OBSTACLES TO DETERMINING PUNITIVE DAMAGES IN CLASS ACTIONS

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Courts and commentators have often embraced the class action device as an ideal means of assessing punitive damages fairly in mass tort cases. In this Article, Professor Hines sounds a cautionary note by identifying a number of procedural and substantive obstacles that may thwart effective class treatment of punitive damages. For example, punitive damages claims often will not raise questions common to the class because of differing state standards for awarding and assessing the amount of punitive damages. In addition, state punitive damages laws and recent Supreme Court due process jurisprudence preclude imposition of class punitive damages prior to some assessment of harm to the class as a whole. In light of these concerns, this Article urges courts to proceed cautiously before certifying class claims for punitive damages with careful regard for the dictates of Rule 23, state punitive damages laws, and the due process clause.

INTRODUCTION

For over three decades, courts and commentators have struggled to resolve the vexing dilemma of punitive damages in the context of a mass tort: how to avoid duplicative punishment of defendants and foster equitable distribution of the punitive bounty among all injured persons. Utilizing the class action device to determine punitive damages in mass tort cases provides an attractive solution, and some courts have been more than willing to certify such class actions.[1] In *Engle v. R.J. Reynolds Tobacco Co.*,[2] for example, the

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1. *See, e.g.*, Hilao v. Estate of Marcos, 103 F.3d 767 (9th Cir. 1996); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986); Decision Regarding Certification of Mandatory Punitive Damages Class, *In re* Exxon Valdez, No. A89-0095-CV, at 13 (D. Alaska Mar. 8, 1994) (on file with Wake Forest Law Re-

state court certified a class action that included punitive damages claims for over 200,000 Florida smokers against the tobacco industry,[3] and the jury awarded the class $145 billion in punitive damages.[4]

Yet a number of complicated procedural and substantive obstacles stand in the way of resolving punitive damages in a class action, many of which have been inadequately addressed. This Article provides a survey of those problems, particularly in mass tort cases such as *Engle*, and urges courts to approach class claims for punitive damages with great care. While the class action solution to mass tort punitive damages problem is enormously appealing in theory, it may not be an effective remedy in practice. The devil, they say, is in the details. First, to the extent a court certifies an opt-out class including claims for punitive damages, as in *Engle*, the class action cannot prevent multiple punishment or inequitable allocation of punitive damages. Although the mandatory class action has a greater potential to achieve these goals, the unique procedural problems such classes raise may frustrate certification of such classes.

Second, with respect to any class resolution of punitive damages, courts must consider whether punitive damages can be imposed fairly on a class basis. Close examination of the factual and legal variations among class members' claims for punitive damages, for example, may suggest liability for such damages is not an issue common to the class. Moreover, class resolution of punitive damages may be hindered by recent state laws and Supreme Court rulings that limit both the amount of punitive damages and the procedures by which such damages may be imposed. While some of these limitations simply call for careful court management, others may prove more lethal to class actions seeking to resolve claims for punitive damages on a class basis. The purpose of this Article is not to sound the death knell for class punitive damages, but to caution courts that these potential procedural and substantive obstacles must not be overlooked.

Part I briefly examines the mass tort punitive damages dilemma, and discusses the powerful policy arguments in favor of resolving punitive damages on a class basis.[5] Part I also analyzes the differences between mandatory and opt-out class actions, and the extent to which each type of class action can effectively address the mass tort punitive damages problem. Because the opt-out class

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view) [hereinafter *Exxon* Punitive Damages Class Order]; *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983), *aff'd on other grounds*, 818 F.2d 145 (2d Cir. 1987).

2. 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

3. *Id.* at 42; *see also infra* notes 176-79, 188-90 and accompanying text.

4. Myron Levin, *Jury Awards $145 Billion in Landmark Tobacco Case*, L.A. TIMES, July 15, 2000, at A1.

5. *See infra* notes 22-54 and accompanying text.

permits individuals to eschew the class action and pursue individual litigation, it may result in multiple assessments of punitive damages as well as uneven distribution of punitive damages among those similarly harmed by a defendant's wrongdoing.[6] The mandatory class approach, on the other hand, better addresses the problem by requiring inclusion of all claimants in a single action, and providing a vehicle that enables equitable distribution of punitive damages among class members.[7] Mandatory class actions, however, face several procedural hurdles that thus far have proved difficult to overcome.

Part II reviews the largely failed history of federal court attempts to utilize the mandatory class action to certify punitive damages classes,[8] and analyzes the procedural obstacles unique to such class actions.[9] Although this history amply illustrates the serious federal court concern about fair assessment of punitive damages in cases involving multiple claimants, it also underscores the caution with which courts must approach mandatory classes. While the mandatory class approach clearly is favored among scholars,[10] and may yet prove a viable solution,[11] the mandatory character of the class, which enables courts to resolve fairly the mass tort punitive damages problem, also creates a set of procedural hurdles that may thwart its effective use.

Parts III and IV analyze the procedural problems that may arise in any class action attempting to resolve claims for punitive damages on a class basis. Part III examines the factual and legal issues that must be resolved in order to determine whether a defendant's conduct gives rise to liability for punitive damages, and the extent to which those issues are truly common to the class. For example, if class punitive damages claims require application of different state standards for determining punishable conduct, a court might conclude that defendant's liability for punitive damages does not constitute a common issue.[12] A court similarly might find commonality lacking if the factual circumstances that give rise to liability for punitive damages involved multiple acts of misconduct that changed over time. While these legal and factual differences may undermine attempts to assess punitive liability on a class basis, courts may be able to manage the class action to enable varying as-

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6. *See infra* notes 55-57 and accompanying text.

7. *See infra* note 54 and accompanying text.

8. *See, e.g., In re* Sch. Asbestos Litig., 104 F.R.D. 422 (E.D. Pa. 1984), *vacated in part*, 789 F.2d 996 (3d Cir. 1986); *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188 (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982).

9. *See infra* notes 62-126 and accompanying text.

10. *See infra* note 54.

11. *See Exxon* Punitive Damages Class Order, *supra* note 1.

12. *See infra* notes 152-56 and accompanying text.

sessments of punitive liability.

Part IV considers whether the determination of the proper amount of punitive damages, as opposed to liability for punitive damages, presents a common issue. Although assessing a single amount of punitive damages would seem to avoid the risks of duplicative punishment and inequitable allocation among class members, some courts have concluded that punitive damages must be assessed on an individual, not a class, basis.[13] Further, Part IV addresses the relative timing of the assessments of class punitive and compensatory damages. This timing is potentially crucial because determining punitive damages prior to assessment of class compensatory damages may violate state law, as some courts recently have concluded.[14] The relative order of damage assessments also may be affected by recent Supreme Court jurisprudence regarding due process limitations on the imposition of punitive damages, specifically the requirement of a "reasonable relationship" between a punitive damages award and the harm caused by defendant's misconduct.[15]

I. MASS TORT PUNITIVE DAMAGES AND THE CLASS ACTION SOLUTION

A. *The Punitive Damages Problem in Mass Tort Cases*

As the Supreme Court explained recently in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,[16] punitive damages are "quasi-criminal" in nature.[17] While awarded to successful plaintiffs in private litigation, their purpose is not to compensate plaintiffs but to vindicate the public interest.[18] Awarding such damages to private

13. *See infra* notes 172-82 and accompanying text.

14. *See, e.g.*, Philip Morris, Inc., v. Angeletti, 752 A.2d 200, 247 (Md. 2000); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 432-33 (Tex. 2000); *see also infra* notes 200-08 and accompanying text.

15. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 580-81 (1996); *see also infra* notes 235-95 and accompanying text.

16. 121 S. Ct. 1678 (2001).

17. *Id.* at 1683 (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 54 (1991)).

18. As the Supreme Court explained in *Cooper*, compensatory and punitive damages "serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct," while the latter serve punishment and deterrence goals. *Id.*; Malcolm E. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269, 292 (1983) ("[T]he purpose of punitive damages is to vindicate the public interest, not that of a particular plaintiff."); *see also* Gertz v. Robert Welch, Inc., 418 U.S. 323, 350 (1974); RESTATEMENT (SECOND) OF TORTS § 908(1) (1995); F. Warren Jacoby, Comment, *The Relationship of Punitive Damages and Compensatory Damages in Tort Actions*, 75 DICK. L. REV. 585 (1970).

citizens has been justified for hundreds of years[19] as a necessary incentive to accomplish the goals of punishing a defendant who has engaged in outrageous conduct and deterring that defendant (as well as others) from engaging in such misconduct in the future.[20] While punitive damages have been the subject of enormous debate among legislators, courts, and scholars,[21] this Article assumes the continuing vitality of punitive damages as an appropriate tool for achieving social justice.

Courts have grappled mightily, however, with the question of how fairly to impose punitive damages in mass tort cases. A hypothetical based on the facts of *BMW of North America, Inc. v. Gore*,[22] helps illuminate the problem. Imagine a car manufacturer that fails to inform fourteen people in a particular state that their cars were repainted prior to sale. Assume that the first of these consumers brings suit, and the jury is instructed to consider the harm suffered by all fourteen people and the reprehensibility of the defendant's conduct (which, to complicate matters, may include evidence regarding people affected in other states).[23] If the jury calculates an award

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19. *See, e.g.*, LINDA L. SCHLUETER & KENNETH R. REDDEN, PUNITIVE DAMAGES 3-4 (2d ed. 1989) (discussing historic origins of punitive damages); *see also* RICHARD L. BLATT ET AL., PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 1.2 (1991) (same).

20. *See, e.g., Cooper*, 121 S. Ct. at 1683 (quoting *Gertz*, 418 U.S. at 350) (Punitive damages "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence."); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 11 (1982) (analyzing various proffered justifications for punitive damages and concluding that they reduce to: "(1) that wrongdoers deserve punishment, beyond that provided by reparative damages; and (2) that imposing a detriment on defendants promotes efficiency by deterring loss-creating conduct"); *see also* RESTATEMENT (SECOND) OF TORTS § 908(1) (1995).

21. *Compare* Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 MINN. L. REV. 1, 13 (1990), David Luban, *A Flawed Case Against Punitive Damages*, 87 GEO. L.J. 359 (1998), *and* David F. Partlett, *Punitive Damages: Legal Hot Zones*, 56 LA. L. REV. 781 (1996), *with* John Dwight Ingram, *Punitive Damages Should be Abolished*, 17 CAP. U. L. REV. 205 (1988), James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic that Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984), *and* W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 GEO. L.J. 285 (1998).

22. 517 U.S. 559 (1996). *BMW* is the Supreme Court's most recent pronouncement regarding the due process limitations on the imposition of punitive damages. *See infra* notes 248-58 and accompanying text.

23. *See BMW*, 517 U.S. at 563-64. States articulate the factors to consider in assessing the amount of punitive damages somewhat differently. *See infra* notes 181-82. But, juries ordinarily are instructed to consider both defendant reprehensibility and the harm caused by defendant's misconduct when calculating an amount of punitive damages sufficient to achieve the goals of punishment and deterrence. *See, e.g.*, Phase II-B Jury Instructions, Engle v. R.J. Reynolds Tobacco Co., No. 94-8273, at 57785-87 (Fla. Cir. Ct. July 14, 2000) (on file with the Wake Forest Law Review) [hereinafter *Engle* Jury Instructions]; *see*

of punitive damages that takes fully into account the entire harm caused and not just the harm to the individual plaintiff, it would seem that the goals of deterrence and punishment that justify punitive damage awards would be achieved.[24]

But what about the other thirteen plaintiffs? Assume that each of them brings a separate suit, introduces the same evidence, and is awarded punitive damages in the same amount as the first plaintiff. Under these circumstances, it seems clear that defendant would be over-deterred and over-punished for the same conduct.[25] Yet if the other thirteen plaintiffs are not allowed to seek punitive damages, it would also seem unfair: the first plaintiff received an award based in part on the harm done to the other thirteen, but they received none of that award.

In *Roginsky v. Richardson-Merrell, Inc.*,[26] one of the earliest opinions confronting the issue, Judge Friendly examined the inevitable risk in mass torts, such as the *BMW* hypothetical, that punitive damage awards prove either excessive or inequitably allocated among those similarly situated.[27] Judge Friendly's analysis of these issues is as insightful today as it was thirty years ago, including his skepticism regarding the judicial system's ability to resolve the problem.[28] He dubbed multiple imposition of punitive damages for

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also TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 463 n.29 (1993) (noting West Virginia jury instructions that included consideration of "the nature of the wrongdoing, [and] the extent of the harm inflicted"); DOUGLAS LAYCOCK, MODERN AMERICAN REMEDIES 672-75 (2d ed. 1994) (examining punitive damages factors).

24. *See, e.g.*, Gen. Motors Corp. v. Moseley, 447 S.E.2d 302, 312 (Ga. Ct. App. 1994) (expressly approving punitive damages award based on mass tort defendant's nationwide conduct); *see also* C. Delos Putz, Jr. & Peter M. Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F. L. REV. 1, 13 (1981) ("[E]ach plaintiff is normally permitted to prove that the defendant's conduct affected numerous persons other than the plaintiff, and each jury is urged to award punitives in an amount sufficient to deter the defendant from the entire course of conduct.").

25. Indeed, these problems may exist even if the jury in each case considers only the harm to the individual plaintiff because the punitive damages award in the first case may still have provided adequate punishment and deterrence.

26. 378 F.2d 832 (2d Cir. 1967).

27. *Id.* at 839; *see also* Margaret Meriwether Cordray, *The Limits of State Sovereignty and the Issue of Multiple Punitive Damages Awards*, 78 OR. L. REV. 275, 279-80 (1999) (discussing the dangers inherent in mass tort cases that "the overall punishment meted out will be inappropriate to the circumstances" and that "the allocation of [mass tort punitive damage] awards among equally deserving plaintiffs will unfairly favor the lucky few who reach the courthouse first"); 2 AM. L. INS., REPORTER'S STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260-61 (1991) (Multiple punitive damages "[p]roblems arise especially in the context of product litigation. . . . [Because] [i]f a defectively designed product is unduly hazardous, it may injure hundreds or even thousands of purchasers and users.").

28. *Roginsky*, 378 F.2d at 839 ("We have the gravest difficulty in perceiving

the same wrongful act punitive damages "overkill."[29] If, as in the *BMW* hypothetical, the jury imposed punitive damages calculated to achieve the goals of deterrence and punishment in light of the total harm caused, any additional punitive awards in later cases would seem excessive, if not constitutionally so,[30] at least as a matter of sound policy.[31]

Yet Judge Friendly acknowledged the "staggering" difficulties associated with any attempt to prevent such overkill.[32] He also found no legal principle on which to base a denial of punitive damages after the first such award.[33] While recent Supreme Court opinions may well suggest due process limitations on the aggregate amount of punitive damages that may be imposed on a mass tort de-

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how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

29. *Id.* One scholar has suggested that if juries are not instructed to consider the full scope of the defendant's misconduct, including harm to all those affected, punitive damages "could turn out to be inadequate, rather than excessive," and create a risk of underdeterrence. Cordray, *supra* note 27, at 279.

30. *See In re* Fed. Skywalk Cases, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting) ("Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants' culpability or the actual injuries suffered by victims, would violate the sense of 'fundamental fairness' that is essential to constitutional due process."); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 140 (1986) (arguing that "[r]epetitive and unrestrained punitive liability for a single course of conduct threatens aggregate punishment that is, by any sensible standard, excessive and unfair" as well as "arguably unconstitutional"); Dennis Neil Jones et al., *Multiple Punitive Damages Awards for a Single Course of Wrongful Conduct: The Need for a National Policy to Protect Due Process*, 43 ALA. L. REV. 1, 3-4 (1991) ("[A]t some point the aggregate amount of multiple punitive damages becomes fundamentally unfair, in violation of the Due Process Clause."); Gary T. Schwartz, *Mass Torts and Punitive Damages: A Comment*, 39 VILL. L. REV. 415, 423-31 (1994) (suggesting that "the core of the prohibition against double jeopardy is probably included in the Due Process guarantee," and arguing its applicability to multiple punitive damages that take into account total harm); *see also infra* Part IV.B.3.

31. *Roginsky*, 378 F.2d at 840-41 (Multiple punitive awards "may not add up to a denial of due process," but could "do more harm than good."); *see also* Cordray, *supra* note 27, at 279-80; Richard W. Murphy, *Superbifurcation: Making Room for State Prosecution in the Punitive Damages Process*, 76 N.C. L. REV. 463, 543 (1998) ("Doling out punishment in numerous discrete actions for a single course of conduct may be constitutional, but it is not sensible."); David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1 (1982); Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 55 (1983) (arguing that while a single punitive damages award "does not necessarily preclude additional awards based on the same outrageous conduct, . . . [t]he aggregate amount of multiple awards . . . can reach a level so fundamentally unfair and destructive" that no additional awards should be permitted).

32. *Roginsky*, 378 F.2d at 839; *see also* Jeffries, *supra* note 30, at 147.

33. *Roginsky*, 378 F.2d at 839.

fendant,[34] the majority of courts to date have agreed with Judge Friendly's assessment.[35]

In addition to voicing concern about excessive punishment, Judge Friendly also considered the distributive justice aspect of punitive damages in the area of mass torts. If a defendant's misconduct affects a large number of people, as in the *BMW* hypothetical, it seems only fair that all should receive some amount of punitive damages. According to Judge Friendly, rejecting punitive damages for all but the first, or first few, plaintiffs, however appropriate in theory, would be neither "fair [n]or practicable."[36] He argued that only "jurisprudes" could countenance the apparent inequity: "most laymen and some judges would have some difficulty in understanding why presumably equally worthy plaintiffs in the other . . . cases [here] or elsewhere in the country should get less or none."[37]

Because no plaintiff is entitled to punitive damages,[38] the goal of achieving equitable distribution of punitive damages among similarly situated plaintiffs is less compelling than the avoidance of ex-

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34. *See infra* notes 229-60 and accompanying text. *But see* Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 413 (Ky. 1998) (rejecting argument that recent Supreme Court due process cases preclude duplicative mass tort punitive damages).

