS IN CANADA

Canada does not have a national equivalent to the Federal Rules of Civil Procedure; rather, the law of class actions in Canada is regulated provincially. Canada has ten provincially-regulated court systems, with each province having jurisdiction to legislate its own laws of procedure.

The law of class actions has a relatively short history in Canada. It dates back to 1978 when the province of Quebec enacted a class actions statute. However, class actions did not "take off" as a legal phenomenon until the mid-1990's after the two largest common law provinces—Ontario and British Columbia—enacted their own class proceedings legislation. Since that time, almost all of the other Canadian provinces have enacted class action legislation, and in the case of any "jurisdictional gaps" in class action legislation, the Supreme Court of Canada has filled the void with a "judge-made" version of class action law; the Supreme Court has recognized that superior courts have a residual inherent jurisdiction to design an *ad hoc*

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process to allow an appropriate action to proceed as a class action in the absence of any legislative regime.[320]

One consequence of Canada's lack of a national class action regime is that defendants can often find themselves having to defend multiple class actions respecting the same subject-mater in different provinces, without recourse to any framework comparable to the U.S. Multi-District Litigation rules for consolidation of such multiple actions.

The test for certification of class actions is relatively consistent among the various provincial class action regimes in Canada. Certification of a class action in Canada requires the proposed representative plaintiff to bring a certification motion for an order permitting the action to proceed as a class action. The "Canadian test" for certification requires the plaintiff to establish the presence of the following five elements:

1. The pleading discloses a cause of action;

2. There is an identifiable class of two or more persons;

3. The claims (or defences) of the class members raise common issues;

4. The class proceeding would be the preferable procedure for the resolution of the common issues; and

5. There is a representative plaintiff who (a) would fairly and adequately represent the interests of the class, (b) has produced a workable plan for advancing the proceeding as a class action and (c) does not have an interest which might conflict with that of other class members.

As can be seen from these elements, the Canadian test for certification does not require that the common issues predominate over the individual issues. Rather, the Canadian test requires only that the proposed class action contains one or more common issues, the resolution of which would materially advance the conduct of the proceeding. In fact, Canadian legislation explicitly contemplates that there may be multiple individual issues and assessments left to be determined after determination of the common issue(s).

Similarly, the Canadian test for certification does not require that the representative plaintiff be "typical" of the class members in respect of all issues. As discussed further below, the absence of this requirement has led to very broad joinder of claims against multiple defendants.

II. THE CANADIAN CLASS ACTION EXPERIENCE

The absence of a requirement that common issues predominate over individual issues has resulted in a lower threshold for certification of class actions in Canada, relative to the threshold

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320 *Western Canadian Shopping Centres v. Bennett Jones Verchere* (2001), 201 D.L.R. (4th) 385 (S.C.C.) at pp. 399 and 403.

under the Federal Rule 23 in the U.S. This effect has been compounded by the absence of a broad typicality requirement, which has contributed to the certification of relatively unmanageable actions with multiple parties on both sides of an action, and sometimes with multiple sets of common and individual issues.

The effect of these differences is particularly evident in the context of product liability class actions. The relaxed demands of the Canadian certification test has led to far more frequent court certification of product liability class actions in Canada than is the experience under the U.S. Federal Rule 23. Indeed, in the course of approving a class settlement agreement involving a class of 11,000 potential class members in a class action based on allegations of faulty furnace exhaust systems, one Ontario Superior Court judge described product liability actions as "the quintessential class proceeding".[321]

A. Common Issues

The contrast between the U.S. and Canadian certification tests is highlighted in the case of *In re Ford Motor Company Ignition Switch Products Liability Litigation*, a multi-district litigation panel case in the Federal District of New Jersey. The U.S. plaintiffs' counsel had framed this proceeding as a class action based on allegations that the ignition switches installed in Ford Tempos were faulty and caused the cars to stall. On two different occasions, U.S. courts refused to certify the class on the basis that individual issues predominated over any common issue(s).[322]

A few years after those U.S. decisions, the British Columbia Supreme Court considered a certification motion of an action raising the same claim in *Reid v. Ford Motor Co.*[323] In contrast to the U.S. Court, the B.C. Supreme Court certified the class proceeding, and defined a set of twelve common issues that, in the court's view, went to the heart of the litigation. The common issues that were certified dealt with questions of negligence, a statutory cause of action, and punitive damages. In regard to the third category, the motions judge noted that punitive damages are an appropriate common issue in many cases because the focus of the inquiry is on the defendant's conduct.

The motions judge recognized that in a product liability claim "[t]here are usually individual issues of injury and causation that have to be determined in individual proceedings following the resolution of the common issues." Yet, that did not pose a concern to the motions judge, who noted that under Canadian law "products liability cases have been certified even where the court determines that the individual issues predominated over the common issues."[324]

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321 *Ontario New Home Warranty Program v. Chevron Chemical Co. et al.* (1999), 46 O.R. (3d) 130 (S.C.J.) at p. 153.

322 174 F.R.D. 332 (D.N.J. 1997) and 194 F.R.D. 484 (D.N.J. 2000).

323 2003 B.C.S.C. 1632.

324 *Id*. at pp. 90 and 92.

Another British Columbia action which illustrates this lowered threshold for certification is *Hoy v. Medtronic Inc.*,[325] an action involving allegations of faulty pacemaker leads. The B.C. court noted that actions based on analogous facts had not been certified in eleven U.S. class actions, and that certification had already been denied in several such actions because of the predominance of individual issues, which overwhelmed the common issues. Nonetheless, the B.C. court granted certification of the class action, holding that the province's Class Proceedings Act specifically allowed for the individual issues to predominate over common issues, so long as the litigation would be "advanced" by the resolution of common issues.

The jurisprudence respecting predominance is similar in Ontario, the largest and most populous province of Canada. *Anderson v. Wilson*[326] was a case brought on behalf of patents of a medical clinic who presented with hepatitis B infection. The Ontario Court of Appeal certified a class of plaintiffs which included individuals who were not themselves infected, but who alleged that they had suffered nervous shock at the time of being told of the *risk* of potential infection. Even though the issues in a claim for nervous shock would appear to be almost entirely individual in nature, the common issues were certified in extremely broad terms as "liability and punitive and exemplary damages".

Similarly, in *Wilson v. Servier Canada Inc.*[327] the court certified the claim by a class of plaintiffs who alleged that the fenfluramine diet drugs had caused serious heart diseases. Despite noting the large number of individual issues which would need to be resolved in the case of each class member, and the fact that the action would likely require individual discovery for each plaintiff, the Ontario Court observed that product liability cases generally lend themselves to class proceeding treatment. Subsequently, this action was settled prior to the trial, which was projected to last nine months, for an initial fund of CDN$25 million, with class counsel legal fees fixed at CDN$10 million plus $2.6 million in disbursements.[328]

B. Typicality

As mentioned above, under the Canadian certification test the representative plaintiff does not need to have the same cause of action against the same defendant(s) as all of the other members of the prospective class, and a class of plaintiffs may contain several sub-classes. This aspect of the Canadian test has led to situations of class actions that comprise a broad joinder of claims against large numbers of defendants within a single class action.

Under this legal framework, a single class action can implicate an entire industry as defendants. For example, in *MacKinnon v. National Money Mart Co.*[329], a representative plaintiff brought a class action against twenty-seven defendants that conduct business as lenders in the "payday loan" industry. The action claimed that all of the defendants had been unjustly

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325 (2000), 94 B.C.L.R. (3d) 169 (S.C.), aff'd (2003), 14 B.C.L.R. (4th) 32 (C.A.).

326 (1999), 175 D.L.R. (4th) 409 (O.C.A.).

327 (2000), 50 O.R. (3d) 219 (S.C.J.).

328 [2005] O.J. 1039 (S.C.J.).

329 (2004), 33 B.C.L.R. (4th) 21 (C.A.).

enriched on the basis that the loan contracts between the various defendants and the plaintiff class members allegedly were, *inter alia*, unconscionable and contrary to the criminal rate of interest provisions of the *Criminal Code of Canada*.

The defendants brought a pleadings motion for an order striking the statement of claim on the basis that the action disclosed no cause of action as against the majority of the defendants, because the lone representative plaintiff had contractual relationships with only four of the twenty-seven defendants. The British Columbia Court of Appeal refused to strike the action, holding that any concerns could be addressed through the installation of sub-classes and the addition of further representative plaintiffs which could be dealt with at a later stage in the litigation, and that causation should in the meantime be considered in the context of the class generally rather than in respect of each of the individually-named defendants.

Campbell v. Flexwatt[330] is a more extreme example of the broad joinder arising from the lack of a meaningful typicality requirement in the Canadian test for certification. That case involved allegations of defective radiant ceiling heating panels. Two representative plaintiffs brought a class action against the suppliers of the ceiling panels and also ten municipalities for alleged negligence in the building requirements and inspections, despite the fact that each of the two plaintiffs had a cause of action against just one municipality. As in *MacKinnon*, the British Columbia Court of Appeal held that there was no need for the representative plaintiff to have a cause of action against all of the defendants, as any issues could be addressed through the appointment of subclasses. The Court of Appeal also observed that the manufacturers of these ceiling tiles were out of business at the time of hearing, and accepted the defendants' submission that "there is some merit to [counsel's] submission that the plaintiffs are simply looking for 'deep pockets' to solve their dilemma". Yet, the court still held that it was just and convenient to certify the action, since doing so would alleviate the need for 2000 individual actions.

Note that the Ontario certification test is slightly more restrictive than that of B.C. in one respect: multiple subclasses and multiple defendants are permitted, but the Ontario courts require the presence of at least one representative plaintiff claimant against each of the defendants for certification.[331] This requirement provides little substantive protection for defendants, however, as it merely means that plaintiffs' counsel will endeavour to gather and organize their subclasses and representative plaintiffs in advance of the certification motion.

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330 (1996) 25 B.C.L.R. (3d) 329 (S.C.), reversed in part [1997] B.C.J. No. 2477.

331 *Rangoonanan Estate v. Imperial Tobacco Canada Ltd.*, (2000) 51 O.E. (3d) 603 (S.C.J.).

Chapter 9

Why Change the Law? The Economic Perspective

by James A. O'Neal[332]

de minimis non curat lex—"The law does not concern itself with trifles."

Traditional aggregate litigation, which adjudicated the joint rights of multiple parties in a common factual setting, made sense not just as a matter of justice but from an economic perspective as well. For example:

- Such aggregate litigation can avoid the risk of potential inconsistencies in result (e.g., subjecting a defendant to incompatible standards).[333]

- Such aggregate litigation can address issues that dispose of or affect the rights of non-parties or uniformly benefit an entire class (e.g., injunctive relief for claims of discrimination).[334]

Such cases achieve the economically desirable goals of avoiding costly ambiguities, addressing issues of broad public concern in a single forum, and reducing the costs of litigation by avoiding duplication of effort.

In recent years, however, litigants have increasingly extended the reach of aggregate litigation into areas in which the class members' claims and rights are not joint but merely similar. Advocates have attempted to justify this expansion in economic terms by arguing that because any individual claimant's loss is small, aggregate litigation is necessary to redress such losses efficiently and to prevent defendants from unjustly enriching themselves. *See, e.g.*, Jonathan R. Macey & Geoffrey P. Miller, The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform, 58 U. Chi. L. Rev. 1, 8 (1991).

In reality, however, the broad extension of aggregate litigation frequently fails to provide either the same economic advantages afforded by earlier cases or proportionate compensation for claimants' most trivial injuries. On the contrary, such aggregate litigation often imposes significant *additional* economic costs on litigants and society alike, forcing courts to slog through a quagmire of trivial claims better addressed though other means, all the while incurring mammoth transaction costs. Any realistic consideration of the status of aggregate litigation must

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333 *See, e.g.*, Alba Conte & Herbert Newberg, *Newberg on Class Action* § 1.8 (4th ed. 2002).

334 *See id.*

take these economic costs into account, and PLAC offers for ALI's consideration the following discussion of the principles of such litigation. PLAC respectfully submits that the economics and incentives attendant upon the modern realities of aggregate litigation if anything argue for its contraction, and certainly not for its expansion.

