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Cover Page Footnote

The author wishes to acknowledge Gerald Hobrecht, Teresa Owens and Lori Sarner Smith, students at the University of California at Davis School of Law, for their valuable research assistance on all aspects of this article; Lynnda Borelli Pires, for typing and proof-reading; and my colleagues, Alan Brownstein and Robert W. Hillman, for their helpful comments on an earlier draft.

PUNITIVE DAMAGES IN MASS TORT LITIGATION: ADDRESSING THE PROBLEMS OF FAIRNESS, EFFICIENCY AND CONTROL

Richard A. Seltzer*

INTRODUCTION

MASS tort litigation in the 1980's has reached unprecedented levels. Thousands of personal injury lawsuits have been filed against manufacturers of such mass-marketed products as asbestos,¹ formaldehyde,² diethylstilbestrol (DES),³ Agent Orange,⁴ automo-

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1. There have been approximately 20,000 personal injury lawsuits filed by workers in connection with exposure to asbestos. *Congress Grapples with Toxic Torts*, Nat'l L.J., Jan. 31, 1983, at 30, col. 1. Additionally, there are approximately 13,000 administrative claims pending against the federal government and 1,000 lawsuits brought under the Federal Tort Claims Act. *Id.* A recent study commissioned by the United States Department of Labor estimates that "there are presently more than 21 million American workers . . . who, in the past forty years, were significantly exposed to asbestos." Selikoff, Report to the U.S. Dep't of Labor, Disability Compensation for Asbestos-associated Disease in The United States 4 (1982). Asbestos has been linked to three diseases that become manifest only after periods of 10 to 40 years. They are: (1) asbestosis (non-malignant fibrous tissue growth in the lungs); (2) lung cancer; and (3) mesothelioma (diffuse cancer that spreads over the surface of either the lungs or the stomach lining). U.S. Att'y Gen., Asbestos Liability Report, 97th Cong., 1st Sess. 19-33 (Comm. Print 1981). Mortality estimates range from 8,200 to 9,700 deaths in workers from asbestos-related cancers in each of the next 20 years, aggregating over 200,000 deaths by the end of the century. Selikoff, *supra*, at 4. These projections do not include deaths from asbestosis. *Id.*

2. It has been estimated that there are between 400 and 700 pending lawsuits involving exposure to formaldehyde. Ranii, *Punitive Damages Given In Formaldehyde Verdict*, Nat'l L.J., Sept. 20, 1982, at 7, col. 1. Formaldehyde foam insulation, now banned in conventional homes by the United States Product Safety Commission, is suspected of causing a variety of ailments, including respiratory problems, headaches and nausea. *Id.*

3. In early 1981, there were an estimated 1,000 lawsuits pending against pharmaceutical manufacturers arising out of problems caused by prenatal exposure to DES. Note, *Market Share Liability: An Answer to the DES Causation Problem*, 94 Harv. L. Rev. 668, 669 (1981). Diethylstilbestrol is a synthetic estrogen which was approved in 1947 by the Food and Drug Administration (FDA) for the prevention of miscarriages. *Id.* Several million women used DES before the FDA reversed itself in 1971 by banning the drug for the treatment of pregnancy problems. *Id.* The drug has

biles,⁵ tampons⁶ and intrauterine contraceptive devices (IUD's).⁷ Many plaintiffs seek recovery of punitive as well as compensatory

been linked in prenatally exposed female offspring to a previously rare form of cancer known as clear-cell adenocarcinoma of the vagina and cervix. *Bichler v. Eli Lilly & Co.*, 55 N.Y.2d 571, 577, 436 N.E.2d 182, 184, 450 N.Y.S.2d 776, 778 (1982).

4. The principal litigation involving Agent Orange is a class action against the manufacturer, limited to common liability issues, brought on behalf of thousands of exposed veterans of the war in Vietnam. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980). Between 1965 and 1970, United States Army planes sprayed approximately 10.65 million gallons of the defoliant Agent Orange on the jungles of Vietnam. *Agent Orange: A problem of exposure*, 117 Sci. News 55, 59 (1980). Dioxin, a poisonous contaminant of Agent Orange, has been tentatively linked to a wide range of conditions including chloracne, liver damage, muscular weakness, testicular cancer, numbness, loss of sex drive, wide swings in mood, headaches, nervous disorders, and birth defects in children. *Search for an Orange Thread*, Newsweek, June 16, 1980, at 56.

5. Approximately 700 lawsuits have been filed against Ford Motor Company arising out of an alleged defect in the transmissions of Ford cars and trucks manufactured between 1966 and 1980. Sylvester, *\$280M Legal Bill for a 'Better Idea'?*, Nat'l L.J., Sept. 27, 1982, at 18, col. 2. The Center for Auto Safety has predicted that Ford may eventually spend \$280 million paying claims for damages resulting from this transmission defect. *Id.*; L.A. Daily J., Oct. 15, 1982, at 5, col. 2. The Center's Director, Clarence Ditlow, has called this problem "the most devastating auto defect I have ever seen." Branam, *Running in Reverse*, Mother Jones, June 1980, at 41, 42. Nearly 200 lawsuits have been filed arising out of a design defect in Jeeps that allegedly renders them prone to rolling over. Granelli, *Settling for Secrecy?*, Nat'l L.J., May 24, 1982, at 1, col. 1, 27, col. 3.

6. Hundreds of women have filed claims against manufacturers of tampons that allegedly caused toxic-shock syndrome (TSS). Ranii, *Male Files Suit Over Toxic Shock*, Nat'l L.J., July 4, 1983, at 47, col. 3. TSS is a bacterial infection that can result in fever, vomiting, diarrhea, and shock. Center for Disease Control, U.S. Dep't of Health & Human Services, *Follow-up on Toxic-Shock Syndrome—United States*, 29 Morbidity & Mortality Weekly Rep. 297, 297 (1980). In some instances, TSS has resulted in death. Ranii, *supra*, at 3, col. 2.

7. A.H. Robins, the manufacturer of the Dalkon Shield IUD, reported that a total of 3,258 lawsuits had been filed against it in connection with the Dalkon Shield; 1,685 of these had been resolved, most by settlement, several by dismissal and only nine by trial, of which seven resulted in judgments for the defendant and two resulted in judgments for the plaintiff. Affidavit of R.P. Wolf, Secretary and Assistant General Counsel of A.H. Robins Co., *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). As of May, 1981, an additional 2,309 claims had been brought against Robins, of which 2,003 had been resolved by settlement or abandonment. *Id.* Claims continued to be made and lawsuits to be filed at a high rate after that date. Affidavit of Robert G. Watts, Executive Vice President of A.H. Robins Co., *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). Between 1970 and 1974 approximately 2.2 million American women used the Dalkon Shield. 526 F. Supp. at 892-93. It was removed from the market due to numerous reports of untoward side effects and adverse reactions including infections, pregnancies, uterine perforations, spontaneous abortions and fetal injuries. *Id.* at 893.

damages, alleging gross misconduct by manufacturers.⁸ Defendants in such cases face the unnerving prospect of repeated punishment for a design error, recurrent manufacturing mistake or inadequate warning. The manufacturer of the Dalkon Shield IUD, for example, has already been assessed over seven million dollars in punitive damages,⁹ and thousands of additional claims are still pending in lawsuits throughout the country.¹⁰ One asbestos manufacturer has been held liable for punitive damages to at least fifteen different plaintiffs.¹¹ That manufacturer and two others have sought protection under the bankruptcy laws as an alternative to defending thousands of pending claims for compensatory and punitive damages arising out of exposure to asbestos.¹²

The problem is not limited to manufacturers of asbestos and IUD's. Other manufacturers have been jolted by substantial punitive damages verdicts arising out of design errors in mass-marketed products.¹³ They, too, face the threat of additional punishment in hundreds of

8. See *infra* notes 9-13 and accompanying text.

9. See Wehrwein, *Dalkon Case Nets \$1.75M*, Nat'l L.J., June 20, 1983, at 4, col. 2 (reporting two punitive damages awards totaling \$7.7 million).

10. See *supra* note 7.

11. These awards were against Johns-Manville Corporation, the world's largest manufacturer of asbestos, and totaled over \$3 million. See *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811 (6th Cir. 1982) (\$500,000 upheld on appeal); *Bunch v. Johns-Manville Corp.* (D. Tenn.) (\$220,000), discussed in 1982 *Asbestos Litig. Rep.* 4749; *Hansen v. Johns-Manville Corp.*, No. G-79-124 (S.D. Tex.) (\$1,000,000), discussed in 1982 *Asbestos Litig. Rep.* 4795; *Noecker v. Johns-Manville Corp.*, No. 366[118] (Pa. C.P.) (\$50,000), discussed in 1982 *Asbestos Litig. Rep.* 4915; *Dorell v. Johns-Manville Corp.*, No. C.A. 7809-88-123-18 (Pa. C.P.) (\$1,000,000), discussed in 1982 *Asbestos Litig. Rep.* 4910. In *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357 (E.D. Pa. 1982), ten successful claimants were awarded a total of \$343,000 in punitive damages against Johns-Manville and eight were awarded \$95,000 against Celotex, another asbestos manufacturer. See *id.* at 366 n.4.

12. See Parnell, *Asbestos Bankruptcies: Are They the Answer?*, The Brief, Feb. 1983, at 5 (manufacturers filing for bankruptcy are Johns-Manville Corp., UNR Industries, Inc., and Amatex Corp.). The Manville bankruptcy was unusual because at the time of the filing the corporation was solvent with a net worth of \$1.1 billion. See Granelli, *Manville Bankruptcy: The Battle Is Beginning*, Nat'l L.J., Sept. 6, 1982, at 5, col. 1. Manville, however, projected its potential liability at \$2 billion based on an estimated 52,000 asbestos-related lawsuits at an average cost of \$40,000. L.A. Daily J., Sept. 1, 1982, at 1, col. 6. Manville's president commented: "This is not a financial failure. . . . It is rather a failure of our court and legislative systems to provide an orderly way to compensate victims of an unexpected occupational health catastrophe." Granelli, *supra*, at 5, col. 1.

13. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (\$3.5 million punitive damages award arising out of Pinto fuel system design defect upheld on appeal); *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456, 424 N.E.2d 568 (1981) (\$1.1 million punitive damages award arising out of Jeep design defect upheld on appeal); *Ford Motor Co. v. Nowak*, 638 S.W.2d 582 (Tex. Civ. App. 1982) (\$4 million punitive damages award arising out of transmission design defect upheld on appeal).

other lawsuits arising out of the same defects.¹⁴ Nor is the problem limited to products liability litigation. Disastrous occurrences other than product failures have also resulted in multiple punitive damages claims. Recent examples include the collapse of two skywalks in the lobby of the Hyatt Regency Hotel in Kansas City, Missouri,¹⁵ and the fire at the MGM Grand Hotel in Las Vegas, Nevada.¹⁶

Punitive damages claims on this scale are a recent phenomenon.¹⁷ Typically, punitive damages claims arose from a single incident involving only two parties, making it possible for a jury to determine an appropriate award without considering the possibility of additional awards by other juries. In modern mass tort cases, however, the responsibility for punishing a defendant is not limited to a single jury. Such decentralization raises important issues including the extent to which a defendant may be punished for a single course of tortious conduct, what the jury should be told about previous awards by other juries or about other punitive damages claims against the same defendant, and how awards should be distributed among the plaintiffs.¹⁸

Predictably, proposals have been made to abolish punitive damages in mass tort litigation.¹⁹ Having withstood years of criticism aimed at the essence of the doctrine,²⁰ however, it is unlikely to be abandoned because a defendant's wrongful conduct injures a large number of people instead of one or two. Proposals for changing the method of awarding punitive damages in mass tort litigation are now being given more serious consideration. These include establishing a ceiling on punitive damages awards against a defendant for a single course of

14. See *supra* notes 2-6 and accompanying text.

15. See *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 342 (1983). On July 17, 1981, 114 persons were killed and hundreds were injured by the collapse of the two skywalks. *Id.* at 1177. Approximately 140 personal injury and wrongful death lawsuits seeking recovery of both compensatory and punitive damages were filed against various defendants in federal and state courts. *Id.* at 1177 n.5.

16. The fire on November 21, 1980 killed 85 people and resulted in over 500 suits for damages. These lawsuits were consolidated in the United States District Court for Nevada. L.A. Daily J., Jan. 5, 1983, at 5, col. 3. In January 1983, the hotel reached a tentative settlement of 450 of these suits with the Plaintiff's Legal Committee requiring the eventual payment of \$75 million. *Id.*

17. W. Prosser, *Handbook of the Law of Torts* § 2, at 13 (4th ed. 1971); see *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-39 (2d Cir. 1967) (discussing the difficulty of awarding punitive damages in a mass tort setting).

18. W. Prosser, *supra* note 17, at 13 (These questions "might well lead to a re-examination of the whole basis and policy of awarding punitive damages.")

19. See Szuch & Shelley, *Time to Eliminate Punitive Damages?*, Nat'l L.J., Feb. 28, 1983, at 13, col. 1 (compensatory damages sufficient to serve deterrence purpose in mass tort cases); Comment, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 Pac. L.J. 1273 (1982) (common question class actions on liability for mass torts serve purposes of punitive damages).

20. See *infra* note 36.

conduct²¹ and eliminating the jury's role in determining the amount of punitive damages.²²

While adoption of these proposals might reduce the danger of excessive punishment, other procedures could be utilized without such wholesale changes in the way punitive damages are awarded.²³ One alternative is dismissal by the trial court of punitive damages claims not supported by solid evidence. Another is a bifurcated trial procedure in which the jury would be reconvened to consider evidence bearing on the proper amount of punishment only if it decided in the first trial that the defendant's conduct warranted imposition of punitive damages. A third procedure permits closer scrutiny of jury awards by trial judges and appellate courts. Implementation of these procedures would assure that juries have a continuing voice in the amount of punishment while providing the safeguards necessary to prevent unfairness to defendants.

Alternatively, to avoid the difficulties inherent in adjudicating multiple punitive damages claims on a case-by-case basis, a class action could be instituted. Two federal district courts recently tried this approach in litigation surrounding the Skywalk collapse in Kansas City²⁴ and the Dalkon Shield design defect.²⁵ These courts determined

21. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 48 & n.227 (1982) [hereinafter cited as Owen I]; Riley, *Punitive Damages: The Doctrine of Just Enrichment*, 27 Drake L. Rev. 195, 252 (1978); Comment, *Mass Liability and Punitive Damages Overkill*, 30 Hastings L.J. 1797, 1800-08 (1979) [hereinafter cited as *Punitive Damages Overkill*].

22. See DuBois, *Punitive Damages in Personal Injury, Products Liability and Professional Malpractice Cases: Bonanza or Disaster*, 43 Ins. Couns. J. 344, 352-53 (1976); Mallor & Roberts, *Punitive Damages: Toward a Principled Approach*, 31 Hastings L.J. 639, 663-66 (1980); Owen I, *supra* note 21, at 52-53. One state has already enacted legislation incorporating this type of proposal for products liability cases. See Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1982) ("If the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages not to exceed an amount equal to twice the damages awarded to the plaintiff."). A similar bill is pending in Congress. See S. 44, 98th Cong., 1st Sess. (Comm. Print 1983).

23. See *infra* pt. IV(B).

24. *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). To compel resolution of all claims in one proceeding, the district court certified two classes under provisions that precluded members from opting out. One was a Fed. R. Civ. P. 23(b)(1)(A) class action on the issue of liability for both compensatory and punitive damages. The other was a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages. *Id.*

25. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The court certified a mandatory nationwide punitive damages class to resolve the thousands of punitive damages claims pending against the manufacturer. *Id.* The court certified the issues of liability for and amount of punitive damages pursuant to Rule 23(b)(1)(B). *Id.* at 895-96. The court also certified

that a class action was the best method by which the hundreds of punitive damages claims could be adjudicated both fairly and expeditiously.²⁶ Any other approach might result in the recovery of punitive damages by only a few of many plaintiffs.²⁷

In the face of overwhelming opposition to the class actions by the plaintiffs, however, both class actions were decertified on appeal.²⁸ The appellate decisions are particularly significant because the rationales espoused by the courts are capable of wide application. Therefore, they may inhibit the use of class actions even in circumstances in which they would provide the most practicable way to adjudicate multiple punitive damages claims.²⁹

This Article delineates those circumstances in which punitive damages class actions should be certified and recommends other adjudicatory procedures that may be used when class actions are inappropriate. Part I traces the development of the punitive damages doctrine and reviews its growth in products liability litigation. Part II discusses the present state of the law regarding multiple punitive damages claims and examines proposals for legislative and judicial reform. Part III reviews class action procedures, discusses their applicability in mass tort litigation and provides a detailed examination of the *Dalkon Shield* and *Skywalk* class actions. Finally, Part IV recommends adjudicatory procedures that provide for the equitable distribution of punitive damages awards and retain the doctrine's deterrent impact without destroying ongoing business enterprises.

I. PUNITIVE DAMAGES: GENERAL PRINCIPLES AND RECENT DEVELOPMENTS

A. *The Procedural Framework*

The doctrine of punitive damages³⁰ permits a plaintiff in a civil lawsuit to recover a sum of money in addition to compensatory damages when the defendant's tortious conduct is determined to have been

a statewide class limited to liability for punitive damages pursuant to Rule 23(b)(3), which permits unwilling plaintiffs to opt out and pursue their claims individually. *Id.* at 903.

26. *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

27. 93 F.R.D. at 424-25; 526 F. Supp. at 897-98.

28. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

29. See *infra* pt. III(C).

30. Punitive damages are often referred to as "exemplary damages." In addition, they have been called "smart money," "punitory," "additional," and "aggravated" damages. See Freifield, *The Rationale of Punitive Damages*, 1 Ohio St. L.J. 5, 5 (1935); Mallor & Roberts, *supra* note 22, at 639 n.1.

particularly outrageous.³¹ These awards are not really damages at all. Rather, they are quasi-criminal sanctions imposed to punish defendants and to deter repetition of the offensive conduct by the defendant and other potential wrongdoers.³² Unlike criminal fines and penalties, however, punitive damages are awarded directly to a successful plaintiff in a civil lawsuit³³ and are assessed without the procedural safeguards granted to criminal defendants.³⁴ These features, together with the unpredictability of punitive damages awards,³⁵ have sparked

31. Restatement (Second) of Torts § 908(1) (1979); Owen I, *supra* note 21, at 7-8.

32. Restatement (Second) of Torts § 908(1) & comment a (1979); Owen I, *supra* note 21, at 7-8. Although punishment and deterrence are the primary functions of punitive damages, several other purposes are also served. First, punitive damages encourage plaintiffs to press their claims and enforce the law by providing an incentive for bringing wrongdoers to justice. Second, punitive damages compensate plaintiffs for actual losses not ordinarily recoverable under law, such as the expense of bringing a suit. Owen, *Punitive Damages in Products Liability Litigation*, 74 Mich. L. Rev. 1257, 1278, 1287-99 (1976) [hereinafter cited as Owen II]. Finally, punitive damages placate plaintiffs' desire for retribution and deter them from engaging in vengeful, illegal acts against defendants. Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. Rev. 1, 5 (1980).

33. A longstanding criticism of this doctrine has been that its purposes are inconsistent with those of traditional civil remedies. Justice Forter, sitting on the New Hampshire Supreme Court in 1873, wrote:

What is a civil remedy but . . . compensation for damage sustained by the plaintiff? . . . Is not punishment out of place, irregular, anomalous, exceptional, unjust, unscientific, not to say absurd and ridiculous, when classed among civil remedies? What kind of a civil remedy for the plaintiff is the punishment of the defendant? The idea is wrong. It is a monstrous heresy. It is an unsightly and an unhealthy excrescence, deforming the symmetry of the body of the law.