35. *See, e.g.,* Dunn v. HOVIC, 1 F.3d 1371, 1385-86 (3d Cir. 1993) (detailing the majority of federal and state courts denying punitive damages challenges "on the ground that they constitute repetitive punishment for the same conduct, . . . reject[ing] such a contention, both on due process and common law tort grounds"); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 505-06 (Fla. 1994) (declining to hold that "successive punitive damage awards in asbestos cases" violated due process); Murphy, *supra* note 31, at 543 (noting that no court has yet accepted argument that multiple punitive damages amount to violation of due process). *But see* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1064 (D.N.J.) (concluding that "subjecting defendants to the possibility of multiple awards of punitive damages for the single course of conduct alleged in this action would deprive defendants of the fundamental fairness required by the Due Process Clause"), *vacated in part on reconsideration*, 718 F. Supp. 1233 (D.N.J. 1989).

36. *Roginsky*, 378 F.2d at 839; *see also Dunn*, 1 F.3d at 1386; *Juzwin*, 718 F. Supp. at 1235 ("[I]t would be impossible for this court to ensure that the 'one and only' prior award contemplated the 'full' damage caused by a defendant's wrongful conduct."); Cordray, *supra* note 27, at 280 (characterizing the "first comer" solution as "unworkable" because the "first jury will likely not be in a position to assess the magnitude of the defendant's wrong" and such an approach "exacerbates the problem of unfair discrimination among plaintiffs").

37. *Roginsky*, 378 F.2d at 840; *see also* Davis v. Celotex Corp., 420 S.E.2d 557, 565-66 (W. Va. 1992) (explaining that it would be "highly illogical and unfair for courts to determine at what point punitive damage awards should cease. . . . Certainly, it would be difficult to determine where the cutoff line should be drawn as between the first, tenth, or hundredth punitive damage award.").

38. *See* Putz & Astiz, *supra* note 24, at 23-24 (explaining that a claim for punitive damages "is not a 'cause of action' which belongs to any particular individual plaintiff; rather, it is a remedy which the law permits the plaintiff to invoke for the good of society").

cessive punitive damages. Indeed, one might argue that there is nothing inequitable in rewarding early, innovative plaintiffs with punitive damages at the expense of later plaintiffs' ability to recover such damages. If the goals of deterrence and punishment have been achieved by an award of punitive damages, it hardly matters from a social utility perspective who receives the windfall of the award. But our judicial system may suffer from the appearance of injustice if only jurisprudes understand this result. Moreover, the argument becomes even less appealing if early punitive awards undermine the availability of even compensatory damages for future claimants.[39]

Scholars also have challenged the assumption that multiple punitive damages for the same act should be avoided.[40] Analogizing to criminal law, one might argue that just as a convicted bomber ought to be sentenced separately for each person harmed, a defendant whose actions harm many should be subjected to multiple damages awards. The analogy is inapplicable, however, if the jury in the first plaintiff's case considered the total amount of harm caused by the misconduct and not simply the harm done to the individual plaintiff.[41]

Despite longstanding recognition of the mass tort punitive damages problem, attempts to find a solution have proved as challenging as Judge Friendly predicted.[42] The next section identifies some of the proposals aimed at the problem, explains why the class action

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39. *See* ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY, *supra* note 27, at 260-61 (Initial punitive damage awards "may strip the firm of its insurance coverage and assets, thus endangering the ability of later claimants to realize their fundamental tort right to compensatory redress."); *cf.* Jack B. Weinstein & Eileen B. Hershenov, *The Effect of Equity on Mass Tort Law*, 1991 U. ILL. L. REV. 269, 290 (1991) ("No matter how financially healthy [mass torts defendants may be], the sheer number of present and future victims means that we are ultimately dealing with a limited compensation fund."). *But see* Cynthia R. Mabry, *Warning! The Manufacturer of This Product May Have Engaged in Cover-Ups, Lies, and Concealment: Making the Case for Limitless Punitive Awards in Product Liability Lawsuits*, 73 IND. L.J. 187, 203 (1997) (questioning whether empirical evidence supports contention that punitive damages deplete ability to pay compensatory damages in future cases).

40. *See, e.g.*, Mabry, *supra* note 39, at 252 (arguing that "[t]he threat of multiple and substantial punitive awards remains necessary to promote public safety by deterring bad acts by manufacturers"); Jerry J. Phillips, *Multiple Punitive Damage Awards*, 39 VILL. L. REV. 433, 434 (1994).

41. *See* Schwartz, *supra* note 30, at 428 (Although the criminal law analogies may seem apt, "[i]f the punitive damage award does thus serve as the jury's response to the [defendant]'s full misconduct, then any later punitive damage awards against that [defendant] can indeed be properly analyzed as double punishment (or jeopardy).").

42. *See, e.g.*, Juzwin v. Amtorg Trading Corp., 718 F. Supp. 1233, 1236 (D.N.J. 1989) ("The court abides by its ruling that multiple awards of punitive damages for a single course of conduct violate the fundamental fairness requirement of the Due Process Clause, but concludes that equitable and practical concerns prevent it from fashioning a fair and effective remedy.").

has emerged as one of the best hopes of resolving the dilemma, and considers the utility of the two types of class actions to effectuate the goals of preventing excessive punishment and achieving distributive justice.

B. The Class Action Solution

Courts and legislatures have considered a number of proposed solutions to the mass tort punitive damages dilemma. State legislatures in the last few decades have enacted several reforms generally aimed at curbing excessive punitive damages, such as imposing caps on the amount of punitive damages that can be imposed,[43] requiring bifurcation of issues related to punitive damages,[44] raising the evidentiary burden of proof necessary to establish liability for punitive damages to clear and convincing,[45] and requiring that successful plaintiffs split any punitive damages recovery with the state.[46]

In addition, reforms more narrowly tailored to the problem of mass tort punitive damages have been proposed or enacted. Some states have attempted to limit the number of times punitive damages may be imposed on a defendant for the same conduct.[47] Another measure would require juries to consider any earlier punitive damages awards directed at the same misconduct in calculating the appropriate amount of punitive damages in later cases.[48] Some

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43. *E.g.*, COLO. REV. STAT. ANN. § 13-21-102(1)(a) (2001) (limiting punitive damages to amount of compensatory damages); CONN. GEN. STAT. ANN. § 52-240b (2001) (limiting punitive damages to two times compensatory damages in product liability suits); KAN. STAT. ANN. § 60-3702(e)(1)-(2) (1994) (limiting punitive damages to lesser of defendant's gross income in preceding five years or $5 million); VA. CODE ANN. § 8.01-38.1 (2000) (limiting punitive damages to $350,000 in medical malpractice suits). *But see* Sandra N. Hurd & Frances E. Zollers, *State Punitive Damages Statutes: A Proposed Alternative*, 20 J. LEGIS. 191, 200 (1994) (arguing that such caps "def[y] logic" because "it is precisely the lack of predictability that gives punitive damages their deterrent effect").

44. *See infra* note 197; *see also* Part IV.B.2.

45. *E.g.*, ALA. CODE § 6-11-20(a) (2001); CAL. CIV. CODE § 3294(a) (LEXIS Supp. 2001); GA. CODE ANN. § 51-12-5.1(b) (2000); MINN. STAT. ANN. § 549.20.1(a) (2000); UTAH CODE ANN. § 78-18-1(1)(a) (2001); Victor E. Schwartz et al., *Reining in Punitive Damages "Run Wild": Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003, 1013 (1999) (advocating in favor of the higher burden of proof, and noting that it is now the law in twenty-nine states and the District of Columbia).

46. *E.g.*, GA. CODE ANN. § 51-12-5.1(e)(2) (2000) (allocating 75% of punitive damages to state); MO. REV. STAT. § 537.675 (2000) (50% of punitive damages); *see also* Eric Kades, *Windfalls*, 108 YALE L.J. 1489, 1564 (1999) (arguing in favor of shifting the punitive damage "windfall" from plaintiff to state).

47. *E.g.*, GA. CODE ANN. § 51-12-5.1(e)(1) (struck down as a violation of equal protection and due process, McBride v. Gen. Motors Corp., 737 F. Supp. 1563, 1576-77 (M.D. Ga. 1990)); OHIO REV. CODE ANN. § 2315.21(D)(3)(a)-(b) (1998).

48. *See, e.g.*, MINN. STAT. ANN. § 549.20(3) (2000); *Engle* Jury Instructions, *supra* note 23 at 57787 (directing jury to consider, inter alia, "the existence of

commentators have even argued that punitive damages should be eliminated altogether in the context of certain mass torts because the enormous compensatory liability faced by such mass tort defendants adequately satisfies deterrence goals.[49]

The class action device, however, has emerged as perhaps the most popular solution to the mass tort punitive damages dilemma,[50] and for understandable reasons. If all similarly situated plaintiffs can be brought together in a class action, the defendant would not be subjected to the risk of potentially excessive punitive damages, and every injured class member could share fairly in the punitive award. While intuitively appealing, this solution has not proved particularly successful. To understand why, one must look first to the two different types of class actions, opt-out and mandatory, and consider the extent to which either can accomplish the goals of effective punishment and equitable allocation.

All class actions must satisfy the following prerequisites set forth in Federal Rule of Civil Procedure 23(a): the class must be too

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other civil awards against each defendant for the same conduct"); Jacqueline Perczek, Comment, *On Efficiency, Punishment, Deterrence and Fairness: A Survey of Punitive Damages Law and a Proposed Jury Instruction*, 27 SUFFOLK U. L. REV. 825 (1993). *But see* Seltzer, *supra* note 31, at 59-60 (noting that despite widespread acceptance, such an instruction "might . . . be highly prejudicial to defendants, who would probably prefer to take their chances with juries that are uninformed about other litigation arising out of the same conduct"); Jeffries, *supra* note 30, at 146-47 (characterizing as "almost laughable" the protections offered by such jury instructions).

49. *See, e.g.*, Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 530 (5th Cir. 1984) (noting that "[w]here strict liability for compensatory damages imposes adequate punishment, . . . we decline to cleave to a judge-made remedy of punitive damages that would both fail in its own purpose and obstruct the broader objectives of the underlying cause of action"), *vacated en banc by* 750 F.2d 1314 (5th Cir. 1985); Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840-41 (2d Cir. 1967) (questioning punitive damages where "[c]riminal penalties and heavy compensatory damages . . . should sufficiently meet these [social disapproval and deterrence] objectives"); Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819, 1863-64 (1992) (arguing that punitive damages in asbestos cases fail to serve any deterrent function, and therefore "lose their constitutional moorings"); Mark Donald Peters, Comment, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 PAC. L.J. 1273, 1300 (1982) (A punitive damage award in a mass tort class action seeking significant compensatory damages "is an unnecessary and unwarranted measure from which society derives no benefit."). *But see* Wangen v. Ford Motor Co., 294 N.W.2d 437, 441 (Wis. 1980) (rejecting argument that punitive damages in product liability cases should be abolished); Schwartz, *supra* note 30, at 421 (disagreeing with argument that a defendant "required to compensate a large number of victims should be exempt from the punishment that punitive damages can inflict," while conceding that mass tort punitive damages do not serve deterrence goals).

50. *See, e.g.*, Mabry, *supra* note 39, at 236-37 ("Courts and litigants agree that a class action suit is the most acceptable alternative for controlling the effects of multiple punitive damage awards."); Putz & Astiz, *supra* note 24, at 14.

numerous for practicable joinder, there must be questions of law and fact common to the class, and the class representatives must have claims typical of the class and adequately protect the interests of the class.[51] Mass tort class actions easily satisfy the numerosity requirement, but sometimes fail to meet the requirements of commonality, typicality, and adequacy.[52]

If a class action satisfies these prerequisites, it must then meet the requirements for one of the four class action types set forth in Rule 23(b). For purposes of discussing the effectiveness of the class action procedure to address the mass tort punitive damages problem, the distinction between mandatory and opt-out classes is the most important. The classes authorized by Rules 23(b)(1)(A), (b)(1)(B), and (b)(2) are referred to as "mandatory" because absent class members have no right to opt out of the class to pursue individual suits, as may class members in a Rule 23(b)(3) class.[53] Mandatory punitive damages class actions have been championed by a host of commentators and courts as the ideal solution to the mass tort punitive damages dilemma because only by mandating the inclusion of every affected person can a class action fully accomplish the goals of preventing punitive damages overkill and ensuring distributive justice.[54] In a mandatory class action, a jury can make an assessment of punitive liability including accurate consideration of the total harm caused by the defendant, class members are precluded from bringing multiple claims for punitive damages, and any punitive damages award may be divided fairly among class members.

Indeed, it is the very opt-out nature of the (b)(3) class action that undermines its attractiveness to resolve the problem of punitive damages in mass tort cases: because class members can opt out, the risks of excessive punishment and inequitable distribution persist.[55]

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51. FED. R. CIV. P. 23(a)(1)-(4). Most state class action statutes include the same or similar requirements.

52. *See infra* Part III.

53. *See* Ortiz v. Fibreboard Corp., 527 U.S. 815, 833 n.13 (1998) (citing 1 HERBERT NEWBERG & A. CONTE, CLASS ACTIONS § 4.01, at 4-6 (3d ed. 1992)).

54. *See, e.g.*, Phillips, *supra* note 40, at 444-48; Seltzer, *supra* note 31, at 83; Edward F. Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507, 508 (1987). *But see* Schwartz, *supra* note 30, at 431 (criticizing the nationwide mandatory punitive damages class solution for allowing "the punitive damage tail to wag the entire dog of tort liability").

55. *See* Phillips, *supra* note 40, at 445; Sherman, *supra* note 54, at 511 (noting that threat of "duplicative litigation may undermine the utility of a (b)(3) class action"). This assumes, of course, the viability of individual action. If the value of a class member's claim for compensatory damages is sufficiently low, the suit may be considered a negative value suit precluding individual litigation even when coupled with a claim for punitive damages. In that event, no risk of excessive punishment or inequitable allocation would be posed by Rule 23(b)(3)'s opt-out provision. Indeed, the argument in favor of Rule 23(b)(3) cer-

If class members exercise their opt-out rights and pursue individual actions, defendants could be subjected to multiple punitive damages awards in both the individual suits and the class action that result in aggregate punitive damages that may over-deter and over-punish.[56] The opt-out class action also fails to ensure proportionate distribution of punitive damages among similarly situated plaintiffs. The cases brought by individuals who opt out of the class action will likely go to judgment before the class trial, and if those plaintiffs recover punitive damages it could endanger (or at least compromise) the ability of the class to recover punitive damages.[57]

Given the policy arguments in favor of mandatory over opt-out class actions, it may seem surprising, then, that courts considering class claims for punitive damages have been less willing to approve mandatory class actions. As detailed below in Part II, courts attempting to employ the mandatory class device have faltered due to a number of procedural obstacles unique to mandatory classes that

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tification may become dramatically stronger, because absent aggregation of class members' claims for compensatory and punitive damages, defendant's misconduct might go entirely unpunished and undeterred. *Cf.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 617 (1997) (explaining that the framers of the (b)(3) class provision "had dominantly in mind vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"). Meeting jurisdictional amount in controversy requirements, however, might be difficult. *See, e.g.*, Gilman v. BHC Secs., Inc., 104 F.3d 1418, 1431 (2d Cir. 1997) (holding that punitive damages "on behalf of a class may not be aggregated for jurisdictional purposes where, as here, the underlying cause of action asserted on behalf of the class is *not* based upon a title or right in which the plaintiffs share, and as to which they claim, a common interest"). *But see* Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359 (11th Cir. 1996) ("When punitive damages reflect the defendant's course of conduct towards all of the putative class members, it is entirely proper that the damages be considered in the aggregate" for determination of jurisdictional amount in controversy.); Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1335 (5th Cir. 1995) (same).

56. *See* Putz & Astiz, *supra* note 24, at 20 (describing the threat of multiple punitive damage awards brought by opt-out class members as "deeply disturbing"). Professors Putz and Astiz proposed that class punitive damage awards "should be viewed as extinguishing society's right to punish the defendant for its conduct with relation to that particular class," such that once a class action has been certified, "the punitive damages claims on behalf of that class belong to the class and not to the individual class member who may elect to remove his individual claims for actual damages from the class action." *Cf. In re* Shell Oil Refinery, 136 F.R.D. 588, 590-91 (E.D. La. 1991), *aff'd sub nom.* Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992) (consolidating opt-out claims for punitive damages with class determination of punitive damages).

57. For example, prior punitive damages awards to opt-out class members might be considered mitigating factors in assessing class punitive damages. *See, e.g.*, *Engle* Jury Instructions, *supra* note 23, at 57787. Or the court might find that either the defendant lacks sufficient resources to pay further punitive damages or the aggregate of prior punitive damages awards violate either state law limits or substantive due process. *See infra* Part IV.

limit their use.[58] Perhaps the best explanation for the success of the Rule 23(b)(3) classes is simply that they do not face those jurisprudential problems specific to the mandatory class action. Short of a mandatory class action, class action treatment of at least some group of punitive damage claimants may seem superior to the alternative of having all punitive damages claims brought individually.[59] Class resolution of punitive damages claims also might be particularly compelling to a court already intending to certify the tort claims of the class.[60]

It is crucial for courts, in considering either an opt-out or a mandatory class action, to approach with great care the procedural and substantive hurdles to assessing punitive damages on a class basis that may hinder any class solution.[61] Part II describes the federal court experience with mandatory classes involving claims for punitive damages, and identifies the procedural difficulties unique to such class actions.

II. PROCEDURAL CONSIDERATIONS UNIQUE TO MANDATORY CLASS ACTION RESOLUTION OF PUNITIVE DAMAGES

In the 1980s, the dual concerns of fairly distributing punitive damages to mass tort plaintiffs[62] and protecting defendants against duplicative punitive damage liability[63] led to the certification of several major mandatory nationwide punitive damage class actions, including *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*,[64] *In re Federal Skywalk Cases*,[65] *In re*

58. *See* Cordray, *supra* note 27, at 281 (concluding that "[t]he practical problems of using the class action device . . . have proved virtually insurmountable").