I. *DE MINIMIS NON CURAT LEX*: THE LAW DOES NOT CONCERN ITSELF WITH TRIFLES

The common law maxim *de minimis non curat lex*—the law does not concern itself with trifles—finds deep roots in American jurisprudence.[335] Courts invoke this maxim when dismissing inconsequential claims involving an alleged wrong that either constitutes only a trifling invasion of a right or causes only trifling damage.[336] The basis for the *de minimis* doctrine is the most simple economic principle—efficiency. Some wrongs are no more than trifles so slight that the law precludes a claimant from seeking redress because the costs associated with bringing the claim far outweigh the potential benefits. Thus, the *de minimis* doctrine concludes that these trifles "must yield to practical common sense and substantial justice" so as "to prevent expensive and mischievous litigation, which can result in no real benefit to [the] complainant, but which may occasion delay and injury to other suitors."[337]

This basic cost-benefit calculus underpins nearly all strategic decisions in litigation. Plaintiffs (and their lawyers, especially those working on a contingency fee basis) have a strong disincentive to bring a claim if they may suffer an economic loss even if they ultimately prevail. From a purely economic perspective, individual plaintiffs should not (and in fact normally do not) bring "trifling" cases because the transaction costs will easily—and overwhelmingly—outstrip the maximum potential recovery. Further, most people simply lack the time or energy to pursue such claims and instead write them off as the cost of getting out of bed each morning. Indeed, "[m]ost individuals are too preoccupied with daily life and too uninformed about the law to pay attention to whether they are being overcharged or otherwise inappropriately treated by those with whom they do business. Even if they believe that there is something inappropriate about a transaction, individuals are likely just to 'lump it,' rather than expend the time and energy necessary to remedy a perceived wrong."[338] This is the way the economic "marketplace" of litigation should work in its undisturbed state.

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335 *See, e.g.*, *Lee v. Weisman*, 505 U.S. 577, 631 (1992) (Souter, J., concurring) (quoting an 1822 letter from James Madison arguing that his peers were unlikely to challenge a legislative prayer under the Establishment Clause so "[r]ather than let this step beyond the landmarks of power [that] have the effect of a legitimate precedent, it will be better to apply to it the legal aphorism de minimis non curat lex"); 1 Am. Jur. 2d *Actions* § 51 (2005).

336 1 Am. Jur. 2d *Actions* § 51 (2005); *see also, e.g.*, *Koos v. First Nat'l Bank of Peoria*, 358 F. Supp. 890, 892 (S.D. Ill. 1973).

337 Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 Gonz. L. Rev. 315, 323-24 (2002) (quoting *Schlichtman v. N.J. Hwy Auth.*, 579 A.2d 1275, 1279 (N.J. Super. Ct. Law Div. 1990)).

338 Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 Me. L. Rev. 223, 227 (2004).

II. THE CLASS ACTION

Enter aggregate litigation, and in particular the class action, a procedural convenience intended to aggregate many common claims in a single judicial proceeding.[339] By allowing many plaintiffs to consolidate their claims, the class action can amplify the significance of claims that would otherwise be too uneconomical for an individual plaintiff to pursue alone.[340] Indeed, the most frequently offered justification for aggregate litigation is that it permits plaintiffs to litigate claims that no individual plaintiff could or would pursue alone.[341]

There can be little question that a class action may provide a expedient means of allowing individuals to pursue together claims that require redress but that might go unprosecuted if left as single claims.[342] However, as one organization studying class action litigation noted, providing the framework for aggregated litigation is not that simple: "[A]ny change in the court processes that provides more efficient means of litigating is likely to enable more litigation."[343] This "enabling mechanism" of Rule 23 significantly expands the pool of litigants, both in number and type.[344] As aggregate litigation has evolved over the years since courts adopted the current Rule 23, defendants face an entirely different type of litigation, with classes of nameless litigants asserting broad claims that pose risks in case assessment that differ in many ways from ordinary, one-on-one litigation.

Although Rule 23 was initially created to allow for civil rights and other similar social policy reform litigation,[345] it has in the last 20 years taken on a new use for new types of cases. During this period, plaintiffs' lawyers have successfully argued for the expansion of class actions into product liability and mass tort litigation.[346] What was intended to be a procedural tool has evolved into a "mechanism that affects the substantive outcome of a lawsuit" by forcing

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339 1 *The New Palgrave Dictionary of Economics and the Law* 257 (Peter Newman, ed., Stockton Press, 1998).

340 Jeff Nemerofsky, *What is a "Trifle" Anyway?*, 37 Gonz. L. Rev. 315, 333 (2002).

341 *See, e.g., id.* (stating that the class action "provides a mechanism through which persons with small claims can obtain compensation for harms that would not be available from other means"); Deborah R. Hensler, Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation, 11 Duke J. of Comp. & Int'l L. 179, 182 (2001).

342 *See id.* at 5.

343 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 49-50 (2000) (providing an overall analyses of a study of damage class actions conducted by the RAND Institute for Justice).

344 *See id.*

345 *See id.* at 52; S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 8, 2005 WL 627977.

346 S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 8, 2005 WL 627977; Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 99 (2000).

corporate defendants to respond to the leverage of a class action certification by settling rather than litigating.[347]

III. THE ECONOMICS OF AGGREGATE LITIGATION

A. Aggregate Litigation Fundamentally Changes the Litigation Cost-Benefit Analysis and Results in the Filing of Trifling Claims That Would Never be Brought by an Individual Plaintiff

Aggregate litigation can undermine the cost-benefit analysis that underpins ordinary two-party litigation. In the typical class-action paradigm, plaintiffs' counsel does not bill the class an hourly fee and pays litigation costs and expenses as they are incurred until the litigation concludes (whether by settlement or, more rarely, by judgment). At that point, class counsel seeks attorney's fees and reimbursement of costs and expenses, either directly from the defendant or from a "common fund" intended to benefit the class. Because absent class members are often unidentified until they seek a portion of the recovery, they may remain anonymous if the class action is unsuccessful, and in any event bear no economic risk. The absence of both out-of-pocket costs and ultimate financial risk to class members removes from aggregate litigation the normal cost-benefit calculus that balances the likelihood and amount of the potential recovery against the litigation costs in deciding whether to file a suit. As a result, many "negative value" cases, in which the expected individual recoveries are a tiny fraction of the actual costs of litigation, are brought as class actions.[348]

A classic example of a class action seeking astronomical damages over a trifling claim is *Harris v. Time, Inc*.[349] In *Harris*, the plaintiffs filed a class action lawsuit claiming that Time magazine committed a breach of contract through its offer of a calculator watch just for opening a piece of junk mail.[350] The California Court of Appeal held that the *de minimis* doctrine applied and affirmed the trial court's dismissal of plaintiffs' claims, noting "plaintiffs suffered no damage or loss other than having been enticed by the external wording of a piece of bulk rate mail to open [an] envelope, believing that doing so would result in the receipt of a free plastic calculator watch."[351] The court quipped that "[a]lthough most of us, while murmuring an appropriate expletive, would have simply thrown away the mailer, and some might have stood on principle and filed an action in small claims court to obtain the calculator watch, [plaintiff] did something a little different: he launched a $15,000,000 lawsuit in San Francisco Superior Court."[352] The court concluded that "the present action is 'de minimus [sic]' in the extreme. . . .

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347 S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 20, 2005 WL 627977.

348 Gary L. Sasso, *Class Actions: De Minimis Curat Lex?*, 31 No. 4 Litig. 19 (Summer 2005); Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 Me. L. Rev. 223, 228 (2004).

349 191 Cal. App.3d 449, 237 Cal. Rptr. 584 (1987).

350 *Harris v. Time, Inc.*, 191 Cal. App.3d 449, 452-53, 237 Cal. Rptr. 584, 585-86 (1987).

351 *Id.* at 452, 237 Cal. Rptr. at 585.

352 *Id.* at 453, 237 Cal. Rptr. at 586.

[and] is an absurd waste of the resources of this court, the superior court, the public interest law firm handling the cases and the citizens of California whose taxes fund our judicial system."[353] Unfortunately, the *Harris* court's disposition of this "negative value" case is the exception rather than the rule.

B. Entrepreneurial Attorneys Drive Class Action Litigation and Have Their Own Economic Interests That Do Not Always Align With the Interests of the Class Members

Experience has shown that in practice, aggregate litigation often does not result in the idealistic "pooling" of the class members' resources to pursue a common claim against a wrongdoer. Instead, class action litigation has become a cottage industry dominated by a few firms that specialize in seeking out claims and creating class representatives to assert them. Entrepreneurial plaintiffs' attorneys have developed sophisticated monitoring strategies that enable them to seek out opportunities for litigation instead of waiting for clients to come to them.[354] These attorneys select the class representative, underwrite the costs of litigation, and exercise "all but absolute control" over the lawsuit.[355] To the extent the unnamed class members are even aware of the class action, they play little role in the litigation and usually have a trivial financial stake in the outcome.[356] Thus, "[m]ost class actions are 'lawyer driven'" cases in which the class attorney controls the litigation process and settlement decisions, rendering the class representative no more than a "token figurehead."[357]

The evolution of plaintiffs lawyers specializing in—and actively seeking out—class action litigations results, not from attorneys who are greedy or venal, but from the economic necessities of the situation. Because aggregate litigation effectively circumvents the *plaintiff's* normal litigation cost-benefit analysis, as discussed above, the controlling economic factor becomes instead the cost-benefit analysis of the *attorney*. In other words, the deciding question is not whether prosecuting a claim makes economic sense for the plaintiffs. Instead, the decision to file a claim hinges on whether class counsel believes it can structure a claim that will survive

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353 *Id.* at 458, 237 Cal. Rptr. at 589.

354 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain—Executive Summary* 9 (Rand Institute for Social Justice 1999).

355 *Id.*; *see also* Alon Klement, *Incentive Structures for Class Action Lawyers*, 20 J. L. Econ. & Org. 102, 103-104 (2004); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3 (1991).

356 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain—Executive Summary* 9 (Rand Institute for Social Justice 1999); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 3 (1991).

357 Alon Klement, *Incentive Structures for Class Action Lawyers*, 20 J. L. Econ. & Org. 102, 103-104 (2004); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 5 (1991).

preliminary motion practice and produce a certified class, and, as discussed below, coerce an early settlement.

The metamorphosis of plaintiffs' counsel from counselor to injured party to the *de facto* party in interest raises numerous practical and ethical issues. Financial incentives drive plaintiffs' lawyers to increase the frequency of class action litigation and to push the bounds of existing law in search of the next claim—regardless of merit—that can garner a quick, large settlement.[358] Indeed, plaintiffs' lawyers have numerous incentives to settle cases with the smallest possible investment of time and money, regardless of the interests of the putative clients. Inasmuch as most law firms that represent plaintiffs in class action specialize in such litigation, they maximize their profitability and minimize their risk of loss by spreading their time and resources broadly over several cases instead of putting their proverbial eggs in one basket.[359] One negative side effect of this risk-spreading by class counsel can be the settlement of claims at less than full value to the class members.[360] Because class representatives rarely participate in strategic decisions (and absent class members never do), the class lawyers often make settlement decisions unchecked by anyone but the court, which necessarily operates with only the information the plaintiffs' attorney and the settlement-motivated defendant give it. This results in settlements that maximize the fee award but *not* necessarily the benefit to the class members. One study suggests that class counsel are more interested in "finding a settlement price that defendants [will] agree to—rather than in finding out what class members had lost, what defendants had gained, and how likely it was that defendants would actually be held liable if the suit were to go to trial, and negotiating a fair settlement based on the answers to these questions."[361]

C. Examples of Cases Providing Disproportionate Compensation to Class Counsel

Horror stories abound of class settlements that provide astronomical fees for the class attorneys and trivial awards for the class members. Of these cases, the most widely criticized involve awards of coupons or vouchers to class members. The coupons and vouchers that go unused impose no cost on the defendants and provide no benefit to the class members.[362] Indeed, these coupon settlements are often little more than a marketing ploy by the defendant and may generate sales (and profits) that would not have occurred but for the incentive of the coupon

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358 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain—Executive Summary* 9 (Rand Institute for Social Justice 1999).

359 Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. of Comp. & Int'l L. 179, 189-90 (2001).

360 *Id.*

361 *Id.* at 199.

362 Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 Me. L. Rev. 223, 229 (2004).

or voucher.[363] Courts sometimes use the face value of the coupons—instead of the face value multiplied by the percentage of the coupons that are actually used—to determine the fee award for class counsel, which can result in a dramatic inflation in the amount of fees paid to class counsel.[364]

The more egregious cases illustrating the disparity between the value of the compensation awarded to the class members and the fees received by class counsel include *Shields v. Bridgestone/Firestone, Inc.*, *Scott v. Blockbuster, Inc.*, and *Hoffman v. BancBoston Mortgage Corp.* In each of these cases, the class members received a token award—if any—while class counsel were paid handsomely.

In *Shields*, the class asserted claims against Bridgestone/Firestone relating to tire failure problems. Under the settlement, Bridgestone/Firestone agreed to replace any recalled tires (which it had already voluntarily agreed to do outside of litigation), redesign its tires, and fund a consumer education program.[365] The only monetary compensation under the settlement provided each of the 45 named plaintiffs with $2,500, but the other 10-15 million class members received no monetary compensation.[366] Meanwhile, class counsel received $19 million in fees and expenses.[367]

In *Scott*, the class members challenged Blockbuster's late fee policy on video rentals.[368] Under the settlement, each class members received coupons for discounts on future rentals, with face values ranging from $10.06 to $21.16 per person.[369] while class counsel received $9.25 million.[370]

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363 *See, FTC Workshop—Protecting Consumer Interests in Class Actions, September 13-14, 2004, Workshop Transcript*, 18 Geo. J. Legal Ethics 1161, 1168-69 (2005) (statements of Christopher Leslie).