Fay v. Parker, 53 N.H. 342, 382 (1873). See Defense Research Inst., Inc., *The Case Against Punitive Damages* 9 (1969); W. Prosser, *supra* note 17, § 2, at 9; Chiardi, *Should Punitive Damages be Abolished?—A Statement for the Affirmative*, 1965 A.B.A. Sec. Ins. Negl. & Comp. L. Proc. 282; Long, *Punitive Damages: An Unsettled Doctrine*, 25 Drake L. Rev. 870, 888 (1976). The doctrine has also been criticized for permitting successful plaintiffs to receive a windfall. See Walker v. Sheldon, 10 N.Y.2d 401, 409, 179 N.E.2d 497, 501, 223 N.Y.S.2d 488, 494 (1961) (Van Voorhis, J., dissenting); Kink v. Combs, 28 Wis. 2d 65, 80, 135 N.W.2d 789, 797 (1965); Hodgin & Veitch, *Punitive Damages—Reassessed*, 21 Int'l & Comp. L.Q. 119, 132 (1972); Long, *supra*, at 886.

34. K. Redden, *Punitive Damages* § 2.4, at 33-34 (1980); Note, *Exemplary Damages in the Law of Torts*, 70 Harv. L. Rev. 517, 524 (1957) [hereinafter cited as *Exemplary Damages*]; Comment, *Criminal Safeguards and the Punitive Damages Defendant*, 34 U. Chi. L. Rev. 408, 412 (1967).

35. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 331, 294 N.W.2d 437, 472 (1980) (Coffey, J., dissenting) ("The implications for the free enterprise system, and therefore the structure of our economy, are too disturbing to leave a decision of this magnitude to five jurists."); K. Redden, *supra* note 34, § 2.4, at 34 ("As the award is determined by a jury who arrive at a set figure by subjective rather than objective

much criticism and debate.³⁶ The survival of the doctrine in modern tort litigation despite these recurring attacks is testimony to its four thousand years of historical precedent.³⁷

Inherited by American courts from the English common law,³⁸ the doctrine of punitive damages is generally accepted in all but four states³⁹ and is specifically provided for in many state⁴⁰ and federal⁴¹

calculation, the amount of punishment is often not correlated with the amount of culpability exhibited.”).

36. K. Redden, *supra* note 34, § 2.4, at 33. The earliest recorded debate regarding the validity of the doctrine of punitive damages was between Greenleaf and Sedgwick. Compare 2 S. Greenleaf, *The Law of Evidence* § 253, at 240 n.2 (16th ed. 1899) (doctrine should be limited) with 1 T. Sedgwick, *Measure of Damages* § 354 (9th ed. 1912) (doctrine should be supported). See Walther & Plein, *Punitive Damages: A Critical Analysis: Kink v. Combs*, 49 Marq. L. Rev. 369, 379-80 (1965) (discussing the Greenleaf-Sedgwick debate over punitive damages). The debate continues today. Compare Ghiardi, *supra* note 33, at 284 (punitive damages should be judicially abolished), with Belli, *supra* note 32, at 23 (punitive damages perhaps more important in modern times).

37. Multiple damages, punitive in nature, have been documented in the Babylonian Code of Hammurabi of 2000 B.C., G. Driver & J. Miles, *The Babylonian Laws* 500 (1952), in Hittite law dating from approximately 1400 B.C., 4 M. Belli, *Modern Trials* § 26, at 75 (1959), and in Hindu law of circa 200 B.C., *id.* at 84.

38. Punitive damages existed in medieval English statutes, 2 F. Pollack & F. Maitland, *The History of the English Law* 522 & n.1 (2d ed. 1959), and at common law as a means of justifying excessive compensatory damages awards or to provide damages not otherwise compensable under the common law, J. Ghiardi & J. Kircher, *Punitive Damages Law and Practice* § 1.02, at 3-5 (1981). In 1964, the House of Lords restricted the scope of actual punitive damages awards by limiting such awards to cases involving oppressive, arbitrary or unconstitutional acts of government servants, in which the tortfeasor sought to profit from the tort and for which punitive damages awards are expressly permitted by statute. *Rookes v. Barnard*, 1964 A.C. 1129, 1226-27. The practical effect of the decision is limited, however, because English courts still permit “aggravated damages,” which are difficult to distinguish from exemplary damages in that they allow a jury awarding compensatory damages to consider conduct that is malicious, spiteful or injurious to a plaintiff’s dignity. See J. Fleming, *The Law of Torts* 584-85 (5th ed. 1977); J. Ghiardi & J. Kircher, *supra*, § 1.03, at 7-8.

American law incorporated the doctrine not only to punish and deter, but also to satisfy the desire for revenge, promote necessary litigation when compensatory damages are small and provide relief for emotional injuries incapable of measurement. See *Exemplary Damages*, *supra* note 34, at 520-22; Comment, *Punitive Damages Awards in Strict Product Liability Litigation: The Doctrine, The Debate, The Defenses*, 42 Ohio St. L.J. 771, 772 (1981). By the middle of the 19th century, acceptance of the doctrine in the United States was such that the Supreme Court could state that the propriety of awarding punitive damages “will not admit of argument.” *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851) (dictum).

39. See J. Ghiardi and J. Kircher, *supra* note 38, § 401. The states that prohibit punitive damages are: (1) Louisiana, *Ricard v. State*, 390 So. 2d 882, 884 (La. 1980); J. Ghiardi & J. Kircher, *supra* note 38, § 409; (2) Massachusetts, *Caperci v. Huntington*, 397 F.2d 799, 801 (1st Cir.) (dictum), *cert. denied*, 393 U.S. 940 (1968); J. Ghiardi & J. Kircher, *supra* note 38, § 410; (3) Nebraska, *Prather v. Eisenmann*, 200

statutes. In most jurisdictions, punitive damages may be assessed for conduct that is malicious, reckless, willful, wanton or in conscious disregard of the consequences.⁴² They are generally unavailable in breach of contract actions,⁴³ wrongful death actions⁴⁴ and actions against governmental entities.⁴⁵

Neb. 1, 11, 261 N.W.2d 766, 772 (1978); J. Ghiardi & J. Kircher, *supra* note 38, § 411; and (4) Washington, *Kammerer v. Western Gear Corp.*, 27 Wash. App. 512, 521-22, 618 P.2d 1330, 1337 (1980), *aff'd*, 96 Wash. 2d 416, 635 P.2d 708 (1981). At least two of these jurisdictions, however, permit punitive damages if they are explicitly provided for by statute. J. Ghiardi & J. Kircher, *supra* note 38, § 409 (Louisiana); *id.* § 410 (Massachusetts).

Most states retain punitive damages as part of their common law, J. Ghiardi and J. Kircher, *supra* note 38, table 4-1, but some codify the remedy by statute in appropriate tort cases. *See, e.g.*, Cal. Civ. Code § 3294 (West Supp. 1983); Colo. Rev. Stat. § 13-21-102 (1973); Ga. Code Ann. § 51-12-5 (1982); Nev. Rev. Stat. § 42.010 (1965); N.D. Cent. Code § 32-03-07 (Supp. 1981); Okla. Stat. Ann. tit. 23, § 9 (West 1955); S.D. Codified Laws Ann. § 21-3-2 (1979). *See infra* note 40.

40. *See, e.g.*, Cal. Civ. Code § 3340 (West 1970) (exemplary damages may be awarded for wrongful injuries to animals); Iowa Code Ann. § 639.14 (West 1950) (punitive damages may be awarded for malicious attachment); S.C. Code Ann. § 39-5-140 (Law. Co-op. 1977) (treble damages may be awarded for unfair or deceptive trade practices); Tex. Rev. Civ. Stat. Ann. art. 8306, § 5 (Vernon 1967) (exemplary damages may be awarded for wrongful death of worker); Utah Code Ann. § 76-6-412 (1978) (treble damages may be awarded for receiving certain stolen property); Va. Code § 8.01-40 (1977) (punitive damages may be awarded for knowingly making unauthorized use of another's picture).

41. *See, e.g.*, Clayton Act § 4, 15 U.S.C. § 15 (1976) (treble damages may be awarded for injuries resulting from violation of antitrust laws); Fair Credit Reporting Act § 616, 15 U.S.C. § 1681(n) (1976) (punitive damages may be awarded for wilful noncompliance with Fair Credit Reporting Act); Omnibus Crime Control and Safe Streets Act of 1968 § 802, 18 U.S.C. § 2520(b) (1976) (punitive damages may be awarded for interception of wire or oral communications); Civil Rights Acts of 1968 § 812, 42 U.S.C. § 3612(c) (1976) (punitive damages not in excess of \$1,000 may be awarded for violation of fair housing laws).

42. *See* J. Ghiardi & J. Kircher, *supra* note 38, § 5.01, at 5-3 to 5-11 (1981); C. McCormick, *Handbook on the Law of Damages* § 79, at 280-82 (1935).

43. Restatement (Second) of Contracts § 355, at 154 (1981) ("Punitive damages are not recoverable for a breach of contract unless the conduct constituting the breach is also a tort for which punitive damages are recoverable."); *see* 5 A. Corbin, *Contracts* § 1077, at 437 (1964); J. Ghiardi & J. Kircher, *supra* note 38, § 5.16, at 48; K. Redden, *supra* note 34, § 2.5, at 41. There are exceptions to the general rule prohibiting punitive damages in contract actions:

[P]unitive damages may be awarded upon proof of the requisite wantonness of behavior in the following types of cases: fraud; breach of promise of marriage; breach of contract of service by a public utility or common carrier; wrongful failure by a bank to honor a depositor's check; breach of contract of employment; breach of fiduciary duty; interference with contractual relations of others; and breach of contract amounting to or accompanied by an independent tort.

Owen II, *supra* note 32, at 1272; *see, e.g.*, *Rosener v. Sears, Roebuck & Co.*, 110 Cal. App. 3d 740, 757, 168 Cal. Rptr. 237, 247 (1980) (punitive damages appropriate

The procedural framework for applying the doctrine is substantially the same in all jurisdictions.⁴⁶ First, the trial judge must make a

when breach of contract amounts to fraud); *Jones v. Abriani*, 169 Ind. App. 556, 580, 350 N.E.2d 635, 650 (1976) (“[P]unitive damages are particularly appropriate in proper cases involving consumer fraud.”); *Fletcher v. Aetna Casualty & Sur. Co.*, 80 Mich. App. 439, 444, 264 N.W.2d 19, 21 (1978) (Exemplary damages may be recovered from one who breaches a contract that concerns “matters of mental concern and solicitude.”) (quoting *Stewart v. Rudner*, 349 Mich. 459, 471, 84 N.W.2d 816, 824 (1957)), *aff’d sub nom.* *Bradley v. Mid-Century Ins. Co.*, 409 Mich. 1, 294 N.W.2d 141 (1980).

44. Eighteen states currently permit punitive damages for wrongful death while 31 states do not. K. Redden, *supra* note 34, § 4.2(A)(3), at 87. Jurisdictions that do not allow recovery of punitive damages rely on a narrow judicial construction of the state’s wrongful death statute. *Id.* Other courts have construed such statutes to provide for punitive damages, and many jurisdictions have passed statutes specifically allowing punitive damages in wrongful death actions. *Id.* An excellent case in point is *Robert v. Ford Motor Co.*, 100 Misc. 2d 646, 417 N.Y.S.2d 595 (1979), *rev’d*, 73 A.D.2d 1025, 424 N.Y.S.2d 747 (1980), in which a New York trial court held that denial of punitive damages in wrongful death actions, when they were available in other personal injury claims, was contrary to the state constitution. *Id.* at 655, 417 N.Y.S.2d at 601-02. Soon after this decision was reversed by the appellate division, the New York State Law Revision Commission proposed legislation specifically providing for punitive damages in wrongful death actions. New York Law Revision Commission, Memorandum Relating to the Assessment of Punitive Damages in Wrongful Death Actions or in Personal Injury Actions After the Death of the Victim, Leg. Doc. No. 65[G] (1982). Subsequently, the state legislature enacted legislation permitting punitive damages in wrongful death actions. 1982 N.Y. Laws 100 (codified at N.Y. Est. Powers & Trusts Law § 11-3.2(b) (McKinney Supp. 1982-1983)). See generally McClelland, *Survival of Punitive Damages in Wrongful Death Cases*, 8 U.S.F.L. Rev. 585 (1974) (discussion of punitive damages in wrongful death actions); Note, *Punitive Damages and Wrongful Death*, 8 Cum. L. Rev. 567, 574-77 (1978) (discussion and nationwide survey of punitive damages in wrongful death actions).

45. The vast majority of states prohibit an award of punitive damages against a governmental body or agency, either by statute or by judicial interpretation of sovereign immunity. J. Ghiardi & J. Kircher, *supra* note 38, § 5.13, at 39. The Federal Tort Claims Act, 28 U.S.C. §§ 2671-80 (1976 & Supp. V 1981), similarly prohibits assessment of punitive damages against the United States. *Id.* § 2674; see *Hartz v. United States*, 415 F.2d 259, 264 (5th Cir. 1969). Punitive damages are also precluded by federal statute in suits against foreign states. 28 U.S.C. § 1606 (1976). A minority of jurisdictions, however, has held or indicated that a governmental entity can be liable for punitive damages. *Young v. City of Des Moines*, 262 N.W.2d 612, 620-22 (Iowa 1978) (punitive damages recoverable against governmental subdivision, although not against the state); *City of Covington v. Faulhaber*, 177 Ky. 623, 625, 197 S.W. 1065, 1066 (1927) (punitive damages might be awarded in a proper case against the city); *Ray v. City of Detroit Dep’t of St. Rys.*, 67 Mich. App. 702, 707, 242 N.W.2d 494, 496 (1976) (punitive damages are compensatory, not penal, and may therefore be assessed against municipal corporation); *Lochhaas v. State*, 64 A.D.2d 816, 817, 407 N.Y.S.2d 298, 299 (1978) (punitive damages might be awarded in appropriate case against the state); *Gigler v. City of Klamath Falls*, 21 Or. App. 753, 763-64, 537 P.2d 121, 126 (1975) (punitive damages could be awarded in proper case against the city). In Vermont, damages, including punitive damages, may be assessed against the state within statutory limits. Vt. Stat. Ann. tit. 12, § 5601 (1973).

46. See J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 110, 111 n.1 (procedure with regard to punitive damages liability generally accepted).

preliminary determination that there is sufficient evidence of aggravated conduct to justify the imposition of punitive damages.⁴⁷ Then the jury⁴⁸ has discretion to make an award and to determine an amount.⁴⁹ In assessing the amount, the jury is usually instructed by the trial judge to consider the purpose of punitive damages,⁵⁰ the culpability of the defendant's conduct,⁵¹ the nature and extent of the plaintiff's injuries⁵² and the wealth of the defendant.⁵³ Several states also require that the punitive damages award bear a reasonable relationship to the compensatory damages award.⁵⁴ Although the jury may choose not to award punitive damages,⁵⁵ any award it does make

47. *Id.*; K. Redden, *supra* note 34, § 3.4, at 56.

48. As used in this article, the word "jury" includes the court in a bench trial in its role as finder of fact.

49. Restatement (Second) of Torts § 908 comment d (1979); J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 110-11; W. Prosser, *supra* note 17, § 2, at 13; K. Redden, *supra* note 34, § 3.4(A), at 56. *But see* Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1983).

50. *E.g.*, *Central Armature Works, Inc. v. American Motorists Ins. Co.*, 520 F. Supp. 283, 296 (D.D.C. 1980); *Loch Ridge Constr. Co. v. Barra*, 291 Ala. 312, 320, 280 So. 2d 745, 751 (1973); *Riegel v. Aastad*, 272 A.2d 715, 718 (Del. 1970); *see* J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 111.

51. *E.g.*, *Loch Ridge Constr. Co. v. Barra*, 291 Ala. 312, 320, 280 So. 2d 745, 751 (1973); *Ayers v. Christiansen*, 222 Kan. 225, 229, 564 P.2d 458, 461 (1977); *First Sec. Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 619 (Tex. Civ. App. 1973); *see* J. Ghiardi & J. Kircher, *supra* note 38, § 5.38, at 111.

52. *See, e.g.*, *Sherrod v. Piedmont Aviation*, 516 F. Supp. 46, 52-53 (E.D. Tenn. 1978); *Wisner v. S.S. Kresge Co.*, 465 S.W.2d 666, 669 (Mo. App. 1971); *First Sec. Bank & Trust Co. v. Roach*, 493 S.W.2d 612, 619 (Tex. Civ. App. 1973).

53. J. Ghiardi & J. Kircher, *supra* note 38, § 5.36, at 105; *see* Restatement (Second) of Torts § 908(2) & comment e (1979); W. Prosser, *supra* note 17, § 2, at 14; K. Redden, *supra* note 34, § 3.5(C), at 61. The financial condition of a defendant should be considered because the same monetary punishment may be severe to a relatively poor defendant but only a slap on the wrist to a rich one. Nevertheless, discovery and disclosure at trial of evidence concerning a defendant's financial status have been among the most controversial aspects of punitive damages law. *See* Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1191 (1931); *Exemplary Damages*, *supra* note 34, at 528. While a few states have enacted statutes that require a preliminary finding that punitive damages will probably be awarded before permitting discovery of a defendant's financial status, *see* Cal. Civ. Code § 3295(c) (West Supp. 1982); Wis. Stat. § 804.01 (1977), many states have left the issue to judicial decision, *see* J. Ghiardi & J. Kircher, *supra* note 38, § 9.11, at 34-35.

54. *See* K. Redden, *supra* note 34, § 3.6(c), at 63-64. As a practical matter, the reasonable relation rule has not been rigidly followed even by those jurisdictions which recognize it. *See* *Pinckard v. Dunnavant*, 281 Ala. 533, 538, 206 So. 2d 340, 344 (1968); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48 (Alaska 1979), *cert. denied*, 454 U.S. 894 (1981); *H.J. Miller v. Carnation Co.*, 39 Colo. App. 1, 6-7, 564 P.2d 127, 131 (1977).

55. *See supra* note 49 and accompanying text.

is subject to review by both the trial judge and the appellate courts.⁵⁶ Excessive verdicts may be reduced or may provide grounds for reversal, a new trial or the exercise of remittitur.⁵⁷

B. Application in Products Liability Litigation

Punitive damages have been awarded in products liability actions for over one hundred years.⁵⁸ A recent dramatic increase in both the number of cases⁵⁹ and the propensity of plaintiffs' lawyers to seek punitive awards,⁶⁰ however, has generated a new wave of criticism. Some commentators have assailed the doctrinal inconsistency of permitting a punitive damages claim (which must be based on the wrongful conduct of defendant) in an action based upon strict products liability (which focuses on the product itself).⁶¹ Many courts have held, however, that the evidence necessary to justify a punitive damages award need not parallel that required to establish liability for

56. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 38-39 (1982); see Restatement (Second) of Torts § 908 comment d (1979); J. Ghiardi & J. Kircher, *supra* note 38, § 5.39; K. Redden, *supra* note 34, § 3.6(A), at 62.

57. Restatement (Second) of Torts § 908 comment d (1979).

58. The first reported instance of a punitive damages award sustained in a products liability case is *Fleet v. Hollenkemp*, 52 Ky. 175, 13 B. Mon. 219 (1852), in which a pharmacist's error led to the plaintiff's ingestion of traces of poison mixed with his medicine. The court held that awarding punitive damages should not depend on the form of action, but on the nature of the harm and the conduct which caused it. *Id.* at 180, 13 B. Mon. at 225-26.

59. Products liability suits filed in federal district courts increased by 134% between 1974 and 1976. 3 Research Group, Inc., Interagency Task Force on Product Liab., *Product Liability: Final Report of the Legal Study* 9 (1977).

60. Ford Motor Company, for example, reported that less than 0.5% of the products liability complaints filed against it prior to 1970 contained claims for punitive damages, while 27.1% of all such complaints in 1980 sought punitive awards. See Owen I, *supra* note 21, at 54 n.258. If only personal injury lawsuits are considered, the 1980 percentage is higher. *Id.* One commentator notes that "whereas 25 years ago, the punitive damage case was a rarity, today it is an anomaly when one sees a complaint which does not seek punitive damages." Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, 1980 Ins. L.J. 257, 259 (emphasis in original).