59. *See* Sherman, *supra* note 54, at 511-17.

60. *But see In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 295 (S.D. Ohio 1997) (certifying Rule 23(b)(3) product liability class including claims for negligence and strict liability but declining to certify class claims for punitive damages); *In re* Copley Pharm. Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 467-68 (D. Wyo. 1995) (same).

61. *See* discussion *infra* Parts III-IV.

62. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("[I]f no class is certified under Rule (b)(1)(B), non-class members who opt out under Rule 23(b)(3) would conceivably receive all of the punitive damages or, if their cases are not completed first, none at all."); *see also In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1193 (N.D. Cal. 1981).

63. While most of these courts evinced graver concerns about the inequitable division of punitive damages among plaintiffs, some also cited the unfairness to defendants of repetitive punitive damage awards based on the same wrongful acts. *See, e.g.*, *Agent Orange*, 100 F.R.D. at 728.

64. 521 F. Supp. 1188, 1191 (N.D. Cal. 1981), *vacated and remanded*, 693 F.2d 847 (9th Cir. 1982).

65. 93 F.R.D. 415, 428 (W.D. Mo. 1982), *vacated*, 680 F.2d 1175 (8th Cir. 1982).

"Agent Orange" Product Liability Litigation,[66] and *In re School Asbestos Litigation*.[67] In addition, the district court in *In re Bendectin* certified a mandatory punitive damages class action in order to facilitate a global settlement of class claims.[68] While none of these class certifications were ultimately successful, examination of the issues and policies discussed in these cases is instructive.

These class actions were certified under Rule 23(b)(1)(B), which permits a mandatory class action when there is a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[69] The courts relied on two related limited fund[70] theories to invoke this mandatory class action provision. The first theory, adopted by the *Dalkon Shield*, *Skywalk*, and *Bendectin* district courts, recognized the existence of a limited fund due to the limited assets of the defendant.[71] The courts expressed the quite sensible fear that early punitive damage claims

66. 100 F.R.D. 718, 729 (E.D.N.Y. 1983), *aff'd on other grounds*, 818 F.2d 145 (2d Cir. 1987).

67. 104 F.R.D. 422, 433 (E.D. Pa. 1984), *aff'd in part and vacated in part*, 789 F.2d 996 (3rd Cir. 1986).

68. 102 F.R.D. 239 (S.D. Ohio), *vacated*, 749 F.2d 300 (6th Cir. 1984).

69. FED. R. CIV. P. 23(b)(1)(B). Courts have routinely rejected certification of mandatory classes under both Rules 23(b)(1)(A) and (b)(2). Rule 23(b)(1)(A) applies when the failure to maintain a class action creates a risk of "inconsistent or varying adjudications" that would create "incompatible standards of conduct" for the defendant. FED. R. CIV. P. 23(b)(1)(A). The vast majority of federal courts have steadfastly refused to apply this provision to mass tort class actions. *See, e.g.*, *Bendectin*, 749 F.2d at 304; McDonnell Douglas Corp. v. United States Dist. Ct. for the Cent. Dist. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). *But see In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 285 (S.D. Ohio 1997) (certifying (b)(1)(A) medical monitoring subclass). Several commentators have urged federal courts to reconsider certification of mass tort (b)(1)(A) classes. *See, e.g.*, Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L.J. 1, 43 (1986); Panzer & Patton, *Utilizing the Class Action Device in Mass Tort Litigation*, 21 TORT & INS. L.J. 560, 568-69 (1986); Phillips, *supra* note 40, at 447. Mandatory Rule 23(b)(2) class actions require that the relief sought be primarily injunctive in nature, an element generally not present in the punitive damages mass tort context. *See, e.g.*, *Bendectin*, 749 F.2d at 304. *But see Telectronics*, 172 F.R.D. at 286 (certifying (b)(2) medical monitoring subclass).

70. The limited fund, where "claims are made by numerous persons against a fund insufficient to satisfy all claims," presents a classic example of the Rule 23(b)(1)(B) class action. FED. R. CIV. P. 23 advisory committee's note.

71. *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (finding limited fund in part due to threat that defendant will be "unable to respond to claims for punitive damages due to actual or constructive bankruptcy"); *Bendectin*, 102 F.R.D. at 241; *In re* Fed. Skywalk Cases, 93 F.R.D. 415, 424 (W.D. Mo. 1982); *see also* Coburn v. 4-R Corp., 77 F.R.D. 43, 46 (E.D. Ky. 1977).

might deplete the defendant's resources before all plaintiffs could bring their cases to trial, "substantially impairing" the ability of later plaintiffs to "protect their interests."[72] To avoid "an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest,"[73] these courts certified mandatory limited assets class actions to assure that punitive damages would be shared fairly by all claimants.[74]

The second theory arose in response to the problem of duplicative punitive damages awards. The district courts in *Dalkon Shield*, *School Asbestos*, and *Agent Orange* adopted the so-called "limited generosity" or "limited punishment" theory, concluding that at some point state or constitutional limits would be imposed on the total punitive damages permitted against a mass tort defendant for a single transaction or course of conduct.[75] The limited fund that allegedly necessitates mandatory class treatment of punitive damages, then, would result not from exhaustion of a defendant's assets but from judicial recognition of substantive or due process limits that would prevent repetitive punitive damages awards.[76] Once a defendant had been sufficiently punished or deterred, any additional punitive damages awarded to later plaintiffs would be denied as overkill.[77] Therefore, these courts certified Rule 23(b)(1)(B) punitive damages class actions to distribute fairly whatever amount could be said to represent the maximum allowable punitive award among all those injured by defendant's wrongful conduct.

Both limited fund theories garnered some support among the federal circuit courts, but none of these class certification orders ultimately prevailed. With respect to the class actions certified under the limited assets theory, the appellate courts chiefly focused on the

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72. *Bendectin*, 102 F.R.D. at 241; *Skywalk*, 93 F.R.D. at 424; *Dalkon Shield*, 521 F. Supp. at 1193.

73. *Coburn*, 77 F.R.D. at 45.

74. *See, e.g.*, *Skywalk*, 93 F.R.D. at 425 ("Only a single class-wide adjudication of the issues of liability for and amount of punitive damages can protect the interest of every victim in receiving his or her just share or any punitive damage award."); *Dalkon Shield*, 521 F. Supp. at 1193.

75. *See Dalkon Shield*, 521 F. Supp. at 1193 (certifying (b)(1)(B) class action on both limited fund and limited punishment theories); *In re* Sch. Asbestos Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984) (finding a substantial probability that punitive damages might be prohibited at some point because they would amount to "overkill") (citing Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967)); *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 728 (E.D.N.Y. 1983) ("There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.").

76. *See Agent Orange*, 100 F.R.D. at 727 (rejecting argument that compensatory and punitive damages combined would exceed defendants' assets, but certifying mandatory class on alternate limited punishment theory); *see also Sch. Asbestos*, 104 F.R.D. at 434.

77. *See Agent Orange*, 100 F.R.D. at 727-28.

absence of sufficient factual findings establishing the presence of a limited fund. As the Ninth Circuit explained in *Dalkon Shield*, the lower court certified a limited assets class "without sufficient evidence of, or even a preliminary fact-finding inquiry concerning [the defendant's] actual assets, insurance, settlement experience and continuing exposure."[78] The courts grappled somewhat with the appropriate burden of proof — whether the court must find that individual punitive damage claims "necessarily" affect class members' claims[79] or merely that a "substantial probability" exists[80] — but agreed that a Rule 23(b)(1)(B) class could not be certified absent a factual inquiry regarding the existence of a limited fund.[81]

The appellate courts viewed the limited punishment classes more favorably,[82] but nevertheless did not approve them.[83] For ex-

78. *Dalkon Shield*, 693 F.2d at 852 n.28-30.

79. *Id.* at 852.

80. *In re* Bendectin Prods. Liab. Litig., 749 F.2d 300, 306 (6th Cir. 1984) (quoting *Agent Orange*, 100 F.R.D. at 726).

81. *See Sch. Asbestos*, 789 F.2d at 1005; *Bendectin*, 749 F.2d at 306 (citing the district court's failure both to make findings and to hold an evidentiary hearing); *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 848-53 (1998) (rejecting (b)(1)(B) settlement class of asbestos claimants in part due to the inadequate factual record supporting the presence of a limited fund).

82. *See, e.g., Sch. Asbestos*, 789 F.2d at 1005 ("Thus powerful arguments have been made that, as a matter of constitutional law or of substantive tort law, the courts shoulder some responsibility for preventing repeated awards of punitive damages for the same acts or series of acts."); *In re* Diamond Shamrock Chem. Co., 725 F.2d 858, 862 (2d Cir. 1984) (denying writ of mandamus to reverse *Agent Orange* class certification "given the fact that punitive damages ought in theory to be distributed among the individual plaintiffs on a basis other than date of trial").

83. It is true that the Second Circuit declined to issue a writ of mandamus decertifying the (b)(1)(B) punitive damages class in *Agent Orange*. *Diamond Shamrock*, 725 F.2d at 862. But failing to issue an extraordinary writ of mandamus to decertify the class does not amount to appellate approval of that certification. On direct appeal from the district court's approval of a settlement among the parties excluding punitive damages, the Second Circuit concluded that it "need not address the propriety of the certification of a mandatory class under Rule 23(b)(1)(B)." *Agent Orange*, 818 F.2d at 167. Nevertheless, it appears from dicta in a more recent Second Circuit case that its denial of mandamus in the *Agent Orange* litigation may indeed reflect the court's favorable view of Rule 23(b)(1)(B) class actions to resolve punitive damages in mass tort cases. *See In re* Joint E. and S. Dist. Asbestos Litig., 982 F.2d 721, 736-37 (2d Cir. 1992) (rejecting proposed (b)(1)(B) asbestos class action in bankruptcy on other grounds). The court explained that although its denial of a writ of mandamus in *Diamond Shamrock* did not "imply approval," the limited punishment theory considered in that case hewed

> much closer to the traditional concept of a limited fund than occurs whenever an entity becomes insolvent. Though the potential amount of aggregate punitive damages had not yet been determined, that amount was finite . . . because the recoveries of early successful claimants for punitive damages would quickly reach a total sufficient to assure deterrence, thereby precluding later claimants as a matter of

ample, the Ninth Circuit in *Dalkon Shield* expressed concern about the potential unfairness of repetitive punitive damages, but took the position that "no rule of law limits the amount of punitive damages a jury may award."[84] The Third Circuit, in *School Asbestos*, similarly cited recent cases declining to find any constitutional or state law safeguards against multiple punitive damage liability,[85] but struck a more sympathetic tone. The court acknowledged "powerful arguments" in favor of constitutional or substantive limits on repetitive punitive damage awards, and hypothesized that these arguments might support a mandatory punitive damages class under other circumstances.[86]

The *School Asbestos* court also emphasized the underinclusiveness of the proposed class, which, in the court's view, would defeat the intended purpose of the mandatory class action.[87] The class covered only the asbestos-related property damage claims of primary and secondary school districts, and failed to include other property damage claims or, more crucially, personal injury claims.[88] Even if the district court's limited punishment theory proved correct, then, the limited amount of punitive damages deemed appropriate might already have been imposed in cases brought by the thousands of claimants not included in the class long before the class trial could be held, undermining the justification for mandatory class.[89]

Finally, in the *Skywalk* case, the Eighth Circuit found that the mandatory punitive damages class certification order violated the Anti-Injunction Act.[90] The district court had issued an injunction prohibiting any person injured in the collapse of two hotel skywalks from pursuing punitive damages, either in private settlements or in

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of law.

Id.

84. *In re:* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982). The court rather cryptically suggested that procedures other than the mandatory class action device might protect a defendant against "unreasonable punitive damages." *Id.* Of course, these cases all pre-date the Supreme Court's recent jurisprudence articulating substantive due process limits on the imposition of punitive damages, which might provide more compelling grounds to proceed with a limited punishment class. *See infra* Part IV.B.3.

85. *Sch. Asbestos*, 789 F.2d at 1004. In *Dunn v. HOVIC*, the Third Circuit again affirmed its conclusion that multiple punitive damages are "not inconsistent with the due process clause or substantive tort law," noting that "no single court can fashion an effective response to the national problem flowing from mass exposure to asbestos products." 1 F.3d 1371, 1386 (3d Cir. 1993).

86. *Sch. Asbestos*, 789 F.2d at 1005.

87. *Id.* at 1006; *see also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 854-55 (1998) (striking down a Rule 23(b)(1)(B) asbestos class action in part due to class underinclusiveness).

88. *Sch. Asbestos*, 789 F.2d at 1005.

89. *Id.* at 1006.

90. *In re* Fed. Skywalk Cases, 680 F.2d 1175, 1182 (8th Cir. 1982).

pending state court actions.[91] A divided panel of the Eighth Circuit found the order in violation of the Anti-Injunction Act,[92] rejecting arguments that the order met the "necessary in aid of jurisdiction" exception.[93] Whatever authority a district court might have to enjoin future state litigation, the majority held, a mandatory class action could not justify the injunction of simultaneous state cases.[94] Judge Heaney, in dissent, argued forcefully that the majority's position would doom any effective use of a mandatory class action to deal with the problem of punitive damages.[95]

Many commentators have criticized the appellate courts in these cases for failing to embrace the mandatory class action as the best answer to the seemingly unsolvable problem of punitive damages in mass tort cases.[96] And, Judge Heaney's predictions notwithstanding, the Ninth Circuit arguably indicated its approval of such a mandatory class in *In re ExxonValdez*.[97] That case, which resulted

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91. *In re* Fed. Skywalk Cases, 93 F.R.D. 415, 428 (W.D. Mo. 1982).

92. 28 U.S.C. § 2283 (1994).

93. *Skywalk*, 680 F.2d at 1182-83.

94. *Id.* at 1183; *see also Sch. Asbestos*, 789 F.2d at 1002 (noting that mandatory class actions "rais[e] serious questions of personal jurisdiction and intrusion into the autonomous operation of state judicial systems," and are further "complicat[ed]" by the Anti-Injunction Act).

95. *Skywalk*, 680 F.2d at 1191 (Heaney, J., dissenting). Judge Heaney argued that if a mandatory class action was appropriate, as he believed it was in *Skywalk*, an injunction against state court proceedings fit squarely within the necessary in aid of jurisdiction exception to the Anti-Injunction Act. *Id.* at 1192. Troubled by the lower court's prohibition against any settlements including punitive damages, however, Judge Heaney would have modified the court's order to permit such settlements and to give defendants credit in the event of an award of punitive damages to the class. *Id.* at 1184.

96. *See, e.g.*, Phillips, *supra* note 40, at 447-48; Seltzer, *supra* note 31, at 80-81 ("The problem with the appellate opinions in the *Skywalk* and *Dalkon Shield* cases is not that they were wrongly decided, but rather that they went too far."); Sherman, *supra* note 54, at 535-36 (commending Judge Heaney's proposed modification and noting that "the Eighth Circuit's approach gave scant importance to the peculiar efficiency and fairness benefits offered by a (b)(1) class"); Note, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787, 1789 (1983) (praising the lower court (b)(1)(B) class actions in *Dalkon Shield* and *Skywalk* as the "best way to protect the interests of plaintiffs, defendants, and the judicial system").

97. 229 F.3d 790, 795-96 (9th Cir. 2000). Explaining why "courts have encouraged the use of mandatory class actions to handle punitive damages claims in mass tort cases," the Ninth Circuit observed that such class actions "avoid the possible unfairness" that results when the earliest plaintiffs bankrupt a mass tort defendant, and "avoid the possible unfairness of punishing a defendant over and over again for the same tortious conduct." *Id.* While appellate review of the punitive damages award was pending, neither party appealed the propriety of the mandatory punitive damages class certification. The Ninth Circuit also evinced some approval of an earlier limited assets mandatory class action in *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996), but the defendant estate in that case raised only challenges to the class definition and the

in a classwide punitive damage award of $5 billion,[98] involved the 1989 grounding of an Exxon ship that resulted in an oil spill affecting thousands of people near Prince William Sound in Alaska.[99] The district court certified the Rule 23(b)(1)(B) class under the limited punishment theory.[100] The court relied on recent Supreme Court cases recognizing substantive due process limits on punitive damages, which must be "no greater 'than reasonably necessary to punish and deter.'"[101] In light of this precedent, the court concluded that the due process limits on the total amount of punitive damages available to the class created a limited fund as contemplated by Rule 23(b)(1)(B).[102] The court rejected plaintiffs' argument that due process equally could be satisfied by informing juries in individual cases of any previous punitive damages awards, citing both the unfairness of allowing early plaintiffs to "reap a lion's share of the award" and uncertainty as to the protection such a procedure would provide.[103]

While *Exxon* may provide hope to advocates of the mandatory punitive damages class, particularly in its finding that due process limits on punitive damages provide the basis for a limited punishment (b)(1)(B) class, it may still prove to be of limited utility. First, it involved a mass accident rather than a more problematic mass tort with widely dispersed effects.[104] The court characterized the *Exxon* class action as "unique[ly]" suited to mandatory class treatment and particularly "compelling" because the case involved a mass accident rather than a dispersed product liability mass tort: the class action involved claimants in only one state, with the same applicable substantive law, and the same facts potentially subjecting

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typicality of the class representatives, not the propriety of a mandatory class.

98. *Exxon Valdez*, 229 F.3d at 793-94 (detailing the 1994 trifurcated class trial and punitive damages award, noting that $5 billion was "at that time the largest award of its kind in history").

99. *Id.* at 792.

100. *Exxon* Punitive Damages Class Order, *supra* note 1, at 8.

