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Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control

Richard A. Seltzer
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, formaldehyde, diethylstilbestrol (DES), Agent Orange, automo-

* Acting Professor of Law, University of California at Davis. 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 proofreading; and my colleagues, Alan Brownstein and Robert W. Hillman, for their helpful comments on an earlier draft.

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


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.” Branan, 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.


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. 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, and thousands of additional claims are still pending in lawsuits throughout the country. One asbestos manufacturer has been held liable for punitive damages to at least fifteen different plaintiffs.

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.

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.
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.
other lawsuits arising out of the same defects. 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, and the fire at the MGM Grand Hotel in Las Vegas, Nevada.

Punitive damages claims on this scale are a recent phenomenon. 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.

Predictably, proposals have been made to abolish punitive damages in mass tort litigation. Having withstood years of criticism aimed at the essence of the doctrine, 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.
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.").
20. See infra note 36.
conduct\textsuperscript{21} and eliminating the jury's role in determining the amount of punitive damages.\textsuperscript{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.\textsuperscript{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 City\textsuperscript{24} and the Dalkon Shield design defect.\textsuperscript{25} These courts determined

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\item \textsuperscript{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).
\item \textsuperscript{23} See infra pt. IV(B).
\item \textsuperscript{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. \textit{Id.}
\item \textsuperscript{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. \textit{Id.} The court certified the issues of liability for and amount of punitive damages pursuant to Rule 23(b)(1)(B). \textit{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. Any other approach might result in the recovery of punitive damages by only a few of many plaintiffs.

In the face of overwhelming opposition to the class actions by the plaintiffs, however, both class actions were decertified on appeal. 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.

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 damages 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

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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 Freifeld, The Rationale of Punitive Damages, 1 Ohio St. L.J. 5, 5 (1935); Mallor & Roberts, supra note 22, at 639 n.1.
particularly outrageous. 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. Unlike criminal fines and penalties, however, punitive damages are awarded directly to a successful plaintiff in a civil lawsuit and are assessed without the procedural safeguards granted to criminal defendants. These features, together with the unpredictability of punitive damages awards, 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.


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. The survival of the doctrine in modern tort litigation despite these recurring attacks is testimony to its four thousand years of historical precedent.

Inherited by American courts from the English common law, the doctrine of punitive damages is generally accepted in all but four states and is specifically provided for in many state and federal codes.

In 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 Chiardi, 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. Chiardi & 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. Chiardi & 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. Chiardi 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. Chiardi & J. Kircher, supra note 38, § 409; (2) Massachusetts, Caperci v. Huntoon, 397 F.2d 799, 801 (1st Cir.) (dictum), cert. denied, 393 U.S. 940 (1968); J. Chiardi & 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. They are generally unavailable in breach of contract actions, wrongful death actions and actions against governmental entities.

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).


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.

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


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. Then the jury has discretion to make an award and to determine an amount. In assessing the amount, the jury is usually instructed by the trial judge to consider the purpose of punitive damages, the culpability of the defendant's conduct, the nature and extent of the plaintiff's injuries and the wealth of the defendant. Several states also require that the punitive damages award bear a reasonable relationship to the compensatory damages award. Although the jury may choose not to award punitive damages, 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.
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 disclosing 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(e) (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(e), 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. 884 (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. Excessive verdicts may be reduced or may provide grounds for reversal, a new trial or the exercise of remittitur.

B. Application in Products Liability Litigation

Punitive damages have been awarded in products liability actions for over one hundred years. A recent dramatic increase in both the number of cases and the propensity of plaintiffs' lawyers to seek punitive awards, 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). Many courts have held, however, that the evidence necessary to justify a punitive damages award need not parallel that required to establish liability for

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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. Chiardi & 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.


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).

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

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. The complexity of product design cases, the difficulty of discerning the “wrongfulness” of a corporate decision-making process and the problem of ascertaining the real wealth of a corporation make it difficult for juries to be effective in punishing defendants.