61. Haskell, *The Aircraft Manufacturer's Liability for Design and Punitive Damages—The Insurance Policy and the Public Policy*, 40 J. Air L. & Com. 595, 620 (1974) ("When a plaintiff relies on a strict liability theory, logic compels the conclusion that punitive damages are inappropriate."); Tozer, *Punitive Damages and Products Liability*, 39 Ins. Couns. J. 300, 301 (1972) ("Strict liability and punitive damages will not mix. In strict liability the character of the defendant's act is of no consequence; in the punitive damages claim the character of the act is paramount."); see Wangen v. Ford Motor Co., 97 Wis. 2d 260, 322, 294 N.W.2d 437, 468 (1980) (Coffey, J., dissenting); Ghiardi & Koehn, *Punitive Damages in Strict Liability Cases*, 61 Marq. L. Rev. 245, 251 (1977).

compensatory damages.⁶² Accordingly, verdicts assessing punitive damages have been upheld in products liability actions grounded in strict liability⁶³ as well as in negligence⁶⁴ and fraud and deceit.⁶⁵

A more troublesome criticism is that juries in products liability cases are ill-equipped to mete out fair and effective punishment to large corporate defendants.⁶⁶ The complexity of product design cases,⁶⁷ the difficulty of discerning the "wrongfulness" of a corporate decision-making process⁶⁸ and the problem of ascertaining the real wealth of a

62. See, e.g., *Drake v. Wham-O Mfg. Co.*, 373 F. Supp. 608, 611 (E.D. Wis. 1974); *Fleet v. Hollenkemp*, 52 Ky. 175, 179-81, 13 B. Mon. 219, 225-26 (1852); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 275, 294 N.W.2d 437, 446 (1980).

63. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 775, 174 Cal. Rptr. 348, 360 (1981) (Pinto fuel tank vulnerable to crash); *Gryc v. Dayton-Hudson Corp.*, 297 N.W.2d 727, 729 (Minn.) (pajamas catching on fire), *cert. denied*, 101 S. Ct. 320 (1980); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 263, 294 N.W.2d 437, 447 (1980) (rupture of car fuel tank). Punitive damages have also been permitted in other types of strict liability actions. See, e.g., *Reynolds v. Pegler*, 123 F. Supp. 36, 37 (S.D.N.Y. 1954) (libel), *aff'd*, 223 F.2d 429 (2d Cir.), *cert. denied*, 350 U.S. 846 (1955); *Milford v. Tidwell*, 276 Ala. 110, 112, 159 So. 2d 621, 623 (1963) (trespass to land and liability for ultra-hazardous activities); *Nevada Cement Co. v. Lemler*, 89 Nev. 447, 448-49, 514 P.2d 1180, 1181 (1973) (nuisance).

64. See, e.g., *Kappinger v. Cullen-Schlitz & Assocs.*, 513 F.2d 901, 906 (8th Cir. 1975) (defendants liable based on *res ipsa loquitur* for injuries and death resulting from gas explosion); *Moore v. Jewel Tea Co.*, 116 Ill. App. 2d. 109, 132, 253 N.E.2d 636, 647-48 (1969) (Drano manufacturer liable based on *res ipsa loquitur* for injuries resulting from explosion of Drano), *aff'd*, 46 Ill. 2d 288, 263 N.E.2d 103 (1970); *Rinker v. Ford Motor Co.*, 567 S.W.2d 655, 667-68 (Mo. App. 1978) (negligent failure to warn).

65. See, e.g., *Gillham v. Admiral*, 523 F.2d 102, 107 (6th Cir. 1975) (defendant misrepresented safety of television), *cert. denied*, 424 U.S. 913 (1976); *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 97 (D.S.C. 1979) (defendant misrepresented usable life of roofing), *aff'd*, 644 F.2d 877 (4th Cir. 1981); *Standard Oil Co. v. Gunn*, 234 Ala. 598, 600, 176 So. 332, 333 (1937) (defendant liable for agent's deceitful sale of adulterated motor oil). Punitive damages have not been permitted, however, in actions for breach of express or implied warranties because of the longstanding general prohibition against the remedy in actions based on contracts. See Restatement (Second) of Contracts § 355 (1981); A. Corbin, *supra* note 43, § 1077. Describing warranty actions in products cases as "a synthesis of both tort law and the contract law of sales," Professor Owen argues that punitive damages should not be available in non-commercial actions for product injuries under any legal theory. Owen II, *supra* note 32, at 1274.

66. See Owen I, *supra* note 21, at 20.

67. See *id.* at 10-11; Henderson, *Judicial Review of Manufacturers' Conscious Design Choices: The Limits of Adjudication*, 73 Colum. L. Rev. 1531 (1973) (courts are unsuited to implement standards for complex product liability issues); Twerski, Weinstein, Donaher & Piehler, *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U.L. Rev. 347 (1980) (same).

68. See Owen I, *supra* note 21, at 15.

Final "decisions" concerning a complex product are often the result of a splintered, bureaucratic process involving a complicated combination of human judgments made by scores of persons at different levels in the

modern corporation⁶⁹ are all factors that distinguish products liability cases from single-incident torts cases. A growing number of commentators⁷⁰ and members of Congress⁷¹ and at least one state legislature⁷² have taken the position that after a jury decides punitive damages should be imposed, the trial judge should assess the amount. Supporters of this position argue that the determination of appropriate punishment in these cases requires expertise and sophisticated insight into social policy more likely to be possessed by a dispassionate judge than by a jury.⁷³ While the jury's role in assessing punitive damages in products liability litigation has survived so far, there is a trend toward tighter judicial control over punitive awards.⁷⁴

hierarchy who pass on different aspects of the problem at different times. Various engineers may have to rely upon the work of research chemists, physicists, and other scientists; input from the financial and marketing arms of the enterprise must be factored in along the way. The entire process may take years.

Id.

69. Corporate wealth, as a factor in the amount of punitive damages assessed, is usually proven by net worth. *See, e.g.,* Richards Co. v. Harrison, 262 So. 2d 258, 264 (Fla. Dist. Ct. App. 1972); Nevada Cement Co. v. Lemler, 89 Nev. 447, 453, 514 P.2d 1180, 1183 (1973); *cf.* Parrott v. Bank of Am. Nat'l Trust & Sav. Ass'n, 97 Cal. App. 2d 14, 25, 217 P.2d 89, 96 (1950) (capital surplus and undivided profits). Professor Owen suggests that in the case of large corporate defendants, a typical jury would "be receptive to an argument that anything less than \$1 million would be but a drop in the bucket." Owen I, *supra* note 21, at 20.

70. *See* DuBois, *supra* note 22, at 352-53; Mallor & Roberts, *supra* note 22, at 663-66; Owen I, *supra* note 21, at 52; Owen II, *supra* note 32, at 1320; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1171 (1966) [hereinafter cited as *Reappraisal of Punitive Damages*].

71. *See supra* note 22.

72. *See* Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1983).

73. Owen II, *supra* note 32, at 1320; *see Reappraisal of Punitive Damages, supra* note 70, at 1171. This is consistent with the argument that other complex litigation should be removed from the jury system, an issue which has recently received a great deal of attention. *See, e.g.,* Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation*, 128 U. Pa. L. Rev. 829 (1980); Edquist, *The Use of Juries in Complex Cases*, 3 Corp. L. Rev. 277 (1980); Jorde, *The Seventh Amendment Right to Jury Trial Antitrust Issues*, 69 Calif. L. Rev. 1 (1981); Note, *The Right to a Jury Trial in Complex Civil Litigation*, 92 Harv. L. Rev. 898 (1979); Note, *Preserving the Right to Jury Trial in Complex Civil Litigation*, 32 Stan. L. Rev. 99 (1979); Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury*, 42 U. Pitt. L. Rev. 693 (1981); Annot., 54 A.L.R. Fed. 733 (1981).

74. *See, e.g.,* Johnson v. Husky Indus., 536 F.2d 645, 651 (6th Cir. 1976); Forrest City Mach. Works, Inc. v. Aderhold, 273 Ark. 33, 46, 616 S.W.2d 720, 726 (1981); Jones v. Fischer, 42 Wis. 2d 209, 224-27, 166 N.W.2d 175, 183-84 (1969); *see also* Restatement (Second) of Torts § 908 comment f (1979) ("In many states there has been a tightening of control by the appellate courts over [the] discretion of the trier of fact."); Owen I, *supra* note 21, at 44 ("In practice . . . especially in cases against institutional defendants, there appears to be a growing trend to subject such awards to greater judicial scrutiny.").

C. Mass Tort Punitive Damages Awards—The MER/29 Cases

The emergence of modern mass tort litigation has caused special problems in assessing and controlling punitive damages awards. A single design error, inadequate warning or recurrent manufacturing mistake can permeate an entire product line, resulting in tens, hundreds or thousands of personal injury lawsuits with accompanying punitive damages claims.⁷⁵ Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity.⁷⁶

The first mass tort litigation that presented this problem involved an anti-cholesterol drug sold under the trade name MER/29.⁷⁷ Promoted as a safe way to prevent heart attacks,⁷⁸ the drug was used by

75. See *supra* notes 1-7 and accompanying text. The possibility of multiple punitive damages claims exists in other types of personal injury suits as well. The Skywalk collapse and MGM Grand fire are but two recent examples. See *supra* notes 15-16. Commercial airliner crashes are another. See *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir.), *cert. denied*, 101 S. Ct. 387 (1980).

76. Although insurance coverage might theoretically reduce the danger of financial disaster, the issue whether punitive damages may be insured against has not been resolved uniformly. See K. Redden, *supra* note 34, at 679. The approximately 36 jurisdictions that have considered the question are nearly evenly split. Annot., 16 A.L.R.4th 14-47 (1982). Compare *Northwestern Nat'l Casualty Co. v. McNulty*, 307 F.2d 432, 441 (5th Cir. 1962) ("[T]here are especially strong public policy reasons for not allowing socially irresponsible automobile drivers to escape the element of personal punishment in punitive damages.") with *Lazenby v. Universal Underwriters Ins. Co.*, 214 Tenn. 639, 647, 383 S.W.2d 1, 5 (1964) (It is not contrary to public policy to hold that a private contract of insurance protects an insured against punitive damages.). Most of the jurisdictions that prohibit insurance coverage of punitive damages on public policy grounds provide an exception when the insured is vicariously liable. J. Ghiardi & J. Kircher, *supra* note 38, § 7.15 (1981). Alternatively, many of the jurisdictions that allow insurance against punitive damages have refused to allow coverage when the insured's conduct is intentional. K. Redden, *supra* note 34, § 9.5, at 703; see Long, *supra* note 33 (discussing both the vicarious liability exception and the alternative intentional tort exception); Sprentall, *Insurance Coverage of Punitive Damages*, 84 Dick. L. Rev. 221 (1979-1980) (same); Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 Baylor L. Rev. 203 (1981) (same); Note, *Punitive Damages and Liability Insurance: Theory, Reality and Practicality*, 9 Cum. L. Rev. 487 (1978) (same); Note, *Insurance for Punitive Damages: A Reevaluation*, 28 Hastings L.J. 431 (1976) (same); Note, *Insurance Coverage of Punitive Damages*, 10 Idaho L. Rev. 263 (1974) (same).

77. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967). The drug was developed and tested by the William S. Merrell Company, a Cincinnati-based subsidiary of Richardson-Merrell, Inc. of New York. See Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 Calif. L. Rev. 116, 117 (1968). MER/29 was approved for prescription sales by the FDA based on test data submitted by the manufacturers indicating that the drug was relatively nontoxic in animals and without serious side effects in humans. *Id.*

78. Paul Rheingold, who conducted most of plaintiffs' discovery in the litigation, described the promotion as follows:

The initial advertising campaign for doctors included distribution of 100,000 copies of a Western Union manual about MER/29, publication of an eight-

about 400,000 persons before the manufacturer removed it from the market in response to reports of injurious side effects.⁷⁹ Between 1961 and 1967, more than 1500 personal injury lawsuits were filed against the manufacturer in state and federal courts.⁸⁰ Many of these actions included claims for punitive damages based upon allegations of fraud in connection with test data submitted by the manufacturer to the Food and Drug Administration.⁸¹

In *Roginsky v. Richardson-Merrell, Inc.*,⁸² the plaintiff was awarded \$17,500 in compensatory damages and \$100,000 in punitive damages after a lengthy jury trial.⁸³ The Second Circuit affirmed the compensatory damages award but reversed the punitive damages award on the ground that the issue of punitive damages should not have been submitted to the jury.⁸⁴ Although the court recognized that

page advertisement in leading medical journals, and a series of monthly ads and direct-mail pieces. In true Madison Avenue form, all this material had one simple message: MER/29 had been proved safe, nontoxic and free of side effects. Salesmen on the routes and even a free handout movie repeated the message.

Rheingold, *supra* note 77, at 145.

79. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 836 (2d Cir. 1967); *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 701, 60 Cal. Rptr. 398, 408 (1967). It has been estimated that over 5,000 people were injured by the drug. Rheingold, *supra* note 77, at 121.

80. Rheingold, *supra* note 77, at 121. In addition, hundreds of claims were settled without lawsuits being filed. *Id.*

81. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 & n.9 (2d Cir. 1967). The company apparently concealed reports of side effects in humans from inquiring physicians as well as the FDA and continued to promote the drug as entirely safe even after strong evidence that it was not became available. See *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 695-701, 60 Cal. Rptr. 398, 404-08 (1967); Rheingold, *supra* note 77, at 119. The Second Circuit held, however, that management's conduct did not amount to "deliberate disregard." 378 F.2d at 844-50. Prompted by charges that the company had submitted fraudulent test data to the FDA, the Department of Justice launched an investigation of all test data and reports of toxicity and side effects known to Richardson-Merrell. Rheingold, *supra* note 77, at 120. Indictments were returned by a Washington, D.C. grand jury in December, 1963, formally charging Richardson-Merrell, its subsidiary, William S. Merrell, and three of the subsidiary's chemists with submitting false test data to the FDA and withholding other test data and reports which disclosed toxicity and side effects. *Id.* at 120-21. After pleading *nolo contendere* in a prior criminal proceeding, the two corporate defendants were fined a total of \$80,000. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 n.8 (2d Cir. 1967).

82. 254 F. Supp. 430 (S.D.N.Y. 1966), *rev'd in part*, 378 F.2d 832 (2d Cir. 1967). Plaintiff alleged that he suffered skin disorders, hair loss and eventually developed cataracts from his use of the drug in 1961. 378 F.2d at 836. His case was the first to be tried of 75 MER/29 cases then pending in the Southern District of New York. *Id.* at 834.

83. 378 F.2d at 834.

84. *Id.* at 835.

more than one recovery of punitive damages against a tortfeasor is permissible,⁸⁵ it held that the evidence of high-level complicity in the fraudulent conduct was insufficient to justify such an award.⁸⁶ The appellate opinion has been cited frequently⁸⁷ for the dicta in which Judge Friendly warned of the danger of punitive damages "overkill" in mass tort cases: "The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill."⁸⁸

85. *Id.* at 840-41.

86. *Id.* at 850. The court noted instances in the record demonstrating falsification and fraudulent omissions by chemists, but it did not find sufficient evidence of recklessness on the part of high level management to hold the corporation accountable for punitive damages. Purporting to follow New York's complicity rule, which holds the corporate master liable for punitive damages "only when superior officers either order, participate in or ratify outrageous misconduct," *id.* at 842 (quoting Morris, *Punitive Damages in Personal Injury Cases*, 21 Ohio St. L.J. 216, 221 (1960)), the court held that the executives were not aware of the danger of MER/29, *id.* at 850. In *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 60 Cal. Rptr. 398 (1967), however, the court reviewed a punitive damage verdict based on essentially the same evidence, applied the complicity rule, and concluded that there was "evidence from which the jury could conclude that [Richardson-Merrell] brought its drug to market, and maintained it on the market, in reckless disregard of the possibility that it would visit serious injury upon persons using it." *Id.* at 714, 60 Cal. Rptr. at 416. The careful scrutiny which was given to the evidence in *Roginsky* is closer than *Toole* to the approach of Professor Owen, who advocates tighter judicial control over punitive damages awards in products liability cases. Professor Owen would require clear and convincing evidence of "flagrant indifference to the public safety." Owen II, *supra* note 32, at 1368; *see* Owen I, *supra* note 21, at 59.

87. *E.g.*, *Moran v. Johns-Manville Sales Corp.*, 691 F.2d 811, 817 (6th Cir. 1982); *Neal v. Carey Can. Mines, Ltd.*, 548 F. Supp. 357, 376 (E.D. Pa. 1982); *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 660, 437 N.E.2d 910, 914-15 (1982) (Sullivan, J., concurring).

88. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967). Judge Friendly also expressed alarm at the impact that one mistake could have on an entire corporation, stating that a "sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." *Id.* at 841.

Having identified the problem, the court considered three alternatives for resolving it, ultimately rejecting each as unworkable. The first alternative was an instruction to the jury, like that given by the trial judge, to consider the effect of other similar lawsuits pending against the defendant throughout the country. *Id.* at 839. The court concluded that such an instruction was so vague and uncertain that as a practical matter it could not be followed. *Id.* at 839. The court also expressed concern that local juries might demand that plaintiffs in their district receive awards comparable to those received by plaintiffs in other communities. *Id.* at 840. The second alternative was to place an arbitrary ceiling on punitive awards in mass tort cases. This, too, was dismissed as impracticable because there was no assurance that other states would follow suit. *Id.* at 840. Finally, the court mentioned the benefits of

Ultimately, no punitive damages overkill occurred in the MER/29 litigation; between 1962 and 1967 over ninety-five percent of the claims were settled.⁸⁹ In the eleven cases in which jury verdicts were returned there were four defense verdicts, four plaintiffs' verdicts for compensatory damages only, and three plaintiffs' verdicts that included punitive damages.⁹⁰ Of the three punitive damage awards, the award in *Roginsky* was reversed⁹¹ and the other two were significantly reduced.⁹² The fact that a manufacturer apparently guilty of criminal misconduct dodged the punitive damages bullet in all but two of over 1500 cases has led to speculation that the overkill threat is "more theoretical than real."⁹³

The recent unprecedented number of multiple punitive damages verdicts in mass tort cases has raised again the spectre of overkill recognized by Judge Friendly in *Roginsky*.⁹⁴ Because of the threat to

consolidating all pending cases in a single court and allowing a jury to make one award which would then be held for distribution to all successful plaintiffs. This solution was also rejected, however, because of the inability of a federal court or any state court to consolidate all of the cases filed in different states. *Id.* at 839-40 n.11. Much earlier, Richardson-Merrell had proposed that the Coordinating Committee for Multiple Litigation of the United States District Courts (predecessor to today's Judicial Panel on Multidistrict Litigation) assume control over all pretrial phases of the MER/29 litigation. Rheingold, *supra* note 77, at 126. The request was denied, presumably because the majority of the cases had been filed in state courts, and the federal courts therefore had no power to order consolidation. *Id.* at 126.

89. Rheingold, *supra* note 77, at 137. All settlements were designated as payments for compensatory damages only, *id.* at 138-39, although some undoubtedly included payments beyond what would have been included in the absence of punitive damages claims.

90. *Id.* at 133, 136.

91. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 851 (2d Cir. 1967).

92. *Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689, 717, 60 Cal. Rptr. 398, 418 (1967) (trial judge reduced punitive damages from \$500,000 to \$250,000); *Ostopowitz v. Wm. S. Merrell Co.*, No. 5879-1963 (N.Y. Sup. Ct.) (trial judge reduced punitive damages from \$850,000 to \$100,000), *reported in N.Y.L.J.*, Jan. 11, 1967, at 21, col. 3.