364 *See, e.g.*, id. at 1165-67 (statements of John Delacourt).

365 *Shields v. Bridgestone/Firestone, Inc.*, No. B-170,462, 2004 WL 546883 at *5 (Dist. Ct. of Tex. - Jefferson County March 12, 2004) (unpublished opinion).

366 *Id.* at *20 (Dist. Ct. of Tex. - Jefferson County March 12, 2004) (unpublished opinion); Brenda Sapino Jeffreys, *Judge Approves $149 Million Firestone Tire Settlement—But Not all Class Members Think it's a Good Deal*, Texas Lawyer (March 22, 2004), http://www.law.com/jsp/article.jsp?id=1079640446435.

367 *Shields v. Bridgestone/Firestone, Inc.*, No. B-170,462, 2004 WL 546883 at *21 (Dist. Ct. of Tex. - Jefferson County March 12, 2004) (unpublished opinion); Brenda Sapino Jeffreys, *Judge Approves $149 Million Firestone Tire Settlement—But Not all Class Members Think it's a Good Deal*, Texas Lawyer (March 22, 2004), http://www.law.com/jsp/article.jsp?id=1079640446435.

368 *See Johnson v. Scott*, 113 S.W.2d 366, 369 (Tex. App. 2003) (summarizing class action claim).

369 *Id.* at 374.

370 *Id.* at 371.

Finally, and most egregiously, in *Hoffman v. BancBoston Mort. Corp*., the class members alleged that the defendant had overcharged mortgagors so that a surplus existed in each mortgagor's escrow account.[371] Under the settlement, defendant changed its escrow practices and made "de minimis interest payments (not to exceed $8.76)" to the class members.[372] However, the settlement also allowed the defendant to deduct the $8.5 million attorneys' fee award from the accounts of nearly 300,000 class members that joined the settlement, which resulted in a net *loss* of $80-100 to each class member.[373]

Although these examples are extreme, they are symptomatic of the very real economic problem posed by aggregate litigation. Aggregate litigation often has the effect of putting the cart before the horse. The primary focus of the litigation, and in particular the settlement, shifts from compensating injured parties (which finds justification in theories of both economics and justice) to compensating the attorneys who bring the claim (which finds justification in neither).

D. Aggregate Litigation Fundamentally Changes the Cost-Benefit Analysis Employed by Defendants

On the defense side, the potential magnitude of an adverse judgment, as well as the substantial attorneys' fees, defense costs, and business disruption inherent with class action litigation, create a pressure for defendants to settle the litigation as early and cheaply as possible, a pressure that can be compelling to the point of coercive..[374] Aggregate litigation also increases the number of plaintiffs that would assert a claim because of the broadly defined classes and the minuscule percentage of plaintiffs who choose to opt out. [375] This increased number of claimants inevitably drives the cost of class settlement higher than the sum of the claims that individual claimants would *actually* assert in the absence of the class action.[376] These factors drive early settlements regardless of the actual merit of the underlying claims.[377]

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371 *See Kamilewicz v. Wildman, Harrold, Allen & Dixon*, 700 So. 2d 340, 341 n.1 (Ala. 1997) (describing settlement terms).

372 *Id.*

373 *Id.* (stating that pursuant to the settlement, after paying the class members their settlement awards, the defendant charged the escrow accounts of the two named plaintiffs $91.33 and $80.94, respectively for their shares of the class attorneys' fees).

374 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain—Executive Summary* 10 (Rand Institute for Social Justice 1999).

375 Edward F. Sherman, *Consumer Class Actions: Who Are The Real Winners?*, 56 Me. L. Rev. 223, 227 (2004).

376 Deborah R. Hensler, *Revisiting the Monster: New Myths and Realities of Class Action and Other Large Scale Litigation*, 11 Duke J. of Comp. & Int'l L. 179, 190 (2001).

377 *In the Matter of Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (citing Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973)); *see also* J.B. Heaton, *Settlement Pressure*, 25 Int'l Rev. L. & Econ. 264 (2005); Gary L. Sasso, *Class Actions: De Minimis Curat Lex?*, 31 No. 4 Litig. 16 (Summer 2005).

1. In practice, the cost to a defendant of disputing the suitability of class certification is far greater than a plaintiffs' costs in urging class certification

There is no question that the costs of aggregate litigation weigh heaviest on the defendants. This is evident in the initial stage of attaining class certification itself. Although the burden of establishing the requirements of Rule 23 or the corresponding state rules formally rests on plaintiffs, practice suggests that defendants in fact bear the greater burden—and thus the greater cost—in opposing a class certification motion.

Rule 23 anticipates that the burden is the plaintiff's to move for class certification shortly after initiating a class action complaint, and that it remains the plaintiffs' counsel's burden to establish that their particular case is one appropriately maintained as a class action under the requirements of Rule 23.[378] Commonly, however, the real burden at this stage of the litigation rests with the defendant in attempting to convince the court *not* to certify a class. The risk is that plaintiffs will make a bare-bones motion for certification and the court will, with little analysis, certify the class at the outset and worry about the mechanics of how actually to try the case on a classwide basis later. This concern—directed mainly to state court judges—was acknowledged as one of the purposes behind passage of the recently enacted Class Action Fairness Act of 2005. The final Senate Report on the legislation noted that "some state court judges are less careful than their federal court counterparts about applying the procedural requirements that govern class action. In particular, many state court judges are lax about following the strict requirements of Rule 23."[379] Thus, if a defendant determines that it needs, for whatever reason, to defend the litigation aggressively, the certification of a class at the very early stages of the case changes the way in which that defendant is going to have to defend such a case. The certification stage of litigation sets the course of the entire remainder of the case, defining both the course and the cost of the defense.

Faced with such risks at the certification stage, defendants have a strong interest in preventing class certification. After all, once a class is certified, the expenses of the litigation may be overwhelming depending on the size and sophistication of the defendant.

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[378] *See* Fed. R. Civ. P. 23; *Kassover v. Computer Depot, Inc.*, 691 F. Supp. 1205, 1213 (D. Minn. 1987), *aff'd*, 902 F.2d 1571 (8th Cir. 1990); *Knight v. Board of Ed. of City of New York*, 48 F.R.D. 108 (E.D.N.Y. 1969).

[379] S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 14 2005 WL 627977; *see also id.* at 5 "[C]urrent [class action] law enables lawyers to "game" the procedural rules and keep nationwide or multi-state class actions in state courts whose judges have reputations for readily certifying classes and approving settlements without regard to class member interests."

2. Effect of aggregate litigation on settlement

a. Regardless of defendants' strength on the merits, a bet-the-company risk unavoidably coerces a defendant toward settlement

Although the damages to which each individual class member claims entitlement may be only a few dollars, the vast size of some plaintiff classes can create potential damage amounts into the hundreds of millions or even billions of dollars. The sheer magnitude of this sort of exposure can exert considerable pressure on the defendant to settle, even when the plaintiffs' probability of success on the merits is slight."[380]

In the Seventh Circuit, Judge Friendly has noted that such pressure leads to what he termed "blackmail settlements."[381] Indeed, a company facing such a claim has only two choices: staking the company's future on the decision of a single jury trial or settling solely out of "fear of the risk of bankruptcy . . . even if they have no legal liability . . . ."[382] Indeed, this threat can coerce settlement of aggregated claims that, had they been brought individually, the defendant would have fought as frivolous. For example, the Senate Report of the Judiciary Committee supporting passage of the Class Action Fairness Act of 2005 recounted a case reported by the Insurance Commissioner of the District of Columbia. In that case, class plaintiffs sued two auto insurance companies based on a practice that was not only accepted industrywide but done in accordance with instructions from the Texas Department of Insurance. Nevertheless, facing high legal expenses and unwanted publicity, the defendants settled for $36 million for the sin of following this accepted practice.[383] Although such results may offend the ordinary sense of justice, they are not surprising from an economic point of view. Even if the chance of losing at trial is only one in ten, a settlement demand of less than 10% of the asserted value of the claim is, economically, difficult to justify refusing.

This concern has been articulated by no less a respected economist/jurist than Judge Richard Posner of the U.S. Court of Appeals for the Seventh Circuit. In *In re Rhone-Poulenc Rorer, Inc.*, the district court had certified a nationwide class of hemophiliacs who alleged they were infected with HIV from contaminated blood products made by the defendant.[384] The defendant moved for a writ of mandamus reversing the trial court's certification of the class.

In granting the writ and reversing class certification, Posner observed that defendants in large class actions often find themselves in a Catch-22: either "stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[385] Posner then predicted the practical effect class certification would

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380 *Blair v. Equifax Check Servs. Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

381 Friendly, Judge Henry J., *Federal Jurisdiction, A General View* 120 (1973).

382 *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

383 S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 21, 2005 WL 627977.

384 *See generally* 51 F.3d 1293 (7th Cir. 1995).

385 *Id.* at 1299.

have had in this case. Posner noted that approximately 300 related cases were on file and that 13 had already been tried, with the defendants prevailing in 12 of the 13 cases (92.3%).[386] In the absence of class certification, Posner predicted that the defendants would take the 300 related cases to trial and win a similar percentage of them, while losing 25.[387] He then estimated that each loss would result in a $5 million award, for a total damage amount of $125 million.[388]

Posner then hypothetically assumed that the class was certified and estimated that the class would consist of 5000 plaintiffs with claims that survive the statute of limitations.[389] Assuming the same judgment amount—$5 million per plaintiff—Posner calculated that the total exposure soars to $25 billion.[390] As Posner aptly stated, given these stakes, the defendants "may not wish to roll these dice. That is putting mildly. They will be under intense pressure to settle."[391] Posner noted that if class certification were granted , "[o]ne jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand . . . and [may] hurl the industry into bankruptcy."[392]

The economic problem with class certification was manifest in the *Rhone-Poulenc* scenario. In the absence of class certification, the total value of the individual claims was $125 million. However, once the class was certified, the settlement value of the case—derived by multiplying the risk of loss (7.7%) times the potential damages ($25 billion)—jumped over 1500% to $1.925 billion. In this way, the stakes in aggregate litigation can become so high that defendants are coerced into settling suspect claims solely out of fear of a catastrophic jury verdict. In granting mandamus, Judge Posner and the 7th Circuit recognized the dangers in certifying a class of this nature—where the human suffering of the class members is much more forceful than the plaintiffs' ability to prove any kind of liability—and specifically recognized the serious financial dilemma a defendant faces when a class is certified. Posner wrote that "certification of a class action, even one lacking merit, forces defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability."[393]

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386 *Id.* at 1296, 1299.

387 *Id.* at 1298.

388 *Id.*

389 *Id.*

390 *Id.*

391 *Id.*

392 *Id.* at 1300.

393 51 F.3d 1293, 1299 (7th Cir. 1995).

b. Basing the economic decision to settle a case on the result of a purely procedural issue, rather than on the merits of the claim, severely and unavoidably distorts the economic realities of the underlying legal issues, whatever those issues may be

In aggregate litigation, the economic realities faced by defendants, plaintiffs, and plaintiffs' attorneys often make them lose sight of what most lay people would assume to be the most important issue in the case: liability. In the mid-1990s, the RAND Institute for Civil Justice conducted a study of class actions by examining in detail ten different cases in which classes were certified and the cases concluded either by class settlement or by trial. The RAND Institute determined that the "big question" of whether such lawsuits concluded with recoveries comparable to the injuries alleged, and whether class plaintiffs were actually well-served by the litigations, was a question of interpretation. One conclusion made about these ten suits was that "[w]hether plaintiffs in any of these ten class actions *should* have received compensation from *these* defendants is a normative question that was never decided by the courts, because the cases were settled without judgment."[394] However, the costs to the defendants in some of the cases outweighed the actual value of the litigation itself:

> As in all other forms of civil litigation, the costs of obtaining these benefits were large. Defendants in some of the class actions spent tens of millions of dollars—in one instance, hundreds of millions of dollars—in plaintiff attorney fees and expenses and administrative costs, including the costs of notice and disbursement of settlement funds. Defense attorneys' charges added unknown amounts to these transaction costs; in some cases, these charges may have exceeded plaintiff attorney fees and expenses. In three of the ten class actions, transaction costs (excluding defense fees) exceeded the total amounts paid to class members; in another two cases, transaction costs and payments to class member were roughly equal.[395]

IV. OTHER NEGATIVE ASPECTS OF AGGREGATE LITIGATION

Class action settlements often provide little benefit to either the class members or society. The joint interests of plaintiffs' counsel and defendants in quick settlement (albeit for vastly different reasons) can result in settlement without adequate factual or legal investigation into the plaintiffs' claims, resulting in little realized economic value either to the class members or to society. [396] On the contrary, such quick-and-cheap settlements without regard to the merits may actually impose significant costs on society. These costs take several forms, including (a) the effective deprivation of the defendants' ability to obtain an adjudication of the case on the merits because of the risk of an enormous damage award that would immediately force bankruptcy, (b)

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394 *Id.* at 468.