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.D.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.


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 corporation are all factors that distinguish products liability cases from single-incident torts cases. A growing number of commentators and members of Congress and at least one state legislature 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. 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.

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.


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.


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 730, 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. Individual awards that appear reasonable can aggregate to threaten the very survival of a business entity.

The first mass tort litigation that presented this problem involved an anti-cholesterol drug sold under the trade name MER/29. Promoted as a safe way to prevent heart attacks, 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. Between 1961 and 1967, more than 1500 personal injury lawsuits were filed against the manufacturer in state and federal courts. 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.

In Roginsky v. Richardson-Merrell, Inc., the plaintiff was awarded $17,500 in compensatory damages and $100,000 in punitive damages after a lengthy jury trial. 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. Although the court recognized that

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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,\textsuperscript{5} it held that the evidence of high-level complicity in the fraudulent conduct was insufficient to justify such an award.\textsuperscript{6} The appellate opinion has been cited frequently\textsuperscript{7} 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."\textsuperscript{85}

85. \textit{Id.} at 840-41.

86. \textit{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," \textit{id.} at 842 (quoting \textit{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, \textit{id.} at 850. In \textit{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." \textit{Id.} at 714, 60 Cal. Rptr. at 416. The careful scrutiny which was given to the evidence in \textit{Roginsky} is closer than \textit{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, \textit{supra} note 32, at 1388; see Owen I, \textit{supra} note 21, at 59.


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." \textit{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. \textit{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. \textit{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. \textit{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. \textit{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. 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. Of the three punitive damage awards, the award in Roginsky was reversed and the other two were significantly reduced. 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.”

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. 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. 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 l26. 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 l26.

89. Rheingold, supra note 77, at l37. All settlements were designated as payments for compensatory damages only, id. at l38-39, although some undoubtedly included payments beyond what would have been included in the absence of punitive damages claims.

90. Id. at l33, l36.


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 2l, col. 3.

93. Owen II, supra note 32, at l324-25. 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 l979 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, 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. 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. 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, an add-on system for distributing awards, a limitation of punishment in each case to the wrong inflicted upon each plaintiff, admission into evidence of other awards, removal of the assessment function from the jury, and litigation of all punitive damages claims in a single proceeding.

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...
net worth, after which punitive awards would be limited to an amount equal to attorney fees and other litigation costs. While this approach is more flexible than a strict dollar limit, it has disadvantages. First, five million dollars may not be enough to deter large corporations from profitable misconduct. 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. 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.

Finally, there is the problem of implementing the aggregate cap system. Federal legislation is one possibility, 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 I, 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.\textsuperscript{110} Legislative or judicial action on a state-by-state basis would solve the problem only if all states adopted a uniform cap system.

\textbf{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{114}

\textbf{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 \textit{Hoffman v. Sterling Drug, Inc.},\textsuperscript{115} for example, the court issued pretrial rulings which excluded evidence of other persons similarly injured by the drug "Aralen," and also excluded evidence of the defend-

\begin{itemize}
\item \textsuperscript{110} H.R. 5214, 97th Cong., 1st Sess. (1981) was substantially identical to Professor Owen's aggregate cap proposal. \textit{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) \textit{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.
\item \textsuperscript{111} \textit{Punitive Damages Overkill, supra} note 21, at 1801.
\item \textsuperscript{112} \textit{Id.}
\item \textsuperscript{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.
\item \textsuperscript{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. \textit{See Punitive Damages Overkill, supra} note 21, at 1801.
\item \textsuperscript{115} 374 F. Supp. 850 (M.D. Pa. 1974).
\end{itemize}
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. 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.