93. Owen II, *supra* note 32, at 1324-25. Professor Owen observed:

[I]f this is an example of the most crushing punishment that will befall a manufacturer guilty of flagrant marketing misbehavior—and it is difficult to imagine a more extreme case of such misbehavior than that of Richardson-Merrell in marketing MER/29—then the threat of bankrupting a manufacturer with punitive damages awards in mass disaster litigation appears to be more theoretical than real.

Id. A federal district court reached the same conclusion in 1979 in a commercial products liability case involving two sizeable punitive damages verdicts against a supplier of roofing materials: "Twelve years have now passed, and many of the fears expressed by Judge Friendly have simply not been realized . . . This court is unconvinced that the 'specter of overkill' is anything more than just that—an unrealized phantom or mental image." *Campus Sweater & Sportswear Co. v. M.B. Kahn Constr. Co.*, 515 F. Supp. 64, 109 (D.S.C. 1979), *aff'd*, 644 F.2d 877 (4th Cir. 1981).

94. See *supra* notes 9, 11, 13 and accompanying text.

the continued economic viability of some defendants posed by these multiple punitive damages awards,⁹⁵ several proposals have been set forth to modify the structure and procedure for awarding punitive damages in mass tort litigation.

II. MULTIPLE PUNITIVE DAMAGES CLAIMS: PROPOSALS FOR REFORM

The courts that have considered the legality of multiple awards have generally acknowledged that a single punitive damages award against a defendant does not necessarily preclude additional awards based on the same outrageous conduct.⁹⁶ The aggregate amount of multiple awards, however, can reach a level so fundamentally unfair and destructive that any additional awards above that level should not be permitted.⁹⁷ At some point, justifiable punishment ends and overkill begins. Several proposals have been introduced to reform existing procedures to prevent such overkill, including an aggregate cap on awards,⁹⁸ an add-on system for distributing awards,⁹⁹ a limitation of punishment in each case to the wrong inflicted upon each plaintiff,¹⁰⁰ admission into evidence of other awards,¹⁰¹ removal of the assessment function from the jury,¹⁰² and litigation of all punitive damages claims in a single proceeding.¹⁰³

A. Aggregate Cap Proposals

Professor David Owen has proposed that mass tort plaintiffs be permitted to recover punitive damages up to an aggregate amount, the lesser of either five million dollars or five percent of a defendant's

95. See *supra* note 12 and accompanying text.

96. See, e.g., Northern Dist. of Cal., *Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967); *Maxey v. Freightliner Corp.*, 450 F. Supp. 955, 962 (N.D. Tex. 1978), *aff'd in part, vacated in part on other grounds*, 665 F.2d 1367 (5th Cir. 1980); *Vollert v. Summa Corp.*, 389 F. Supp. 1348, 1351 (D. Hawaii 1975); *Delos v. Farmer Ins. Group*, 93 Cal. App. 3d 642, 667, 155 Cal. Rptr. 843, 859 (1979); *Unified School Dist. No. 490 v. Celotex Corp.*, 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); *State ex rel. Young v. Crookham*, 618 P.2d 1268, 1274 (Or. 1980); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 291-92, 294 N.W.2d 437, 454 (1980); see also *Morris*, *supra* note 53, at 1194-95 & n.39; *Owen II*, *supra* note 32, at 1325; *Punitive Damages Overkill*, *supra* note 21, at 1805.

97. See *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 297-98, 294 N.W.2d 437, 457 (1980); *J. Ghiardi & J. Kircher*, *supra* note 38, § 6.09, at 31.

98. See *infra* notes 104-10 and accompanying text.

99. See *infra* notes 111-14 and accompanying text.

100. See *infra* notes 115-19 and accompanying text.

101. See *infra* notes 120-27 and accompanying text.

102. See *infra* notes 129-30 and accompanying text.

103. See *infra* pt. III.

net worth, after which punitive awards would be limited to an amount equal to attorney fees and other litigation costs.¹⁰⁴ While this approach is more flexible than a strict dollar limit,¹⁰⁵ it has disadvantages. First, five million dollars may not be enough to deter large corporations from profitable misconduct.¹⁰⁶ Indeed, the five million dollar limit benefits only those corporations that need protection the least because a company's net worth must exceed \$100 million for the five million dollar limit to be less than five percent of its net worth. If there must be some arbitrary limit, it should be the same percentage of net worth for a large corporation as for a smaller business enterprise.

Second, the aggregate cap would reward those plaintiffs fortunate enough to get to trial early, undoubtedly encouraging a flood of early trial requests. It has been argued that the diligence of these earlybird plaintiffs should be rewarded because of the greater expenditures required to prove the initial punitive damages claims, which often benefit later plaintiffs by making it easier to establish subsequent claims.¹⁰⁷ It seems unfair, however, to permit a handful of plaintiffs and their attorneys to obtain substantial recoveries merely because they are in a position to finance the litigation, leaving subsequent plaintiffs with little or nothing. Moreover, when attorneys represent more than one plaintiff, as they often do in mass tort litigation, they may face the ethical dilemma of selecting which client's case to litigate first, possibly precluding their other clients from sharing in punitive damages awards.¹⁰⁸

Finally, there is the problem of implementing the aggregate cap system. Federal legislation is one possibility,¹⁰⁹ but such proposals

104. Owen I, *supra* note 21, at 49 n.227. A similar approach was proposed in Riley, *supra* note 21, at 252.

105. In *Roginsky*, Judge Friendly discussed setting a limit of \$5,000-\$10,000 in each individual case. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967). One obvious problem with this approach is that it leaves open the possibility of an aggregate award that could destroy a smaller enterprise. Moreover, dollar limits are inherently inflexible and may often be unfair.

106. Juries may find this argument particularly persuasive. See Owen I, *supra* note 21, at 51 n.243. In *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981), for example, the jury awarded \$125 million in punitive damages based largely on plaintiffs' evidence that Ford had saved \$100 million by not adopting a safer design for the Pinto fuel system. Wall St. J., Feb. 14, 1978, at 1, col. 4. The Wall Street Journal reported that the jury foreman "recalls bringing up the \$125 million figure himself. He reasoned that if Ford had saved \$100 million by not installing safe tanks, an award matching that wouldn't really be punitive. So he added \$25 million." *Id.* at 17, col. 1. The trial judge reduced the award to \$3.5 million. 119 Cal. App. 3d at 772, 174 Cal. Rptr. at 358.

107. See Mallor & Roberts, *supra* note 22, at 669; Owen II, *supra* note 32, at 1325; *Punitive Damages Overkill*, *supra* note 21, at 1811-12 (1979).

108. See *infra* note 183.

109. Owen I, *supra* note 21, at 49 n.227; Riley, *supra* note 21, at 252.

have not fared well in Congress.¹¹⁰ Legislative or judicial action on a state-by-state basis would solve the problem only if all states adopted a uniform cap system.

B. *Add-on Awards*

Another proposal would permit recovery only of the amount by which a punitive damages award exceeds the largest previous award against the defendant arising out of the same mass tort.¹¹¹ The first award sets the figure that subsequent awards must exceed for future plaintiffs to recover any punitive damages. All awards would also have to withstand the usual judicial scrutiny for fairness.¹¹²

This proposal improves only slightly upon present procedures for awarding punitive damages. Although the defendant would be protected from duplicative punitive damages assessments, the earliest plaintiffs would have even more of an advantage than under Professor Owen's proposal. This would result inevitably in a competitive race to trial.¹¹³ Additionally, because enforcement in fewer than all states would destroy its effectiveness, implementation of this proposal, like other uniform solutions, would require federal legislation.¹¹⁴

C. *Assessment of Award Vis-A-Vis One Plaintiff*

A third approach to the problem of overkill is to limit the punishment in each case to the wrong inflicted on the particular plaintiff. In *Hoffman v. Sterling Drug, Inc.*,¹¹⁵ for example, the court issued pre-trial rulings which excluded evidence of other persons similarly injured by the drug "Aralen," and also excluded evidence of the defend-

110. H.R. 5214, 97th Cong., 1st Sess. (1981) was substantially identical to Professor Owen's aggregate cap proposal. *Compare id.* § 11(d)-(e) (punitive damages limited to \$1 million for each claimant; if aggregate sum of previous awards equal to lesser of \$5 million or five percent of net worth, punitive damages limited to lesser of litigation expenses or \$1 million) *with* Owen I, *supra* note 21, at 48 & n.227 (punitive damages limited to \$1 million for each claimant; if aggregate sum of previous awards equal to lesser of \$5 million or five percent of net worth, punitive damages limited to litigation expenses). This bill, introduced by Rep. Norman D. Shumway (R. Cal.), was referred to the Committee on Energy and Commerce, 127 Cong. Rec. H 9529 (daily ed. Dec. 14, 1981), but was not reported out for consideration by the House of Representatives during the 97th Congress.

111. *Punitive Damages Overkill*, *supra* note 21, at 1801.

112. *Id.*

113. Only the first plaintiff to secure a judicially-approved award would be assured of recovery. Smaller future awards, even if justified, would result in no recovery.

114. The author of the "add-on" proposal suggests that enactment could be made under the power of Congress to regulate interstate commerce, U.S. Const., art. I, § 8, cl. 3. *See Punitive Damages Overkill*, *supra* note 21, at 1801.

115. 374 F. Supp. 850 (M.D. Pa. 1974).

ant's net worth.¹¹⁶ In addition, the court barred the plaintiff from arguing that the jury should render an award that punishes the defendant for its conduct toward all injured plaintiffs.¹¹⁷ The court stated that these rulings were mandated by Pennsylvania law which requires that any punitive damages award must bear a reasonable relationship to the compensatory damages award.¹¹⁸

This approach, however laudable in its objectives, prevents the jury's consideration of some of the essential criteria upon which punitive damages awards should be based. The moral turpitude of conduct should be judged, at least in part, by the extent of the harm that it causes.¹¹⁹ A jury could not properly award a plaintiff's proportionate share of these punitive damages without first determining the aggregate award to all injured persons. To make this determination, the very evidence excluded by the court in *Hoffman* would have to be introduced. Moreover, refusing to admit evidence of a defendant's net worth precludes a jury from considering a key factor in determining when even an individual award would exceed the amount necessary to punish and deter. If every court adjudicating these multiple claims adopted this practice, the result might be a classic case of overkill.

D. Evidence of Other Punitive Damages Claims

Another way to prevent punitive damages overkill is to inform each jury of other punitive damages awards already imposed or that may be imposed in the future upon a mass tort defendant. This is the position taken by the Restatement,¹²⁰ several courts,¹²¹ at least two

116. *Id.* at 857.

117. *Id.* In rejecting plaintiff's argument that the jury should consider the impact of Aralen on the whole of society, the court stated:

Applying the plaintiff's rationale, each injured consumer of Aralen, using identical evidence regarding testing, notice, etc., could individually recover on behalf of "society" to punish the affront. Such a result would be ludicrous. Instead, we view the law to be that each Aralen consumer showing a bona fide injury may, if the evidence warrants, collect his reasonable proportion of the punitive damages the defendant owes to "society."

Id.

118. *Id.* Professor Owen agrees with the court's view that the punitive damages verdict must be a reasonable sum in relation to the defendant's conduct vis-a-vis the plaintiff: "This view probably is correct in that it relates the punitive award to the plaintiff's injury consistent with traditional doctrine, reduces substantially the incentive to race to the courthouse, and anticipates a multiplicity of similar actions that together will result in many smaller 'stings' to the manufacturer." Owen I, *supra* note 21, at 51 n.243.

119. See Restatement (Second) of Torts § 908 comment e (1979).

120. *Id.*

121. Unified School Dist. No. 490 v. Celotex Corp., 6 Kan. App. 2d 346, 355, 629 P.2d 196, 206 (1981); State *ex rel.* Young v. Crookham, 618 P.2d 1268, 1273 (Or. 1980); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 304, 294 N.W.2d 437, 459-60 (1980).

state legislatures¹²² and several commentators.¹²³ By considering other punishment for the same conduct,¹²⁴ along with evidence of the defendant's current financial status, a jury should be able to make a more informed judgment of the amount necessary for punishment and deterrence.¹²⁵

Conversely, this same evidence could backfire against a defendant. A jury may be influenced unfairly by prior verdicts against the defendant; it may believe that previous awards of punitive damages justify a similar award in the case before it¹²⁶ and may even rely on

Contra Lemer v. Boise Cascade, Inc., 107 Cal. App. 3d 1, 9-11, 165 Cal. Rptr. 555, 560-61 (1980). In Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967), Judge Friendly commended the trial court for instructing the jury to consider the effect of other cases and potential cases against the defendant, but expressed uncertainty about the effect of such an instruction: "[I]t is hard to see what even the most intelligent jury would do with this, being inherently unable to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried." *Id.* The court noted that the trial judge in *Ostopowitz v. Wm. S. Merrell Co.*, No. 5879-1963 (N.Y. Sup. Ct.), reported in N.Y.L.J., Jan. 11, 1967, at 21, col. 3, refused to admit the same evidence. *Id.*

122. See Minn. Stat. Ann. § 549.20(3) (West Supp. 1981); Or. Rev. Stat. § 30.925 (1979).

123. See *Morris*, *supra* note 53, at 1195; *Owen II*, *supra* note 32, at 1319; *Riley*, *supra* note 21, at 213.

124. There is a split of authority regarding the admissibility of criminal sanctions arising out of the same conduct. Compare *Browand v. Scott Lumber Co.*, 125 Cal. App. 2d 68, 74-75, 269 P.2d 891, 896 (1954) (assault and battery conviction properly considered in civil action based on the altercation) and *Wirsing v. Smith*, 222 Pa. 8, 16, 70 A. 906, 909 (1908) (conviction admissible in aggravated assault and battery suit arising out of the same incident) with *Irby v. Wilde*, 155 Ala. 388, 391, 46 So. 454, 454 (1908) (not proper to introduce assault conviction in mitigation of punitive damages in civil trial) and *C. McCormick*, *supra* note 42, at § 82 (generally not proper to introduce evidence of criminal punishment in mitigation of punitive damages). See generally Annot., 98 A.L.R.3d 870 (1980) (criminal liability barring or mitigating recovery of punitive damages).

125. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 304-05, 294 N.W.2d 437, 459-60 (1980). There is, however, no unanimity on this point. Some contend that the difficulties of keeping abreast of every case and of predicting the outcome of future cases, including claims not yet filed, make this proposal impracticable to administer. See *Wangen v. Ford Motor Co.*, 97 Wis. 2d 260, 325, 294 N.W.2d 437, 469 (1980) (Coffey, J., dissenting) ("Are the Wisconsin courts to monitor the courts of the other 49 states so as to insure that a Wisconsin court's award of punitive damages does not place an undue burden on the manufacturer and his employees?"); *Punitive Damages Overkill*, *supra* note 21, at 1806 (jury would be forced to predict outcome of subsequent actions as well as consider those being adjudicated or already adjudicated).

126. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 840 (2d Cir. 1967); *Punitive Damages Overkill*, *supra* note 21, at 1806-07. Professor *Morris* recommended that the jury be apprised of such evidence, but cautioned:

This would not be without its dangers, for juries might assume that since the defendant has once been found guilty, their verdict must necessarily be against him. They might also fail to see that the defendant has already been

such awards in determining the defendant's compensatory damages liability.¹²⁷ Such knowledge on the part of the jury might therefore be highly prejudicial to defendants,¹²⁸ who would probably prefer to take their chances with juries that are uninformed about other litigation arising out of the same conduct.

E. *Removal of the Assessment Function from the Jury*

Many of the problems generated by multiple punitive damages claims might be avoided by authorizing the trial judge, rather than the jury, to determine the amount of punitive damages.¹²⁹ Under this approach, the jury would still decide whether punitive damages should be assessed without being apprised of either the findings of other juries or the defendant's net worth. If the jury determined that punitive damages should be awarded, the court would assess an appropriate award based on all the usual considerations, including evidence of other punitive damages claims and awards and evidence of the defendant's financial condition.¹³⁰ This approach is consistent with the view that judges will award punitive damages based on a more sophisticated understanding of the proper punishment for corporate defendants' misconduct.¹³¹ It eliminates, however, the important function of the jury as the conscience of the community in assessing an

punished in part, and might feel it their duty to punish him more severely because of the injury to others than the plaintiff. In other words, this evidence which is given to the jury on the theory that the defendant should have a comparatively lenient admonition, if any, might prejudice them in such a way that the defendant would be held liable regardless of a failure of the plaintiff to prove his case, and be given more severe admonition than he would receive without its admission.

Morris, *supra* note 53, at 1195 n.40.

127. This seems particularly true in a close case when the question of a product's defectiveness is seriously disputed. Plaintiffs' attorneys might welcome this evidence to tip the scales on a complicated issue of liability. The fact that other juries have found the defendant's conduct in marketing the product outrageous in addition to finding the product defective might be an important consideration in the jury room. See J. Ghiardi & J. Kircher, *supra* note 38, § 5.40, at 125-26; Mallor & Roberts, *supra* note 22, at 665.

128. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedure*, 69 Va. L. Rev. 269, 295 (1983). Evidence of other punitive damages claims might otherwise be inadmissible. *Id.* The prejudicial character of prior judgments against the defendant may be exacerbated by the fact that different standards of proof obtained in the previous trial. J. Ghiardi & J. Kircher, *supra* note 38, § 5.42, at 129.

129. See *supra* notes 22, 71 and accompanying text.

130. See *supra* text accompanying notes 50-53.

131. See *supra* note 66.

amount of punitive damages that reflects the degree of the defendant's culpability.¹³²

III. PUNITIVE DAMAGES AND CLASS ACTIONS

The problematic alterations in the mechanism for assessing punitive damages outlined above are not necessary to prevent punitive damages overkill. In appropriate circumstances, a class action may provide the best means of resolving the problems presented by punitive damages in mass tort litigation.

The idea of litigating all punitive damages claims in a single proceeding is not new. In a superb article published over fifty years ago, Professor Morris proposed that when there are multiple claims any assessment of punitive damages should be withheld until all compensatory damages claims are resolved.¹³³ Joinder of the punitive damages claims would then be appropriate.¹³⁴ In the *Roginsky* opinion discussed above, Judge Friendly envisioned a procedure by which "it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs."¹³⁵

While these approaches provide a theoretical basis for the resolution of many of the punitive damages problems, only class actions provide a practical means for doing so. The other procedural devices for consolidating multiple lawsuits¹³⁶ generally do not provide for a single trial on the punitive damages issue because they cannot affect actions

132. See *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975); *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968).

133. Morris, *supra* note 53, at 1195.

134. *Id.* Professor Morris, however, was discussing a situation like that presented by the twin cases of *Luther v. Shaw*, 157 Wis. 231, 147 N.W. 17 (1914), and *Luther v. Shaw*, 157 Wis. 234, 147 N.W. 18 (1914). In those cases, a man who failed to fulfill a promise of marriage was held liable for punitive damages both to the jilted woman for breach of promise, 157 Wis. at 233, 147 N.W. at 17, and to her father for "seduction" of his daughter, 157 Wis. at 235, 147 N.W. at 18. Professor Morris specifically limited his proposal to these and similar facts: "Such practice might not be advisable when it would result in the presentation to a court of evidence of a highly disparate mass of losses only tied together by the common factor of being caused by a single act." Morris, *supra* note 53, at 1195.

135. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 n.11 (2d Cir. 1967). The court ultimately rejected this procedure because it considered federal legislation the only practicable means of implementation: "[W]e perceive no way of accomplishing that except by legislation requiring all claims in respect of drugs supervised by the FDA to be asserted in the federal courts—hardly a desirable course." *Id.*

136. See, e.g., Fed. R. Civ. P. 20(a) (joinder); Fed. R. Civ. P. 22 (interpleader); Fed. R. Civ. P. 24 (intervention); Fed. R. Civ. P. 42(a) (consolidation).

pending in other jurisdictions.¹³⁷ For example, a state court in which a Dalkon Shield claim is pending could not consolidate cases pending in federal courts or in the courts of sister states. Similarly, a federal district court could not unilaterally consolidate Dalkon Shield cases pending in state courts or other federal courts.¹³⁸

The Judicial Panel on Multidistrict Litigation¹³⁹ has the authority to transfer mass tort cases pending in various federal districts to a single federal district court, but these transfers are available only for the purpose of coordinating and economizing the discovery process and other pre-trial procedures.¹⁴⁰ When discovery and other pre-trial proceedings have been completed, the actions are generally remanded to the transferor courts for trial.¹⁴¹

Federal change of venue provisions provide a mechanism for transfer of cases between federal districts for trial, but only to a district where the action might originally have been brought.¹⁴² This could result in a single punitive damages trial only in the unlikely event that all the cases were filed in federal courts and all the district courts in which the actions were brought agreed to the transfer.

In view of the problems associated with other procedural devices for combining multiple lawsuits, it was logical for the federal district

137. See F. James & G. Hazard, *Civil Procedure* § 12.10 (2d ed. 1977) (federal process can generally only be served within territorial limits of a state in which a court is sitting); C. Wright, *Federal Courts* 420-21 (4th ed. 1983) (same).

138. See C. Wright, *supra* note 137, at 420-21. See *supra* note 88.

139. The Judicial Panel consists of seven circuit and district judges designated by the Chief Justice of the United States. 28 U.S.C. § 1407(d) (1976).

140. *Id.* § 1407. The Judicial Panel, upon its own initiative or motion of a party, may order cases from various districts transferred to a convenient forum for pre-trial purposes. *Id.* § 1407(c). This procedure has been invoked in many instances of mass tort litigation. See, e.g., *In re Cutter Labs., Inc. "Braunwald-Cutter" Aortic Heart Valve Prods. Liab. Litig.*, 465 F. Supp. 1295 (J.P.M.D.L. 1979); *In re Multi-Piece Rim Prods. Liab. Litig.*, 464 F. Supp. 969 (J.P.M.D.L. 1979); *In re Air Crash Disaster at Taipei Int'l Airport on July 31, 1975*, 433 F. Supp. 1120 (J.P.M.D.L. 1977); *In re Air Crash Disaster at Fla. Everglades on Dec. 29, 1972*, 360 F. Supp. 1394 (J.P.M.D.L. 1973). Cases involving the Dalkon Shield IUD were transferred by the Judicial Panel in 1975 to the United States District Court for the District of Kansas for co-ordinated pre-trial proceedings. See *In re A.H. Robins Co., "Dalkon Shield" IUD Prods. Liab. Litig.*, 406 F. Supp. 540 (J.P.M.D.L. 1975).

141. See 28 U.S.C. § 1407(a) (1976). Another limitation on the Judicial Panel is its inability to consolidate cases pending in both state and federal courts. In addition, even in the unlikely event that all mass tort law suits were brought in federal courts, consolidation within a single district could be achieved only with respect to the cases already pending. Therefore, when claims arise over an extended period of time, as do many that arise from a single design defect in a mass-produced product, consolidation would not prevent multiple punitive damages awards. See J. Ghiardi & J. Kircher, *supra* note 38, § 5.42, at 128.

142. 28 U.S.C. § 1404(a) (1976); see *In re Multidistrict Civil Actions Involving Air Crash Disaster near Hanover, N.H. on Oct. 25, 1968*, 342 F. Supp. 907, 910 (D.N.H. 1971).

courts in the *Skywalk* and *Dalkon Shield* cases to use the class action as a means of adjudicating the punitive damages claims. By using representative parties, a class action can cut across jurisdictional lines and determine the rights of a large group of similarly interested claimants in a single proceeding.¹⁴³ Overkill would be avoided because the defendant's entire punitive damages liability would be determined in a single action. The amount awarded in a single trial could be distributed among claimants on a basis far more equitable than approaches that reward only the first few successful plaintiffs.

The particular circumstances in the *Skywalk* and *Dalkon Shield* cases, however, rendered them inappropriate for class certification.¹⁴⁴ Nevertheless, the cases presented the courts of appeals with an opportunity to offer guidelines on the appropriate use of class actions in connection with multiple punitive damages claims. The Eighth and Ninth Circuits instead severely restricted the circumstances in which a class action would be considered appropriate, thereby effectively discarding a procedural device that under certain conditions provides the best solution to the mass tort punitive damages problem.¹⁴⁵

A. Federal Class Action Procedures

Tracing its origins to English equity practice,¹⁴⁶ federal class action procedure was codified in 1938 in Rule 23 of the Federal Rules of Civil Procedure.¹⁴⁷ Rule 23 was substantially revised in 1966 because of general confusion and dissatisfaction with the criteria for determining which cases were appropriate for class action treatment.¹⁴⁸ The 1966

143. See 7 C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1751 (1972 & Supp. 1980).

144. See *infra* notes 216-20 and accompanying text.

145. See *infra* pt. IV(A).

146. For a detailed history of equitable class actions and their eventual application in damages cases, see Foster, *The Status of Class Action Litigation*, Research Contributions of the American Bar Foundation (No. 4 1974).

147. The full text of original Rule 23 and advisory committee notes are reprinted in 3B J. Moore & J. Kennedy, *Moore's Federal Practice* ¶ 23.01[1.-1], [2] (2d ed. 1982). Most states have some form of class action statute, several of them similar to Rule 23. Note, *State Class Action Statutes: A Comparative Analysis*, 60 Iowa L. Rev. 93, 102 (1974); Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 Miss. L.J. 39, 74-76, 78-82 (1975); see Unif. Class Actions [Act] [Rule], 12 U.L.A. 21 (Supp. 1983) (act similar to Fed. R. Civ. P. 23).

148. Original Rule 23 reflected Professor Moore's terminology and distinction between "true," "hybrid," and "spurious" class suits. It provided in relevant part:

[One or more persons may bring suit on behalf of a class] when the character of the right sought to be enforced is

(1) joint, or common . . .

(2) several, and the object of the action is the adjudication of claims which do or may affect specific property involved in the action; or

amendments changed the structure of the rule and provided clearer guidelines for the certification and administration of class actions.¹⁴⁹

(3) several, and there is a common question of law or fact affecting the several rights and a common relief is sought.

3B J. Moore & J. Kennedy, *supra* note 147, at ¶ 23.01 [1.-1], at 23-14. Criticism focused on the inability to comprehend the criteria. See Note, *Federal Class Actions: A Suggested Revision of Rule 23*, 46 Colum. L. Rev. 818, 822 (1946) ("The federal courts have, in general, uncritically accepted Professor Moore's terminology and the analysis of representative actions in terms of jural relationships and joinder, to their own confusion and the frustration of the purpose of representative actions.").

149. Rule 23(a), as amended, provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

(1) the prosecution of separate actions by or against individual members of the class would create a risk of

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

(B) 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; or

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against the members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Action.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits.

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be

The question of certification is addressed to the discretion of the district court, which must determine whether the provisions of Rule 23 have been met.¹⁵⁰ The four general prerequisites to any class action have come to be known as “numerosity” of class members, “commonality” of legal and factual questions, “typicality” of claims and defenses of the class representative and “adequacy of representation.”¹⁵¹

identified through reasonable effort. The notice shall advise each member that (A) the court will exclude him from the class if he so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if he desires, enter an appearance through his counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

(4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

Fed. R. Civ. P. 23.

150. See *Walker v. Jim Dandy Co.*, 638 F.2d 1330, 1334 (5th Cir. 1981); *Shapiro v. Midwest Rubber Reclaiming Co.*, 626 F.2d 63, 71 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 860 (1981); *Rex v. Owens ex rel. State of Okla.*, 585 F.2d 432, 435-36 (10th Cir. 1978).

151. See A. Miller, *An Overview of Federal Class Actions: Past, Present, and Future 22-31* (1977). There are two additional general prerequisites which have been

If these prerequisites are satisfied, the court's focus turns to whether the circumstances fit within a category of permissible class actions specified in Rule 23(b).¹⁵²

Rule 23(b)(1) categories involve situations in which class actions are necessary to avoid prejudice that might otherwise result if the lawsuits were permitted to proceed individually. Rule 23(b)(1)(A) authorizes class actions to protect the party opposing the class¹⁵³ from the application of incompatible standards of conduct with respect to different members of the class.¹⁵⁴ Rule 23(b)(1)(B) specifically protects members of the class when individual litigation of some claims might substantially impair the ability of others to recover, such as when there is a limited fund.¹⁵⁵ These class actions are "mandatory" in the sense that once the class is certified, all class members are bound by the eventual result, whether or not individual members of the class object to being included, and often, whether or not they are even aware of the proceedings.¹⁵⁶

Rule 23(b)(3), the "common question" class action, unlike its subsection (b)(1) and (b)(2) counterparts, does not require that the class

implied by the courts: that there be an actual identifiable class, 7 C. Wright, A. Miller & M. Kane, *supra* note 143, § 1760, and that a class representative be a member of that class. *Id.* § 1761.

152. Fed. R. Civ. P. 23(b). Rule 23(b)(2), which applies to actions in which the appropriate remedy is either injunctive or declaratory relief, is not generally pertinent to a discussion of mass tort litigation.

153. The term "party opposing the class," although ambiguous, is construed to mean the party opposing the claims of the class, rather than a party opposing maintenance of the case as a class action. 3B J. Moore & J. Kennedy, *supra* note 147, ¶ 23.35[1], at 23-266 n.5.

154. See *Dale Elec., Inc. v. R.C.L. Elec., Inc.*, 53 F.R.D. 531 (D.N.H. 1971) (patent infringement action against infringing class).

155. The advisory committee note to the 1966 amendment of Rule 23(b)(1)(B) states:

In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the lawsuits. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims. A class action by or against representative members to settle the validity of the claims as a whole, or in groups, followed by separate proof of the amount of each valid claim and proportionate distribution of the fund, meets the problem.

Fed. R. Civ. P. 23 advisory committee note to 1966 amendment.

156. Although Rule 23 only provides for notice in Rule 23(b)(3) class actions, the modern trend is to require notice in subsection (b)(1) mandatory actions as well. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 564-65 (2d Cir. 1968); *Richmond Black Police Officers Ass'n v. City of Richmond*, 386 F. Supp. 151, 158 (E.D. Va. 1974); *Bormann v. Long Island Press Publishing Co.*, 379 F. Supp. 951, 954 (E.D.N.Y. 1974); *Lopez v. Wyman*, 329 F. Supp. 483, 486 (W.D.N.Y. 1971), *aff'd mem.*, 404 U.S. 1055 (1972).

comprise "all those who will share in or be directly affected by the grant or denial of relief."¹⁵⁷ The nexus between the class members may be simply that they claim to have been injured by the defendant in similar ways.¹⁵⁸ Because many litigants may have such a nexus, Rule 23(b)(3) imposes the additional prerequisites, absent from the "necessity" class action sections, that common questions of law or fact "predominate" over individual issues,¹⁵⁹ and that a class action be the "superior" method of handling the litigation.¹⁶⁰

Rule 23(b)(3) not only involves the most substantive change from the old rule,¹⁶¹ but was also responsible for most of the controversy following the 1966 amendments. Critics complained that the new common question class actions precipitated a burdensome increase in the volume of federal litigation¹⁶² and resulted in many ethical abuses by attorneys.¹⁶³

157. 3B J. Moore & J. Kennedy, *supra* note 147, ¶ 23.45[1], at 23-316.

158. A. Miller, *supra* note 151, at 40. Another distinguishing characteristic of Rule 23(b)(3) class actions is that they are not mandatory. Concerned about binding absent class members, the drafters of the 1966 amendments provided in Rule 23(c)(2) that the best practicable notice be given to all Rule 23(b)(3) class members informing them of their right to opt out of the class if they do not wish to be bound by the result.

159. This goes well beyond the commonality prerequisite in Rule 23(a), which merely requires the existence of common questions of law or fact. Predominance, however, does not mean that every issue need be common to all class members. See *Bryan v. Amrep Corp.*, 429 F. Supp. 313, 317 (S.D.N.Y. 1977); *Contract Buyers League v. F & F Inv.*, 48 F.R.D. 7, 11 (N.D. Ill. 1969); 7A C. Wright, A. Miller & M. Kane, *Federal Practice and Procedure* § 1778 (1972 & Supp. 1982).

160. The determination of superiority requires a qualitative analysis based on the factors enumerated in Rule 23(b)(3), including the interest in individual control of the litigation, the extent and nature of cases already pending, the desirability of litigating in the particular forum, and the difficulty of managing a class action.

161. The 1938 predecessor of Rule 23(b)(3) was nothing more than a permissive joinder device by which similarly situated claimants meeting the prerequisites could opt into the class. See 3B J. Moore & J. Kennedy, *supra* note 147, ¶ 23.45[1], at 23-314. The 1966 amendments changed the procedure so that all class members receiving adequate notice are bound unless they opt out. See *supra* note 149.

162. Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 377 (1972); see Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem"*, 92 Harv. L. Rev. 664, 670 (1979). Professor Miller, however, argues that although the shift from an opt in to an opt out procedure made class actions more available in many cases, the large increase in consumer, antitrust, securities and environmental litigation would have occurred in any event because of the consumer and environmental movements, new legislation expanding private rights and remedies, and a growing pool of attorneys looking for new avenues of litigation. Miller, *supra*, at 669-76.

163. Miller, *supra* note 162, at 665-66. "[Critics] also have charged widespread abuse of the rule by lawyers and litigants on both sides of the 'v.' including unprofessional practices relating to attorneys' fees, 'sweetheart' settlement deals, dilatory motion practice, harassing discovery, and misrepresentation to judges." *Id.*; see Federal Judicial Center, *Manual for Complex Litigation* § 1.41 (4th ed. 1977);

By the early 1970's, the controversial nature of common question class actions began to take its toll. Courts became more prone to deny class certification,¹⁶⁴ petitions for attorney fees were subjected to greater scrutiny¹⁶⁵ and defendants were often permitted discovery on the issue of unprofessional conduct by class counsel in soliciting representative parties.¹⁶⁶ Finally, the Supreme Court significantly reduced the attractiveness of many class actions, particularly those of small-claim consumers, by holding that each class representative must satisfy the amount in controversy requirement¹⁶⁷ and that the plaintiff must bear the expense of notice to the class in a suit for damages.¹⁶⁸

Within the past few years, the class action pendulum appears to have returned to center. Plaintiffs' attorneys have generally been more selective in seeking class relief, defendants less intransigent in opposing class certification, and judges more adept at administering class litigation, particularly in the use of subclasses and certification limited to certain issues as provided in Rule 23(c).¹⁶⁹

B. Mass Tort Class Actions

From their inception, the amendments to Rule 23 have provoked a split between leading commentators and the Advisory Committee concerning the propriety of certifying mass tort cases as class actions. Professors Moore, Kennedy,¹⁷⁰ Wright, Miller and Kane¹⁷¹ view com-

DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience* (pts. 1 & 2), 1976 Am. B. Found. Research J. 1021, 1273; Franks, *Rule 23—Don Quixote Has a Field Day: Some Ethical Ramifications of Securities Fraud Class Actions*, 46 Chi.-[Kent L. Rev. 1 (1969)]; Handler, *The Shift From Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 Colum. L. Rev. 1, 9 (1971); Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Awry?*, 70 F.R.D. 199, 203 (1976); Simon, *supra* note 162, at 377.

164. See *In re Hotel Tel. Charges*, 500 F.2d 86 (9th Cir. 1974); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973); Miller, *supra* note 162, at 679.

165. See Miller, *supra* note 162, at 679.

166. *Id.*

167. *Zahn v. International Paper Co.*, 414 U.S. 291, 301 (1973); *Snyder v. Harris*, 394 U.S. 332, 339-40 (1969).

168. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 177 (1974).

169. Miller, *supra* note 162, at 680.

170. 3B J. Moore & J. Kennedy, *supra* note 147, ¶ 23.45[3], at 23-353 n.40 states:

[C]onsidering the wide-spread experience courts are gaining in the use of separate trials for the class issues of liability and individual issues of damage, a mass accident appears peculiarly appropriate for class treatment. Indeed, the question of liability to all those injured in a plane or train crash is more likely to be uniform than that of liability for manipulation of the price of securities; with the introduction of such large-scale public transpor-

mon question class actions as the most expeditious means of adjudicating the common liability issues in many mass tort personal injury situations, particularly those that arise out of a single disaster. Under Rule 23(c)(4), certification can be limited to those issues common to the entire class or common to subclasses. Individual compensatory damages claims, as well as non-common liability issues, can therefore be resolved individually outside the scope of the class action.

The Advisory Committee has taken a contrary position, stating:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.¹⁷²

Most courts have concurred with the Advisory Committee and denied certification of mass tort personal injury cases brought as class actions.¹⁷³ Denials generally have been based on the strong interest of

tation facilities as the "jumbo jets," the ability to determine liability for an accident in one proceeding will be even more desirable.

171. 7A C. Wright, A. Miller & M. Kane, *supra* note 159, § 1783, at 116-17 states:

The central issue of liability . . . may be a difficult one that occasionally will require lengthy expert testimony, perhaps concerning the physical condition of a vehicle or the state of a technological art in a particular field of transportation or manufacturing. If the various tort claims were tried individually, the evidence would have to be repeated time and time again. . . . Absent other considerations, it seems wasteful to relitigate the same liability issue in different actions and before different courts. The argument for class action treatment is particularly strong in cases arising out of mass disasters such as an airplane crash in which there is little chance of individual defenses being presented.

172. Fed. R. Civ. P. 23 advisory committee note to 1966 amendment. In a subsequent article, the reporter for the committee wrote that the committee's argument against mass accident class actions was not based on the presence of individual damage questions, a common situation in Rule 23(b)(3) class actions, but was based on the fact that often "the class [action] procedure is not 'superior' to more commonplace devices." Kaplan, *Continuing Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (I)*, 81 Harv. L. Rev. 356, 393 (1967); see Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 Buffalo L. Rev. 433, 438-46 (1960) (joinder, interpleader, intervention, consolidation, joint trials and stays are alternative mechanisms for handling mass accident litigation). The committee's reasoning is inapplicable to single event disasters such as commercial airline accidents or building collapses. The issues of liability and defenses to liability would always be common in such cases and a class action would therefore be the superior form of adjudication.

173. Class actions have been rejected in the following personal injury cases:

(1) Involving the drug DES: *Ryan v. Eli Lilly & Co.*, 84 F.R.D. 230 (D.S.C.

individual litigants in controlling their own litigation, the diversity of issues of proximate causation (particularly in products liability cases), and the divergence of legal standards in cases arising in different jurisdictions.¹⁷⁴

A minority of courts has certified mass tort personal injury cases¹⁷⁵ as class actions based on issues concerning liability for compensatory

1979); *Morrissy v. Eli Lilly & Co.*, 76 Ill. App. 3d 753, 394 N.E.2d 1369 (1979); *Ferrigno v. Eli Lilly & Co.*, 175 N.J. Super. 551, 420 A.2d 1305 (Law Div. 1980).

(2) Involving the Dalkon Shield intrauterine device: *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir.) (certification reversed on appeal), *cert. denied*, 103 S. Ct. 817 (1983); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 407 N.Y.S.2d 196, *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978).

(3) Involving asbestos: *Harville v. Johns-Manville Prods. Corp.*, No. 78-642 (S.D. Ala. Nov. 21, 1979); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566 (E.D. Tex. 1974).

(4) Mass disaster/single occurrence: *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.) (hotel skywalk collapse; certification reversed on appeal), *cert. denied*, 103 S. Ct. 342 (1982); *McDonnell Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083 (9th Cir. 1975) (air crash; certification reversed on appeal), *cert. denied*, 425 U.S. 911 (1976); *Marchesi v. Eastern Airlines, Inc.*, 68 F.R.D. 500 (E.D.N.Y. 1975) (air crash); *Causy v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392 (E.D. Va. 1975) (air crash); *Daye v. Pennsylvania*, 334 F. Supp. 1337 (E.D. Pa. 1972) (bus accident), *aff'd on other grounds*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76 (E.D. Pa. 1970) (air crash).

