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# Managing Punitive Damages: A Role For Mandatory "Limited Generosity" Classes And Anti- Suit Injunctions?

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# MANAGING PUNITIVE DAMAGES: A ROLE FOR MANDATORY "LIMITED GENEROSITY" CLASSES AND ANTI-SUIT INJUNCTIONS?

Joan Steinman\*

*In this Article, I consider whether "limited generosity" classes may be used to determine a defendant's entire liability for punitive damages arising from a defined course of conduct. The goals of such a class action would include adequately punishing and deterring the defendant, keeping the defendant's liability within state-mandated and constitutional limits, and facilitating equitable distribution of the damages among injured plaintiffs. The Article describes the legal limits on punitive damages liability that states have established and that the Supreme Court has held substantive due process to impose, and then carefully examines whether such limits constitute a predicate for mandatory class certification under Rule 23(b)(1)(B) of the Federal Rules and analogous state rules. I consider, in particular, the implications of the Supreme Court's 1999 decision in Ortiz v. Fibreboard Corp. for such punitive damages classes. In the final section of the Article, I consider the obstacles to issuance of anti-suit injunctions that could prevent mandatory punitive damages classes from being undermined by parallel pursuit of such damages in separate actions brought by class members.*

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When companies are alleged to have tortiously caused vast human suffering, often over a long period of time, and are sued for both compensatory and punitive damages, sometimes in multiple class action lawsuits, some folks would be pleased if the companies were put out of business by awards of such damages. Others, people and entities whose wealth and quality of life are enhanced by the defendant companies (including the defendants' employees, stockholders and trading partners, communities to which such corporations and their employees contribute, even states), may greatly fear the potential outcome of the litigation. Although many aspects of substantive law and procedure could be utilized to cabin the consequences of such lawsuits,<sup>1</sup> this Article will consider the viability of two existing

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procedural tools that also may afford benefits to plaintiffs, in the aggregate, and conserve judicial resources: "limited generosity" mandatory classes<sup>2</sup> and injunctions against the pursuit of punitive damages in tort suits that overlap with class litigation. Although crippling damage awards can be made in a single case, defendants and their supporters often are most concerned about the cumulative effect of multiple judgments, particularly with the cumulative effect of multiple punitive damages awards. Both focuses of this Article have relevance when multiple lawsuits that are either proceeding or anticipated could result in multiple punitive damages awards for the same course of conduct.

### I. "LIMITED GENEROSITY" CLASSES—AN INTRODUCTION

Although the subject of this symposium is state court class actions, I will concentrate on Rule 23 of the Federal Rules of Civil Procedure because many state class action rules are modeled upon it.<sup>3</sup>

Rule 23 and state law analogues allow an action to be maintained as a class action if the prosecution of separate actions by individual members of the class would create a risk of adjudications with respect to individual class members that would, as a practical matter, dispose of the interests of other members who are not parties or substantially impair or impede the ability of those other members to protect their interests.<sup>4</sup> The Advisory Committee Notes

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Institute of Technology. A.B. 1969, University of Rochester; J.D. 1973, Harvard University. I would like to thank Cindy Stuyvesant, a current student, and Melanie Maron and Bethany Schols, recent graduates of Chicago-Kent, for their research assistance, my colleagues Nancy Marder and Margaret Stewart for their valuable comments on drafts of this Article and in discussions of its subject matter, and the Marshall Ewell Research Fund for financial support.

1. Substantive and procedural law also could be legislatively *modified* in numerous respects to control the potential consequences of such lawsuits.

2. Mandatory class actions are those in which absent class members are not entitled to notice or to exclude themselves as a matter of right under Rule 23 of the Federal Rules of Civil Procedure and state law analogues. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 833 n.13 (1999).