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. 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, several courts, 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.
state legislatures\textsuperscript{122} and several commentators.\textsuperscript{123} By considering other punishment for the same conduct,\textsuperscript{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.\textsuperscript{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 it\textsuperscript{126} and may even rely on

\textit{Contra} Lemer v. Boise Cascade, Inc., 107 Cal. App. 3d 1, 9-ll, 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." \textit{Id.} The court noted that the trial judge in Ostopowitz v. Wm. S. Merrell Co., No. 5879-1963 (N.Y. Sup. Ct.), \textit{reported in} N.Y.L.J., Jan. II, 1967, at 21, col. 3, refused to admit the same evidence. \textit{Id.}


\textsuperscript{123} See Morris, supra note 53, at lll95; Owen II, supra note 32, at 1319; Riley, supra note 21, at 213.

\textsuperscript{124} There is a split of authority regarding the admissibility of criminal sanctions arising out of the same conduct. \textit{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) \textit{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) \textit{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) \textit{and} C. McCormick, supra note 42, at § 82 (generally not proper to introduce evidence of criminal punishment in mitigation of punitive damages). \textit{See generally} Annot., 98 A.L.R.3d 870 (1980) (criminal liability barring or mitigating recovery of punitive damages).

\textsuperscript{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. \textit{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?"); \textit{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).

\textsuperscript{126} See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967); \textit{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.


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 lawsuits generally do not provide for a single trial on the punitive damages issue because they cannot affect actions

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.
pending in other jurisdictions. 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.

The Judicial Panel on Multidistrict Litigation 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. When discovery and other pre-trial proceedings have been completed, the actions are generally remanded to the transferor courts for trial.

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. 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).
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.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{145}

A. Federal Class Action Procedures

Tracing its origins to English equity practice,\textsuperscript{146} federal class action procedure was codified in 1938 in Rule 23 of the Federal Rules of Civil Procedure.\textsuperscript{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.\textsuperscript{148} The 1966

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{143} See 7 C. Wright, A. Miller & M. Kane, Federal Practice and Procedure § 1751 (1972 & Supp. 1980).
\item \textsuperscript{144} See infra notes 216-20 and accompanying text.
\item \textsuperscript{145} See infra pt. IV(A).
\item \textsuperscript{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).
\item \textsuperscript{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
\begin{itemize}
\item (1) joint, or common . . .
\item (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
\end{itemize}
amendments changed the structure of the rule and provided clearer
guidelines for the certification and administration of class actions.\footnote{149}

(3) several, and there is a common question of law or fact affecting the
several rights and a common relief is sought.\footnote{3B J. Moore & J. Kennedy, \textit{supra} note 147, at \textsection 23.01 [1.-1], at 23-14. Criticism focused on the inability to comprehend the criteria. \textit{See} Note, \textit{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 ques-
tions 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 mem-
bers 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 injunc-
tive 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 mem-
ers, 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; No-
tice; 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. 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." 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.


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

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.


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.


MASS TORT PUNITIVE DAMAGES

comprise "all those who will share in or be directly affected by the grant or denial of relief." The nexus between the class members may be simply that they claim to have been injured by the defendant in similar ways. 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, and that a class action be the "superior" method of handling the litigation.

Rule 23(b)(3) not only involves the most substantive change from the old rule, 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 litigation and resulted in many ethical abuses by attorneys.

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 repre-
sentative 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 sat-
sify 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 oppo-
sing 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-

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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.
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

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:

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.\textsuperscript{174}

A minority of courts has certified mass tort personal injury cases\textsuperscript{175} as class actions based on issues concerning liability for compensatory

\begin{itemize}
\end{itemize}


\textsuperscript{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.
Federal class actions in which Rule 23(b)(3) certification has been granted have largely consisted of cases in which the classes were limited to carefully defined liability issues.\(^\text{178}\)

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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, 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 action 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, and concluded that this constituted a limited

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). 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; 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. In either situation, full punitive damages recov-

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.

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.\footnote{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.}

In each case, certification was opposed by an overwhelming majority of plaintiffs.\footnote{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 defendants.} 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.\footnote{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 defendants.} Plaintiffs in the Dalkon Shield class action cited several
reasons for opposing the action, including the impropriety of certification on the court's own initiative, the lack of personal jurisdiction...
over non-California plaintiffs, superscript 189 and the diversity of legal and factual questions presented by the multistate claims. superscript 189

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).