(5) Other: *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980) (Three Mile Island incident); *Wright v. McMann*, 321 F. Supp. 127 (N.D.N.Y. 1970) (prisoner injuries resulting from constitutional violations), *aff'd in part, rev'd in part on other grounds*, 460 F.2d 126 (2d Cir.), *cert. denied*, 409 U.S. 885 (1972); *City of San Jose v. Superior Ct.*, 12 Cal. 3d 447, 525 P.2d 701, 115 Cal. Rptr. 797 (1974) (noise pollution from airport); *D'Amico v. Sitmar Cruises, Inc.*, 109 Cal. App. 3d 323, 167 Cal. Rptr. 254 (1980) (food contamination on cruise ship); *Snyder v. Hooker Chems. & Plastics Corp.*, 104 Misc. 2d 735, 429 N.Y.S.2d 153 (Sup. Ct. 1980) (toxic wastes).

174. *See, e.g., In re Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.*, 693 F.2d 847, 850, 855 (9th Cir. 1982) (divergent legal standards; diverse proximate cause issues), *cert. denied*, 103 S. Ct. 817 (1983); *Yandle v. PPG Indus., Inc.*, 65 F.R.D. 566, 570-71 (E.D. Tex. 1974) (diverse proximate cause issues); *Daye v. Pennsylvania*, 344 F. Supp. 1337, 1342-43 (E.D. Pa. 1972) (interest in individual control), *aff'd on other grounds*, 483 F.2d 294 (3d Cir. 1973), *cert. denied*, 416 U.S. 946 (1974); *Hobbs v. Northeast Airlines, Inc.*, 50 F.R.D. 76, 78-79 (E.D. Pa. 1970) (divergent legal standards; interest in individual control); *Rosenfeld v. A.H. Robins Co.*, 63 A.D.2d 11, 16-17, 407 N.Y.S.2d 196, 199 (diverse proximate cause issues), *appeal dismissed*, 46 N.Y.2d 731, 385 N.E.2d 1301, 413 N.Y.S.2d 374 (1978); *see also* Comment, *Mass Accident Class Actions*, 60 U. Cal. L. Rev. 1615, 1638 (1972) ("[T]he three potential obstacles to a mass accident class action are the applicability of differing laws to individual class members, a strong individual interest in controlling separate actions, and the lack of a proper court in which to concentrate the litigation.") [hereinafter cited as *Mass Accident Class Actions*].

175. Class actions are viewed more favorably when mass tort claims involve only economic losses, or when personal injuries are part of larger economic loss claims.

damages.¹⁷⁶ Federal class actions in which Rule 23(b)(3) certification¹⁷⁷ has been granted have largely consisted of cases in which the classes were limited to carefully defined liability issues.¹⁷⁸

Compare Ouellette v. International Paper Co., 86 F.R.D. 476 (D. Vt. 1980) (diminished property value and enjoyment of use caused by discharge of waste products into Lake Champlain) and *Fruit v. Allied Chem. Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (commercial losses caused by discharge of toxic chemical into the James River) and *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969) (commercial losses to exhibition resulting from convention center fire) and *Anthony v. General Motors Corp.*, 33 Cal. App. 3d 699, 109 Cal. Rptr. 254 (1973) (reversing denial of certification for owners of GM trucks or campers equipped with defective wheels) and *State ex rel. Anaconda Aluminum Co. v. District Ct.*, 158 Mont. 228, 490 P.2d 351 (1971) (tree damage caused by flouride plant emissions) and *Hurt v. Midrex Div. of Midland Ross Corp.*, 276 Or. 925, 556 P.2d 1337 (1976) (denial of class action reversed as to plaintiffs whose automobiles suffered paint damage from particulates emitted from defendant's plants) with cases cited *infra* note 176.

176. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) (Agent Orange exposure); *Payton v. Abbott Labs.*, 83 F.R.D. 382 (D. Mass. 1979) (DES); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977) (fire at supper club); *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401 (E.D. Pa. 1976) (contaminated provisions served to cruise ship passengers); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973) (same), *aff'd*, 507 F.2d 1278 (5th Cir. 1975); *Stewart v. North Am. Asbestos Corp.*, No. 78-L201 (McClellan Co., Ill. Cir. Ct. 1982) (asbestos-related illness). See *infra* note 234 for a discussion of Skywalk state and federal class actions certified after the court of appeals reversed a previous federal certification.

177. A few classes have been mistakenly certified under Rule 23(b)(1)(A), based on the possibility that individual litigation could result in inconsistent verdicts on the issue of liability for compensatory damages. E.g., *In re Federal Skywalk Cases*, 93 F.R.D. 415, 423-24 (W.D. Mo.), *rev'd on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 46 (E.D. Ky. 1977); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 (S.D. Fla. 1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975); see *In re Gabel*, 350 F. Supp. 624, 630 (C.D. Cal. 1972), *vacated sub nom. McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976). Under the better and majority view, the possibility of inconsistent verdicts on liability in actions for personal injuries does not mean a defendant is faced with incompatible standards of conduct within the meaning of Rule 23(b)(1)(A). No inconsistent standards result from the fact that a defendant may win some of the cases and lose others. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1187 n.8 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982); *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 789 (E.D.N.Y. 1980); *Payton v. Abbott Labs, Inc.*, 83 F.R.D. 382, 389 (D. Mass. 1979); *Causey v. Pan Am. World Airways, Inc.*, 66 F.R.D. 392, 398 (E.D. Va. 1975); *Mass Accident Class Actions*, *supra* note 174, at 1620.

178. See, e.g., *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980); *Payton v. Abbott Labs., Inc.*, 83 F.R.D. 382, 386-87 (D. Mass. 1979); *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 404 (E.D. Pa. 1976); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 (S.D. Fla.

C. *The Skywalk and Dalkon Shield Class Actions*

Most of the reasons for rejecting class actions in mass tort cases are absent when certification is limited to claims for punitive damages. Because plaintiffs have no right to recover punitive damages,¹⁷⁹ they lack the strong interest that they may have in pursuing their compensatory damages claims individually. Moreover, evidence of the aggravated nature of the defendant's conduct will generally not vary from victim to victim. Thus, the class certifications in the *Skywalk* and *Dalkon Shield* cases represent a significant new approach to solving the problems presented by punitive damages claims in a mass tort context.

1. Certification by the District Courts

Although different kinds of mass torts were involved—a single disastrous occurrence in the *Skywalk* cases and the failure of a mass-marketed product in the *Dalkon Shield* cases—the considerations that led each district court to certify a punitive damages class action¹⁸⁰ were much the same. Each court determined that individual recoveries of punitive damages by the first successful plaintiffs would either reduce or totally eliminate the funds available for recovery of damages by later plaintiffs,¹⁸¹ and concluded that this constituted a limited

1973), *aff'd*, 507 F.2d 1278 (5th Cir. 1975). The extent and severity of injuries are also significant. *Bentkowski v. Marfuerza Compania Maritima, S.A.*, 70 F.R.D. 401, 404 (E.D. Pa. 1976).

179. See *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) ("Punitive damages are, to a large degree, a windfall to a plaintiff . . . exacted for the benefit of society . . ."), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); D. Dobbs, *Handbook on the Law of Remedies* § 3.9, at 204 ("Punitive damages are not given as of right in any state . . .").

180. Each district court also certified classes concerning liability for compensatory damages. *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 903 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). These certifications were based on considerations different from those that supported adjudicating all the punitive damage claims in a single proceeding. Compare 93 F.R.D. at 422-24 (compensatory damages) *with id.* at 424-25 (punitive damages), and compare 526 F. Supp. at 894-96 (compensatory damages) *with id.* at 896-900 (punitive damages).

181. See *In re Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.) ("[M]embers of the class face a very real risk that the winner of the race to the courthouse might be awarded all of the monies available."), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898 (N.D. Cal. 1981) ("It is almost certain that an award of punitive damages to a plaintiff in one case will alter the potential

fund which permitted certification of a class of plaintiffs under Rule 23(b)(1)(B).¹⁸² The funds available for payment of punitive damages claims might be limited in one of two ways: (1) the financial resources of the defendants might simply be inadequate to satisfy all the claims;¹⁸³ or (2) if resources were adequate, the law would imply some limit on the extent to which a defendant can be punished for the same wrongful conduct.¹⁸⁴ In either situation, full punitive damages recov-

recovery of a plaintiff in a later filed suit.”), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

182. 93 F.R.D. at 424-25; 526 F. Supp. at 897-98.

183. The *Skywalk* court stated: “Those persons who have filed lawsuits presently seek compensatory damage awards in excess of one billion dollars and punitive damage awards in excess of 500 million dollars.” *In re Federal Skywalk Cases*, 93 F.R.D. 415, 419 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The court observed that while the defendants’ assets and liability insurance would be adequate to pay the compensatory damages claims, their ability to pay punitive damages awards was questionable, particularly if Missouri law permitted more than one award. *Id.* at 424. Even if Missouri law were construed to permit only one award of punitive damages, the court reasoned that a limited fund would still exist because all but the first successful plaintiff would be precluded from recovery. *Id.* at 425. Finally, the court noted the potential conflict of interest faced by attorneys representing more than one plaintiff if the cases were permitted to proceed individually. A victory by the plaintiff whose case was ready for trial first might preclude the attorney’s other clients from recovering punitive damages. *Id.* at 425. The *Dalkon Shield* court noted:

At the present time, some 1,573 suits involving claims for compensatory damages well over \$500 million and claimed punitive damages in excess of \$2.3 billion, are pending against A.H. Robins. The potential for the constructive bankruptcy of A.H. Robins, a company whose net worth is \$280,394,000.00, raises the unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress.

In re Northern Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig., 526 F. Supp. 887, 893 (N.D. Cal. 1981) (footnote omitted), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

184. *In re Northern Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The *Dalkon Shield* court reasoned that at some point overlapping punitive damages awards “violate that sense of ‘fundamental fairness’ which lies at the heart of constitutional due process.” *Id.* at 899. In those circumstances, the court observed:

If plaintiff No. 1 recovers one million dollars in punitive damages, plaintiff No. 2 runs a serious risk of being told that the amount awarded in the first suit represented an implied finding of the maximum amount the defendant should be punished. Obviously, the greater the number of plaintiffs, the more serious the risk becomes that the late plaintiff will find her demand for punitive damages dismissed. At the very least, the trial court may admit evidence as to the payment of prior awards working to the detriment of a party seeking additional punishment for the same misconduct.

Id. at 898 (footnotes omitted).

eries would be distributed only to the first plaintiffs who received favorable verdicts. Subsequent plaintiffs would recover little or no punitive damages. Each district court considered this unfair to those later plaintiffs and determined that equitable distribution to all deserving plaintiffs could be attained only through a mandatory class action in which all plaintiffs were represented, and in which none could choose to pursue claims individually.¹⁸⁵

In each case, certification was opposed by an overwhelming majority of plaintiffs.¹⁸⁶ Several plaintiffs in the *Skywalk* cases argued that a class action was unnecessary and counterproductive in view of the rapid pace at which cases were being settled through the efforts of the state court.¹⁸⁷ Plaintiffs in the *Dalkon Shield* class action cited several

185. *In re Federal Skywalk Cases*, 93 F.R.D. 415, 424-25 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 897-98 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). According to the district court in the *Dalkon Shield* case, the representative parties would first present their compensatory damages cases and then proceed with the punitive damages phase of the trial. 526 F. Supp. at 920. If the jury determined that the defendant was liable to the nationwide class for punitive damages, it would be instructed to assess an amount which would punish the defendant once for all potential claimants. *Id.* The court suggested two alternative pro-rata distribution schemes—one based on the total number of claimants, and the other based on the amount of compensatory damages awards. *Id.* at 920 n.183. Although beyond the scope of this Article, it is assumed that the proceeds of any classwide punitive damages recovery would be distributed in some equitable manner along the lines suggested by the district court.

186. *See In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 849-50 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1178 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

187. The state court, in which all but 18 of the approximately 140 Skywalk lawsuits were filed, 680 F.2d at 1177 n.5, invested considerable time in the settlement process with remarkable success. Prior to the certification order of January 25, 1982, 121 injury and death claims had been settled for a total of more than \$18.6 million. This represented 41% of the death claims, 35% of the minor personal injury claims and 26% of the injury claims by persons requiring hospitalization. *See* Petitioners' Reply to Class Counsel's Brief in Opposition to Petition for Mandamus at 13, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). In the order certifying the class, the district court expressly prohibited any further settlements of punitive damages claims while settlements of compensatory damages claims were permitted to continue. 93 F.R.D. at 428. The effect of this order was to halt the fast pace of settlements. Petitioners' Reply to Class Counsel's Brief in Opposition to Petition for Mandamus at 14, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). Defendants were understandably unwilling to settle just the compensatory damages claims while leaving unresolved the punitive damages claims. Brief of Appellant Jacqueline N. Rau at 36, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The situation was aggravated when the lead counsel appointed for the class filed a motion to prohibit any action upon the announced intention of certain

reasons for opposing the action, including the impropriety of certification on the court's own initiative,¹⁸⁸ the lack of personal jurisdiction

defendants to offer to settle with plaintiffs in return for full releases of both compensatory and punitive damages claims. *Id.* at 18. Class counsel were concerned that additional settlements, should the jury be advised of them, might reduce the ultimate punitive damage award in the class action trial and result in "unfairness" to class counsel in connection with the fees to be awarded. Memorandum in Support of Plaintiff's Motion in Limine at 14 n.7, *In re Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), *cited in* Brief of Appellant Jacqueline N. Rau at 36, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The result was that counsel for the class, apparently in the interest of preserving a large fee, opposed the expeditious payment of claims of the class members it was appointed to represent. *Id.* at 38. One of the appellants' briefs put the situation in somewhat earthier terms:

The various cases arising out of the skywalk collapse were proceeding expeditiously and efficiently, under the auspices of plaintiffs' and defendants' coordinating committees, in the Circuit Court for Jackson County, Missouri, well before the institution of the class action in federal court. That entire process is now disrupted. The punitive damage "tail" is wagging the compensatory damage "dog," and lawyers from the East with dollar signs in their eyes have hold of the leash.

Id. at 43-44.

188. Opening Brief for Appellant at 11-14, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *vacated*, 103 S. Ct. 817 (1983). Although the court officially granted the defendant's motion for certification of the class, the facts indicated that as a practical matter the court acted *sua sponte*. Indeed the district court expressly held that it was proper for it to have done so. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 894 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit, in reversing, did not address plaintiffs' argument that a *sua sponte* order was inconsistent with the traditionally passive role of the court. *Compare In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983) with Opening Brief of Appellant at 11-14, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). *See also* Wilson v. Zarhadnick, 534 F.2d 55, 57 (5th Cir. 1976) ("The grant, *sua sponte*, of class action relief when it is neither requested nor specified, is an obvious error."); La Mar v. H & B Novelty & Loan Co., 489 F.2d 461, 463-64 (9th Cir. 1973) (judiciary has "fundamentally passive" role in class action litigation).

A court apparently may grant class certification *sua sponte* as part of its responsibility to administer litigation in a fair and efficient manner. Although the Federal Rules of Civil Procedure neither authorize nor preclude *sua sponte* class certification, such orders have been used in analogous contexts. *See, e.g.*, Lead Indus. Ass'n v. Occupational Safety & Health Admin., 610 F.2d 70, 79 n.17 (2d Cir. 1979) (transfer pursuant to 28 U.S.C. § 1404(a) (1976)); Cass v. Sonnenblick-Goldman Corp., 287 F. Supp. 815, 819 (E.D. Pa. 1968) (consolidation under Fed. R. Civ. P. 41(a)). Additionally, it has been held that when an action is brought as a class, a court need not wait for a motion by the parties before making the determination of certification. *See Walker v. World Tire Corp.*, 563 F.2d 918, 921 (8th Cir. 1977); Senter v. General Motors Corp., 532 F.2d 511, 521-22 (6th Cir.), *cert. denied*, 429 U.S. 870 (1976).

over non-California plaintiffs,¹⁸⁹ and the diversity of legal and factual questions presented by the multistate claims.¹⁹⁰

189. See Opening Brief of Appellant at 14-18, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit, however, denied class certification on other grounds and did not address this issue. There was no apparent jurisdictional bar to class certification in this case. Federal courts have indicated that jurisdiction can be exercised over both defendant and plaintiff nonresident class members, albeit in limited fact situations, without meeting the minimum contacts requirements set forth in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), provided due process is satisfied through notice and adequate representation. *In re Gap Stores Sec. Litig.*, 79 F.R.D. 283, 291-92 (N.D. Cal. 1978); *United States v. Trucking Employers, Inc.*, 72 F.R.D. 98, 99-100 (D.D.C. 1976).

While this approach to jurisdiction may be accepted in federal court, there is less agreement over whether a state court can exercise jurisdiction over absentee class members due to territorial limitations on its power. While some state courts have followed the federal approach by requiring notice and adequate representation, see *Shutts v. Phillips Petroleum Co.*, 222 Kan. 527, 567 P.2d 1292 (1977), *cert. denied*, 434 U.S. 1068 (1978); *Schlosser v. Allis-Chalmers Corp.*, 86 Wis. 2d 226, 271 N.W. 2d 879 (1978), others have held that traditional minimum contacts analysis must be applied. See *Miner v. Gillette Co.*, 89 Ill. App. 3d 315, 411 N.E.2d 1092 (1980), *modified*, 87 Ill. 2d 7 (1981), *cert. dismissed*, 103 S. Ct. 484 (1983); *Spirek v. State Farm Mut. Auto Ins. Co.*, 65 Ill. App. 3d 440, 382 N.E.2d 111 (1978); *Feldman v. Bates Mfg. Co.*, 143 N.J. Super. 84, 362 A.2d 1177 (App. Div. 1976); *Klemow v. Time, Inc.*, 466 Pa. 189, 352 A.2d 12, *cert. denied*, 429 U.S. 828 (1976). For further analysis of this issue, see Note, *Multistate Plaintiff Class Actions: Jurisdiction and Certification*, 92 Harv. L. Rev. 718 (1979); Note, *Consumer Class Actions with a Multistate Class: A Problem of Jurisdiction*, 25 Hastings L.J. 1411 (1974); Note, *Toward a Policy-Based Theory of State Court Jurisdiction over Class Actions*, 56 Tex. L. Rev. 1033 (1978); Comment, *Civil Procedure: In Personam Jurisdiction over Nonresident Plaintiffs in Multistate Class Actions*, 17 Washburn L.J. 382 (1978).

190. See Brief of the Oregon Appellants at 15, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). Such differences, however, can generally be handled in a class action by the use of subclasses, as provided for in Rule 23(c)(4), if there are not so many subclasses that the jury would be unduly confused.