395 *Id.*

396 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain—Executive Summary* 10 (Rand Institute for Social Justice 1999).

extortionate payments for frivolous damage claims, and (c) lost opportunities for deterring the filing of frivolous suits. [397] Indeed, the plaintiffs' bar's increasing awareness of defendants' tendencies to settle aggregate litigation prematurely may result in an *increased* number of frivolous claims filed by unscrupulous attorneys looking for a quick payday.[398] Finally, truly meritorious claims may be settled quickly on terms that neither adequately compensate injured plaintiffs nor provide a sufficient incentive to prevent the defendant from repeating the offending conduct.

In the end, as the Senate Judiciary Committee determined through its own hearing on the topic, the true costs associated with the advent of these settlement classes are the costs to society that result from an increase in aggregate litigation without a comparable increase in the quality or meritorious nature of such suits.[399]

The advent of class actions changed the dynamics of already-aggregated mass tort litigation, exacerbated old controversies, and created new ones. Mass tort practitioners had already learned that large numbers of cases, collected together, create intense pressure for settlement, and many had adopted strategies for finding substantial numbers of clients.[400]

V. THE PRESENT LEGAL STRUCTURE PROVIDES ECONOMICALLY EFFICIENT ALTERNATIVES TO AGGREGATE LITIGATION

Advocates of class actions and other aggregate litigation often urge that, where individuals' claimed losses are small, aggregate litigation provides the only economically viable means of redressing such losses and of preventing a defendant from profiting from improper or unlawful conduct. In reality, however, current law provides several alternative methods of addressing disputes involving these broad concerns that are, in many instances, much *more* economically efficient than aggregate civil litigation. Indeed, some states have specifically banned aggregate litigation in some of the very types of cases in which individual claimants' claims may be small, such as consumer fraud actions.[401]

A. Attorneys General Often Provide a More Efficient Means of Setting Priorities and Allocating Resources to the Pursuit of the Broad Public Goals Urged in Support of Aggregate Litigation

The front line of defense for protecting society and its members from the broad abuses of corporate, institutional, union, or other concentrated power are the attorneys general, the government lawyers who are specifically charged with that very protection. Both the federal

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397 *Id.*

398 *Id.*

399 S. Rep. 109-14, 2005 U.S.C.C.A.N. 3, 32, 2005 WL 627977.

400 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 49-106 (2000).

401 *See* Ala. Code § 8-19-10(F); Ga. Code § 10-1-399(a); La. Rev. Stat. § 1409; Miss. Code § 75-24-15(4); Mont. Code § 30-14-133(1); S.C. Code § 39-5-140.

government and the states have statutes authorizing their respective attorneys general to protect the public interest in the very areas that most often prompt aggregate litigation, including consumer fraud, environmental contamination, workplace safety, and insurance sales and claims-handling practices.[402] These statutes provide attorneys general with a panoply of weapons with which to pursue those goals, including broad powers to seek damages, injunctions, fines, and civil penalties against corporations and institutions that violate the public trust.

Actions by attorneys general under such laws have a number of economic advantages over privately commenced aggregate litigation that (at least ostensibly) pursues the same goals. At the threshold, attorneys general can and do conduct informal investigations and communicate with companies about possible violations of the law, particularly minor or unintentional violations. Through such communications, attorneys general and these companies can often reach compromises that both satisfy the law and account for the commercial needs of the companies, avoiding litigation altogether. Attorneys general can often reach such amicable compromises in the same types of disputes—corporate conduct that violates public policy but nonetheless has a *de minimis* impact on any particular individual—that can generate expensive, inefficient, and inherently confrontational aggregate litigation.

An attorney general can thus address the public's legitimate concerns informally, with minimal transaction costs to either the public or the offending company. In contrast, a private attorney, whose economic welfare depends on the recovery of money in an adversarial setting, lacks both the incentive and the ability to reach such informal resolutions. Moreover, the private litigant's necessary focus on a monetary recovery, although punishing the defendant for past transgressions, may do little to serve the larger public goal of positively affecting the defendant's *future* conduct.

Attorney general actions also provide economic advantages when claims are actually placed in suit. Attorney general offices are generally large and employ scores or even hundreds of attorneys, far more than most private firms, providing substantial economies of scale. Moreover, because of both their number and their experience, these attorneys often have specialized legal expertise both in the procedures for pursuing and correcting unlawful conduct and in the substantive legal fields at issue in particular cases.

Perhaps most importantly, because attorneys general lack the profit motive inherent in private aggregate litigation, settlements in attorney general actions are both more probable and more likely to truly serve the public interest. Although a settlement demand from an attorney general may seem onerous to a defendant, such a demand is unlikely to present the kind of "bet the company" dilemma sometimes presented by private litigants in aggregate litigation.

In addition, a private person instituting an aggregate action is necessarily myopic: a private plaintiff can assert a claim only for an injury he or she has actually suffered, and, from an

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[402] *See, e.g.*, the Lanham Act, 15 U.S.C. § 1051 et seq (consumer deception); the Comprehensive Environmental Response, Compensation and Liability Act (CERCLA), 42 U.S.C. § 9601 et seq. (environmental pollution); the Solid Waste Disposal Act. 42 U.S.C. § 6901 et seq. (same); and the Occupational Health and Safety Act, 29 U.S.C. § 651 et seq., as well as their state analogs.

economic point of view, a private attorney can only be expected to bring an action that presents a reasonable likelihood of an acceptable economic return. In contrast, an attorney general can assess and act on broader economic priorities and for the good of the public as a whole, without the concerns of standing or profit. In addition, because the attorney general is either a publicly elected official or the immediate appointee of such an elected official,[403] the attorney general is much more publicly accountable for those decisions and actions than a private attorney or litigant could ever be.

B. Conciliation Court Provides Plaintiffs with Economically Efficient Means of Recovering Damages for Small Injuries

With respect to actual redress for claims that might otherwise be regarded as *de minimis*, conciliation courts (often called "small claims" courts) provide an economically efficient means of addressing such claims. Virtually all states provide such courts for the resolution of small monetary claims.[404] Statutes generally place limits on the amount of recovery that a plaintiff may seek in such a court, but these limits range from a few hundred to a few thousand dollars,[405] well above the individual plaintiffs' or class members' recoveries in most aggregate litigation.

These conciliation courts provide a convenient and efficient forum for dispute resolution to those individuals whose economic injuries are sufficient to motivate them to seek monetary recovery. The transaction costs are low. The plaintiff pays a modest filing fee, which can often be recovered from the defendant if the plaintiff prevails.[406] The court often provides standard forms and other forms of procedural assistance to the litigants.[407] The parties present their cases themselves in a relatively informal manner, and receive a prompt decision with the right of appeal. States have worked hard to increase the convenience and reduce the costs of these courts, and with considerable success.[408] Such courts provide a user-friendly and economically efficient means of addressing small monetary claims that might otherwise escalate into unnecessarily expensive and burdensome aggregate litigation.

Rather than circumventing the cost-benefit balancing that should underlie all litigation decisions, these courts respect that balance and work with it. Aggregate litigation *increases* costs in the hope of obtaining a large "benefit," which is often of dubious value to stakeholders who may be unaware that they have even been injured. In contrast, conciliation courts *reduce* the

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403 *See, e.g.*, 28 U.S.C. § 503; Minn. Const. Art. 5 § 1; C.R.S.A. Const. Art. 4 §§ 1-3.

404 *See, e.g.*, Minn. Stat. 491A; John C. Ruhnka & Steven Weller, *Small Claims Courts, A National Examination* at 1-2, App. A (1978).

405 *See* John C. Ruhnka & Steven Weller, *Small Claims Courts, A National Examination* at 2, App. A (1978).

406 *See, e.g.*, Minn. Stat. 491A.02, subd. 3.

407 *Id.* at subd. 2.

408 *See* John C. Ruhnka & Steven Weller, *Small Claims Courts, A National Examination* at 1 (1978).

costs of pursuing a claim (both monetary and otherwise) to a level more proportionate to the benefit sought, and lets the individual decide whether the cost is worth the risk.

C. Alternative Dispute Resolution Also Provides Parties With Economically Efficient Means of Recovering Damages for Small Injuries

Alternative dispute resolution ("ADR") also provides economically efficient means of resolving smaller claims. Because the shape and scope of ADR in a particular situation usually depends on the wishes of the parties, ADR is a particularly flexible tool that can be readily adapted to suit the economic realities of each particular situation. The parties may select from a variety of forms of binding and nonbinding processes,[409] and may limit or expand the scope of the matters resolved by agreement. Indeed, unlike courts, ADR neutrals may resolve even the most marginal of disputes if the parties conclude that such a resolution justifies the economic costs of reaching it.

Both courts and legislatures have long recognized the value of such ADR procedures in resolving smaller, individual claims. For example, Congress stated in the statute governing consumer product warranties:

> Congress hereby declares it to be its policy to encourage warrantors to establish procedures whereby consumer disputes are fairly and expeditiously settled through informal dispute settlement mechanisms.

15 U.S.C. § 2310(a)(1).

Many courts mandate ADR procedures in civil cases.[410] Some statutes of the type that most frequently underlie aggregate litigation themselves endorse or even mandate the use of such ADR processes. For example, Texas's consumer fraud statute provides that either party may compel mediation of a claim,[411] and Mississippi prohibits any plaintiff from bringing a consumer fraud suit until he has made an attempt to resolve the dispute through a settlement program administered by the attorney general.[412]

Corporations likewise have made no secret of their preference for ADR in addressing small claims, and frequently include arbitration provisions in their consumer contracts. Such

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409 Options for ADR include binding arbitration, non-binding arbitration, a consensual special magistrate, a summary jury trial, early neutral evaluation, a non-binding advisory opinion, neutral fact finding, mediation, a mini-trial, and mediation-arbitration.

410 *See generally, e.g.*, Minn. Gen. R. Prac. 114.

411 Tex. Gen. Bus. Laws § 17.5051.

412 Miss. Code § 75-24-15(2).

contractual provisions requiring the resolution of disputes through ADR procedures are both favored and enforceable.[413]

Arbitration and other ADR methods offer a number of economic advantages in resolving small claims. Like conciliation courts, they have generally low transaction costs. Plaintiffs can ordinarily represent themselves, and many of the procedural and evidentiary rules that create delay and expense in civil litigation are relaxed considerably.[414] Binding forms of ADR also have the advantage of finality, with the lack of an appeal on the merits cutting off transaction costs.[415]

In sum, ADR presents yet another existing method for the resolution of small claims based on broad corporate conduct. Like attorney general actions and conciliation court, ADR will be economically superior to aggregate litigation in many situations, and preserves the cost-benefit analysis that is critical to the efficient operation of dispute resolution on both a macroeconomic and a microeconomic level.

VI. THE MERE RISK OF A BET-THE-COMPANY CASE HAS SIGNIFICANT ECONOMIC EFFECTS REGARDLESS OF THE EVENTUAL OUTCOME

Although the actual outcome of aggregate litigation (either through settlement or judgment) provides the most prominent evidence of the economic effects of such litigation on defendants, it is far from the only evidence. Such aggregate litigation can have profound effects on the well-being of defendants regardless of how the litigation is actually resolved.

A. Effects on Financial Markets

For publicly traded defendants, financial markets undeniably reflect the effects of large class action settlements that negatively impact the defendant's bottom line, but may also react even at the onset of certain class action cases. One study analyzing the impact of securities class actions on the market suggests that "the market in general view the filing of class-action lawsuits as a negative impact," and this negative impact can be seen for days following the announcement of the filing of a complaint.[416] Likewise, another study conducted by financial economists

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413 *See, e.g.*, Uniform Arbitration Act § 1; 9 U.S.C. § 2; Minn. Stat. 572.08; Cal. Civ. Proc. Code § 1281 (West); N.Y. C.P.L.R. § 7503 (McKinney); *Onvoy, Inc. v. SHAL, LLC*, 669 N.W.2d 344 (Minn. 2003) .

414 *See generally* AAA, *Commercial Arbitration Rules and Mediation Procedures* (2005).

415 *See, e.g.*, 9 U.S.C. §§ 9, 10; *Lifescan, Inc. v. Premier Diabetic Services, Inc.*, 363 F.3d 1010, 1012 (9th Cir. 2004); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 932 (10th Cir. 2001); *Barnes v. Logan*, 122 F.3d 820 (9th Cir. 1997); *DiRussa v. Dean Witter Reynolds, Inc.*, 121 F.3d 818, 821 (2d Cir. 1997).