101. *Id.* (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 22 (1991)). For a more detailed discussion of Haslip and more recent Supreme Court decisions regarding procedural and substantive due process, *see infra* Part IV.B.3.

102. *Exxon* Punitive Damages Class Order, *supra* note 1, at 10.

103. *Id.* at n.9.

104. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (distinguishing between "mass tort cases arising from a common cause or disaster" and mass tort cases where "disparities among class members [are] great"); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1358 (1995). As Professor Coffee explains:

> By any doctrinal test, class certification is easier to justify in the mass accident setting than in the mass exposure context. In the former context, there is little variation in terms of legal claims among those injured (thus making class treatment more appropriate), while in the latter "mass exposure" cases both the facts and the applicable law vary greatly from case to case.

Id.

the defendant to punitive liability.[105] Second, the *Exxon* class action benefited enormously from the state courts' deference to the federal class action, which eliminated the federalism concerns that undermined the mandatory class in *Skywalk*.[106] Noting the state courts' "high degree of deference and cooperation," the federal district court in *Exxon* concluded that no injunction of state court proceedings would be necessary.[107] Rather, the court requested the state courts to "recognize as a matter of comity" the wastefulness of parallel proceedings on punitive damages, and defer to the federal punitive damages class action.[108] The Alaska courts apparently did exactly that, rejecting punitive damages claims in parallel state court actions.[109] Finally, any future certification of a limited punishment class action like *Exxon* depends on a recognition of aggregate limits on the imposition of punitive damages, which thus far no other court has acknowledged.[110]

Enthusiasm for the successful mandatory class treatment of punitive damages in *Exxon* also must be tempered by the Supreme Court's recent pronouncements on Rule 23(b)(1)(B)'s application to mass tort class actions, albeit in the context of a settlement class. In *Ortiz v. Fibreboard Corp.*,[111] the Supreme Court struck down a proposed nationwide settlement class of asbestos claimants, which included claims for punitive damages, as an unwarranted and "adventurous application of Rule 23(b)(1)(B)."[112] Preliminarily, the Court expressed concern about the due process implications of exercising

105. *Exxon* Punitive Damages Class Order, *supra* note 1, at 1; *see also In re* Shell Oil Refinery, 136 F.R.D. 588, 591 (E.D. La. 1991), *aff'd sub nom.* Watson v. Shell Oil Co., 979 F.2d 1014 (5th Cir. 1992), *reh'g en banc granted*, 990 F.2d 805 (5th Cir. 1993), *appeal dismissed*, 53 F.3d 663 (5th Cir. 1994) (certifying class claims for punitive damages). The court in *Shell Oil* explained that "[w]here the defendant's conduct occurs in a single incident, such as the explosion at Shell's refinery, the defendant's conduct towards each plaintiff is identical." *Id.* Moreover, the court distinguished more complicated mass torts "affecting plaintiffs nationwide, and involving a course of conduct occurring over a long period of time as well as the likelihood of future claims, the present case involves a single event affecting, at one time, certain people [in a finite geographical area]." *Id.*

106. *See supra* notes 90-94 and accompanying text.

107. *Exxon* Punitive Damages Class Order, *supra* note 1, at 11.

108. *Id.*

109. *See In re* Exxon Valdez, 229 F.3d 790, 793 (9th Cir. 2000) (citing Chenega Corp. v. Exxon Corp., 991 P.2d 769, 775 (Alaska 1999)).

110. *See supra* notes 34-35.

111. 527 U.S. 815 (1999).

112. *Id.* at 845. *But see* Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2011 (2000) (emphasizing that Ortiz did not involve a "separate certification of punitive damages claims," and urging that "[a]s a matter of class action practice, due process, and equity, such formulations should not be foreclosed").

personal jurisdiction over absent class members in a mandatory class action involving compensatory and punitive damages claims (as opposed to solely equitable claims).[113] The Court distinguished its decision in *Phillips Petroleum Co. v. Shutts*,[114] noting that in *Shutts* it had permitted personal jurisdiction over out-of-state absent class members because of the opportunity afforded such plaintiffs to opt out of the class.[115] Unfortunately, the Court declined this opportunity to resolve the due process requirements with respect to mandatory class actions including claims for money damages,[116] but the looming uncertainty posed by *Ortiz* may well dissuade lower courts from embarking on such "adventur[es]."

Like the courts in *Dalkon Shield* and *In re Bendectin,* the *Ortiz* Court rejected the settlement class in part because of the district court's failure to conduct a rigorous examination into the existence and nature of the alleged limited fund.[117] Certification of a limited fund class, the Court held, requires rigorous evaluation of both the total claims against such a fund and the defendant's total assets.[118] As for the first requirement, the Court explained the difficulties associated with calculating total liability for personal injury damage claims:

> It is simply not a matter of adding up the liquidated amounts, as in the models of limited fund actions. Although we might

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113. *Ortiz*, 527 U.S. at 846-47. The Court explained: "The inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class. Unlike Rule 23(b)(3) class members, objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have no inherent right to abstain." *Id.*

114. 472 U.S. 797 (1985).

115. *Ortiz*, 527 U.S. at 847-48. Interestingly, the lower court in *School Asbestos* considered the implications of *Shutts*. *In re* Sch. Asbestos Litig., 620 F. Supp. 873, 876 (E.D. Pa. 1985). The court concluded that the due process demands of Shutts were inapplicable to a class action for punitive damages, a remedy it found "more similar to equitable relief in that it seeks to provide for the public good as does a criminal fine." *Id.*

116. Indeed, the Court has been rather enigmatic in its apparent interest in confronting the issue, yet inability to find the appropriate vehicle by which to do so. *See* Adams v. Robertson, 520 U.S. 83 (1997) (dismissing writ of certiorari as improvidently granted); Ticor Title Ins. v. Brown, 511 U.S. 117, 123-26 (1994) (per curiam) (O'Connor, J., dissenting) (disagreeing with Court's dismissal of writ of certiorari as improvidently granted where "*Shutts*" question could have been addressed). Several commentators have addressed the so-called "*Shutts*" question, the due process implications of a multi-state mandatory class action involving money damages, with varying solutions. *See, e.g.*, Miller & Crump, *supra* note 69, at 52-57; Linda S. Mullenix, *Class Actions, Personal Jurisdiction, and Plaintiffs' Due Process: Implications for Mass Tort Litigation*, 28 U.C. DAVIS L. REV. 871, 913-16 (1995); Linda S. Mullenix, *Getting to* Shutts, 46 U. KAN. L. REV. 727 (1998).

117. *Ortiz*, 527 U.S. at 848-53; *see supra* notes 78-81 and accompanying text.

118. *Id.* at 850-52.

> assume, *arguendo*, that prior judicial experience with asbestos claims would allow the court to make a sufficiently reliable determination of the probable total, the District Court here apparently thought otherwise, concluding that "there is no way to predict [defendant's] future asbestos liability with any certainty."[119]

The Court did not have to reach the question of how certain a court must be of the total claims, however, because the district court manifestly erred in failing to conduct an adequate inquiry regarding the defendant's assets.[120]

As in *School Asbestos*, the *Ortiz* Court also rejected the Rule 23(b)(1)(B) class for underinclusiveness.[121] The negotiating parties deliberately excluded from the class up to a third of the potential claimants against the limited fund.[122] The Court reasoned that if all claimants to the fund are not included in the class definition, the underlying justification for a limited fund class action is seriously undermined, if not negated. Finally, citing a concern equally applicable to opt-out class actions, the *Ortiz* Court faulted the class certification for its failure to provide structural protections, such as subclasses, that would have ensured adequate representation to the groups of claimants within the class with conflicting interests.[123]

Some of the obstacles recognized by *Ortiz* might prove surmountable with careful district court management.[124] For example,

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119. *Id.* at 850; *see also In re:* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) (distinguishing a court's ability to assess the value of securities claims as opposed to mass personal injury claims: "not every plaintiff will prevail and not every plaintiff will receive a jury award in the amount requested").

120. *Ortiz*, 527 U.S. at 850-53. While some factual findings were made with respect to the sale value of the defendant asbestos company, the Court faulted the lower court for "simply accept[ing]" the settling parties' assertions regarding disputed insurance policy assets rather than "undertaking an independent evaluation" of such funds. *Id.* at 851.

121. *Id.* at 854-55; *see also In re* Sch. Asbestos Litig., 789 F.2d 996, 1006 (3d Cir. 1986); *see supra* notes 87-89 and accompanying text.

122. *See Ortiz*, 527 U.S. at 854-55. Moreover, these claimants also happened to be represented by class counsel and received apparently superior treatment in side negotiations contemporaneous to the class settlement. *Id.*

123. *Id.* at 855-59. The Court emphasized its earlier holding in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 627 (1997), that "class settlements must provide 'structural assurance of fair and adequate representation for the diverse groups and individuals affected.'" *Ortiz*, 527 U.S. at 856. But the Court concluded that "[n]o such procedure was employed here, and the conflict was as contrary to the equitable obligation entailed by the limited fund rationale as it was to the requirements of structural protection applicable to all class actions under Rule 23(a)(4)." *Id.* at 856-57.

124. *See, e.g.*, Cabraser & Sobol, *supra* note 112, at 2011 (conceding that *Ortiz* mandates caution, but arguing that courts in the future should be able to proceed in the face of the "manageable difficulties" posed by *Ortiz's* requirements).

determining the scope of a defendant's assets, while likely to be a complicated inquiry, should not preclude a mandatory class. As for the insufficiency of the limited fund, however, the Court's distinction between assessing insufficiency in "model[ ] limited fund actions" involving "liquidated amounts" and those involving non-liquidated claims (such as the mass tort personal injury claims in *Ortiz*) suggests its serious concern about a court's ability to properly ascertain fund insufficiency as to the latter.[125]

The addition of claims for punitive damages in a mass tort class action merely compounds this problem. Determining the amount of punitive damages a class would recover with any degree of accuracy would be virtually impossible prior to determination of the reprehensibility of the defendant's conduct or the extent of harm allegedly caused by that misconduct.[126] Moreover, *Ortiz* and the other appellate cases instruct that a court certifying a mandatory class including claims for punitive damages must tread cautiously to avoid the federalism concerns raised by enjoining state court proceedings, as well as the due process constraints imposed on certification of a mandatory class involving claimants lacking constitutionally adequate contacts with the forum state.

The very mandatory character of the (b)(1)(B) class action that best serves to redress the mass tort punitive damages dilemma simultaneously creates a set of procedural roadblocks that frustrates its successful implementation. Laudable in spirit, therefore, the mandatory class action may not prove a feasible solution, at least as currently constituted. The remainder of this Article identifies additional substantive and procedural thickets applicable to mandatory and opt-out class actions that may defeat (or at least entangle) any successful class resolution of punitive damages.

III. DETERMINING LIABILITY ON A CLASS BASIS

Prior to certification of any class action including claims for pu-

125. *Ortiz*, 527 U.S. at 850.

126. While some commentators have argued for a mandatory class action seeking only claims for punitive damages, *see, e.g.*, Cabraser & Sobol, *supra* note 112, such a class action also would fail the *Ortiz* limitations. First, assuming state law would even permit a class action of this type (punitive damages, after all, are derivative of substantive claims and not stand-alone causes of action), *see infra* note 196, ascertaining the amount of class punitive damages would remain a serious obstacle, made even more challenging by the exclusion of class compensatory claims. Second, and more significantly, disconnecting claims for punitive damages from claims for compensatory damages would violate the Court's requirement in *Ortiz* that a limited fund class action include all claimants to the fund. A class action alleging only claims for punitive damages would fail to satisfy this requirement because it would exclude claimants seeking to recover compensatory damages.

nitive damages,[127] courts must consider the separate but related issues of whether liability for punitive damages and punitive damages amount may be determined on a class basis. Analysis of the propriety of determining liability for punitive damages on a class basis focuses on whether such liability is truly a "common" question for all class members. The question of whether the amount of punitive damages presents a common issue will be examined in Part IV.

In order to certify punitive damages for class treatment, Rule 23(a)(2) requires a court to determine that liability for punitive damages presents a "question of law or fact common to the class."[128] In Rule 23(b)(3) class actions, courts often consider this commonality requirement to be subsumed by the more demanding predominance requirement[129] and therefore analyze the two requirements together.[130] In *Amchem Products, Inc. v. Windsor*,[131] the Supreme Court emphasized the important due process implications of the Rule 23(a) requirements, and mandated a rigorous evaluation of each element.[132] The federal circuit courts also have issued opinions chastising district courts for failing to conduct careful analyses of the Rule 23(a) and (b)(3) requirements before certifying a mass tort class action.[133]

Significantly, these courts concluded that even liability issues related exclusively to defendant's conduct might not be common to

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127. While most of the substantive and procedural concerns discussed in the remaining sections of this Article apply with equal force to mandatory as well as opt-out class actions, some may be relevant only to the predominance and superiority assessments required by Rule 23(b)(3) opt-out classes.

128. FED. R. CIV. P. 23(a)(2). State class actions usually contain the same or a similar requirement. *See, e.g.*, TEX. R. CIV. P. 42(a).

129. *See* FED. R. CIV. P. 23(b)(3) (mandating that courts find "the questions of law or fact common to the members of the class predominate over any questions affecting only individual members").

130. *See, e.g.*, Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 435 (Tex. 2000) ("[T]he exacting standards of the predominance inquiry act as a check on the flexible commonality test under Rule 42(a)(2).").

131. 521 U.S. 591 (1997).

132. *Id.* at 620-22; *see also* Gen. Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982) (requiring lower courts to conduct a "rigorous analysis" into Rule 23 prerequisites before class certification). The *Amchem* Court explained that "[s]ubdivisions (a) and (b) focus court attention on whether a proposed class has sufficient unity so that absent members can fairly be bound by decisions of class representatives." *Amchem*, 521 U.S. at 621.

133. *See* Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234-35 (9th Cir. 1996) (faulting class certification order for "merely reiterat[ing]" the requirements of typicality, adequacy, predominance, and superiority without explaining in detail how those requirements have been met); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996); *In re* Am. Med. Sys., Inc., 75 F.3d 1069, 1086 (6th Cir. 1996); *In re* Rhone-Poulenc Rorer, Inc, 51 F.3d 1293 (7th Cir.), *cert. denied*, 516 U.S. 867 (1995).

the class in light of factual and legal variations.[134] For example, in *In re American Medical Systems*,[135] the Sixth Circuit granted a writ of mandamus decertifying a nationwide product liability class action in part due to the factual and legal differences presented by the class claims.[136] The court explained that in light of the ten product models produced over twenty years, the allegedly common issues of strict liability, fraud, and negligence did not present factually or legally common questions because they would "differ depending upon the model and the year it was issued."[137] In addition, the Sixth Circuit criticized the lower court for failing to consider how the fifty state laws that would have to be applied to plaintiffs' claims might "differ[ ] from jurisdiction to jurisdiction."[138]

In any class action attempting to resolve the punitive damages claims of a mass tort class, therefore, courts must closely scrutinize whether the class claims for such damages are truly "common" or, in the case of a (b)(3) class action, present predominantly common issues. Several courts considering this question have determined that the factual and legal differences among the class members' claims

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134. *See Castano*, 84 F.3d at 743; *Am. Med. Sys.*, 75 F.3d at 1080-83; *Valentino*, 97 F.3d at 1234; *Rhone-Poulenc*, 51 F.3d at 1293; *see also In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417, 425 (E.D. La. 1997) (rejecting class certification due to unmanageable factual and legal differences among class members that would make the nationwide product liability class "unwieldy, unfair, and unlawful").

135. 75 F.3d 1069 (6th Cir. 1996).

136. *Id.* at 1090.

137. *Id.* at 1081; *see also Amchem*, 521 U.S. at 624 (noting "disparate questions undermining class cohesion," such as the fact that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods"). The *American Medical Systems* court also found that the (b)(3) superiority requirement could not be met by such a case:

> A single litigation addressing every complication in every model of prosthesis, including changes in design, manufacturing, and representation over the course of twenty-two years . . . would present a nearly insurmountable burden on the district court . . . [and] [i]f 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 . . . .

Am. Med. Sys., 75 F.3d at 1085.

138. *Am. Med. Sys.*, 75 F.3d at 1085; *see also Amchem*, 521 U.S. at 624 ("[d]ifferences in state law . . . compound these [factual] disparities," undermining class cohesion); *Rhone-Poulenc*, 51 F.3d at 1300-01 (contending that even if the law of negligence varies among states only in nuance, the significance of even nuanced differences "is suggested by a comparison of differing state pattern instructions on negligence and differing judicial formulations of 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."); *Castano*, 84 F.3d at 742 n.15 ("We find it difficult to fathom how common issues could predominate in this case when variations in state law are thoroughly considered.").

for punitive damages in mass tort cases preclude a finding of commonality or predominance.[139] In the words of one court recently denying a (b)(3) class action, resolution of liability for punitive damages "would require the court to apply differing issues of state law to an endless combination of facts in perhaps a million cases."[140] The following two sections address these possible factual and legal differences in more detail.

A. Factual Differences Presented by Class Resolution of Punitive Damages Liability

With respect to factual variations, some courts rejecting class treatment of punitive damages claims have emphasized that even when the focus is exclusively on the culpability of defendant's conduct, the facts that potentially subject it to punitive liability may differ.[141] Mass tort cases, as in *Engle*,[142] often involve defendant misconduct spanning a number of years and involving different products or designs. As the Second Circuit explained:

> The wrongfulness of a defendant's conduct [potentially subjecting it to liability for punitive damages] will normally be subject

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139. *See, e.g., In re:* N. Dist. of Cal., "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982) (denying class certification in part due to factual and legal variations raised by class claims for punitive damages); *In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997); Mack v. Gen. Motors Acceptance Corp., 169 F.R.D. 671, 679 (M.D. Ala. 1996); *In re* Copley Pharm., Inc. "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 467-68 (D. Wyo. 1995).