The plaintiffs also argued that a nationwide punitive damages class action raised insurmountable choice of law problems because each state in which cases were pending would apply its own standards for punitive damages. Brief of the Oregon Appellants at 8-13, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). California law, for example, requires that the evidence establish at a minimum that the defendant was reckless. See *Taylor v. Superior Court*, 24 Cal. 3d 890, 894-95, 598 P.2d 854, 856, 157 Cal. Rptr. 693, 696 (1979); *G.D. Searle & Co. v. Superior Court*, 49 Cal. App. 3d 22, 32, 122 Cal. Rptr. 218, 225 (1975); Cal. Civ. Code § 3294 (West Supp. 1983). Several other jurisdictions sanction punitive damages awards upon a finding of recklessness or gross negligence. See, e.g., *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 47 (Alaska 1979), *modified on other grounds*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); *Smith v. Chapman*, 115 Ariz. 211, 214-15, 564 P.2d 900, 903-04 (1977); *Kang v. Harrington*, 59 Hawaii 652, 663, 587 P.2d 285, 293 (1978); *Jolley v. Puregro Co.*, 94 Idaho 702, 708, 496 P.2d 939, 945 (1972); *Lindquist v. Ayerst Labs.*,

2. Reversals by the Courts of Appeals

Both certification orders were reviewed in interlocutory appeals.¹⁹¹ In a two-to-one decision, the Eighth Circuit held that certification of a mandatory class of punitive damages claimants in the *Skywalk* case violated the Anti-Injunction Act.¹⁹² A unanimous panel of the Ninth Circuit held that the *Dalkon Shield* class action failed to satisfy the general prerequisites of Rule 23(a)¹⁹³ and, in any event, did not involve circumstances which would permit certification pursuant to Rule 23(b)(1)(B).¹⁹⁴ Although each court ostensibly relied upon different grounds, the fundamental rationale for each decision was the rejection of the lower court's conclusion that plaintiffs' recovery of

Inc., 227 Kan. 308, 316, 607 P.2d 1339, 1347 (1980); *Butcher v. Petranek*, 181 Mont. 358, 361-62, 593 P.2d 743, 745 (1979); *Samedan Oil Corp. v. Neeld*, 91 N.M. 599, 601, 577 P.2d 1245, 1247 (1978); *Pennsylvania Glass Sand Corp. v. Ozment*, 434 P.2d 893, 898 (Okla. 1967). The resolution of these choice of law problems in connection with multistate claims for punitive damages is discussed *infra* note 226.

191. The district court in the *Dalkon Shield* case requested interlocutory review pursuant to 28 U.S.C. § 1292(b) (1976). *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 919 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). In the *Skywalk* case, the Eighth Circuit agreed to hear the plaintiffs' appeal on the ground that the order was an injunction within the meaning of 28 U.S.C. § 1292(a)(1) (1976), which provides in pertinent part: "the courts of appeals shall have jurisdiction of appeals from: (1) Interlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions . . ." *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). Certain plaintiffs also sought review of the district court's order on a petition for mandamus, asserting an abuse of judicial discretion. *Id.* at 1177. The court of appeals did not discuss the propriety of review on that basis.

192. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1183 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982) (construing the Anti-Injunction Act, 28 U.S.C. § 2283 (1976)). The majority opinion did not distinguish between the subsection (b)(1)(A) class, which was certified on the issues of liability for compensatory and punitive damages, and the subsection (b)(1)(B) class, which was certified on the issues of liability for and amount of punitive damages. The dissent, however, correctly stated that the subsection (b)(1)(A) class was improper because the rule was not meant to require certification to avoid the possibility of inconsistent damages verdicts. *Id.* at 1187 n.8 (Heaney, J., dissenting). See *supra* note 177.

193. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

194. *Id.* at 852. The Ninth Circuit also decertified the statewide subsection (b)(3) class for compensatory damages because it failed to meet the typicality requirement of Rule 23(a) as well as the superiority requirement of subsection (b)(3). *Id.* at 854-56. This is consistent with the trend of cases in the Ninth Circuit and throughout the country concerning common question class actions on mass tort liability issues. See *supra* note 173.

punitive damages was jeopardized by either a lack of funds or an implied-in-law limit on aggregate punitive damages awards.¹⁹⁵

a. *The Eighth Circuit Decision*

Surprisingly, the Eighth Circuit eschewed standard class action analysis and based its decision on the Anti-Injunction Act,¹⁹⁶ which, with certain exceptions, prohibits federal courts from enjoining proceedings pending in state courts.¹⁹⁷ Because the mandatory class certification had been ordered by the federal district court after lawsuits had been initiated in state court, the court of appeals reasoned that the order effectively enjoined the state court from continuing to adjudicate the punitive damages claims.¹⁹⁸ The court rejected the argument that this situation came within the Act's exception for injunctions "necessary in aid of [the federal court's] jurisdiction" because of the adverse effect independently pursued punitive damages claims might have on remaining claims. According to the majority, at this point there was no limited fund, but only "an uncertain claim for punitive damages against defendants who have not conceded liability."¹⁹⁹ Having so easily disposed of the lower court's primary basis for certification, the court of appeals held that the situation merely involved simultaneous in personam actions in state and federal courts regarding the same subject matter, a practice permitted under the dual federal-state system.²⁰⁰

This rigid construction of the Anti-Injunction Act creates a potential barrier to class certification in mass tort cases. The Eighth Circuit,

195. See *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

196. 28 U.S.C. § 2283 (1976). The Act provides that a "court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." *Id.*

197. *Id.*

198. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

199. *Id.* at 1182. In a strong dissent, Judge Heaney wrote that because the inevitable effect of a Rule 23(b)(1)(B) certification order is to preclude independent litigation in all other courts, it "seems self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class." *Id.* at 1191-92 (Heaney, J., dissenting).

200. *Id.* at 1182-83. The court cited *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977), and *Kline v. Burke Constr. Co.*, 260 U.S. 226 (1922), as support. Neither *Vendo* nor *Kline*, however, involved a class action, let alone a mandatory action grounded on the need to protect claimants to a limited fund.

by holding the Anti-Injunction Act paramount, may effectively prevent certification of a Rule 23 mandatory class action whenever even a single case involving the same subject matter has been initiated previously in state court.²⁰¹

b. *The Ninth Circuit Decision*

The Ninth Circuit's analysis of the Rule 23(a) criteria was essentially a prelude to its more definitive holding under Rule 23(b)(1)(B). Although the court held that the class action failed to satisfy the Rule 23(a) prerequisites of commonality,²⁰² typicality²⁰³ and adequacy of representation,²⁰⁴ the basis of this holding appeared to be the court's

201. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1193 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982).

202. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850, *cert. denied*, 103 S. Ct. 817 (1983). The court of appeals determined that the factual and legal issues in the punitive damages claims were "not entirely common" to all plaintiffs. *Id.* With respect to various plaintiffs who began using the product at different times, the court was concerned that the culpability of Robins might vary depending on the information it had concerning side effects, its concealment of that information, and its advertising and promotion. *Id.* One who suffered injuries in 1974 might have an altogether different punitive damage case than one who was injured in 1970. The court also suggested that the legal standards to be applied in determining whether and to what extent punitive damages should be awarded might well differ among individual plaintiffs. 693 F.2d at 850. See *supra* note 190. The court's analysis of this issue, however, was inappropriate. The fact that some issues are not common does not mean that the commonality requirement is not met. See *Moseley v. General Motors Corp.*, 497 F.2d 1330, 1334 (8th Cir. 1974). The inquiry under Rule 23(a) is whether there are questions of law and fact common to the class, not whether such questions predominate. Predomination is only required in connection with a Rule 23(b)(3) common question class action. The court essentially conceded this point by stating: "If commonality were the only problem in this case, it might be possible to sustain some kind of a punitive damage class." *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

203. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The court noted in cursory fashion that no plaintiffs sought or accepted the role of representative parties and stated: "Typicality, while it may not be insurmountable, remains a significant problem." *Id.*

204. *Id.* at 851. Opposition to the punitive damages class action was so vehement that some plaintiffs' attorneys threatened legal action against the firm appointed as lead counsel. Not only did that firm subsequently resign as lead counsel for the punitive damages class, but no other plaintiffs' attorneys expressed a willingness to serve as lead counsel. Interview with Rodney Klein, original lead counsel for punitive damages class, in Sacramento, California (June 14, 1982). Although the district court eventually appointed an attorney not previously connected with the *Dalkon Shield* litigation, who accepted the lead counsel position, the court of appeals was obviously troubled by the plaintiffs' hostility to a class action. See *In re Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

concern with the problem of managing a class action involving multi-state claims of persons vehemently opposed to their forced membership in a class.²⁰⁵ These management problems, however, are more appropriately analyzed in terms of the superiority of the class action to individual litigation.²⁰⁶

The more significant aspect of the Ninth Circuit's decision was its conclusion that the circumstances relied upon by the lower court did not constitute the kind of limited fund envisioned under Rule 23(b)(1)(B).²⁰⁷ The court of appeals rejected both grounds for the lower court's finding of a limited fund—the inability of defendants to satisfy potential judgments and the implied-in-law ceiling on punitive damages recoveries—because the record did not establish that separate punitive damages awards would “inescapably” or “necessarily” affect later claims.²⁰⁸ According to the court, the theoretical possibility that later plaintiffs' recoveries would be diminished or eliminated by earlier recoveries did not satisfy the requirements of Rule 23(b)(1)(B).²⁰⁹ The court noted, however, that “[t]he detrimental effect of earlier claims upon later claims commends itself . . . as worthy of future judicial and legislative consideration.”²¹⁰

3. A Critical Analysis: Appellate Overkill

The problem with the appellate opinions in the *Skywalk* and *Dalkon Shield* cases is not that they were wrongly decided, but rather

205. See 693 F.2d at 850-51. The court stated: “We are not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases, but the combined difficulties overlapping from each of the elements of Rule 23(a) preclude certification in this case.” *Id.* at 851.

206. See *infra* pt. III(C)(2)(c).

207. *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

208. *Id.* at 851-52. While the likelihood of insufficient funds to pay all claims is a recognized ground for Rule 23(b)(1)(B) certification, see *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); Fed. R. Civ. P. 23 advisory committee note to 1966 amendment, the factual basis for such a finding was challenged by the plaintiffs. See Opening Brief for Appellant at 9-10, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). The Ninth Circuit was critical of the district court's denial of plaintiffs' motion to conduct limited discovery on the issue of Robins' ability to pay all claims in the litigation: “Rule 23(b)(1)(B) certification is proper only when separate punitive damages claims necessarily will affect later claims. The district court erred by ordering certification without sufficient evidence of, or even a preliminary fact-finding inquiry concerning Robins' actual assets, insurance, settlement experience and continuing exposure.” *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 852 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

209. 693 F.2d at 851-52.

210. *Id.* at 851.

that they went too far. In each case, the assertion of a limited fund was rejected as speculative.²¹¹ Although both courts limited their holdings to the cases' factual circumstances, the likelihood in future cases that a similar assertion will be speculative renders these decisions broadly applicable. Therefore, punitive damages class actions may be precluded even when class actions provide the best means of adjudicating the claims.

This unsatisfactory result is due in part to the structure of Rule 23 itself, which by its terms does not permit a trial court or a court of review to consider whether a mandatory class action is the best means of adjudication in the particular circumstances. Only in Rule 23(b)(3) common question class actions are courts permitted to consider the relative superiority of the class action device to individual litigation.²¹² The inquiry under Rule 23(b)(1)(B) is essentially confined to whether individual adjudications would somehow prejudice the rights of other members of the prospective class.²¹³ The district courts in the *Skywalk* and *Dalkon Shield* cases correctly held that some class members would be prejudiced,²¹⁴ because it was clear that funds for payment of punitive damages would become more limited with each ensuing award, if for no other reason than the implicit limits on permissible aggregate punitive damages recoveries. The Eighth and Ninth Circuits, however, would require more concrete evidence before recognizing such a limited fund.

The chilling effect of the *Skywalk* and *Dalkon Shield* appellate decisions could be avoided by introducing qualitative criteria into the certification process in cases involving multiple punitive damages claims. Unlike the traditional Rule 23(b)(1)(B) situations, which always require classwide adjudication, multiple punitive damages claims should result in certification of a class action only when the benefits of the device outweigh the problems it would cause. Recognition of these claims as a hybrid of subsections (b)(1)(B) and (b)(3) would provide a way to distinguish those mass tort cases in which the punitive damages claims should be adjudicated in a single classwide proceeding from those not appropriate for class treatment.²¹⁵ Beyond

211. See *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 851-52 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re Federal Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

212. See *supra* note 149.

213. *Id.*

214. *In re Federal Skywalk Cases*, 93 F.R.D. 415, 424-25 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

215. If the limited fund concept of Rule 23(b)(1)(B) were extended to cover class actions for punitive damages in products liability cases, a trial court considering

the usual inquiry into the general class action prerequisites, courts faced with the question of certifying a punitive damages class action should be permitted to decide whether it is the best way under the circumstances to adjudicate the punitive damages claims.

The use of this qualitative analysis in the *Skywalk* and *Dalkon Shield* cases would have led to either the denial of certification by the district courts or the decertification of such actions by the courts of appeals without establishing barriers to future class actions. The unilateral usurpation of authority by each district court over the many cases pending outside its jurisdiction was unwarranted. In the *Skywalk* cases, most of the lawsuits were filed in the state court, which had administered the litigation, coordinated discovery and encouraged settlements.²¹⁶ The brisk pace at which cases were being settled prior to the certification order was halted by the certification of the punitive damages class action.²¹⁷ The anomalous result was that a class action aimed at expediting resolution of punitive damages claims actually delayed recovery of compensation for injuries. Compensation of the victims of a disaster should not be secondary to punitive damages claims.²¹⁸ A qualitative assessment of the foreseeable impact on the settlement process would certainly have led to denial of certification.

In the *Dalkon Shield* cases, the order certifying a nationwide punitive damages class amounted to a unilateral assumption of authority over thousands of cases pending in other jurisdictions. The fact that the court ordering certification had previously dismissed the punitive damages claims in a *Dalkon Shield* trial,²¹⁹ and that the defendant strongly supported the class action while all plaintiffs opposed it, gave

certification under Rule 23(b)(1)(B) could properly imply a superiority requirement or otherwise consider superiority in addition to the Rule 23(a) prerequisites. In practice, reviewing courts have found an abuse of discretion only when the trial court incorrectly applied the specific criteria of Rule 23. *See, e.g.*, *Walker v. Jim Dandy Co.*, 638 F.2d 1330, 1335-36 (5th Cir. 1981) (numerosity and commonality); *Livesay v. Punta Gorda Isles, Inc.*, 550 F.2d 1106, 1110 (8th Cir. 1977) (inadequate representation), *rev'd on other grounds sub nom.* *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978); *Gay v. Waiters' & Dairy Lunchmen's Union*, 549 F.2d 1330, 1332-33 (9th Cir. 1977) (numerosity); *Carey v. Greyhound Bus Co.*, 500 F.2d 1372, 1380-81 (5th Cir. 1974) (numerosity and superiority).

216. *See supra* note 187.

217. *Id.*

218. *See* Brief of Appellant Jaqueline N. Rau at 43-44, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

219. Opening Brief of Appellant at 7, *In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847 (9th Cir. 1982) (citing *Breyer v. A.H. Robins Co.*, No. 75-1459 (N.D. Cal. 1980), which ruled as a matter of law that there was insufficient evidence to submit the issue of punitive damages to the jury), *cert. denied*, 103 S. Ct. 817 (1983).

the impression of unfairness to the plaintiff class.²²⁰ The prospect of a nationwide class of unwilling plaintiffs bound by the result obtained by an attorney whom they did not trust provided a compelling reason for decertification.

IV. RECOMMENDED GUIDELINES FOR ADJUDICATING MASS TORT PUNITIVE DAMAGES CLAIMS

A. *Class Actions*

Courts should have the discretion to adjudicate all mass tort punitive damages claims in a single, classwide proceeding when a class action is superior to individual litigation. If class action treatment is otherwise appropriate in connection with these claims, certification should be granted under Rule 23(b)(1)(B), which precludes individual claimants from opting out.²²¹ This approach permits distribution of punitive damages far more equitably than the present system, which rewards plaintiffs on a first-come, first-served basis. All mass tort cases with multiple claims for punitive damages present a potential Rule 23(b)(1)(B) limited fund situation; early awards may affect later claims because of either the defendant's inability to pay or the implied-in-law limit on total awards.

Courts considering certification of punitive damages claims should initially focus on whether the Rule 23(a) general class action prerequisites are satisfied and, if they are, whether a mandatory class action is superior to individual adjudication under the circumstances. Because

220. These circumstances provided the basis for plaintiffs' argument that Robins had "forum shopped" for an anti-punitive damages court in which to dispose of all the punitive damages claims. *Id.* at 8.

221. Another approach that might achieve the same result was recommended in Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F.L. Rev. 1 (1981). The authors suggest that when a common question class action includes claims for punitive damages, those who opt out of the class should be precluded from recovering punitive damages. *Id.* at 27. Although the authors do not specifically address the problem of mass tort personal injury litigation, this approach could be used in those mass torts which are certifiable under Rule 23(b)(3). One problem, however, is that relatively few mass injury cases have been held to qualify for certification under the common question subsection. See *supra* note 173. Other problems are the statutory notice and opt out provisions of subsection (c)(2) which are specifically applicable to all Rule 23(b)(3) class actions. Punitive damages class actions pursuant to Rule 23(b)(1)(B), however, do not depend on the maintenance of a class action on the liability issues in the underlying personal injury cases. Therefore, the issue of punitive damages liability could be adjudicated in a single proceeding even if the other issues in the litigation are not appropriate for class action treatment. Moreover, the provisions prohibiting opting out of a Rule 23(b)(1)(B) class action are already in place. There is no need to revise statutory requirements in order to adjudicate all the claims in a single proceeding.

the Rule 23(a) prerequisites will be met in most mass tort situations,²²² the primary focus usually will be on the question of superiority.²²³

Courts should then focus on qualitative criteria in connection with the certification of punitive damages class actions under Rule 23(b)(1)(B), including (1) the pendency of punitive damages claims in other jurisdictions, (2) the foreseeable effect of a class action on the settlement process, and (3) the degree to which the prospective class members support or oppose the class action. These factors differ somewhat from the factors enumerated in Rule 23(b)(3) for common question class actions.²²⁴

1. Pendency of Punitive Damages Claims in Other Jurisdictions

Mass tort litigation often takes place in more than one jurisdiction. Lawsuits based upon a defect in a mass-produced product, for example, are likely to be filed in each state where the injuries occur. A single disaster, such as the crash of a commercial airliner, will often spawn multistate and multidistrict litigation.²²⁵ Certification by one court of a mandatory punitive damages class action will necessarily affect cases in other jurisdictions. While some intrusion upon the authority of other states and courts²²⁶ is tolerable in the interests of justice and economy, there are limits that a court should not unilaterally exceed.

222. Probably the most troublesome of the Rule 23(a) prerequisites in mass tort cases is "typicality." Plaintiffs will sometimes have claims against defendants not named by other plaintiffs. In the analogous case of *LaMar v. H & B Novelty & Loan Co.*, 489 F.2d 461 (9th Cir. 1973), involving actions based on violations of the Truth in Lending Act, 15 U.S.C. §§ 1601-1677 (1976), the Ninth Circuit held that a class representative who was not injured by some of the defendants could not sue on behalf of persons with claims against those defendants, even though the representative had suffered identical injuries at the hands of other parties. *Id.* at 466.

223. See *supra* note 215.

224. See *supra* note 149.

225. See S. Speiser, *Lawsuit 450-51* (1980); Speiser, *Resolving Foreign Air Crashes in the American Court System*, Nat'l L.J., Oct 11, 1982, at 24, col. 1.