416 Charmen Loh & R.S. Rathinasamy, *Do All Securities Class Actions Have the Same Merit? A Stock Market Perspective*, 6 Review of Pacific Basin Financial Markets and Policies 167, 176 (2003).

examined 46 securities class actions and found that those lawsuits alone resulted in "an average of 2.71% in loss of shareholder wealth."[417]

Indeed, it is the stockholders of corporations who often feel a great impact as a result of various types of class action litigations, from securities cases[418] to employment cases.[419] Even in cases where the stockholders themselves bring the actions, the effects of a case on the market and the company's worth are far-reaching: "If the [defendant] should decide to defend itself at trial rather than settle with the plaintiff class, the [defendant] then would be forced to shoulder other burdens. In addition to the operational costs resulting from the management distractions, outside counsel fees, and disbursements commonly associated with class action litigation . . . the prolonged period of uncertainty about the [defendant's] potential judgment liability during the pendancy of the trial may tend to depress the overall market value of the firm."[420]

B. Effects on Customer Relations

Where defendants settle claims relating to their products or services, the consumers (on whose behalf plaintiffs' counsel purportedly sued to protect) often ultimately bear much of the costs of such settlements. Businesses faced with ever-increasing litigation and settlement costs frequently have little option but to pass those costs on to consumers.[421]

In addition to this shifting of costs to consumers (which fails to benefit the consuming public as a whole), class actions often create negative attitudes toward companies that consumers know are involved in such litigation. The publicity such cases garner—publicity often actively sought by plaintiffs' attorneys and by external sources such as government agencies and consumer organizations—poses very real risks to the defendant companies, again regardless of the actual merit of the claim asserted.[422]

As one set of authors noted, "judicial action is a powerful force in the area of consumer behavior within our litigious society, and indications are that it will play an increasingly important role."[423] To the extent that plaintiffs' attorneys continue to use class actions to pursue such a wide variety of claims in such a variety of areas, corporations will inevitably factor

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417 *Id.* at 168.

418 John MacLeod Hemingway, *Materiality Guidance in the Context of Insider Trading: A Call for Action*, 52 Am. U.L. Rev. 1131, 1184-87 (October 2003).

419 Michelle McCann, *Shareholder Proposal Rule: Cracker Barrel in Light of Texaco*, 39 B.C. L. Rev. 965, 965-70 (July 1998).

420 John MacLeod Hemingway, *Materiality Guidance in the Context of Insider Trading: A Call for Action* at 187.

421 Deborah R. Hensler et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 49-80-81 (2000).

422 Doris VanDoren et al., *The Effect of a Class Action Suit on Consumer Attitudes*, 11 Journal of Public Policy & Marketing 45, 45 (Spring 1992).

423 *Id.* at 50.

consumer attitudes into their risk/benefit analyses when deciding how to defend these lawsuits. Indeed, the same authors quoted above note that one way of diffusing consumer backlash against a company involved in class suits is to "settle early" before the defendant is exposed to too much negative press.[424] Such considerations put the actual legal merit of the claims far down the line and skew the traditional risk/benefit analysis of a typical case.

[424] *Id.* at 49-50.

Chapter 10

Medical Monitoring

by John J. Mulderig and Jeffrey E. Richardson[425]

Earlier drafts of ALI's PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION proposed a radical change to the law of class certification of medical monitoring cases, favoring aggregate treatment almost any time that a plaintiff proposed medical monitoring as a remedy. The Comment to an earlier draft § 2.05 of admitted that the draft "consciously breaks from the terminology used by existing law …."[426] The revised text in Discussion Draft No. 2 recognizes that many medical monitoring cases are not appropriate for aggregated treatment. Instead of "consciously break[ing]" from settled law, the current draft merely seeks to "refine[]" the law.[427]

Unfortunately, the approach recommended in Discussion Draft No. 2 would not refine the law, but only add confusion to it. First, Discussion Draft No. 2 confuses the merits of a medical monitoring lawsuit with the determination of whether such a case should be certified as a class action. Second, Discussion Draft No. 2 proposes new terminology to be used when considering aggregation of medical monitoring claims and this new terminology not only confuses issues but distorts the law. Third, while Discussion Draft No. 2 improves upon earlier drafts by recognizing that certain medical monitoring lawsuits are inappropriate for aggregate consideration when individual issues exist such as causation or affirmative defenses, it fails to provide any greater clarity to the law and creates internal inconsistencies within the Discussion Draft.

This chapter describes the medical monitoring remedy and then describes the current state of the law on aggregate treatment of claims for medical monitoring under class action law. Then this chapter explains how the approach recommended by Discussion Draft No. 2 would only make the law confusing and unfair.

I. THE MEDICAL MONITORING REMEDY

In those states that recognize medical monitoring as a remedy, a plaintiff is usually seeking to recover the costs of certain medical tests—specifically, tests that are medically necessary to detect the possible onset of physical harm stemming from exposure to toxic substances, at a time when early medical intervention could prevent or minimize the potential harm. Medical monitoring is typically a remedy sought in cases of latent injury, where the

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426 Preliminary Draft No. 4 (September 21, 2006), Comment a.

427 Discussion Draft No. 2, Comment a.

exposure can affect the body in ways that do not become manifest for many years. The plaintiff does not currently have any detectable physical injury from the exposure (and is at most at an increased risk of ever having such an injury), but he or she does claim a current need for monitoring to detect the onset of any such injury so that appropriate steps can be taken to minimize the impact, such as treating a disease in its incipient stage. Thus, a plaintiff seeking medical monitoring is seeking to have the defendant pay for future medical expenses (monitoring), based on the assumption that the early detection of disease allows the disease to be addressed before it becomes worse.[428]

Many states do not recognize a claim for medical monitoring in the absence of present physical injury.[429] Approximately 20 states have no definitive precedent yet on whether medical monitoring is recognized and, if so, under what circumstances.[430] Those states that allow a plaintiff to seek medical monitoring typically require not only an underlying tort (sometimes a limited category of torts[431]) but also add requirements, such as medical necessity, that a plaintiff must meet to demonstrate that it is appropriate for the defendant to pay for the screening tests. Such additional elements are intended to ensure that medical monitoring claims are genuine, not speculative, and are something more than mere checkups that even unexposed persons should

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428 *Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 138, 522 S.E.2d 424, 429 (1999); *Bourgeois v. A.P. Green Indus., Inc.*, 716 So.2d 355, 358 (La. 1998).

429 *See, e.g., Paz v. Brush Eng. Materials, Inc.*, 949 So. 2d 1, 9 (Miss. 2007) ("Therefore, in response to the question from the Fifth Circuit as to whether Mississippi recognizes a medical monitoring cause of action without a showing of physical injury this Court has previously refused to recognize such an action and in accordance with Mississippi common law continues to decline to recognize such a cause of action."); *Henry v. Dow Chem. Co.*, 473 Mich. 63, 96, 701 N.W.2d 684, 701 (2005) ("plaintiffs' medical monitoring claim is not cognizable under our current law and ... recognition of this claim would require both a departure from fundamental tort principles and a cavalier disregard of the inherent limitations of judicial decision-making."); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 832 (Ala. 2001) ("Alabama law does not recognize a cause of action for medical monitoring."); *Wood v. Wyeth-Ayerst Laboratories*, 82 S.W.3d 849, 856-59 (Ky. 2002) ("Traditional tort law militates against recognition of [medical monitoring] claims, and we are not prepared to step into the legislative role and mutate otherwise sound legal principles."); *see also Badillo v. American Brands, Inc.*, 117 Nev. 34, 44, 16 P.3d 435, 441 (2001) ("In light of the lack of consensus in other jurisdictions and the complex fact pattern of tobacco litigation and causality, we hold that Nevada common law does not recognize a cause of action for medical monitoring. A remedy of medical monitoring may be available for an underlying cause of action, but neither party has briefed the issue nor set forth the cause of action to which it would provide a remedy.")

430 *See, e.g., Paz*, 949 So. 2d at 6; Christopher P. Guzelian, Bruce E. Hillner and Philip S. Guzelian, *A Quantitative Methodology for Determining the Need for Exposure-Prompted Medical Monitoring*, 79 Ind. L.J. 57, 58-59 (2004).

431 *See Redland Soccer Club v. Dept. of the Army*, 548 Pa. 178, 193, 696 A.2d 137, 144 (Pa. 1997) (medical monitoring limited to "negligence").

have.[432] Without such limitations, a defendant could "become a health care insurer for medical procedures routinely needed to guard persons against some of the ordinary vicissitudes of life. It would convert toxic torts into a form of specialized health insurance."[433] These limitations necessarily limit the amenability of medical monitoring to aggregation because their very purpose is to limit the remedy to particular individuals or subgroups of the population.

Thus, beyond establishing an underlying tort, typical requirements for medical monitoring relief are: (1) exposure to a proven hazardous substance, (2) caused by defendant's negligence; (3) as a proximate result of the exposure, the plaintiff has a significantly increased risk of contracting a serious latent disease; (4) a monitoring procedure exists to make early detection possible; (5) the prescribed monitoring regime is different from that normally recommended in the absence of exposure; and (6) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles.[434]

II. AGGREGATION OF CLAIMS FOR MEDICAL MONITORING UNDER CURRENT LAW

Today, when plaintiffs seek to aggregate claims for medical monitoring, courts use federal Rule 23(b)(3) or Rule 23(b)(2) (or the corresponding state court rules) to analyze whether such claims may proceed on a classwide basis. Under Rule 23(b)(3), of course, class certification will be denied when, among other things, individual issues predominate. Under Rule 23(b)(2), certification is inappropriate either if medical monitoring is not considered "injunctive" relief, or if the claims are not "cohesive," an equivalent requirement to "predominance," but even more stringent given the mandatory (non-opt out) nature of class actions under Rule 23(b)(2).[435]

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[432] *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 431-32 (W. Va. 1999); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 978 (Utah 1993); *see also Asbestos Litigation Gone Mad: Exposure Based Recovery From Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L.Rev. 815 (2002) (noting the speculative nature of monitoring claims and rejecting the notion that monitoring is a remedy).

[433] *Redland Soccer Club v. Dept. of the Army*, 548 Pa. 178, 193, 696 A.2d 137, 144 (Pa. 1997).

[434] *See, e.g., Bower v. Westinghouse Elec. Corp.*, 206 W. Va. 133, 522 S.E.2d 424 (1999); *Redland Soccer Club v. Dept. of the Army*, 548 Pa. 178, 696 A.2d 137 (Pa. 1997); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970 (Utah 1993); *Bourgeois v. A.P. Green Indus., Inc.*, 716 So.2d 355 (La. 1998) (overruled by statute La. Civ. Code art. 2315); *Petito v. A.H. Robins Co., Inc.*, 750 So.2d 103 (Fla. App. 1999); *Meyer v. Fluor Corp.*, No. SC 87771, 2007 WL 827762 (Mo., March 20, 2007).

[435] *See, e.g., Wilson v. Brush Wellman, Inc.*, 103 Ohio St. 3d 538, 544-45, 817 N.E.2d 59, 65-66 (Ohio 2004); *Barnes v. The Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998).

A. Rule 23(b)(3)

Class certification under Rule 23(b)(3) requires proof, by the party seeking certification, that questions of law or fact common to the class members predominate over individual questions and that a class action is superior to other available methods to adjudicate the controversy. Fed. R. Civ. P. 23(b)(3). Most courts faced with the question have declined to certify cases seeking medical monitoring under federal Rule (b)(3), and parallel state court rules, due to the proof problems created by the individualized substantive elements in medical monitoring cases.

Often, courts deny class certification in cases seeking medical monitoring because the appropriateness of medical monitoring relief turns on individual issues that cannot be decided for all class members at one time and therefore common issues do not predominate. For example, to avoid the problem of overbroad relief, states recognizing medical monitoring usually impose a requirement that the asserted monitoring regime be "different" from medical care that is ordinarily recommended in the absence of exposure. In other words, the defendant's tortious conduct must create the need for monitoring. One of the elements a plaintiff seeking such relief must prove is that the monitoring at issue would not have been recommended even had there been no exposure as a result of tortious conduct. This is an inherently individualized requirement because each person's pre-existing medical condition,[436] and each person's degree of exposure, will often turn upon the individual circumstances of each plaintiff. The test might already be recommended for some plaintiffs because of their medical histories, but not for others.

For example, in In *Perez v. Metabolife Int'l, Inc.*, 218 F.R.D. 262 (S.D. Fla. 2003), consumers of a dietary supplement alleged that it caused various health problems and sought certification of a medical monitoring class. Under substantive Florida law, there are seven elements that a plaintiff must satisfy to recover for medical monitoring,[437] and the *Perez* court found that the individual determinations necessary to establish those seven elements would predominate over common issues. The postulated risk was dependent upon both response and dose. Thus whether the product significantly increased the risk of latent disease varied from person to person. Likewise, the necessity of monitoring depended upon how much each user ingested and over what period. The background risk, determined by what other substances each person was exposed to and what other risk factors lurked in each person's medical history, meant that different persons needed different monitoring regimens. *Id.* at 271-72. For these reasons,

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[436] If a toxic exposure increases the risk of, say, cancer or immune system dysfunction, then a person with a personal or familial history of such conditions is plainly at a greater need for prophylactic tests than persons without such pre-existing risk factors.