140. *Mack*, 169 F.R.D. at 679. Such a view, interestingly, suggests that concerns about punitive damages "overkill" may simply be overlooking important distinctions among punitive awards to mass tort plaintiffs. In the case of mass torts involving varying facts and law, some multiple awards might reflect not duplicative punishment, but appropriately nuanced treatment of misconduct warranting separate punishment and deterrence. *See* Simpson v. Pittsburgh Corning Corp., 901 F.2d 277, 281 (2d Cir. 1990), *cert. dimissed*, 497 U.S. 1057 (1990) (rejecting punitive damages overkill argument absent "an adequate factual basis for determining that the wrongful conduct sought to be punished is the same as the conduct previously punished").

141. *See, e.g., Dalkon Shield,* 693 F.2d at 850; *Mack*, 169 F.R.D. at 679; *cf.* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417 (5th Cir. 1998) (denying class certification of punitive damages for alleged employment discrimination because the class "challenge[d] various policies and practices over a period of nearly twenty years" that may have been more or less unjustifiable, or implemented differently over time); Bishop v. Gen. Motors Corp., 925 F. Supp. 294, 298 n.1 (D.N.J. 1996) (citing Tapscott v. MS Dealer Serv. Corp., 77 F.3d 1353, 1359 n.13 (11th Cir. 1996)) (rejecting aggregation of class members' punitive damages claims to satisfy jurisdictional amount in controversy in part because "the individual class members' rights to punitive damages may vary in this case" depending on whether plaintiffs "purchased their cars before GM became aware of the defect").

142. 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

> to varying assessments depending on the degree to which the dangers of its product were known at a particular time and the deliberateness of its conduct in declining to warn or even concealing dangers of which it was aware.[143]

Because the defendant may be more or less culpable depending on what it did or said at which time, some courts have concluded that the punitive damages claims of people affected at different times or by differing products do not present common questions of fact.[144] For example, the Ninth Circuit in *Dalkon Shield* expressed concern as to whether commonality could be satisfied because "questions about [the defendant's] knowledge of the safety of its product at material times while the Shield was on the market . . . are not entirely common, however, to all plaintiffs."[145]

Other courts, however, have found punitive damages liability to present common questions in spite of any such factual variations. For these courts, the common factual questions concern the defendant's "course of conduct" that similarly affected all class members.[146] For example, in *Jenkins v. Raymark Industries, Inc.*,[147] the district court determined the common question of punitive damages in an asbestos case to be whether a "[d]efendant's actions constituted a conscious indifference to the welfare of the class as a whole."[148] Affirming the district court's certification of punitive damages, the Fifth Circuit nevertheless emphasized that fairness required "[s]ufficient evidence [to be] adduced for every one of each of defendant's products to which a class member claims exposure so that the class jury can make the requisite findings as to *each* product and *each* defendant for such questions as . . . when, if ever, conduct was grossly negligent."[149]

B. Varying State Law Standards for Determining Liability for Punitive Damages

Courts have also considered, with respect to multi-state class actions, the impact on commonality and predominance of varying state punitive damages laws.[150] Just as differing factual bases for

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143. *Simpson*, 901 F.2d at 281.

144. *See, e.g., Dalkon Shield,* 693 F.2d at 850; *Mack*, 169 F.R.D. at 679.

145. *Dalkon Shield,* 693 F.2d at 850.

146. *See, e.g.,* Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986); Day v. NLO, Inc., 851 F. Supp. 869, 884 (S.D. Ohio 1994) (certifying punitive damages for class treatment, the court noted that "[o]f all the issues to be decided in this case, the issue of punitive damages is least dependent upon the individual differences between Plaintiffs").

147. 109 F.R.D. 269 (E.D. Tex. 1985), *aff'd*, 782 F.2d 468 (5th Cir. 1986).

148. *Jenkins*, 109 F.R.D. at 286.

149. *Jenkins*, 782 F.2d at 475.

150. *See, e.g., Dalkon Shield*, 693 F.2d at 850 (noting that applicable laws of the fifty states "do not apply the same punitive damages standards," putting

punitive liability may prevent a finding of commonality or predominance, commonality also may be undermined to the extent that class claims arise under state laws containing different legal standards for determining liability for punitive damages.[151] Citing these state law variations, a number of courts have rejected class treatment of punitive damages liability.[152] As the court in *Walsh v. Ford Motor Co.* explained, "the variety of approaches to punitive damages among the states indicates less consensus . . . than controversy."[153] State standards of conduct creating punitive damage liability "range from gross negligence to reckless disregard to various levels of willfulness and wantonness."[154]

Complicating matters further, even among states with similar standards of conduct, standards of proof vary between preponderance of the evidence and clear and convincing evidence.[155] In light of this complication, the court in *In re Telectronics Pacing Systems, Inc.* rejected the class plaintiffs' attempt to resolve the problem of varying state punitive damages standards by creating subclasses to reflect those variations:

> For example, both Arkansas and Alabama require a showing of

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into doubt whether the claims could be regarded as presenting common questions of law).

151. *See* Briggs L. Tobin, Comment, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 470 (1989) ("Because of varying standards in state laws governing punitive damages, a mass-tort class may have difficulty satisfying the commonality requirement.").

152. *See, e.g., In re* Telectronics Pacing Sys., Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997); Mack v. Gen. Motors Acceptance Corp., 169 F.R.D. 671, 678 (M.D. Ala. 1996) (denying certification of claims for punitive damages on predominance grounds because "treatment of punitive damages varies from state to state"); Walsh v. Ford Motor Co., 627 F. Supp. 1519, 1520-26 (D.D.C. 1986), *vacated on other grounds*, 807 F.2d 1000, 1016 (D.C. Cir. 1986) (declining to certify class claims for punitive damages due to applicability of differing state law standards of punitive liability); *cf.* Castano v. Am. Tobacco Co., 84 F.3d 734, 743 (5th Cir. 1996) (criticizing the lower court, in part, for failing to consider variations in state punitive damages laws).

153. *Walsh*, 627 F. Supp. at 1524; Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damage Reform*, 46 AM. U. L. REV. 1573, 1618 (1997) ("[E]very state has a different way of characterizing and defining what form of conduct gives rise to the imposition of punitive damage awards."). *But see* Larry Kramer, *Choice of Law In Complex Litigation*, 71 N.Y.U. L. REV. 547, 583 (1996) ("[T]here will never be fifty different substantive rules, or even fifteen or ten. States tend to copy their laws from each other and many use identical or virtually identical rules.").

154. *Dalkon Shield*, 693 F.2d at 850; *see also* BLATT ET AL., *supra* note 19, § 3.2 (providing a state-by-state analysis of laws regarding standards of conduct subjecting a defendant to punitive damages, noting that a few states do not allow punitive damages at all).

155. *See, e.g., Telectronics*, 172 F.R.D. at 294.

> willful or wanton conduct in order to award punitive damages. Consequently, Plaintiffs group Alabama and Arkansas in [the same subclass]. These two states, however, require different standards of proof. . . .
>
> It is not appropriate to group together in one subclass implantees from states whose laws provide for different standards of proof. Any attempt to do so would make it nearly impossible to properly instruct a jury and would be hopelessly confusing to the jury.[156]

In the *Simon v. Philip Morris, Inc.*[157] litigation, Judge Weinstein has taken a novel approach to this problem.[158] Contemplating a nationwide class against tobacco companies that would include claims for punitive damages, Judge Weinstein has determined that New York choice of law rules would permit the application of a single state's law to the claims of all class members.[159] Given the geographic dispersion of the defendants and class members, the variations among state law punitive damage standards, and constitutional limits on choice of law,[160] it is very difficult to understand how this conclusion can be justified.[161] Under a different rationale, Judge Weinstein similarly tried to avoid varying state law standards by applying a single state's law to the claims of class members in the *Agent Orange* litigation, but was ultimately repudiated by the Second Circuit.[162] If the same fate befalls his *Simon* choice of law plan,

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156. *Id.*

157. 124 F. Supp. 2d 46 (E.D.N.Y. 2000).

158. *Id.* The current version of this litigation, dubbed "*Simon II*," has not resulted in a class certification order as of this writing.

159. *Id.* at 102; *see also* Tobin, *supra* note 151, at 479-86 (proposing that federal courts in mass tort actions be allowed to formulate a "uniform standard of punitive damage liability to be applied to the *entire* plaintiff class").

160. *See* Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) (constitutional limitations on choice of law apply even in nationwide class actions).

161. *See, e.g.*, Spence v. Glock, 227 F.3d 308, 313 (5th Cir. 2000) (criticizing lower court for failing to consider, for choice of law purposes, the relationship of all states with interests in nationwide product liability class action: "If it had, it would have recognized that this case implicates the tort policies of all 51 jurisdictions of the United States, where proposed class members live and bought [the product]."); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996), *aff'd sub. nom.* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) ("[B]ecause we must apply an individualized choice of law analysis to each plaintiff's claims, the proliferation of disparate factual and legal issues is compounded exponentially."); *In re* Ford Motor Co. Bronco II Prod. Litig., 177 F.R.D. 360, 370-71 (E.D. La. 1997).

162. *See In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165-66 (2d Cir. 1987) (describing Judge Weinstein's choice of law analysis predicting that each state court would resort to a "national consensus of product liability law" as "bold and imaginative," but reaffirming that state laws will govern claims and "every jurisdiction would be free to render its own choice of law decision").

Judge Weinstein has indicated his intention to utilize subclasses to accommodate varying state laws.[163]

C. *Conclusion: Impact on Commonality and Predominance of Factual and Legal Variations in Class Claims for Punitive Damage*

The commonality and predominance problems created by both factual and legal variations relating to liability for punitive damages must be evaluated carefully by courts considering class certification of claims for punitive damages. A class action must be structured in a manner that acknowledges important differences among class members' claims. If some class members, whether factually or legally, possess stronger claims for punitive damages than other class members, due process concerns are implicated by a plan that impairs those claims.[164] Moreover, the defendant's due process right to a fundamentally fair assessment of punitive liability would be violated by the imposition of punitive liability without regard to what exactly the defendant did to whom, and which state's laws that conduct violated.[165]

Such scrutiny will not prevent class certification of punitive liability issues in all mass tort class actions. In the case of a mass accident, such as the oil spill in *Exxon Valdez*, the class claims for punitive damages will likely involve only one state's law and the misconduct that gives rise to liability will not vary among class members.[166] Even for more dispersed mass torts, the class claims might involve only a single product manufactured during a relatively short period of time, or the class claims might involve the laws of only one state, as in *Engle*[167] and *Jenkins*.[168]

Even in mass tort class actions involving multiple state laws or complicated fact patterns, a court might be able to utilize subclasses or other procedures to manage significant differences among class

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163. *Simon*, 124 F. Supp. 2d at 99.

164. *See Amchem*, 521 U.S. at 627.

165. *See infra* notes 235-66 and accompanying text.

166. *Exxon* Punitive Damages Class Order, *supra* note 1, at 10; *see also In re* Air Crash Disaster at Stapleton Int'l Airport, 720 F. Supp. 1455, 1459 (D. Colo. 1988) (consolidating "common issues," including punitive damages, that "would involve identical evidence and standards of conduct").

167. Engle v. R.J. Reynolds Tobacco Co., 672 So. 2d 39, 42 (Fla. Dist. Ct. App. 1996) (restricting class certification to claims of Florida citizens). Rejecting the certification of a nationwide class, the court in *Engle* reasoned that "where, as here, the class contains so many members from so many states and territories that it threatens to overwhelm the resources of a state court, it is settled that such a broad-based class is totally unmanageable and cannot be certified." *Id.* (citing Walsh v. Ford Motor Co., 130 F.R.D. 260 (D.D.C. 1990), *appeal dismissed*, 945 F.2d 1188 (D.C. Cir. 1991)).

168. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 470 (5th Cir. 1986) (class defined to include only those plaintiffs who had filed actions in the Eastern District of Texas).

members.[169] But subclassing often will not be a manageable solution, as the court in *Telectronics* concluded.[170] Differing facts and laws can combine together to create an unworkable matrix of issues to be decided by a single jury. Moreover, a single jury may not be feasible if state laws variously require or prohibit the introduction of certain evidence to establish liability, or require different burdens of proof. A class action requiring multiple juries, with complicated jury interrogatories, is highly unlikely to be workable or fair to the parties.[171]

IV. OBSTACLES TO DETERMINING AMOUNT OF PUNITIVE DAMAGES IN CLASS ACTIONS

Calculating any award of punitive damages to represent the appropriate amount (no more, no less) necessary to punish and deter defendant misconduct is a complicated task in any case, but becomes truly daunting in cases involving mass torts. As discussed in Part I.B, many regard the class action device as the most sensible vehicle for resolving the mass tort punitive damages dilemma. Indeed, class actions (particularly mandatory classes) would seem to provide the best mechanism for accurately assessing punitive damages to reflect the true magnitude of harm caused by defendant's conduct. As attractive as the class action solution may be as a policy matter, however, a number of substantive and procedural obstacles may frustrate any determination of punitive damages on a class basis. Before a court certifies a class action including claims for punitive damages, it must decide whether the amount of punitive damages is truly an issue common to the class and, if so, how to determine that amount. In making these decisions, the court must consider whether resolution of punitive damages on a class basis prior to determination of class compensatory damages violates state punitive damages laws or the requirements of substantive due process.

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169. *See, e.g.*, LAYCOCK, *supra* note 23, at 669 (suggesting nationwide mass torts classes might be divided into 50 subclasses in light of state law variations); Arthur R. Miller & Price Ainsworth, *Resolving the Asbestos Personal-Injury Litigation Crisis*, 10 REV. LITIG. 419, 433-34 (1991) (noting that problems relating to factual and legal variations among class claims, including different punitive liability standards, "can be eliminated through the use of subclasses or mini-trials like those . . . in *Jenkins*").

170. *In re* Telectronics Pacing Sys. Inc., 172 F.R.D. 271, 294 (S.D. Ohio 1997).

171. *See, e.g., In re* Masonite Corp. Hardboard Siding Prods. Liab. Litig., 170 F.R.D. 417 (E.D. La. 1997) (rejecting the feasibiliy of subclasses to solve the problems created by factual and legal variations among class members' claims). Commenting on a related Alabama class action that purported to resolve liability questions under the laws of all 51 jurisdictions, the *Masonite* court remarked: "The parties in these MDL cases are unclear, as is this Court, as to the uncertain meaning of the abstruse interrogatory responses in [the Alabama case]." *Id.* at 419.

A. Commonality of Punitive Damages Amount

Some courts have rejected certification of class punitive damages on the ground that determining the proper amount of such damages constitutes an issue unique to each class member, not an issue common to the class.[172] For example, in *In re Copley Pharmaceutical, Inc., "Albuterol" Products Liability Litigation*,[173] the court held that punitive damages must be calculated for each class member individually "because they depend on an individual's injury and compensable damages."[174] The court reasoned that even punitive liability questions, such as "whether [the defendant] was willful and wanton or reckless," could not usefully be resolved on a class basis because of the need to consider the nature of defendant's punitive conduct in assessing punitive damages for each individual class member: "[P]unitive 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."[175]

Similarly, the class certification in *Engle* originally appeared to contemplate that assessment of the proper amount of punitive damages presented an individual issue for each class member. Upholding the class certification order, the appellate court in *Engle* noted that "certain individual issues will have to be tried as to each class member, principally the issue of damages."[176] While that opinion failed explicitly to distinguish between compensatory and punitive damages, the appellate court initially granted defendants' motion to quash the trial court's plan to try punitive damages on a class basis. The court described its earlier order as having held that "the issue of damages, both compensatory and punitive, must be tried on an indi-

172. *See, e.g.*, *Telectronics*, 172 F.R.D. at 294, *rev'd*, 221 F.3d 870 (6th Cir. 2000) (certifying product liability class action under Rule 23(b)(3) but rejecting certification of claims for punitive damages); *In re* Copley Pharm., Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 467-68 (D. Wyo. 1995), *aff'd*, 232 F.3d 900, (10th Cir. 2000) (same); *cf.* Allen v. R & H Oil & Gas Co., 63 F.3d 1326, 1341 (5th Cir. 1995) (Demoss, J., dissenting) (arguing against aggregation of multiple punitive damages claims for purposes of satisfying jurisdictional amount in controversy, explaining that under Mississippi law, "the punitive damage claim of each claimant will be separate and distinct, just as the compensatory damage claims of that claimant are separate and distinct").

173. 161 F.R.D. 456 (D. Wyo. 1995).

174. *Id.* at 467.

175. *Id.* at 467-68; *see also* Phillips, *supra* note 40, at 437-38 ("[T]here is no inherent due process problem arising out of multiple punitive damage awards for the same course of conduct, because each of the claimants has been separately injured and, therefore, each may justly claim retribution from the defendant.").

176. Engle v. R.J. Reynolds Tobacco Co., 672 So.2d 39, 41 (Fla. Dist. Ct. App. 1996).

vidual basis."[177] Two weeks later, however, the court reversed and, on its own motion, ordered an oral argument to be held on the issue.[178] The appellate court denied defendants' motion to quash the trial court's plan as a violation of its class certification order, allowing the trial of punitive damages on a class basis to proceed "without prejudice to Movants' right to raise the underlying issues herein, which we do not decide today, on any appropriate subsequent appeal."[179]

Varying state laws suggest another reason a court might conclude that punitive damages cannot be assessed on a class basis. To the extent that a class action involves multiple state law claims for punitive damages, a court must consider the limitations such laws might place on the amount of punitive damages to be assessed for class members from those states. For example, several states have imposed caps on the amount of punitive damages that may be awarded.[180] In addition, differing state articulations of the factors a jury may consider when calculating the proper amount of punitive damages might frustrate any attempt to determine punitive damages on a class basis.[181] While many of these differences may prove significant, the most obvious example is the distinction between states like Florida that permit jury consideration of a defendant's net worth and those that forbid the introduction of any such evidence.[182] As with regard to the differing state punitive liability standards and burdens of proof addressed in Part III, due process requires that courts pay close attention to significant differences among class claimants, and perhaps utilize subclasses to reflect important state punitive damages law variations.