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.

2. Reversals by the Courts of Appeals

Both certification orders were reviewed in interlocutory appeals. 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. A unanimous panel of the Ninth Circuit held that the Dalkon Shield class action failed to satisfy the general prerequisites of Rule 23(a) and, in any event, did not involve circumstances which would permit certification pursuant to Rule 23(b)(1)(B). 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 compensatory and punitive damages in Skywalk was improper because it failed to meet the typicality requirement of Rule 23(a) as well as the superiority requirement of subsection (b)(3). 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).


197. Id.


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.\textsuperscript{201}

\textbf{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,\textsuperscript{202} typicality\textsuperscript{203} and adequacy of representation,\textsuperscript{204} the basis of this holding appeared to be the court's

\begin{itemize}
\item \textsuperscript{201} In re Federal Skywalk Cases, 680 F.2d 1175, 1193 (8th Cir.) (Heaney, J., dissenting), \textit{cert. denied}, 103 S. Ct. 342 (1982).
\item \textsuperscript{202} In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850, \textit{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. \textit{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. \textit{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." \textit{In re Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.,} 693 F.2d 847, 850 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 817 (1983).
\item \textsuperscript{203} In re Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982), \textit{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." \textit{Id.}
\item \textsuperscript{204} \textit{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 \textit{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 \textit{In re Northern Dist. of Cal., Dalkon Shield Prods. Liab. Litig.,} 693 F.2d 847, 851 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 817 (1983).
\end{itemize}
concern with the problem of managing a class action involving multi-
state claims of persons vehemently opposed to their forced member-
ship 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
collection 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 sepa-
rate punitive damages awards would "inescapably" or "necessarily"
affect later claims.208 According to the court, the theoretical possibil-
ity 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 ef-
fact 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 ele-
ments of Rule 23(a) preclude certification in this case." Id. at 851.


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
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{213} The district courts in the Skywalk and Dalkon Shield cases correctly held that some class members would be prejudiced,\textsuperscript{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.\textsuperscript{215} Beyond

\textsuperscript{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).
\textsuperscript{212} See supra note 149.
\textsuperscript{213} Id.
\textsuperscript{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. 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. 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. 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 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.
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. 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. 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.


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.\textsuperscript{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,\textsuperscript{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).

\textsuperscript{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.”).

\textsuperscript{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. 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. 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. 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.

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(e) (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.\footnote{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.\footnote{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,\footnote{235} when the order is construed as an injunction of pending cases,\footnote{236} or upon a petition for a writ of mandamus alleging an abuse of judicial discretion.\footnote{237} The certification order should always be construed as an injunction of pending cases, ensuring the availability of interlocutory review.\footnote{238}

\footnote{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.}

\footnote{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, \textit{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. \textit{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.” \textit{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.” \textit{Id.}}

\footnote{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.” \textit{Id.} This was the procedure employed in the \textit{Dalkon Shield} class certification appeal. \textit{In re Northern Dist. of Cal. “Dalkon Shield” IUD Prods. Liab. Litig.}, 526 F. Supp. 887, 919 (N.D. Cal. 1981), \textit{vacated}, 693 F.2d 847 (9th Cir. 1982), \textit{cert. denied}, 103 S. Ct. 817 (1983).}


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

\footnote{238}{\textit{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,\(^2\)\(^3\)\(^9\) can result in a series of disputes as well as an appearance of unfairness or bias.\(^2\)\(^4\)\(^0\) 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-
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. 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. 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.

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. 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. This will ensure that only serious punitive damages claims will be considered by juries.

2. Bifurcation of Trials

Under procedures already available in federal courts and in most states, 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.
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. In the first trial, the parties would present evidence relating to liability for compensatory and punitive damages, and the amount of compensatory damages. 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)
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, 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, 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...
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.