[437] *Petito v. A.H. Robbins Co.*, 750 So. 2d 103, 106-07 (Fla. App. 1999) established these elements: "(1) exposure greater than normal background levels; (2) to a proven hazardous substance; (3) caused by the defendant's negligence; (4) as a proximate result of the exposure, plaintiff has a significantly increased risk of contracting a serious latent disease; (5) a monitoring procedure exists that makes the early detection of the disease possible; (6) the prescribed monitoring regime is different from that normally recommended in the absence of the exposure; and (7) the prescribed monitoring regime is reasonably necessary according to contemporary scientific principles."

neither the predominance nor the superiority requirements of Rule 23(b)(3) satisfied. *Id.* at 273. Indeed, even the commonalty threshold of Rule 23(a), a bar set so low by most courts as to be irrelevant in most cases, was only questionably met. *Id.* at 273. Other courts have refused to certify medical monitoring cases for similar reasons.[438]

Courts deciding whether to certify proposed class actions seeking medical monitoring focus not just on the particular requirements of medical monitoring relief, but also on underlying liability issues. If the defendant's liability to individual class members cannot be determined without individual determinations of issues such as legal causation or affirmative defenses, the class certification is inappropriate regardless of whether the remedy is medical monitoring or a more traditional form of damages. For example, in *Duncan v. Northwest Airlines, Inc.*, 203 F.R.D. 601 (W.D. Wash. 2001) a class of nonsmoking flight attendants sued an airline for exposure to second-hand smoke and sought medical monitoring. The liability of the airline to individual class members would turn on individual issues of causation such as when and how long they worked at the airline, whether they had immediate family members who smoked, the number of smokers on each flight, the flight attendant's duties on the aircraft, the duration of each flight and the time of day of each flight. *Id.* at 613. Moreover, there were individual issues of comparative fault which would turn upon "the individual knowledge of each plaintiff and would require examination of the extent to which each individual flight attendant volunteered for the flights." *Id.* Thus, regardless of the medical monitoring remedy, individual issues of liability made class certification inappropriate.[439]

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438 *See, e.g., Goasdone v. Am. Cyanamid Corp.*, 354 N.J. Super. 519, 808 A.2d 159 (2002) (common issues did not predominate because of individual factors such as the nature, level and duration of the exposure and the need for monitoring beyond that already necessary for individual class members); *Bourgeois v. A.P. Green Indus., Inc.*, 939 So. 2d 478, 491 (La. App. 5th Cir. 2006) ("the question of whether a former employee had been significantly exposed to asbestos was not a common one, but an individual one; each plaintiff would have to prove that he/she satisfies the criteria to state a valid cause of action for medical monitoring ...."); *Ball v. Union Carbide Corp.*, 385 F.3d 713, 727-28 (6th Cir. 2004) ("Even though liability issues may have been common to the putative class, by seeking medical monitoring and environmental cleanup of property, Plaintiffs have raised individualized issues."); *Wyeth v. Gottlieb*, 930 So. 2d 635, 641 (Fla. App. 3 Dist. 2006) (individual issues predominate when monitoring program would, for some class members, "involve essentially the same medical examinations that menopausal and post-menopausal women are advised to complete regardless of whether they used Prempro.").

439 *See also In re Rezulin Products Liab. Litig.*, 210 F.R.D. 61, 66-67 (S.D.N.Y. 2002) (denying certification to proposed class of Rezulin users because of predominance of individual issues such as causation, comparative fault, statute of limitations and choice of law); *Wilson*, 103 Ohio St. 3d at 545, 817 N.E.2d at 66 (predominance requirement of Ohio's Rule 23(b)(3) and cohesiveness requirement of (b)(2) not satisfied because of individual issues of "whether Brush Wellman owed a duty, whether there was a breach of that duty, whether the statute-of-limitations defense applies, and questions of contributory negligence."); *In re Baycol Products Litig.*, 218 F.R.D. 197, 212 (D. Minn. 2003) ("Although the states have not addressed medical monitoring in a uniform way, it appears that whether such a claim is recognized as an independent cause of

Of course, there have also been reported cases that have allowed class certification of medical monitoring claims. However, these cases have often involved either peculiar situations or else applied a Rule 23(b)(3) analysis that did violence to substantive law by ignoring or postponing determination of elements of the cause of action that required individual adjudication.[440] The effort in such cases to, in effect, create a hierarchy of medical monitoring elements that favors common ones and disfavors individual ones, was contrary to the fundamental principle of fidelity to substantive law and to the Rules Enabling Act (and its state analogues) that precludes procedural rules from modifying substantive law.

B. Rule 23(b)(2)

Because the predominance requirement of Rule 23(b)(3) has been the vehicle by which most courts have refused to certify medical monitoring class actions, many plaintiffs have sought certification under Rule 23(b)(2), which does not have an explicit "predominance" element. A plaintiff seeking (b)(2) certification must prove that the defendant "acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief, or corresponding declaratory relief with respect to the class as a whole." Fed. R. Civ. P. 23(b)(2). Unlike Rule 23(b)(3) certification, where notice to class members is mandatory and a class member may chose to opt out of the class, notice is not mandatory for a Rule 23(b)(2) class (although a court "may" order it), and class members are bound by the judgment without the opportunity to opt out. Fed. R. Civ. P. 23(c)(2).

Although there is more disagreement in the caselaw than under Rule 23(b)(3), many courts have refused to certify medical monitoring cases under Rule 23(b)(2) because (1) medical monitoring is not "injunctive relief" or (2) claims for medical monitoring are not sufficiently cohesive.

1. Medical Monitoring And The "Injunctive Relief" Requirement Of Rule 23(B)(2)

Rule 23(b)(2) was designed for cases in which "final relief of an injunctive nature or of a corresponding declaratory nature, settling the legality of the behavior with respect to the class as a whole, is appropriate" and was not designed for cases in which "relief relates exclusively or predominantly to money damages." Advisory Committee Notes to Rule 23(b)(2). The typical illustration is a civil rights case in which a defendant is alleged to have discriminated against an entire class of people based upon their race and the relief sought is to enjoin the defendant from further discriminatory practices. *Id.* Rule 23(b)(2) was enacted in 1966, long before "medical

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action, or an element of damages, the state laws generally require a finding that a plaintiff's exposure to a toxic substance was due to defendant's negligence. As discussed previously, however, a finding of negligence is inextricably intertwined with individual issues. As a result, individual issues will undermine the cohesion of the medical monitoring class."); *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 785-87, 752 A.2d 200, 253-54 (Md. 2000) (predominance of individual liability issues make (b)(2) and (b)(3) certification inappropriate).

[440] *See, e.g., In re Copley Pharmaceutical, Inc.*, 158 F.R.D. 485 (D. Wyo. 1994) (certifying class of Albuterol consumers seeking various relief, including medical monitoring).

monitoring" existed as a cause of action in any jurisdiction. At that time, and now, an "injunction to compel the payment of money . . . was not typically available in equity." *Great-West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204, 210-11 (2002).

Plaintiffs seeking to apply Rule 23(b)(2) to a case seeking medical monitoring typically assert that they are requesting the establishment of an equitable, court-administered, medical monitoring program which would be available for all class members and argue that this constitutes "injunctive relief" under Rule 23(b)(2).[441] Courts often reject this argument, finding that seeking to have a defendant pay money to a fund that will be used to pay for plaintiffs' medical screening is no different than traditional money damages claims seeking compensation for future medical expenses.

Constitutionally, an expansion of Rule 23(b)(2) to include disguised claims for monetary relief would "obviously" offend a defendant's right to jury trial and also "implicate[]"the due process rights of absent class members. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999). This "inherent tension . . . is only magnified if applied to damages claims gathered in a mandatory class." *Id.* Avoidance of these constitutional issues precludes "adventurous application" of Rule 23, and limits mandatory classes to those contemplated by Rule's drafters. *Id.* at 845.

Because medical monitoring, at bottom, requires the payment of money by the defendant to, or on behalf of, a plaintiff, "[t]he medical monitoring claim is a claim for monetary damages." *In re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 861 (3d Cir. 1990), *cert. denied*, 499 U.S. 961 (1991). "The injury in . . . medical monitoring is cost[] of periodic medical examinations necessary to detect the onset of physical harm." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 139 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999). Legal, not equitable, defenses apply. *Id.* at 147-49. "[W]hen one party pays money into a fund from which the other party withdraws, that relief is monetary." *Abbent v. Eastman Kodak*, 1992 WL 1472751, at *13 (D.N.J. Aug. 28, 1992). As another court explained: "Although the plaintiff now characterizes the relief as a program rather than a fund, the bottom line is money" paid by defendants for testing and treatment. *Duncan v. Northwest Airlines, Inc.* 203 F.R.D. 601, 611 (W.D. Wash. 2001).[442]

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441 *See* Venugopal, Pankaj, *The Certification of Medical Monitoring Claims*, 102 Colum. L. Rev. 1659 (2002) (arguing for certification of medical monitoring cases under Rule 23(b)(2)); *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 349 (N.D. Ohio 2001) (approving class certification and settlement of medical monitoring case under Rule 23(b)(2) in addition to (b)(3)).

442 *See also Philip Morris Inc. v. Angeletti*, 358 Md. at 784, 752 A.2d at 252 (plaintiff's use of "injunctive relief" label "does not change the status of the claim from that of a fundamentally monetary nature" when plaintiffs sought "restitution and disgorgement of profits in addition to the actual medical monitoring costs" and when plaintiffs' prayer for relief requested "medical monitoring, whether denominated as damages or in the granting of equitable relief"); *Jaffe v. United States*, 592 F.2d 712 (3d Cir.) (a "request for prompt medical examinations. . .is a claim for money damages. A plaintiff cannot transform a claim for damages into an equitable action by asking for an injunction that orders the payment of money"), *cert. denied*, 441 U.S. 961

Thus, one major impediment to the certification of medical monitoring class actions as "equitable" relief is that, for purposes of the class action rules, the monetary nature of the cause of action does not square with a claim that these claims constitute what the drafters of the Rules meant when they referred to equity.

2. Medical Monitoring And The Cohesiveness Requirement Of Rule 23(B)(2)

Putting aside the partially historical argument concerning whether medical monitoring could constitute "injunctive relief," claims that are too individualized to be certified under Rule 23(b)(3) as opt-out class actions fare no better under Rule 23(b)(2) as mandatory class actions. This is because the due process implications of mandatory aggregation requires that plaintiffs asserting such claims be "cohesive." Cohesiveness is not a term used in 23(b)(2) itself—rather courts have required cohesiveness as a constitutional prerequisite. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 858 (1999); *Georgine v. Amchem Products, Inc.*, 521 U.S. 591, 622-23 (1997). Mandatory classes "require more cohesiveness than a [Rule 23](b)(3) class. This is so because in a [Rule 23](b)(2) action, unnamed members are bound by the action without the opportunity to opt out." *Barnes v. American Tobacco Co.*, 161 F.3d 127, 142-43 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999).

Unlike (b)(3) classes, members of a (b)(2) class do not have the right to opt out. This distinction is logical because injunctive relief is classwide in nature. For example, a defendant ordered to end discriminatory practices will necessarily change its treatment of all class members. But because all class members are bound by any resulting judgment, courts mandate as a condition precedent to (b)(2) certification the requirement that the claims of class members be cohesive, a requirement "similar to [(b)(3)]'s prerequisite of predominance, yet one that is even more demanding and difficult to satisfy." *Philip Morris Inc. v. Angeletti*, 358 Md. 689, 785, 752 A.2d 200, 253 (2000). For many of the same reasons that claims for medical monitoring claims are too inherently individualized to be appropriate for (b)(3) certification, these claims are also inappropriate for (b)(2) certification.