177. R.J. Reynolds Tobacco Co. v. Engle, No. 94-02797, 1999 WL 689284, at *1 (Fla. Dist. Ct. App. Sept. 3, 1999), *vacated*, No. 94-02797, 1999 WL 68924 (1999).

178. R.J. Reynolds Tobacco Co. v. Engle, Nos. 94-02797, 94-8273, 1999 WL 767273, at *1 (Fla. Dist. Ct. App. Sept. 17, 1999).

179. R.J. Reynolds Tobacco Co. v. Engle, 784 So. 2d 1124, 1124 (Fla. Dist. Ct. App. 1999).

180. *See supra* note 43; *see also* Mack v. Gen. Motors Acceptance Corp., 169 F.R.D. 671, 678 (M.D. Ala. 1996) (citing state law variations such as caps on punitive damages in rejecting certification of class punitive damages claims).

181. *See* BLATT ET AL., *supra* note 19, § 3.3 (describing various state jury instructions on amount of punitive damages).

182. *Compare Engle* Jury Instructions, *supra* note 23, at 57787 (instructing the jury to consider, *inter alia*, "the financial condition of each defendant and the probable effect thereon of a particular judgment"), *with* Hardaway Mgmt. Co. v. Southerland, 977 S.W.2d 910, 916 (Ky. 1998) ("It has been the law of this Commonwealth for almost one hundred years that in an action for punitive damages, the parties may not present evidence or otherwise advise the jury of the financial condition of either side of the litigation.").

B. Possible State Law and Substantive Due Process Limitations on Assessment of Punitive Damages on a Class Basis

Even if a court concludes that assessment of punitive damages constitutes an issue common to the class, other problems regarding the timing of that assessment may still hinder class resolution of punitive damages. Mass tort class actions inevitably require bifurcation of some issues.[183] At the very least, class actions ordinarily involve separate trial of issues common to the class from the individual issues that must be litigated for each class member.[184] When courts determine that quantum of punitive damages presents a common question for the class, the most common trial plans for class punitive damages contemplate assessment of punitive damages prior to assessment of individual issues such as injury and actual damages. Such a trial plan, however, may violate substantive due process or state laws that require punitive damages to take into account the scope of harm caused by defendant's conduct.[185] The true magnitude of harm to the class arguably will not be known until each class member has established proof of injury and compensatory damages during the individual issue phase of the class action. As one court explained, "unless a jury were to reach a decision as to whether a defendant's conduct caused actual damages, and, if so, the nature and extent of those damages, it is not in a position to make an informed decision as to the appropriateness of punitive damages."[186]

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183. Mass tort class actions are sometimes even trifurcated or polyfurcated, trying in phases various common questions prior to trying individual issues. *See, e.g.*, Simon v. Philip Morris, Inc., 200 F.R.D. 21, 32 (E.D.N.Y. 2001) (recognizing the court's "[f]lexibility to sever complex trials into three or more parts").

184. For example, in the *Engle* litigation, Phase I included litigation of all defendant conduct issues, including liability for punitive damages. Phase II encompassed individual issues raised by two class representatives as well as determination of a lump sum amount of punitive damages for the class. Individual trials of the remaining class members' claims, including a determination of each class member's compensatory damages, are scheduled to take place in subsequent proceedings. *See* Supplemental Order Setting the Phase Two Trial Procedure at 1, Engle v. R.J. Reynolds Tobacco Co., No. 94-8273 (Fla. Cir. Ct. August 2, 1999) (on file with the Wake Forest Law Review) [hereinafter *Engle* Punitive Damages Order]; *see also Simon*, 200 F.R.D. at 32 ("A fortiori, trial judges have the discretion to sever issues under . . . Rule 23(c)(4)(A) in a fashion that facilitates class adjudication of common issues.").

185. Bifurcation of class punitive damages amount from the issue of compensatory damages, which would be tried in the individual issue phase of the class action by a different jury, might also violate state laws requiring punitive and compensatory damages to be tried by the same jury. *See, e.g.*, KY. REV. STAT. ANN. § 411.186(1)-(2) (2001); MISS. CODE ANN. § 11-1-65(1)(c) (2001); MO. REV. STAT. § 510.263(1)-(3) (2000).

186. Wadleigh v. Rhone-Poulenc Rorer, Inc., 157 F.R.D. 410, 427 (N.D. Ill. 1994) (certifying product liability class action but rejecting certification of class punitive damages as a common issue).

Subsection (1) briefly describes the two methods courts commonly use to determine the amount of punitive damages in class actions, the lump sum method and the multiplier method. Subsections (2) and (3) analyze the impact of state punitive damages laws and the Supreme Court's recent due process jurisprudence on the relative timing of class punitive and compensatory damages.

1. Methodology for Determining and Allocating Class Punitive Damages

Some courts elect to determine quantum of punitive damages in a single, lump sum award to the class, which may be distributed either on a per capita or a pro rata basis among class members. Another method, endorsed by the Fifth Circuit, utilizes a multiplier (or ratio) whereby the class jury determines "an amount of [punitive damages] that each class member should receive for each dollar of actual damages awarded" during the individual issues phase of the class action.[187] These different approaches reflect the complicated nature of punitive damages in class actions.

On the one hand, the conclusion that liability for punitive damages and amount of punitive damages constitute common class questions may suggest that each class member is similarly situated with respect to the nature and strength of his or her claim for punitive damages. Because punitive damages focus on the defendant's misconduct, consideration of individual class members' circumstances would seem to undercut the rationale behind aggregating the class to determine punitive damages in the first place — that liability for punitive damages constitutes a common issue because no individual issues need be considered.

Following this rationale, in an opinion recognizing the "conundrum" of class punitive damages, the trial court in *Engle* adopted a lump sum approach, providing each class member an equal per capita share of any punitive damages.[188] The court rejected the multiplier method on the grounds that it would result in each class member receiving different punitive damages awards, even though defendant's behavior "was the same as to each class member. If the concept of punitive damages is to punish and not reward, then it would appear that under the ratio plan, some class members would recover more punitive damages than others, which may be construed as unfair or a windfall!"[189] The court concluded that the lump

187. Jenkins v. Raymark Indus., Inc., 782 F.2d 468, 474 (5th Cir. 1986); *see also* Hilao v. Estate of Marcos, 103 F.3d 767, 784-85 (9th Cir. 1996).

188. *Engle* Punitive Damages Order, *supra* note 184, at 4.

189. *Id.* at 3. Judge Pointer, in the *Breast Implant* litigation, also apparently adopted a per capita allocation approach to the settlement of that (b)(1)(B) class. *See* Elizabeth Cabraser, *Class Action Update 2001: Mass Tort Trends, Choice of Law, Rule 23(f) Appeals and Proposed Amendments to Rule 23*, ALI-

sum per capita approach best served the underlying punitive damages goal of punishment as well as the "rights of the defendant to know definitively and for certain what its punitive damage obligation may be."[190]

On the other hand, while punitive damages are indeed designed to punish and deter misconduct, assessment of the proper amount of punitive damages must take into account not only the reprehensibility of defendant's conduct but also the extent of harm caused by that conduct. Because the harm suffered by individual class members often varies widely in mass tort cases, the multiplier approach seeks to assess punitive damages to reflect the different degrees of harm suffered by class members: individuals awarded high amounts of compensatory damages will receive proportionately higher awards of punitive damages.[191]

Similarly, a court utilizing a lump sum method might distribute the punitive damages award among class members in a manner proportionate to the harm suffered. For example, while the court in *In re Exxon Valdez* adopted a lump sum approach to punitive damages,[192] it did not distribute the $5 billion class award equally among class members.[193] Rather, the plaintiffs stipulated an allocation plan that would divide the award in differing amounts among fourteen different categories of class claimants, reasoning that "*per capita* distribution among all plaintiffs would not fairly reflect the weight of the harm caused by the spill," given the "widely disparate types of losses."[194]

Whether a court follows the lump sum or the multiplier approach, the next two sections address the state and constitutional laws that may forbid any imposition of class punitive damages that fails to consider adequately the total extent and nature of harm to

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ABA Course of Study, at 782 (describing allocation plan).

190. *Engle* Punitive Damages Order, *supra* note 184, at 4.

191. *See* Miller & Ainsworth, *supra* note 169, at 443-44 (endorsing the multiplier approach).

192. Approval of Second Amended Trial Plan at 2, *In re* Exxon Valdez, No. A89-0095-CV, 1996 WL 384623 (D. Alaska Jan. 25, 1994) (on file with the Wake Forest Law Review) [hereinafter *Exxon* Trial Plan]. The parties' stipulated Second Amended Revised Trial Plan contemplated that liability for and the amount of punitive damages for all plaintiffs would be determined in Phase III of the trial, following Phase I resolution of common liability questions and Phase II resolution of compensatory damages for various categories of claimants (fisheries by geographical region, Alaska Natives, and cannery workers).

193. Plan of Allocation of Recoveries Obtained by Plaintiffs in Litigation Arising From the Exxon Valdez Oil Spill at 2-4, *In re* Exxon Valdez, No. A89-0095CV, 1996 WL 384623 (D. Alaska 1996) (on file with the Wake Forest Law Review).

194. *Id.* at 2; *see also Class Actions for Punitive Damages*, *supra* note 96, at 1807 n.108 (1983) (rejecting allocation of lump sum punitive damages on a per capita basis in favor of "a pro rata share based on the amount of compensatory damages recovered by a claimant relative to those secured by others").

the class.

2. Impact of State Punitive Damages Laws on Class Determination of Punitive Damages Amount

Virtually every state, through statute or common law, forbids the imposition of punitive damages in the absence of nominal or actual damages.[195] These laws do not always speak to the relative timing of these assessments, but several courts have characterized the imposition of compensatory damages as a precondition or prerequisite to calculation of punitive damages. For example, the Tenth Circuit recently explained that under Colorado law, "a claim for punitive damages is not a separate and distinct cause of action; rather, it is auxiliary to an underlying claim" and thus "[a]n award of punitive damages can be entered only after awarding damages in conjunction with an underlying and successful claim for actual damages."[196]

Moreover, punitive damages laws in a number of states, including Florida, now mandate bifurcated trials that adjudicate liability for and amount of compensatory damages (and sometimes liability for punitive damages) before separate trial of the proper amount of punitive damages.[197] Most of these state bifurcation laws appear to be aimed at preventing any prejudice that might result from consideration of evidence related exclusively to the amount of punitive damages during trial of claims for compensatory damages,[198] but the fact remains that many states mandate separate trial of compensatory damages prior to assessment of the amount of punitive dam-

195. *See, e.g.*, Sullivan v. Am. Cas. Co., 605 N.E.2d 134, 140 (Ind. 1992); Hopewell Enters., Inc. v. Trustmark Nat'l Bank, 680 So. 2d 812 (Miss. 1996); Moskovitz v. Mt. Sinai Med. Ctr., 635 N.E.2d 331, 342 (Ohio 1994).

196. Atl. Richfield Co. v. Farm Credit Bank of Wichita, 226 F.3d 1138, 1160 n.11 (10th Cir. 2000) (citing Pulliam v. Dreiling, 839 P.2d 521, 524 (Colo. Ct. App. 1992)).

197. *See, e.g.*, CAL. CIV. CODE § 3295(d) (Deering 2000); GA. CODE ANN. § 51-12-5.1(d) (2000); KAN. STAT. ANN. § 60-3701(a) (1994 & Supp. 2000); MINN. STAT. ANN. § 549.20(4) (West 2000); MO. ANN. STAT. § 510.263(1) (Supp. 2001); MONT. CODE ANN. § 27-1-221(7)(a) (2000); NEV. REV. STAT. § 42.005(3) (2000); N.J. STAT. ANN. § 2A:15-5.12(c) (West 2000); N.D. CENT. CODE § 32-03.2-11(2)-(4) (1996 & Supp. 2001); OHIO REV. CODE ANN. § 2315.21(B)(1) (Anderson 1998 & Supp. 2000); UTAH CODE ANN. § 78-18-1(2) (1996 & Supp. 2001); W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 (Fla. 1994); Hodges v. S.C. Toof & Co., 833 S.W.2d 896, 901 (Tenn. 1992); Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 30 (Tex. 1994); *see also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 app. at 618-19 (Ginsburg, J., dissenting) (1996) (detailing state laws regarding mandatory bifurcation of liability and punitive damages determinations); James R. McKown, *Punitive Damages: State Trends and Developments*, 14 REV. LITIG. 419, 446-53 (1995) (same).

198. *See, e.g.*, *Hodges*, 833 S.W.2d at 901 (expressing concern that evidence of defendant's net financial worth, while relevant to calculation of a punitive damages award, might prove prejudicial to jury's assessment of compensatory damages or liability for punitive damages).

ages. A number of scholars have championed such bifurcation plans, largely on the grounds of avoiding prejudice.[199]

Courts rarely have considered the significance of these state punitive damages laws with respect to resolution of punitive damages claims in class actions. Two courts that recently examined the question, however, overturned class certifications on the basis of such laws. A brief examination of these state supreme court cases helps to illustrate the potential difficulties such laws may present for state court class actions.

In *Philip Morris, Inc. v. Angeletti*,[200] Maryland's highest court struck down class actions involving tobacco-related claims similar to those raised in *Engle*, citing Maryland law describing compensatory damages as "an indispensable precondition to punitive damages."[201] Because Maryland prohibits assessment of punitive damages "without regard to the actual compensatory damages to be awarded," the Court reasoned that class resolution of punitive damages prior to determination of class members' actual damages would violate state law.[202] The Court further explained that:

> Allowing a single jury to set irrevocably the amount of punitive damages to be imposed relative to and on behalf of several, let alone thousands of individuals, whose actual damages are themselves determined separately from each other, does not enable the jury to properly assess the amount of punitive

199. *See, e.g.*, Steven S. Gensler, *Prejudice, Confusion, and the Bifurcated Civil Jury Trial: Lessons From Tennessee*, 67 TENN. L. REV. 653, 674-75 (2000) (analyzing merits of various punitive damages bifurcation plans, none of which included determination of quantum of punitive damages before compensatory liability or damages); Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 ALA. L. REV. 919, 947 (1989) (arguing in favor of bifurcation wherein "punitive damages issues — whether punishment is appropriate at all and, if so, in what amount — should be tried only after the jury has found liability on the merits"); *see also* Owen, *supra* note 31, at 52 (same). *But see* Stephan Landsman et al., *Be Careful What You Wish For: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 328 (cautioning that mandatory bifurcation "seems ill-advised;" the authors describe results of empirical research that suggest "juries in the bifurcated condition gave higher awards for punitive damages than those in the unitary condition").

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

201. *Id.* at 247 (citing Kneas v. Hecht, 262 A.2d 518 (Md. 1970)); *see also id.* at 246 (quoting Shell Oil Co. v. Parker, 291 A.2d 64, 71 (Md. 1972) (holding that "to support an award of punitive damages in Maryland there must first be an award of at least nominal compensatory damages")). Such language might be interpreted to preclude class resolution of even questions related to liability for punitive damages, but the court did not differentiate between liability for and amount of punitive damages.

202. *Angeletti*, 752 A.2d at 247 (Thus, "punitive damages are clearly dependent [on compensatory damages] and can hardly be decided in a vacuum." (quoting *Kneas*, 262 A.2d at 521)).

damages that are appropriate in specific relation to differing amounts of — and reasons for — actual damages.[203]

The Texas Supreme Court, in *Southwestern Refining Co. v. Bernal*,[204] also struck down as violative of state law a mass tort class action calling for determination of class punitive damages prior to resolution of total class compensatory damages.[205] In *Bernal*, however, the court did not rely on general principles regarding the need for compensatory damages to support a punitive damages award. Instead, the court invoked its own recent decision that Texas law required a bifurcated trial of issues related to actual damages before any trial of the amount of punitive damages.[206] The court explained that the intent of this bifurcation rule was to "ensure that punitive damages awards 'are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.'"[207] The court concluded that the proposed class action plan to determine punitive damages "for the entire class without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 [absent class members]" would violate this Texas punitive damages law.[208]

Other courts have rejected challenges to class actions based on similar state punitive damages laws. In *Jenkins v. Raymark Industries, Inc.*,[209] for example, the Fifth Circuit rejected defendants' ar-

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203. *Angeletti*, 752 A.2d at 249. The court in *Angeletti* also briefly considered, but declined to reach, the argument that the bifurcation of class punitive damages and individual resolution of class members' compensatory damages would result in a violation of defendant's right to jury under the Maryland Constitution. *Id.* at 245 n.36. The Court suggested that the class action plan to bifurcate the "interrelated" issues of punitive and compensatory damages, trying the former before the latter, gives rise to "constitutional concerns" that "further [militate] against certification" of the class. *Id.*

204. 22 S.W.3d 425 (Tex. 2000).

205. *Id.* at 433 (citing Transp. Ins. Co. v. Moriel, 879 S.W.2d 10, 29 (Tex. 1994)). The Supreme Court of Florida, interestingly, cited *Moriel* with approval in an opinion adopting a similar punitive damages procedure. W.R. Grace & Co. v. Waters, 638 So. 2d 502, 506 n.3 (Fla. 1994).

206. *Bernal*, 22 S.W.3d at 433 (citing *Moriel*, 879 S.W.2d at 29). The *Moriel* court permitted determination of liability for punitive damages prior to the trial of punitive damages amount on the ground that some evidence relevant to such liability might also be relevant to liability for actual damages. *Moriel*, 879 S.W.2d at 30. One commentator has suggested that such an approach "fails to remedy other more serious risks of prejudice, such as the impact of compensatory damages evidence and punitive liability evidence on compensatory liabilty." Gensler, *supra* note 199, at 674.

207. *Bernal*, 22 S.W.3d at 433. The Florida Supreme Court similarly explained its bifurcation procedure (compensatory damages bifurcated for trial before punitive damage) as motivated by due process concerns. *W.R. Grace & Co.*, 638 So. 2d at 506.