226. Choice of law problems should not generally prevent certification if sensible procedures are utilized. A federal court in a diversity case must apply the choice of law rule of the forum. *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941); *Strussberg v. New England Mut. Life Ins. Co.*, 575 F.2d 1262 (9th Cir. 1978). There are several different approaches to tort choice of law, and few judicial opinions that provide clear guidelines. Some states still follow the traditional rule, which applies the law of the place of injury. E. Scoles & P. Hay, *Conflict of Laws* § 17.7, at 560-61 (1982). Many jurisdictions, however, prefer more analytical choice of law methods, such as "interest analysis," see *id.* §§ 17.11 to .17, the "better law" approach, see *id.* §§ 17.18 to .20, or the "most-significant-relationship test," see *id.* §§ 17.21 to .25; Restatement (Second) of Conflict of Laws § 145 (1971). These approaches require

A court considering certification in these circumstances should first investigate the factual and evidentiary bases for the punitive damages claims to determine whether they would likely be submitted to a jury. If it appears probable that the court would eventually dismiss the punitive damages claims upon a motion for summary judgment or a directed verdict, the court should deny class certification without further inquiry. The decision on the merits of the claims would thus remain with the other courts in which the claims are pending. Otherwise, a mandatory certification order might effectively wrest jurisdiction of the punitive claims from other courts only to result eventually in their dismissal on the merits. This was a legitimate concern in the *Dalkon Shield* litigation because of the district court's dismissal of the punitive damage claims in an earlier trial.²²⁷

When a federal district court, however, concludes that the multi-state punitive damages claims would probably reach the jury and that a class action is the best way to adjudicate them,²²⁸ it should refer the

essentially that the forum court determine initially whether there is a true conflict between the substantive rules of two or more of the interested states, and, if there is such a conflict, to apply the rule of the state whose policy would be more adversely affected by the application of the other state's rule. See Bradley, *After Hurtado and Bernhard: Interest Analysis and the Search for a Consistent Theory for Choice of Law Cases*, 29 Stan. L. Rev. 127, 150 (1976).

When the conflict questions are merely procedural or involve only the standard of culpability for punitive damages liability, there either is no true conflict or the forum state has as much governmental interest in the application of its standard as does any other state. See *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 916-17 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). In the *Dalkon Shield* case, defendant A.H. Robins went out of its way to avoid a true conflict situation by indicating that it might stipulate to the most "liberal" standard of punitive damages." *Id.* at 917. The situation is different if the law of another state with a significant interest does not permit punitive damages. See *In re Air Crash Disaster Near Chicago, Ill.*, 644 F.2d 594, 605 (7th Cir.), *cert. denied*, 454 U.S. 878 (1981) (state in which disaster occurred had the most "legitimate interest" in litigation; law barring punitive damages in wrongful death actions prevailed); *Sibley v. KLM-Royal Dutch Airlines*, 454 F. Supp. 425, 427 (S.D.N.Y. 1978) (applying Dutch law barring punitive damages to claims of Massachusetts residents killed in air crash in Canary Islands).

227. See *supra* note 219. The Supreme Court has precluded inquiry into the merits of a class action by a district court seeking to shift the cost of notice to the defendant. *Eisen v. Carlisle & Jaquelin*, 417 U.S. 156, 177-79 (1974). "[T]he plaintiff must pay for the cost of notice as part of the ordinary burden of financing his own suit." *Id.* at 179. This should not bar a preliminary assessment of the potential success of a class action by a district court seeking to avoid unnecessary intrusions on the jurisdiction of state courts. Cf. *Toucey v. New York Life Ins. Co.*, 314 U.S. 118, 135 (1941) (The anti-injunction statute "expresses the desire of Congress to avoid friction between the federal government and the states resulting from the intrusion of federal authority into the orderly functioning of a state's judicial process.").

228. Punitive damages claims arising out of product-related injuries will sometimes involve such divergent factual issues that trying them all in one proceeding

case to the Judicial Panel for Multidistrict Litigation. The Judicial Panel is not empowered to decide the issue of class certification, but it can select an appropriate forum in which to consolidate all related actions pending in federal district courts.²²⁹ This would provide an opportunity for all parties in those actions to support or oppose certification in a single proceeding. Ultimately, the court selected by the Judicial Panel would decide whether to certify the class.²³⁰ This procedure would avoid the kind of forum-shopping, or at least the appearance of it, which became an issue in the *Dalkon Shield* case.²³¹ Even more important, reference to the Judicial Panel would prevent unwarranted unilateral intrusions by one court on other courts that are actively conducting the litigation.²³²

2. Effect on the Settlement Process

The primary goal in adjudicating mass tort cases should be to compensate deserving plaintiffs for their injuries as fairly and efficiently as possible. This is often achieved by settlements before trial.

would be unduly chaotic, even with the utilization of subclasses permitted by Rule 23(c)(4).

229. 28 U.S.C. § 1407(a) (1976) ("Such transfers shall be made by the judicial panel . . . upon its determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." (emphasis added)).

230. See *In re Bristol Bay, Alaska, Salmon Fishery Antitrust Litig.*, 424 F. Supp. 504, 507 (J.P.M.D.L. 1976); *In re Plumbing Fixture Cases*, 298 F. Supp. 484, 494-95 (J.P.M.D.L. 1968). The transferee court would have the power to vacate or modify a class action determination made previously by any of the transferor courts. Cf. *In re Plumbing Fixture Cases*, 298 F. Supp. at 489 ("The pretrial powers of the transferee court include the powers to modify, expand, or vacate earlier discovery orders.").

231. See *supra* note 220. All parties must be notified of hearings on the issue of transfer and allowed to offer evidence on that issue. 28 U.S.C. § 1407(c) (1976). Furthermore, the Judicial Panel, not the parties, decides which court controls the class action proceedings. *Id.* § 1407(a). Therefore, no party will be able to choose a forum court because they believe the court may be predisposed to decide in their favor. The Judicial Panel, however, has authority to consolidate only cases pending in federal district courts. See 28 U.S.C. § 1407 (1976). The problem of forum-shopping may still exist when a class is certified by a state court.

232. Certification by a federal district court, if viewed as enjoining actions initiated by class members in other courts, may present difficulties under the federal anti-injunction statute, 28 U.S.C. § 2283 (1976). See *supra* pt. III(B)(2)(a). The use of the recommended three-step procedure (transferor court—Judicial Panel—transferee court) should minimize the potential for unwarranted intrusions and help to ensure that certification will only be granted when it is "necessary in aid of [the district court's] jurisdiction." 28 U.S.C. § 2283 (1976). By contrast, certification by a state court would not be considered an intrusion on the jurisdiction of other courts. See *Cole v. Cunningham*, 133 U.S. 107, 121 (1890).

Even when all other factors point toward a class action, certification should be denied when the court finds after a hearing that it would significantly impede or delay the resolution of the underlying disputes.²³³ In those circumstances the benefits of resolving the punitive damages claims in one proceeding are outweighed by the adverse effect on the timely resolution of other proceedings concerned with compensatory claims for injuries or deaths.²³⁴

In any event, the impact of a mandatory class certification order on the settlement process and on punitive damages claims pending in other jurisdictions warrants adoption of a speedy interlocutory appellate procedure. Under current practice, such an order is reviewable on an interlocutory basis only when the district court specifically designates it for immediate appeal,²³⁵ when the order is construed as an injunction of pending cases,²³⁶ or upon a petition for a writ of mandamus alleging an abuse of judicial discretion.²³⁷ The certification order should always be construed as an injunction of pending cases, ensuring the availability of interlocutory review.²³⁸

233. To some extent, a temporary delay in settlements will be a natural byproduct of any certification of a mandatory class action for punitive damages arising out of a mass tort, particularly during the uncertain period while the order is appealed. Once the class action is approved on appeal, however, it should be settled or tried quickly. Settlements of compensatory damages claims should continue because the defendants will not have to fear the return of individual claimants for recovery of punitive damages.

234. A Rule 23(b)(3) class action may actually encourage settlements. Following the reversal of the original class certification in the Skywalk cases, class actions were certified by both the federal district and state courts. Lauter, *Hyatt Litigation Could Set Pattern for Disaster Cases*, Nat'l L.J., Jan 24, 1983, at 3, col. 2, 26, col. 2. Settlement negotiations then resumed in full force and left only a few cases to be resolved by trial. *Id.* at 26, col. 3. The state court settlement package included a \$20 million fund for "supplementary" payments, which have been viewed as "a form of a sub rosa punitive damages payment." *Id.* The federal court settlement package included a \$3.5 million fund for attorneys' fees and similar "supplementary" payments, as well as a \$6.5 million payment to a group of charities as a "healing gesture." *Id.*

235. 28 U.S.C. § 1292(b) (1976). The court of appeals may, in its discretion, entertain an interlocutory appeal "[w]hen a district judge . . . shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." *Id.* This was the procedure employed in the *Dalkon Shield* class certification appeal. *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 919 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

236. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *see* 28 U.S.C. § 1292(a)(1) (1976).

237. *See In re Federal Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

238. *See* 28 U.S.C. § 1292(a)(1) (1976). In the *Skywalk* appeal, the Eighth Circuit assumed jurisdiction on the basis that the certification order effectively enjoined

3. Degree of Support for or Opposition to the Class

While not controlling, the degree to which members of the class support or oppose class certification is a relevant consideration in the certification decision. Overwhelming opposition by the potential class, such as in the *Dalkon Shield* and *Skywalk* cases,²³⁹ can result in a series of disputes as well as an appearance of unfairness or bias.²⁴⁰ A procedural device aimed at streamlining litigation should not be used if it causes even more chaos. If all other factors, however, indicate that a class action is the best way to adjudicate the punitive damages claims, the opposition of the litigants should not be dispositive. This is particularly true when the opposition is based on the loss of fees that plaintiffs' attorneys hoped to recover by individual pursuit of the punitive damages claims. Courts considering certification should analyze the nature of the opposition after a full hearing. If the class action is well-founded and opponents understand the court's reasons for certification, continuing opposition can be reduced, especially when an immediate appeal is permitted and the class certification is upheld.

B. *Bifurcated Trials and Increased Judicial Control*

Although class actions provide the best way to adjudicate mass tort punitive damages claims in some circumstances, there are many in-

claims for punitive damages which were already pending in state court. *In re Federal Skywalk Cases*, 680 F.2d 1175, 1180 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982). See *supra* note 191. These grounds for interlocutory appeal should be expanded in mandatory mass tort class actions so that certification orders can be reviewed on an interlocutory basis even if there are no pending claims in state courts. The fact that the claims could be made in state court or other federal district courts should be enough because the mandatory certification would preclude the litigation of these claims in all courts except the one which certified the class.

239. See *supra* note 204.

240. *Id.* In the *Skywalk* case, the appointment of Irving Younger as one of the lead counsel was particularly grating to other plaintiffs' attorneys because the client he represented, unlike other plaintiffs, did not have significant injuries. Brief of Appellant Jacqueline N. Rau at 37, *In re Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982). The resentment of plaintiffs' attorneys was compounded when the court permitted Younger to remain as lead counsel, see *id.* at 22-25, even when it became apparent that Younger's client could not qualify as class representative because she lacked diversity from all defendants. 680 F.2d at 1178-79. The district court's conduct resulted in a motion for disqualification based on demonstrated partiality and bias. Although the court's denial of the motion for disqualification was upheld on appeal, the court of appeals indicated that it did not condone the lower court's ex parte communications in search of a class representative. *Id.* at 1184. Attorneys representing clients with substantial compensatory damages claims may have had reason to doubt the adequacy of representation, given lead counsel's predominant concern with the punitive damages issue. See *supra* note 187. Lead counsel should scrupulously avoid giving even the appearance of placing the interest of his own client or his fees above the best interests of the class members.

stances in which the device is not superior to individual adjudication. Furthermore, consideration of the factors discussed earlier may reveal that one or more of the Rule 23(a) prerequisites are not met. In these circumstances, courts must be able to administer the individual claims so that appropriate punitive damages are assessed but overkill is avoided.

The proposals for accomplishing this that have received the most support include fixing limits on awards for a single wrong and removing the assessment function from the jury.²⁴¹ Despite support for these measures, arbitrary limits on aggregate awards based on dollar amounts and percentages of net worth should be rejected as needlessly inflexible and potentially overprotective of large corporations.²⁴² Moreover, removal of the jury's assessment function to prevent punitive damages overkill unnecessarily eliminates the jury's important role as the conscience of the community.²⁴³

The problems presented by multiple punitive damages claims in mass tort actions can be resolved by applying procedures already available without changing the jury's functions. Through early dismissal of unsupported claims, bifurcation of trials and close scrutiny of amounts awarded, courts can ensure the fair and effective punishment of outrageous conduct which results in mass injuries.

1. Dismissal of Unsupported Claims

As soon as possible after discovery has been completed, courts should rule on whether there is sufficient evidence to establish a prima facie case for punitive damages.²⁴⁴ If the claim survives a motion for summary judgment, the court should carefully assess the evidence presented at trial. If the evidence is insufficient to justify a punitive award, the court should direct a verdict on the issue.²⁴⁵ This will ensure that only serious punitive damages claims will be considered by juries.

2. Bifurcation of Trials

Under procedures already available in federal courts²⁴⁶ and in most states,²⁴⁷ the trial judge may order separate trials of claims or issues

241. See *supra* pt. II.

242. See *supra* note 106 and accompanying text.

243. See *supra* note 132 and accompanying text.

244. See Owen I, *supra* note 21, at 57.

245. See *Knippen v. Ford Motor Co.*, 546 F.2d 993, 1003 (D.C. Cir. 1976) (affirming directed verdict on issue of punitive damages); *Turney v. Ford Motor Co.*, 94 Ill. App. 3d 678, 686, 418 N.E.2d 1079, 1085 (1981) (affirming trial court's decision to strike punitive damages claim at conclusion of plaintiff's case).

246. Fed. R. Civ. P. 42(b) provides, in relevant part: "The court, in furtherance of convenience or to avoid prejudice, or when separate trials will be conducive to

when necessary to avoid confusion, prejudice or delay. A bifurcated trial procedure in cases involving punitive damages claims would permit a jury to receive all relevant evidence bearing on the amount of punishment without prejudicing the defendant on other issues in dispute.²⁴⁸ In the first trial, the parties would present evidence relating to liability for compensatory and punitive damages, and the amount of compensatory damages.²⁴⁹ The jury would be reconvened for a second trial only if it found the defendant liable for both compensatory and punitive damages. The second proceeding would be limited to evidence bearing on the proper amount of punitive damages, including other claims and awards arising out of the same mass tort and the financial condition of the defendant. The trial judge and appellate courts would continue to review these awards.

Although in certain situations this procedure would be more time consuming than a single trial, in other circumstances it would actually save time. For example, a second trial would be necessary only if (1)

expedition and economy, may order a separate trial of any claim . . . or of any separate issue or of any number of claims . . . always preserving inviolate the right of trial by jury . . .” Although no court has considered the type of bifurcation recommended in this Article, a more disruptive and time-consuming type of bifurcation has been employed. See *Holben v. Midwest Emery Freight Sys.*, 525 F. Supp. 1224 (W.D. Pa. 1981) (separate trials ordered for underlying personal injury claims and punitive damages claims for negligent entrustment of truck to employee). But see *United Air Lines, Inc. v. Weiner*, 286 F.2d 302 (9th Cir.), cert. denied, 366 U.S. 924 (1961) (reversal of trial court's decision to bifurcate issue of punitive damages in personal injury suit arising out of plane crash because of overlapping proof of underlying liability and punitive damages claims). Bifurcation of the punitive damages issue in mass tort litigation, however, is well within the discretion of trial courts pursuant to Rule 42(b) because it involves no duplication of evidence and no time-consuming impanelling of a second jury. See *infra* text accompanying note 249.

247. J. Ghiardi & J. Kircher, *supra* note 38, § 12.05, at 15 & n.1 (listing state statutes “identical or substantially similar to Federal Rule 42(b)”). Some states only allow bifurcation of separate claims, not separate issues. *Id.* at 15 & n.2. Punitive damages in these jurisdictions, however, may be considered “separate but dependent” claims and, therefore, subject to bifurcation. *Id.* § 12.07, at 20. Only four states have no statutes dealing with bifurcation. *Id.* § 12.05, at 15, 16 n.3 (Mississippi, Nebraska, New Hampshire, South Carolina). Bifurcation in these jurisdictions depends on a trial judge's inherent power, a question on which the authorities are split. *Id.* § 12.08.

248. Cf. *Rupert v. Sellers*, 48 A.D.2d 265, 272, 368 N.Y.S.2d 904, 912 (1975) (a defendant's wealth should not be discoverable until after a jury has found the defendant liable for compensatory and punitive damages in the first proceeding). The *Rupert* approach seems overly protective of a defendant's right to privacy. A better view would permit such discovery before trial upon some showing of support for the claim. See Cal. Civ. Code § 3295 (West Supp. 1983); J. Ghiardi & J. Kircher, *supra* note 38, § 12.10, at 26-31.

249. This is a simpler and more time-saving procedure than that suggested by one commentator, who would require a separate trial on all punitive damages issues. See *Fulton, Punitive Damages in Products Liability Cases*, 15 Forum 117, 129-30 (1979).

the trial judge found that sufficient evidence had been presented to submit the punitive damages issue to the jury, (2) the jury found the defendant liable for compensatory damages and (3) the jury determined that punitive damages should be awarded. Moreover, in view of the historically large number of mass tort cases settled before trial,²⁵⁰ the additional burden imposed by the bifurcation procedure on the judicial system would actually be quite small.

3. Close Scrutiny of Punitive Awards

Despite the existing procedural safeguards, a jury might occasionally return an exorbitant or vindictive punitive damages verdict in a mass tort case. Continuing the trend of active review of punitive awards,²⁵¹ trial and appellate courts can and should reduce or vacate such excessive penalties. Trial courts should be granted discretion to determine whether previous awards based on the same tortious conduct have reached a level at which any additional punishment is excessive.

CONCLUSION

The wave of mass tort litigation in the 1980's has again raised the spectre of repeated and excessive punitive damages awards for a single course of tortious conduct. Unless methods are found to adjudicate these claims fairly, efficiently and with proper controls, the doctrine of punitive damages stands to be weakened considerably by "reform" legislation. Proposals currently being considered would establish arbitrary limits on total awards and remove from the jury its traditional function of assessing the amount of punishment. These changes, however, would decrease the deterrent effect of punitive damages and might render civil punishment ineffectual.

The procedures recommended in this Article offer practical alternatives to current proposals for reform and are available under existing procedural rules. One procedure, attempted unsuccessfully in the *Skywalk* and *Dalkon Shield* cases, combines all punitive damages awards arising out of the same tortious conduct into a single class action. Unlike other procedural devices, a mandatory class action can both control the amount of punishment and provide for distribution of

250. See *supra* notes 7, 89 and accompanying text.

251. *E.g.*, *Johnson v. Husky Indus.*, 536 F.2d 645, 651 (6th Cir. 1976) (reversing punitive damages award); *Sturm, Ruger & Co. v. Day*, 594 P.2d 38, 48-49 (Alaska 1979) (reducing amount of punitive damages award), *modified on other grounds*, 615 P.2d 621 (1980), *cert. denied*, 454 U.S. 894 (1981); *Ellis v. Golconda Corp.*, 352 So. 2d 1221, 1225, 1228 (Fla. Dist. Ct. App. 1977) (reversing punitive damages award); *Moore v. Remington Arms Co.*, 100 Ill. App. 3d 1102, 1113-17, 427 N.E.2d 608, 616-19 (1981) (same); see *Owen II*, *supra* note 32, at 1321.

the amount awarded among the insured plaintiffs on an equitable basis. While the limited fund provisions of Rule 23 provide a vehicle for such class actions, certification should not be granted automatically. The benefits of classwide adjudication of punitive damages claims may be outweighed, as they were in the *Skywalk* and *Dalkon Shield* cases, by the detrimental impact that certification would have on the overall management of the litigation, including settlements of the underlying personal injury claims.

When class actions are inappropriate, the problem of punitive damages overkill can still be avoided through other procedural devices available in the federal and most state courts. Early dismissal of unsupported claims will save time and ensure that a jury considers punitive damages only when there is sufficient evidence of blatant misconduct. Bifurcation of trials will permit a jury to hear evidence bearing solely on the amount of punishment only after it first finds against a defendant on liability for compensatory and punitive damages. This procedure will eliminate the danger that such evidence might prejudice the jury with respect to other issues in the trial. Finally, close scrutiny by trial judges and appellate courts of punitive damages awards can prevent excessive punishment by a single jury or, in the aggregate, by several juries.

Existing rules of civil procedure are flexible enough to accommodate punitive damages claims in mass tort cases. Under these rules, juries can still express society's outrage at egregious conduct without being permitted to destroy an otherwise worthy business entity for a single disastrous mistake.