Thus, in *In re St. Jude Medical, Inc.*, 425 F.3d 1116 (8th Cir. 2005), a trial court certified a class of users of a recalled prosthetic heart valve seeking medical monitoring under Rule 23(b)(2). The Eighth Circuit reversed, in part because "[p]roposed medical monitoring classes suffer from cohesion difficulties, and numerous courts across the country have denied certification of such classes." *Id.* at 1122. The inherently individualized substantive element that precluded aggregation in *St. Jude* was medical necessity. The proposed class was insufficiently cohesive because artificial heart valves are already routinely medically monitored as a part of normal follow-up care. Therefore, to determine whether any patient would require additional monitoring above and beyond what was required as a consequence of a serious and permanent surgical procedure would require an "individualized inquiry depending on that patient's medical history, the condition of the patient's heart valves at the time of implantation,

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(1979); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, (N.D. Ill. 1998) (medical monitoring might possibly be framed as injunctive relief in an appropriate case, but here is no different than traditional damages); *see Pohl v. NGK Metals Corp.*, 117 F.Supp.2d 474, 477 (E.D. Pa. 2000) (medical monitoring not "equitable" common fund for jurisdictional purposes).

the patient's risk factors for heart valve complications, the patient's general health, the patient's personal choice, and other factors." *Id.*[443]

Similarly, in *Barnes v. American Tobacco Co.*, 161 F.3d 127 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999), the plaintiffs sought certification of a class of cigarette smokers at risk for smoking-related diseases with medical monitoring as the proposed remedy. On appeal, the court found certification inappropriate under Rule 23(b)(2) because whether the monitoring recommended for a plaintiff would be different than the monitoring recommended for a member of the general public depended upon the individual smoking history of each plaintiff:

> [T]he requirement that each class member demonstrate the need for medical monitoring precludes certification. . . . Although the general public's monitoring program can be proved on a classwide basis, an individual's monitoring program by definition cannot. In order to prove the program he requires, a plaintiff must present evidence about his individual . . . history. . . . This element of the medical monitoring claim therefore raises many individual issues.

Barnes, 161 F.3d at 146.[444]

Admittedly, the Rule 23(b)(2) cases are not uniform, and some courts have certified medical monitoring cases under Rule 23(b)(2). However, these cases typically discuss only the injunctive relief requirement of Rule 23(b)(2), failing to discuss the requirements of medical monitoring relief and the cohesiveness requirement of Rule 23(b)(2).

For example, in *German v. Federal Home Loan Morg. Corp.*, 885 F. Supp. 537 (S.D.N.Y. 1995), apartment residents sued their landlords for failure to remove lead paint and sought, among other remedies, medical monitoring. The court ruled that the request for medical monitoring constituted a request for medical monitoring under Rule 23(b)(2), but emphasized that is ruling was "conditional" pending further discovery "about the needs of the class." *Id.* at 559-60. The court discussed and rejected the defendants' argument that medical monitoring must always constitute consequential damages, but did not discuss the requirement of medical monitoring relief or the cohesiveness of the claims. *Id.*

Similarly, in *Yslava v. Hughes Aircraft Co.*, 845 F. Supp. 705 (D. Ariz. 1993), plaintiffs exposed to contaminated groundwater near an airport sought class certification and medical monitoring. The court stated that because the plaintiffs sought a court-supervised program, they

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443 On remand, the trial court again certified the case as a class action. *In re. St. Jude Medical, Inc.*, 2006 WL 2943154 (D. Minn. 10/13/06). Then the Eighth Circuit granted a petition for appeal under Fed. R. Civ. P 23(f) and the case is currently pending before that court.

444 *See also Thompson v. American Tobacco Co.*, 189 F.R.D. 544, 555-56 (D. Minn. 1999) (a smoker's "need for medical monitoring above and beyond that of the general non-smoking public cannot be determined on a class-wide basis"); *Goasdone v. American Cyanamid Corp.*, 808 A.2d 159, 173 (N.J. 2002) (certification denied under (b)(2) and (b)(3) because of the "multiplicity of individual issues in this workplace medical monitoring claim").

were seeking injunctive relief under Rule 23(b)(2) certification was proper. However, the court did not discuss cohesiveness. *Id.* at 713. Other cases are similar.[445]

Thus, the courts that recognize the cohesiveness requirement of Rule 23(b)(2) consistently rule that classes seeking medical monitoring fare no better under Rule 23(b)(2) than they do under Rule 23(b)(3) because of the abundance of individual issues.

C. Choice Of Law Issues

Certification of statewide class actions seeking medical monitoring will often be inappropriate under Rule 23(b)(2) and (b)(3) because of lack of predominance and lack of cohesiveness. These problems are exacerbated when plaintiffs seek nationwide or multi-state certification, where differences between class members will result not only from the different factual circumstances but also from the different applicable law governing medical monitoring. For example, some states require a plaintiff to show a present physical injury, some do not; some treat medical monitoring as a type of remedy, some treat it as a distinct cause of action; and some states do not recognize medical monitoring at all.[446]

For example, in *Zinser v. Accuflix Research Institute, Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001), the Ninth Circuit affirmed the decision not to certify a nationwide class against a pacemaker manufacturer, finding no error in the trial court's determination that Colorado medical monitoring law could not be applied to all class members because medical monitoring law differs from state to state.

And in *Zehel-Miller v. Astrazenaca Pharm., L.P.*, 223 F.R.D. 659 (M.D. Fl. 2004), the court rejected certification of a nationwide class of users of a prescription depression medication seeking medical monitoring, explaining: "The fact that medical monitoring is not treated uniformly throughout the United States creates a myriad of individual legal issues that defeat the predominance requirement of Rule 23(b)(3); it also means that certification of a Rule 23(b)(3)

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445 *See, e.g., Gibbs v. E.I. DuPont De NeMours & Co., Inc.*, 876 F. Supp. 475, 481 (W.D.N.Y. 1995); *Day v. NLO, Inc.*, 144 F.R.D. 330, 335-36 (S.D. Ohio 1992); *see also In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 347 (N.D. Ohio 2001) (class certified for purpose of settlement, and court noted that in settlement context, "individual issues which are normally present in personal injury litigation become irrelevant, allowing the common issues to predominate.") (quoting *In re Diet Drugs*, 2000 WL 1222042, at *43 (E.D. Pa. 8/28/2000))

446 *In re St. Jude Medical, Inc.*, 425 F.3d at 1122 ("the states recognizing medical monitoring claims as a separate cause of action have different elements triggering culpability [and thus] the medical monitoring class presents a myriad of individual issues making class certification improper."); *Badillo*, 117 Nev. at 34, 16 P.3d at 441 ("we note that the elements of medical monitoring as a cause of action are not uniform from one jurisdiction to another.") *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 533 (N.D. Ill. 1998) ("Medical monitoring is not a uniform concept among the states; the elements a plaintiff must prove to establish a right to medical monitoring differ among the states."); *In re Rezulin Prod. Liab. Litig.*, 210 F.R.D. 61, 74 (S.D.N.Y. 2002); *In re Prempro Products Liab. Litig.*, 230 F.R.D. 555, 564 (E.D. Ark. 2005).

medical monitoring class would render this case totally unmanageable and inefficient." *Id.* at 663.

D. Summary Of Certification Of Medical Monitoring Claims Under Current Law

In light of the great weight of authority rejecting class certification of claims for medical monitoring, it is not surprising that courts have become increasingly skeptical of aggregated litigation asserting such claims. Indeed, in one case involving environmental contamination of groundwater, a court went so far as to suggest that given the substantive elements of medical monitoring under California law, aggregated class action litigation was never appropriate in any medical monitoring case. *Lockheed Martin Corp. v. Superior Court*, 94 Cal.Rptr 2d 652, 656, 79 Cal.App. 4th 1019 (2000). In affirming, the California Supreme Court declined to go so far as to rule that there is a "categorical bar" to certification in medical monitoring cases, but did agree that certification was inappropriate in that particular case because individual issues predominated. *Lockheed Martin Corp. v. Superior Court*, 29 Cal.4th 1096, 1104-06, 131 Cal.Rptr. 2d 1, 6-8, 63 P.3d 913, 917-919 (2003).

With the notable exception of the Missouri Supreme Court's recent *Meyer v. Fluor* case accepting medical monitoring,[447] most of the recent cases to discuss medical monitoring have either rejected it outright (such as the Mississippi Supreme Court's *Paz* case[448]) or have found class certification of medical monitoring claims inappropriate. Given the right factual circumstances and depending upon the cause of action and the medical monitoring law of a particular state, there might be a medical monitoring case in which a class could be certified while still respecting the individualized elements of applicable substantive law. But in the cases to date, courts correctly applying the current rules have overwhelmingly rejected attempts to litigate medical monitoring claims on an aggregate basis. They recognize that entitlement to medical monitoring turns upon individual issues that vary from plaintiff to plaintiff and thus proof as to one plaintiff is simply not proof as to all.

III. THE PRELIMINARY DRAFT'S TREATMENT OF MEDICAL MONITORING DISTORTS AND CONFUSES THE LAW

ALI seeks to change the rules governing class certification of medical monitoring claims in its PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION. As noted above, initial drafts proposed a radical change in the law, favoring aggregate treatment almost any time that a plaintiff proposed medical monitoring as a remedy. The earlier drafts of § 2.05 included only a single Illustration related to medical monitoring, and it found aggregation appropriate.[449] Discussion Draft No. 2 has discarded the approach contained in earlier drafts, but in doing so adopts a new approach would only add confusion to and distort the law in this area.

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447 *Meyer v. Fluor Corp.*, No. SC 87771, 2007 WL 827762 (Mo., March 20, 2007).

448 *Paz v. Brush Eng. Materials, Inc.*, 949 So. 2d 1 (Miss. 2007).

449 *See, e.g.*, Preliminary Draft No. 4 (Sept. 21, 2006) § 2.05 Illustration 1.

In Discussion Draft No. 2 there are now five Illustrations of medical monitoring cases in § 2.05, and the Draft finds class certification appropriate in only one of the five illustrations, the first one. The problems with Discussion Draft No. 2's treatment of medical monitoring are as follows.

A. Illustrations 2 and 4 Confuse Merits and Class Certification

It is well-settled that a court is to consider whether a case should be certified as a class action before the court decides whether the claims of the plaintiff have merit, except to the extent that merits issues are intertwined with class certification issues such as whether individual issues predominate.[450] But two of the five Illustrations in § 2.05 (Illustration 2 and 4) improperly confuse the merits with class certification.

Illustration 2 is an attempt to reflect the rule of many states that a plaintiff must prove at trial that the requested monitoring differs from any monitoring that a reasonable physician would recommend to similarly situated persons who were not exposed to the defendant's product. Illustration 2 states that if the monitoring sought by the plaintiff does not differ from the monitoring that a reasonably physician would recommend to persons not exposed, then the court "should conclude that the requested relief consists of a divisible remedy—in function, a form of conventional damages—and that such relief accordingly is not suitable for aggregate treatment as an indivisible remedy as set forth in this Section."

This approach confuses the merits with class certification. If a plaintiff cannot prove that the monitoring sought was uniquely necessary for all class members because of the defendant's product, then the plaintiff has failed to meet his burden of proof on the merits of his claim for damages and the class should lose at trial—but this is distinct from the question of whether the plaintiff is legally entitled to sue on behalf of a class of individuals. Or, to use the terminology proposed in § 2.05, the question of whether monitoring would be necessary even without exposure to a defendant's product is distinct from the question of whether a remedy should be characterized as either "divisible" or "indivisible" because that characterization only turns upon whether "the distribution of the remedy to any claimant invariably affects the application of the same remedy to other claimants."[451]

Discussion Draft No. 2 makes a similar error in Illustration 4 to § 2.05. That illustration states that if the plaintiff fails to prove that the requested medical monitoring would "serve to guide medical intervention to mitigate disease" then the court should characterize the remedy as divisible. However, a plaintiff's failure to prove that the requested medical monitoring is beneficial for the class is a failure of proof on the merits of his remedy claim, which is distinct from the question of whether it is appropriate for the court to determine the claims of all proposed class members at the same time.

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450 *See, e.g., Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 677 (7th Cir. 2001); *Love v. Turlington*, 733 F.2d 1562, 1564 (11th Cir. 1984).

451 Discussion Draft No. 2 § 2.05, Comment a.

Perhaps the Draft is merely guilty of confusing the law. For example, imagine a lawsuit in which a proposed class representative seeks medical monitoring to screen for a heart condition but a number of class members already need that same test because of other medical conditions unrelated to the defendant's conduct. In such a case, class certification would be inappropriate because a key element of medical monitoring—whether the requested monitoring is different from any monitoring already recommended—might be satisfied for some class members but would not be satisfied for others, necessitating an individual inquiry into the specific facts of each class member and making it impossible to determine this critical issue on a common basis for all class members at one time. If this is what Illustration 2 is attempting to address, then the illustration is appropriately considering class certification before the merits, but Illustration 2 would need to be rewritten so that this is more clear. As currently drafted, the Illustration suggests that a judge should first determine the merits of whether all class members have proven that the requested medical monitoring is different, and then if there has been a failure of proof on the merits then the judge should deny a motion to certify a class action. This puts the cart (whether plaintiffs can prevail on the merits) before the horse (whether common issues predominate such that class certification is appropriate).