208. *Bernal*, 22 S.W.3d at 433.

209. 782 F.2d 468 (5th Cir. 1986).

gument that pre-*Bernal* Texas law prohibited class punitive damages from being determined separately from class compensatory damages.[210] The court reasoned that because punitive damages focus on the defendant's conduct, not the plaintiff's, Texas law would permit assessment of a class punitive damages award: "While no plaintiff may receive an award of punitive damages without proving that he suffered actual damages, the allocation need not be made concurrently with an evaluation of the defendant's conduct. The relative timing of these assessments is not critical."[211]

The court in *Jenkins* did recognize, however, the need to instruct the jury carefully during the class punitive damages phase:

> The jury must not assume that all class members have equivalent claims: whatever injuries the unnamed plaintiffs have suffered may differ from the class representatives' as well as from one another's. Should the jury be allowed to award in the aggregate any punitive damages it finds appropriate, it must be instructed to factor in the possibility that none of the unnamed plaintiffs may have suffered any damages.[212]

It is very difficult to understand how a jury could be expected to evaluate an appropriate lump sum amount under these circumstances, where perhaps none or perhaps all of the absent class members have suffered harm.[213]

The *Jenkins* court also suggested the possibility that the jury could be permitted to determine a punitive damages multiplier rather than a lump sum, which would also serve to ensure that no class member received punitive damages without first recovering actual damages.[214] In *Watson v. Shell Oil Co.*,[215] a panel of the Fifth

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210. *Id.* at 474.

211. *Id.* An intriguing question is raised by the fact that the courts in both *Bernal* and *Jenkins* interpreted Texas punitive damages laws. Of course, *Jenkins* preceded the Texas bifurcation law at issue in *Bernal*, but what might be the effect of such state laws on federal courts considering class claims for punitive damages? The answer to this question turns on application of the *Erie* doctrine, especially as refined by *Hanna v. Plumer*, 380 U.S. 460 (1965), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 437-39 (1996), which is beyond the scope of this article. Even if not required under the *Erie* doctrine to respect such state punitive damages laws, however, some federal courts may nevertheless reject class actions seeking to impose punitive damages for the class prior to class compensatory damages in light of their own views regarding the fairness or efficiency of such bifurcation.

212. *Jenkins*, 782 F.2d at 474.

213. Such an approach could only be considered, if at all, where a court has had enough experience with the mass tort at issue that the jury could be given sufficient information on which to base an assessment of the extent and nature of harm to the class. *Cf.* Francis E. McGovern, *Resolving Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

214. *Jenkins*, 782 F.2d at 474.

215. 979 F.2d 1014 (5th Cir. 1992), *reh'g en banc granted*, 990 F.2d 805 (5th

Circuit embraced the multiplier methodology and again upheld the class punitive damages plan against a similar state punitive damages law argument.[216] The Fifth Circuit later granted a rehearing en banc in *Watson*, vacating the panel decision,[217] and the case settled pending rehearing. But the court recently reaffirmed its approval of the multiplier in *Cimino v. Raymark Industries, Inc.*,[218] and *Watson* may still be worth examining as one of the few cases to examine those issues in detail.

In *Watson*, the court acknowledged the Louisiana substantive law requirement that each plaintiff "must prove both causation and damage" to recover punitive damages, but explained that the multiplier plan respected that law because no plaintiff would recover punitive damages without first establishing actual damages.[219] The multiplier would be based on the actual damages of the class representatives as well as "statistical information about the entire class."[220] The Sixth Circuit, in *Sterling v. Velsicol Chemical Corp.*,[221] also concluded that "[s]o long as the court determines the defendant's liability and awards representative class members compensatory damages, the district court may in its discretion award punitive damages to the class as a whole at one time."[222]

The Texas Supreme Court in *Bernal*, however, explicitly refused to take the view that trying the actual damages claims of the class representatives allowed the jury to gain a sufficient "understanding of the extent of actual damages suffered by the class before assess-

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Cir. 1993), *appeal dismissed*, 53 F.3d 663 (5th Cir. 1994).

216. *Id.* at 1019.

217. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 740 n.12 (5th Cir. 1996) (noting that the panel opinion in *Watson* has no precedential weight because court's internal rules state that "the effect of granting a rehearing en banc is to vacate the previous opinion and judgment of the Court and to stay the mandate").

218. 151 F.3d 297, 323 (5th Cir. 1998) ("The use of a multiplier to determine punitive damages is likewise challenged by Pittsburgh Corning. However, our decisions in *Jenkins* and *Fibreboard* mandate rejection of that challenge.").

219. *Watson*, 979 F.2d at 1019; *see also In re* Shell Oil Refinery, 136 F.R.D. 588, 594 (E.D. La. 1991) (noting that punitive damages for absent class members "cannot be allocated until a plaintiff has proved actual damages because punitive damages are a remedy 'in addition to general and special damages'" under Louisiana law).

220. *Watson*, 979 F.2d at 1019 n.17. The court also emphasized that although it believed defendant's culpability for the oil refinery explosion would be similar as to each plaintiff, "[t]o the extent that class members' punitive damages claims differ," the trial court might further refine the plan by "setting different ratios for different types of claims." *Id.* at 1019 n.19.

221. 855 F.2d 1188 (6th Cir. 1988).

222. *Id.* at 1217; *see also Engle* Punitive Damages Order, *supra* note 184, at 1 (detailing bifurcated trial plan to assess a lump sum punitive damages amount on a class basis that included assessment compensatory damages claims of two plaintiffs).

ing punitive damages."[223] Deciding the class representatives' claims, the Court held, could not satisfy the purposes of the state bifurcation law because the jury would still be deciding class punitive damages "without knowing the severity of the offense or the extent of compensatory damages, if any, for each of the 885 plaintiffs."[224] Absent that knowledge, the Court reasoned, the plan "fails to ensure that punitive damages have some understandable relationship to compensatory damages," as required by Texas law.[225]

The Maryland court in *Angeletti* also considered and rejected the multiplier approach as a way to ensure proper consideration of actual and punitive damages, reasoning that "[m]ere widespread, identical proportionality between actual damages and punitive damages for such a multitude of plaintiffs would not necessarily encapsulate the relation between the two types of damages deemed necessary under this State's common law."[226] In other words, a multiplier that ensures identically proportionate treatment of class members' punitive damages claims would still not satisfy the state's interest in making sure that punitive damages awards "are appropriate in specific relation to differing amounts of — and reasons for — actual damages."[227] The proper ratio of actual to punitive damages therefore cannot be calculated on a class basis.

It is quite difficult to predict the impact on class punitive damages claims of these state laws, both general laws characterizing compensatory damages as a "precondition" to punitive damages and specific laws requiring bifurcated trial of punitive damages. For the states requiring actual damages as a prerequisite to punitive damages, many may be persuaded by the explanation offered in *Jenkins* that no plaintiff will receive punitive damages absent proof of compensatory damages. But the assertion in *Jenkins* that punitive damages speak only to defendant's, not plaintiff's conduct, overlooks the critical importance of considering the scope of harm caused by defendant's conduct as well as reprehensibility. The multiplier solution to that problem also might satisfy some state courts. But the risk that total class punitive damages, even if determined by an identically imposed multiplier of actual to punitive damages, could turn out to be disproportionate to the true scope of harm suffered by the plaintiff class might lead more states to share the views of the Maryland and Texas courts, especially given states' frequently

223. Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 432 (Tex. 2000) (quoting lower court ruling, 960 S.W.2d at 299).

224. *Id.* at 433.

225. *Id. But see Sterling*, 855 F.2d at 1217 ("So long as the court determines the defendant's liability and awards representative class members compensatory damages, the district court may in its discretion award punitive damages to the class as a whole at that time.").

226. Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 249 (Md. 2000).

227. *Id.*

evinced concerns about excessive punitive damages awards.[228]

The significance of these state laws may turn on the courts' willingness to accept estimates of the extent and nature of harm to the class in the form of statistical or expert proofs, as suggested by *Watson*. Such proof, however, can provide at best a rough estimate of harm, and may result in a vastly distorted jury assessment of appropriate class punitive damages. That distortion could result in either excessive or inadequate punishment and deterrence, which would violate state punitive damages laws and perhaps the constitution as well.

3. Impact of Supreme Court Substantive Due Process Jurisprudence On Class Action Resolution of Punitive Damages Amount

In the last twelve years, the Supreme Court has repeatedly grappled with many of the difficult constitutional questions surrounding the imposition of punitive damages.[229] While these opinions fairly can be criticized for providing less than perfect guidance,[230] the Court clearly established that procedural and substantive due process challenges may be invoked against arbitrarily imposed or excessive punitive damages awards.[231] The implications of this line of cases for class action treatment of punitive damages, however, remain murky.

The Court first signaled its willingness to consider due process constraints on punitive damages in *Browning-Ferris Industries of Vermont v. Kelco Disposal, Inc.*[232] Writing for the majority, Justice Blackmun rejected the argument that the Excessive Fines Clause of

228. *See supra* notes 43-48 and accompanying text.

229. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996); Honda Motor Co. v. Oberg, 512 U.S. 415 (1994); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1 (1991); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989). While Supreme Court opinions on punitive damages date back to 1818, *The Amiable Nancy*, 16 U.S. (3 Wheat) 546 (1818), and the Supreme Court signaled a willingness to reconsider constitutional challenges in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813 (1986), it was not until the *Browning-Ferris* case in 1989 that the Court began squarely to consider and, later, impose constitutional limits on punitive damages. In the Court's most recent punitive damages case, *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, the Court held that appellate courts must apply a de novo review standard to district court determinations regarding the constitutionality of a punitive damages award. 121 S. Ct. 1678 (2001).

230. *See, e.g.*, Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2092 (1998) ("After *BMW*, and the unruly precedents on which it is based, the law governing constitutional constraints on punitive damage awards is in a state of considerable uncertainty and flux.").

231. *See id.* at 2092-93.

232. 492 U.S. 257 (1989).

the Eighth Amendment applied in the context of punitive damages awards between private parties,[233] but reserved for future examination the tardily raised argument that the punitive damages awards may be challenged as excessive under the due process clause of the Fourteenth Amendment.[234]

Writing again for the majority two years later, in *Pacific Mutual Life Insurance Co. v. Haslip*,[235] Justice Blackmun suggested that the due process clause does indeed impose substantive limits on punitive damages.[236] The Court provided little guidance regarding how to determine whether a particular award exceeds due process limits, declaring, "[w]e need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case."[237] Instead, the Court focused on the "panoply of Alabama's procedural protections,"[238] citing with approval Alabama's judicial review process,[239]

233. *Id.* at 263-64. The Court adopted an originalist approach to the Excessive Fines Clause, finding that "fines" historically were "understood to mean a payment to a sovereign as punishment for some offense," and not to include "private civil damages" of any kind. *Id.* at 265. In dissent, Justice O'Connor challenged the Court's historical analysis of the eighteenth century meaning of the term "fine," and asserted that the Excessive Fines Clause should be interpreted to include punitive damages. *Id.* at 282. Scholars also criticized the Court's refusal to apply the Eighth Amendment to punitive damages awards. *See, e.g.*, Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. KAN. L. REV. 761 (1995) (proposing reevaluation of the Eighth Amendment's application to punitive damages, arguing in part that *Browning-Ferris*'s rigid interpretation of the term "fine" has been undermined by the Court's more recent jurisprudence extending the Excessive Fines Clause to include civil forfeitures and the expansion of the Fourteenth Amendment's "state action" requirement to include civil suits between private parties); *cf.* Jeffries, *supra* note 30, at 151 (arguing pre-*Browning-Ferris* that punitive damages, "a quasi-criminal form of punishment," are "functionally equivalent to the 'fines' addressed by the eighth amendment and should be subject to constitutional scrutiny on that basis").

234. *Browning-Ferris*, 492 U.S. at 276-77. Concurring specifically to emphasize that the Court "leaves the door open" to future due process challenges, Justice Brennan evinced interest in "look[ing] longer and harder" at punitive damages awards imposed by civil juries who are "left largely to themselves in making this important, and potentially devastating, decision." *Id.* at 280-81 (Brennan, J., concurring).

235. 499 U.S. 1 (1991).

236. *Id.* at 23-24. Two years later, Justice Scalia declared that *Haslip* only "implicit[ly]" recognized a substantive due process right to challenge punitive damages on excessiveness grounds. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 470 (1993) (Scalia, J., dissenting).

237. *Haslip*, 499 U.S. at 18.

238. *Id.* at 23.

239. In determining excessiveness, the Alabama Supreme Court set forth a number of factors for consideration, including a "reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred," and possible

which "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages."[240] In a brief paragraph apparently analyzing the amount of the award at issue, Justice Blackmun characterized the four-to-one ratio of punitive to compensatory damages as "wide," and suggested it "may be close to the line."[241] But he rejected defendant's due process challenge with the cryptic conclusion that the award "did not lack objective criteria."[242]

In *TXO Production Corp. v. Alliance Resources Corp.*,[243] the Court approved a West Virginia punitive damages procedure less meaningfully constrained than Alabama's and a punitive damages award even more disproportionate to compensatory damages.[244] In approving a punitive damages award 526 times compensatory damages, the Court emphasized that while it had endorsed judicial review standards in *Haslip* that included consideration of the punitive to compensatory damages ratio, it "eschewed" any approach that concentrated entirely on that relationship.[245] The Court in *TXO* refined its ratio analysis to include not only the actual harm caused as a result of defendant's conduct but also the "*potential harm*" to plaintiff and the "possible harm to other victims that might have resulted if similar future behavior were not deterred."[246] The Court concluded, then, that any "shock" at such a large ratio "dissipates" in light of the potential harm had defendant's fraudulent scheme succeeded and the fact that the scheme was "part of a larger pattern of fraud" affecting others.[247]

After several years of flirting with substantive due process, the Supreme Court finally reversed an award of punitive damages on the ground that it exceeded due process limits in *BMW of North America, Inc. v. Gore*.[248] As indicated by the hypothetical posed in

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mitigation that might be warranted by "the existence of other civil awards against the defendant for the same conduct." *Id.* at 21-22.

240. *Id.* at 22.

241. *Id.* at 23.

242. *Id.*

243. 509 U.S. 443 (1993).

244. *Id.* at 462. Justice O'Connor, in dissent, railed at the state courts' "cavalier" and constitutionally inadequate post-verdict review, as well as the punitive damages award she regarded as "monstrous" and disproportionate. *See id.* at 472-501 (O'Connor, J., dissenting).

245. *Id.* at 460.

246. *Id.*

247. *Id.* at 462. The Court's next case, *Honda Motor Co. v. Oberg*, focused exclusively on procedural due process, holding that Oregon's lack of adequate judicial review of punitive damages violated procedural due process. 512 U.S. 415, 432 (1994). The Court emphasized the crucial function judicial review serves as a safeguard against the "acute danger of arbitrary deprivation of property" to which punitive damages awards expose defendants. *Id.* at 432.

248. 517 U.S. 559, 586 (1996).

Part I.A., the case involved a $2 million punitive damages award imposed against BMW for failing to disclose to the plaintiff that his automobile had been repainted prior to sale.[249] The jury also awarded Dr. Gore $4,000 in compensatory damages for the diminution of his car's value.[250] Writing for the majority, Justice Stevens offered three "guideposts" to determine whether a defendant has received "adequate notice of the magnitude of the sanction [a State] might impose," including "degree of reprehensibility," "disparity between the harm or potential harm suffered by [the plaintiff] and his punitive damages award," and "the difference between this remedy and the civil penalties authorized or imposed in comparable cases."[251] Justice Stevens concluded that the punitive damages awarded to Dr. Gore were justified by neither the degree of reprehensibility nor the applicable civil penalties.[252]

With respect to the second factor regarding the comparison of punitive damages to harm caused, Justice Stevens reiterated the Court's earlier position that the constitutional line cannot be "marked by a simple mathematical formula."[253] He emphasized, however, the long pedigree enjoyed by the principle that "exemplary damages must bear a 'reasonable relationship' to compensatory damages," and noted earlier Supreme Court cases recognizing the "significan[ce]" of this factor to any determination of excessiveness.[254] In the case at hand, the punitive to compensatory damages ratio amounted to a "breathtaking" 500 to 1.[255] While low compensatory damages might justify a high ratio in cases involving the threat of "additional potential harm," where the conduct was "particularly egregious," or where the injury would be "hard to detect" or "difficult to determine," Justice Stevens concluded that none of those factors were present in Dr. Gore's case.[256]

BMW involved defendant conduct that affected multiple potential plaintiffs — the company had failed to disclose pre-sale repainting to thirteen other Alabamans.[257] In referencing a 500 to 1 ratio, Justice Stevens seems to have assumed that the proper ratio to be considered was that between the punitive damages award and Dr. Gore's own compensatory damages, rather than the harm inflicted on all fourteen Alabama citizens affected by BMW's policy. Justice Stevens did note, however, the much lower 35 to 1 ratio that would

249. *Id.* at 567.
250. *Id.* at 565.
251. *Id.* at 574-75.
252. *Id.* at 580, 584.
253. *Id.* at 582 (citing TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 458 (1993)).
254. *BMW*, 517 U.S. at 580-81.
255. *Id.* at 583.
256. *Id.* at 582.
257. *Id.* at 564.

have resulted if each of the other Alabamans had incurred the same damages as the plaintiff, suggesting that ratio also would be impermissibly disproportionate to BMW's wrongdoing.[258]

By failing to hold definitively which measure should be used, the Court missed an opportunity to make clear whether mass tort punitive damages should be calculated with regard to the total harm imposed or harm to the individual plaintiff. And even if the total harm is the appropriate measure, the Court is silent as to how courts should handle multiple claims for punitive damages based on the same misconduct. Put another way, assuming that Dr. Gore's punitive damages are remitted to an amount not constitutionally excessive, would that amount be equally permissible if imposed in each of the other thirteen Alabama consumers' cases? *BMW* provides little guidance on this question,[259] leaving for another day the question of whether the due process clause protects against multiple punitive damage awards.[260] In addition to the significance of this issue in determining class punitive damages, it may prove crucial to the future of the limited punishment mandatory class action.[261]

Finally, the Court's analysis of the relevance of consumers affected by BMW's policy outside Alabama may also have an impact on mass tort punitive damages. Although such out-of-state conduct might be relevant to consideration of how reprehensibly a defendant may have behaved,[262] Justice Stevens sternly denounced any attempt to include in the punitive damages calculus the "harm" sustained by out-of-state consumers whose state laws permitted the non-disclosure policy at issue.[263] He warned that "principles of state sovereignty and comity" prevent a "State [from] impos[ing] economic sanctions on violators of its laws with the intent of changing the

258. *Id.* at 582 n.35. In his concurring opinion, Justice Breyer implicitly endorsed a ratio that included consideration of the total harm to all Alabama car purchasers affected by BMW's nondisclosure policy, rather than simply the damages awarded to the plaintiff. *Id.* at 590 (Breyer, J., concurring).

259. *See* Owens-Corning Fiberglas Corp. v. Golightly, 976 S.W.2d 409, 413 (Ky. 1998) (noting that the Supreme Court "has been afforded numerous opportunities to address [the issue of duplicative punitive damages in the context of a mass tort] and, to date, has declined to do so").

260. *See* Cabraser & Sobol, *supra* note 112, at 2018 (arguing that this line of cases provides defendants with a "due process right to limit individual (and, presumably, aggregate) punitive damages to an amount that bears a reasonable relationship to individual (and, presumably, aggregate) harm"); Cordray, *supra* note 27, at 285 (contending that "it is likely that the Court's endorsement [in *BMW*] of a substantive due process limit on punitive damages will extend not only to individual awards, but also to the aggregate total of multiple punitive awards for a single course of conduct"); Jones et al., *supra* note 30, at 32. *But see* Phillips, *supra* note 40, at 434 (arguing that multiple punitive damages do not violate due process).

261. *See supra* notes 84-86 and accompanying text.

262. *BMW*, 517 U.S. at 574 n.21.

263. *Id.* at 568-74.

tortfeasors' lawful conduct in other States."[264] While *BMW* holds open the question of a State's power to impose sanctions for conduct that is unlawful in other states,[265] one scholar has suggested that principles of comity and federalism prevent punitive damages awards based on any out-of-state conduct, lawful or otherwise.[266]

Few courts have addressed the impact of this Supreme Court due process jurisprudence on the determination of punitive damages on a class basis,[267] but it may prove problematic.[268] *BMW*'s limitations on extra-territorial imposition of punitive damages may curtail multi-state class actions seeking to recover damages for conduct occurring outside the forum state, although inclusion of representatives from each state would likely minimize federalism concerns. More significant problems for mass tort class actions are raised by *BMW*'s second due process guidepost, requiring courts to examine whether a punitive damages award bears a "reasonable relationship" to the actual or potential harm caused by defendant's conduct.[269]

While the Court in *BMW* considered defendant conduct causing harm to many people, it did so in the context of an economic in-

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264. *Id.* at 572.

265. *Id.* at 574 n.20.

266. Cordray, *supra* note 27, at 303-09. *But see* Gen. Motors Corp. v. Moseley, 447 S.E.2d 302, 311-12 (Ga. Ct. App. 1994) (expressly approving punitive damages award based on mass tort defendant's nationwide conduct).

267. *See, e.g.,* Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998); Hilao v. Estate of Marcos, 103 F.3d 767, 780-81 (9th Cir. 1996); Watson v. Shell Oil Co., 979 F.2d 1014, 1019-20 (5th Cir. 1992), *reh'g en banc granted*, 990 F.2d 805 (5th Cir. 1993); Mack v. Gen. Motors Acceptance Corp., 169 F.R.D. 671, 678-79 (M.D. Ala. 1996); *In re* Copley Pharm. Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 467 (D. Wyo. 1995); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000); *Exxon* Punitive Damages Class Order, *supra* note 1, at 8-9; *Engle* Punitive Damages Order, *supra* note 184, at 2.

268. *Compare Hilao*, 103 F.3d at 780-81 (upholding constitutionality of class punitive damages), *with Allison*, 151 F.3d at 417-18 (rejecting class punitive damages in light of due process requirements). This split in interpretation regarding the constitutionality of class resolution of punitive damages fits squarely within the existing debate on the nature and purpose of punitive damages. To the extent the Supreme Court embraces an excessiveness review that includes consideration of the harm caused rather than purely focusing on the culpability of defendant's conduct, punitive damages in class actions will likely continue to divide courts.

269. *See BMW*, 517 U.S. at 581. One might argue that the *BMW* "guideposts" are merely factors that might, but need not necessarily be considered for proper substantive due process review. *Cf.* Dickerson v. United States, 530 U.S. 428, 440 (2000) (quoting Miranda v. Arizona, 384 U.S. 436, 467 (1966)) (describing *Miranda* guidelines as constitutionally required but not precluding congressional or state alternatives that might "differ[ ] from the prescribed *Miranda* warnings but which were are 'at least as effective'" at satisfying the privilege against self-incrimination).

jury.[270] The complexity of individual issues in mass tort cases should deter courts from utilizing the sort of calculation of harm suggested by the Court in *BMW*, which simply multiplied the diminution of the value of Dr. Gore's car by the number of total Alabama consumers injured by BMW's misconduct.[271] The question of whether, and to what extent, absent class members suffered harm cannot be as readily quantified in more complicated personal injury mass tort cases.[272] And, of course, *BMW* did not involve a class action attempting to impose punitive damages on behalf of all those injured by defendant's conduct.

The most common class action trial plan, as discussed above, assumes that a jury will assess class punitive damages before resolution of class compensatory damages.[273] Such a plan may make it impossible to ensure that punitive damages bear a "reasonable relationship" to the total harm suffered by the class, and several courts have recently rejected class actions on this ground.[274] As the Fifth Circuit recently explained, because *BMW* requires that "punitive damages must be reasonably related to the reprehensibility of the defendant's conduct and to the compensatory damages awarded to the plaintiffs, recovery of [class] punitive damages must necessarily turn on recovery of compensatory damages. Thus, punitive damages must be determined after proof of liability to individual plaintiffs . . . ."[275]

Indeed, postponing assessment of class punitive damages until after resolution of the actual damage claims of the class provides the most satisfying solution to *BMW*'s requirement of proportionate punitive damages. The court in *In re Exxon Valdez* did exactly that,

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270. *BMW*, 517 U.S. at 576.

271. *Id.* at 582 n.35.

272. *Cf.* Ortiz v. Fibreboard Corp., 527 U.S. 815, 850 (1998) (distinguishing between "liquidated" claims and less quantifiable personal injury claims in assessing the insufficiency of a limited fund); *In re:* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 851 (9th Cir. 1982) (emphasizing that "not every [personal injury] plaintiff will prevail and not every plaintiff will receive a jury award in the amount requested").

273. *See supra* notes 184-85 and accompanying text.

274. *See, e.g.*, Allison v. Citgo Petroleum Corp., 151 F.3d 402, 417-18 (5th Cir. 1998); *In re* Copley Pharm. Inc., "Albuterol" Prods. Liab. Litig., 161 F.R.D. 456, 467 (D. Wyo. 1995); Southwestern Ref. Co. v. Bernal, 22 S.W.3d 425, 433 (Tex. 2000). *But see* Hilao v. Estate of Marcos, 103 F.3d 767, 780-81 (9th Cir. 1996); Cabraser & Sobol, *supra* note 112, at 2017-20 (arguing that class treatment of punitive damages comports with Supreme Court's due process jurisprudence).

275. *Allison*, 151 F.3d at 417-18 (citations omitted). While *Allison* involved not a mass tort, but rather employment discrimination, its analysis may be extended to mass torts that similarly involve varying proofs of individual harm. The court did not attempt to square its view of the restrictions *BMW* imposes on class punitive damages with its repeated rejections of due process challenges to the multiplier method of imposing punitive damages.

overseeing a class action trial where the jury determined a lump sum amount of class punitive damages after it awarded class compensatory damages.[276] Once the total harm to the class has been established, through proof of injury and compensatory damages, a jury can calculate a class punitive damage award that reflects the true nature and extent of harm caused by defendant's misconduct. Such an approach might be unorthodox and somewhat unwieldy (deciding common issues, then individual issues, then class punitive damages), but it would achieve the most accurate measure of punitive damages.

One also might argue that *BMW*'s reasonable relationship requirement would be satisfied by the multiplier method of calculating class damages. While *Jenkins v. Raymark Industries, Inc.* was decided prior to the Supreme Court's series of punitive damages decisions, the court nevertheless considered the need for a judicial review of "excessiveness or reasonable proportionality," as required by Texas law.[277] The *Jenkins* plan assumed that after determination of each absent class member's actual and punitive damages (as calculated by the multiplier), the trial court would conduct a review of the "reasonableness of each plaintiff's punitive damage award."[278]

A Fifth Circuit panel further refined the multiplier methodology in *Watson v. Shell Oil Co.*, explaining that the jury's assessment of a punitive damages multiplier would consider the actual damages of class representatives as well as expert statistical testimony regarding the nature of harm sustained by absent class members.[279] The court concluded that such a plan would satisfy *Haslip's* command that punitive damages bear "an understandable relationship to compensatory damages."[280] Indeed, if a multiplier is sufficiently small, such as two or three times compensatory damages, a constitutional attack based on reasonable relationship might prove difficult.

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276. *Exxon* Trial Plan, *supra* note 192, at 2-5. The Plan described the polyfurcated trial as follows: Phase I (liability to the class); Phase II (proximate cause and damages to most claimants); Phase III (liability for and amount of punitive damages); and Phase IV ("cleanup" to determine proximate cause and damages for remaining claimants). *Id.*

277. 782 F.2d 468, 474 (5th Cir. 1986). *Jenkins* predates even the earliest Supreme Court punitive damages case, *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989).

278. 782 F.2d at 474.

279. 979 F.2d 1014, 1019 n.17 (1992). *But see* James W. Paulsen & Gregory S. Coleman, *Fifth Circuit Survey: Civil Procedure*, 25 TEX. TECH L. REV. 509, 534-35 (1994) (criticizing the court's plan as improperly "aggregated nonevidence," and urging that "once the court proposes to base the punitive award, at least in part, on the amount of actual damage caused by the defendant's conduct, then standard evidentiary rules and the traditional requirement of causation may not be avoided").

280. *Watson*, 979 F.2d at 1020 (citing Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 15-17 (1991)).

The Court in *BMW* stated that "[i]n most cases, the ratio will be within a constitutionally acceptable range."[281]

But the Court also has emphasized that there is no "mathematical" bright line that separates the constitutionally permissible from the impermissible,[282] and it would seem that the multiplier approach carries the potential to result in a total imposition of punitive damages that would be excessive.[283] Reasoning by analogy to the state law holding in *Angeletti*, "[m]ere widespread, identical proportionality between actual damages and punitive damages for such a multitude of plaintiffs would not necessarily encapsulate the relation between the two types of damages" required to ensure a constitutionally reasonable relationship.[284] Indeed, the trial court in *Engle* rejected a multiplier approach partly on this ground, explaining that "[d]epending on the size of the ratio . . . it is conceivable that the total amount of the punitive damage award, when all is said and done, would be of enormous proportions — conceivably far greater than a lump sum award, and thereby creating a considerable due process issue."[285]

Finally, even if the *Watson* multiplier plan could be said to accurately evaluate the total harm (or risk of harm) to absent class members,[286] use of such a plan in more complicated mass tort cases is much more dubious.[287] In *Watson*, all claims arose out of an oil refinery explosion in a limited geographical area, and implicated only

281. BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 583 (1996). Use of treble damages in other contexts, such as in antitrust laws, also might support a finding that a multiplier two or three times compensatory damages would pass constitutional muster.

282. *Id.* at 582.

283. *Cf.* David Crump, *Evidence, Economics, and Ethics: What Information Should Jurors Be Given to Determine the Amount of a Punitive Damage Award?*, 57 MD. L. REV. 174, 224 (1998) (criticizing even low statutory punitive damages ratios as "based upon guesstimates" of the deterrence gap, and arguing that "a ratio approach would undercompensate for the gap in some kinds of cases, . . . while overcompensating for the gap in others, particularly those where the conduct is discoverable and results in high actual-damage awards"); *See* Hurd & Zollers, *supra* note 43, at 200-01 (criticizing punitive damages multiplier approach to the extent that it does not take into account harm that could potentially have been caused); Sunstein et al., *supra* note 230, at 2127 (describing statutory multiplier schemes as "crude").

284. Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 249 (Md. 2000). *But see* Cabraser & Sobol, *supra* note 112, at 2026 (arguing in favor of the Fifth Circuit's multiplier methodology, urging that the proper ratio be determined by either "historically proportional ratios approved by the Supreme Court" or "a single classwide ratio").

285. *Engle* Punitive Damages Order, *supra* note 184, at 4.

286. *But see* Paulsen & Coleman, *supra* note 279, at 534-35.

287. *See* Watson v. Shell Oil Co., 979 F.2d 1014, 1023 (5th Cir. 1992) (distinguishing refinery explosion class from toxic tort cases "in which numerous plaintiffs suffer varying types of injury at different times and through different causal mechanisms").

one state's laws. In addition, unlike most mass tort class actions, the trial court in *Watson* had extensive information about the people affected by the refinery explosion, including an eighty-one-page proof of claim form for every member of the class.[288] In nationwide personal injury mass torts involving varying facts and applicable state laws, it would be extremely difficult to conclude that the *Watson* trial plan could ascertain with any degree of precision the true scope of harm to absent class members.

The Ninth Circuit recently offered another possible justification for class punitive damage awards that precede class compensatory damages. In *Hilao v. Estate of Marcos*, the court concluded that class punitive damages could be imposed irrespective of class compensatory damages because *BMW* permitted consideration of "harm likely to result," or "potential harm."[289] *BMW*, the court reasoned, does not require that a "punitive damage award must in all cases be determined after an award of compensatory damages" because compensatory damages, by definition, do not include "harm that was likely to have occurred but did not actually occur."[290] This explanation, that punitive damages need not be based on compensatory damages because *BMW* permits consideration of potential harm, appears to take that factor out of context.

In *BMW* and *TXO*, the Court clarified that the reasonable relationship test includes consideration of "harm likely to result from the defendant's conduct *as well as* the harm that actually has occurred."[291] The use of the term "as well as" would seem to require a court to consider *both* likely and actual harm, not simply to disregard the latter when inconvenient. Moreover, the Court seems to contemplate consideration of potential harm only to the extent that it could have but did not occur, not when it allegedly did occur but is not yet known.

In *TXO*, the Court suggested that it was appropriate for the jury "to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not

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288. *In re* Shell Oil Refinery, 136 F.R.D. 588, 591-92 (E.D. La. 1991), *aff'd*, 979 F.2d 1014 (5th Cir. 1992), *reh'g en banc granted*, 990 F.2d 805 (5th Cir. 1993), *reh'g en banc granted*, 53 F.3d 663 (5th Cir. 1994); *Cf.* Cabraser & Sobol, *supra* note 112, at 2026 n.100 (suggesting that "if sufficient data on classwide damages is available or calculable through statistical means," such that "aggregate compensatory exposure of the defendant" can be ascertained, a lump sum punitive damages award might also be permissible).

289. 103 F.3d 767, 780-81 (9th Cir. 1996) (quoting BMW of N. Am, Inc. v. Gore, 517 U.S. 559, 581 (1996)).

290. *Hilao*, 103 F.3d at 781.

291. *BMW*, 517 U.S. at 581 (quoting TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 460 (1993) (emphasis added)).

deterred."[292] Applying this concept to the facts of the case, the Court determined that the apparently "shocking disparity" between punitive and compensatory damages (526-to-1) passed constitutional muster in light of "the potential loss to respondents . . . had petitioner succeeded in its illicit scheme."[293] The Court in *BMW* contrasted the potential harm in *TXO* "that would have ensued if the tortious plan had succeeded" to the facts in Dr. Gore's case: "[T]here is no suggestion that Dr. Gore or any other BMW purchaser was threatened with any additional potential harm by BMW's nondisclosure policy."[294] In other words, the Court has defined "potential harm" to capture harm that plaintiff luckily did not suffer, but which might have resulted from defendant's wrongful conduct.[295]

Just because a class jury does not yet know the total amount of actual harm suffered by class members does not make such harm "potential" for purposes of determining class punitive damages. The jury will know the exact nature and extent of the total harm caused by defendant's conduct once class members have proved injury and compensatory damages. As inconvenient as it may be, the most accurate way to ascertain the reasonable relationship between class punitive damages and harm to the class is to determine punitive damages after the compensatory damages phase of the class action.

CONCLUSION

This Article has sounded a cautionary note regarding class resolution of claims for punitive damages. The class action solution to mass tort punitive damages, while appealing, presents its own set of problems that courts are only now beginning to recognize. Some of these obstacles may be overcome with careful judicial management, such as providing subclasses to reflect significantly differing interests among class members. Others, however, may present more serious impediments to class resolution of punitive damages claims. Recent Supreme Court due process jurisprudence and state punitive damages laws, for example, may require a class trial structure that resolves class compensatory damages prior to assessment of a class punitive damage award. The purpose of this Article has been to emphasize that courts must consider these substantive and procedural issues before reflexively certifying punitive damages for class treatment.

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292. *TXO*, 509 U.S. at 460.

293. *Id.* at 462.

294. *BMW*, 517 U.S. at 582.

295. *See* Hurd & Zollers, *supra* note 43, at 200-01 (interpreting potential harm language, and noting that in *TXO*, for example, "it is merely fortuitous that extensive harm did not occur." The jury should "be free to consider what might have happened . . . not only what did happen, and punish accordingly.").