B. The Draft's Divisible-Indivisible Test is Unnecessary and, if Anything, Distorts the Law

Discussion Draft No. 2 labels remedies as either divisible or indivisible depending upon whether the determination of the remedy as to one claimant would "predetermin[e] the application of the same remedy to any other claimant in practical effect."[452] This is not an improvement to the law. When a court determines whether entitlement to medical monitoring turns upon individual issues which predominate (under Rule 23(b)(3)) or make the class non-cohesive (under Rule 23 (b)(2)), the court is necessarily also determining whether one claimant's entitlement to a remedy decides the same entitlement to remedy question for all other claimants. Thus, the law is not improved by replacing the current Rule 23(b) test with a divisible-indivisible test; this inquiry already takes place under current law.

To the contrary, replacing traditional Rule 23 considerations with a divisible-indivisible test would only distort the law and make it unfair—especially if it eliminates the requirement of individual proof of underlying liability issues that cannot be decided on an aggregate basis. The adoption of any new terminology always has the potential to lead to new litigation over what the terms mean. Here, such litigation is especially likely because the Draft itself is confusing in its use of the terms, as evidenced by Illustrations 1 and 3.

As explained above, medical monitoring is a type of future medical expense. Rather than a plaintiff asking a defendant to pay for future treatment by a doctor of an injury, the plaintiff is asking the defendant to pay for future tests by a doctor to determine whether the plaintiff has a medical condition that needs to be treated. Either way, the defendant is paying for the plaintiff's future medical expenses.

Illustration 3 to § 2.05 suggests that whether medical monitoring is deemed divisible (inappropriate for aggregate treatment) or indivisible (appropriate for aggregate treatment)

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452 Discussion Draft No. 2 § 2.05, Comment a.

should turn upon whether a defendant pays the money to the class members or to the court. If a plaintiff asks a defendant to pay a total of $1 million for medical monitoring to 1,000 people by making individual payments, then Illustration 3 says that each of those 1,000 people should litigate their claim individually. On the other hand, if the plaintiff asks the defendant to pay the same $1 million to a court with the court to administer the use of that money to pay for medical monitoring for the 1,000 people, then Illustration 3 says that the 1,000 can aggregate their claims and have a single lawsuit.

This distinction is artificial and unfair. Why does it become justified to aggregate claims simply because the payee on the defendant's check is "Clerk of Court" instead of "Plaintiff John Smith"? This distinction is irrelevant to the proof that must be made and the ability to try multiple claims at one time. For this very reason, as noted above, many courts applying the current law have ruled that medical monitoring does not constitute "injunctive relief" for which class certification under Rule 23(b)(2) could be appropriate. Admittedly the courts are not uniform on this issue, but if ALI is going to stake out a position in this debate, Discussion Draft No. 2 chooses the wrong side.

Moreover, Illustration 3's example of whether a remedy should be characterized as divisible or indivisible is inconsistent with the explanation of those terms. Comment a to § 2.05 explains that to determine whether a remedy is divisible or indivisible, one examines whether providing the remedy to one class member would necessarily determine the application of the remedy to all other class member. Similarly, the Draft claims that it attempts to shift the focus to "the suitability of aggregate treatment for each specific type of relief"[453] and warns courts to "remain alert to the possibility that a given remedy might be mischaracterized as indivisible" in a plaintiff's attempt to obtain aggregate treatment.[454] But Illustration 2 only focuses on who the artificial and irrelevant issue of *who* defendant pays, not on the nature of the relief.

Illustration 1 to § 2.05 suffers from a similar flaw. Illustration 1 recognizes that aggregate determination of the right to medical monitoring for an entire class of people is only appropriate if: (1) the plaintiffs will offer aggregate proof (such as epidemiological evidence) that all class members are at a significantly elevated risk of future disease as a proximate result of significant exposure to the defendant's product; (2) the connection between the elevated risk of future disease and the significant exposure does not involve individualized inquiry into the circumstances of particular consumers; (3) a reasonable physician would prescribe a medical monitoring regime to all class members above and beyond the medical services that such a physician would otherwise recommend; and (4) such monitoring would, for all class members, guide medical intervention to mitigate the effects of disease manifestation, should they occur. However, instead of simply stating that if all four of these factors exist then aggregation can be appropriate, the Illustration concludes that if all of these factors exist "then the court should find that the requested relief demands a form of performance other than the distribution of money to individual claimants." This is a logical disconnect. The existence of these four factors means that it may fair to litigate the claims of all class members at the same time because the evidence of the remedy is common to all class members—which, of course, still leaves the important

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453 Discussion Draft No. 2 § 2.05, Reporters' Notes, Comment a.

454 Discussion Draft No. 2 § 2.05, Comment b.

question of whether liability can also be proven for all class members on a classwide basis. But if so, that should be the reason to favor aggregate treatment. The existence of these four factors has nothing to do with whether the relief sought is properly characterized as "a form of performance other than the distribution of money to individual claimants" as that is a characterization that one can make or not make regardless of the presence of these factors.

C. Illustration 5 is Inconsistent With Sections Embracing Issue Certification

Illustration 5 recognizes that even when medical monitoring might otherwise be considered an indivisible remedy that is appropriate for aggregate treatment, aggregation is nevertheless inappropriate where there is a need to conduct "an intermediate inquiry into the individual circumstances of particular consumers . . . ." This was a wise addition to Discussion Draft No. 2. As noted above, courts frequently recognize that class certification is unfair and inappropriate when a defendant's liability to individual class members cannot be determined on a classwide basis.[455] For example, class certification is inappropriate when elements of a cause of action (such as causation) or affirmative defenses (such as comparative fault or statutes of limitation) can only be determined by reviewing the specific circumstances of individual class members. In such cases, it makes no difference if the remedy is medical monitoring or more traditional tort damages; it is still impracticable to litigate the case as a whole on a classwide basis.

Illustration 5 follows this law by giving two examples of when an intermediate inquiry into individual circumstances would be necessary: (1) when causation requires an individual inquiry ("whether exposure was a proximate cause of the elevated risk") and (2) when an affirmative defense requires an individual inquiry ("whether a given individual consumer bears some degree of legal responsibility for the exposure under the principles of comparative negligence.") Other examples that the Draft could have just as easily used include when the cause of action is fraud and the reliance element of the cause of action must be determined on an individual basis, or when the affirmative defense is statute of limitations and the time at which a class member had sufficient notice to bring a claim must be determined on an individual basis.

But while Illustration 5 by itself is an improvement, its inclusion only makes the PRINCIPLES as a whole more confusing because it adds internal inconsistencies. As noted above in Chapter 3 of these Comments, many sections of the Draft, such as such as § 2.03(c), embrace "issue certification" even though courts usually find it inappropriate to allow aggregate treatment of one issue in a case when numerous other critical issues in the same case, such as liability issues, must be determined on an individual basis. Why does the Draft find it *appropriate* to decide one or two discrete issues in a case on an aggregate basis when other important issues in the case must be determined on an individual basis at the same time that the Draft finds it *inappropriate* to decide the remedy of medical monitoring on an aggregate basis because of the presence of those same individual issues? Indeed, Illustration 5 is even inconsistent with the text of § 2.05 itself, which states: "The court may afford aggregate treatment of common issues concerning an indivisible remedy . . . ."

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[455] *Barnes*, cited above, is one such court, and the Reporters' Notes to § 2.05 states that Illustration 5 "underscores the specific holding in *Barnes*."

By both rejecting and accepting issue certification, the adoption of Discussion Draft No. 2 would simply add confusion to the law.

D. Illustrations 1 through 5 Implicitly, and Improperly, Approve Medical Monitoring as a Remedy

As noted above, the right to medical monitoring varies substantially from state to state. Several states have considered and rejected medical monitoring, ruling that unless and until the legislatures in those states change the law, a plaintiff cannot sue without a present injury. Even among those states that do recognize medical monitoring, the requirements vary. And a huge number of states have yet to rule that medical monitoring is appropriate in those states.

By including five illustrations on medical monitoring, Discussion Draft No. 2 gives the impression that medical monitoring is an approved remedy everywhere, when in fact the right to medical monitoring is far more controversial then the right to recover for race discrimination contained in Illustration 6 and the right of retirement plan beneficiaries to recover contained in Illustration 7. ALI should revise the Reporters' Notes, Comment b, to § 2.05 to note the significant disagreement between states regarding the remedy of medical monitoring and to note that Illustrations 1 through 5 are only proper illustrations under the laws of a few states.

IV. CONCLUSION

While treatment of medical monitoring varies from states to state, courts have consistently refused to certify medical monitoring cases as class actions under the existing Rule 23 standards. These results are fair. Section 2.05 of Discussion Draft No. 2 is partially consistent with this law, especially in Illustration 5, but when the existing law is fair there is no justification for changing the law.

On the other hand, other aspects of § 2.05 of Discussion Draft No. 2 would distort the law, such as the Draft's confusion of the merits with class certification. Additionally, the new addition of Illustration 5 to the Draft is inconsistent with other parts of the PRINCIPLES which embrace issue certification.

ALI should substantially revise both its specific discussion of medical monitoring and its treatment of issue certification in general. Otherwise, ALI's PRINCIPLES would confuse and distort the law—the opposite of what ALI is trying to do with its PRINCIPLES.

Appendix

List of Corporate Members of the Product Liability Advisory Council

3M
A.O. Smith Corporation
Altec Industries
Altria Corporate Services, Inc.
American Suzuki Motor Corporation
Amgen Inc.
Andersen Corporation
Anheuser-Busch Companies
Appleton Papers, Inc.
Arai Helmet, Ltd.
Astec Industries
BASF Corporation
Bayer Corporation
Bell Sports
Beretta U.S.A Corp.
BIC Corporation
Biro Manufacturing Company, Inc.
Black & Decker (U.S.) Inc.
BMW of North America, LLC
Boeing Company
Bombardier Recreational Products
BP America Inc.
Bridgestone Americas Holding, Inc.
Briggs & Stratton Corporation
Brown-Forman Corporation
CARQUEST Corporation
Caterpillar Inc.
Chevron Corporation
Continental Tire North America, Inc.
Cooper Tire and Rubber Company
Coors Brewing Company
Crown Equipment Corporation
DaimlerChrysler Corporation
The Dow Chemical Company
E & J Gallo Winery
E.I. DuPont De Nemours and Company
Eaton Corporation
Eli Lilly and Company
Emerson Electric Co.
Engineered Controls International, Inc.
Estee Lauder Companies
Exxon Mobil Corporation
Ford Motor Company
Freightliner LLC
Genentech, Inc.
General Electric Company
General Motors Corporation
GlaxoSmithKline
The Goodyear Tire & Rubber Company
Great Dane Limited Partnership
Guidant Corporation
Harley-Davidson Motor Company
The Heil Company
Honda North America, Inc.
Hyundai Motor America
ICON Health & Fitness, Inc.
Illinois Tool Works, Inc.
International Truck and Engine Corporation
Isuzu Motors America, Inc.
Jarden Corporation
Johnson & Johnson
Johnson Controls, Inc.
Joy Global Inc., Joy Mining Machinery
Kawasaki Motors Corp., U.S.A.
Kia Motors America, Inc.
Koch Industries
Kolcraft Enterprises, Inc.
Komatsu America Corp.
Kraft Foods North America, Inc.
Lincoln Electric Company
Magna International Inc.
Mazda (North America), Inc.
Medtronic, Inc.
Mercedes-Benz of North America, Inc.

Merck & Co., Inc.
Michelin North America, Inc.
Microsoft Corporation
Mine Safety Appliances Company
Mitsubishi Motors North America, Inc.
Nintendo of America, Inc.
Niro Inc.
Nissan North America, Inc.
Nokia Inc.
Novartis Consumer Health, Inc.
Novartis Pharmaceuticals Corporation
Occidental Petroleum Corporation
PACCAR Inc.
Panasonic
Pfizer Inc.
Porsche Cars North America, Inc.
PPG Industries, Inc.
Purdue Pharma L.P.
Putsch GmbH & Co. KG
The Raymond Corporation
Raytheon Aircraft Company
Remington Arms Company, Inc.
Rheem Manufacturing
RJ Reynolds Tobacco Company
Sanofi-Aventis
Schindler Elevator Corporation
SCM Group USA Inc.
Shell Oil Company
The Sherwin-Williams Company
Smith & Nephew, Inc.
St. Jude Medical, Inc.
Sturm, Ruger & Company, Inc.
Subaru of America, Inc.
Synthes (U.S.A.)
Terex Corporation
Textron, Inc.
TK Holdings Inc.
The Toro Company
Toshiba America Incorporated
Toyota Motor Sales, USA, Inc.
TRW Automotive
UST (U.S. Tobacco)
Vermeer Manufacturing Company
The Viking Corporation
Volkswagen of America, Inc.
Volvo Cars of North America, Inc.
Vulcan Materials Company
Water Bonnet Manufacturing, Inc.
Watts Water Technologies, Inc.
Whirlpool Corporation
Wyeth
Yamaha Motor Corporation, U.S.A.
Yokohama Tire Corporation
Zimmer, Inc.