3. *See, e.g.*, ALA. R. CIV. P. 23(b)(1)(B); ALASKA R. CIV. P. 23(b)(1)(B); ARIZ. R. CT. 23(b)(1)(B); ARK. R. CIV. P. 23(b); COLO. R. CIV. P. 23(b)(1)(B); DEL. CT. C.P.R. 23(b)(1)(B); D.C. R. CIV. P. 23(b)(1)(B); FLA. R. CIV. P. 1.220(b)(1)(B); HAW. R. CIV. P. 23(b)(1)(B); IDAHO R. CIV. P. 23(b)(1)(B); IOWA R. CIV. P. 42.3(a)(3); KAN. STAT. ANN. § 60-223(b)(1)(B) (1994); KY. R. CIV. P. 23.02(a)(ii); LA. C.C.P. ART. 591(B)(1)(b) (1999); MO. R. CIV. P. 52.08(b)(1)(B); MONT. CODE ANN. § 25-20-RULE 23(b)(1)(B) (1999); OKLA. STAT. ANN. tit 12, § 2023(B)(1)(b) (2000); OR. R. CIV. P. 32(B)(1)(b); PA. R. CIV. P. 1708(a)(3)(ii); S.C. R. CIV. P. 19(a)(2); S.D. CODIFIED LAWS § 15-6-23(b)(1)(B) (1984); TEX. R. CIV. P. 39(a)(2).

4. *See* FED. R. CIV. P. 23(b)(1)(B). Before "certifying" a case as a class action, a district court must find in addition that "the class is so numerous that joinder of all members is impracticable," that "there are questions of law or fact common to the class," that the claims (or defenses) of the named representative plaintiffs (or defendants) are typical of the claims (or defenses) of the class, and that "the representative parties will fairly and adequately protect the interests of the class." FED. R. CIV. P. 23(a).

to the Rule make clear the drafters' view that this provision is satisfied "when claims are made by numerous persons against a fund insufficient to satisfy all claims," among other occasions.<sup>5</sup> Although claimants often contend that Rule 23(b)(1)(B) is satisfied when a comparison of (a) the total probable liability to be incurred from as-yet unliquidated claims with (b) the assets available to satisfy those claims demonstrates the inadequacy of the latter "fund" to pay all the claims,<sup>6</sup> the focus of this Article is not on such insufficient-assets

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In tobacco litigation and other mass tort cases in which harm is alleged to have been done to many geographically dispersed individuals, over a long period of time, and perhaps as the result of a variety of breaches of duty, plaintiffs may have difficulty satisfying some of these requirements. While the numbers, geographic dispersion, and other characteristics of the plaintiffs often make it easy to find that the class is so numerous that joinder of all members is impracticable, it may be less clear that there are questions of law or fact common to the class, that the claims of the named representative plaintiffs are typical of the claims of the class, or that the representative parties will fairly and adequately protect the interests of the class. The difficulties of meeting Rule 23(a)'s requirements may be exacerbated if the class is defined to include future members, who have not yet manifested injury.

However, fact questions concerning a defendant's knowledge about the dangerousness of its product—what defendant knew and when it came to know particular facts, what information it withheld from the public, and what it stated in advertising and in product instructions—exemplify what may be common questions as to sub-classes and perhaps as to the entire proposed plaintiff class. Punitive damages are well suited for class treatment because the focus is on defendants' conduct and wealth, rather than on matters peculiar to individual plaintiffs. Similarly, there may be questions of law as to the requirements and standards for punitive damage awards that are common to sub-classes, and perhaps to the entire proposed plaintiff class. *See, e.g., Sterling v. Velsicol Chem. Corp.*, 855 F.2d 1188, 1197 (6th Cir. 1988) (affirming a Rule 23(b)(3) certification, and noting that, "[i]n mass tort accidents, the factual and legal issues of a defendant's liability do not differ dramatically from one plaintiff to the next"); *Jenkins v. Raymark Indus., Inc.*, 782 F.2d 468, 470-71 (5th Cir. 1986) (finding common questions in asbestos-related personal injury suits, raising, *inter alia*, the viability of the "state of the art" defense); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982) (indicating that all the matters listed above might have been questions of fact common to all or many of the plaintiffs in this products liability case in which the district court had certified a Rule 23(b)(1)(B) punitive damages class), *cert. denied*, 459 U.S. 1171 (1983).

The typicality requirement may be relatively easy to satisfy when the class certification is for punitive damages recovery only, again because the focus is concentrated on the defendant and its conduct. *See, e.g., Jenkins*, 782 F.2d at 474 (noting that, in the context of a Rule 23(b)(3) certification, when the issue is punitive damages, the focus is on the defendants' conduct, not on the plaintiffs'). Similarly, there are no inherent obstacles to finding adequate class representatives, so long as the class and sub-classes are appropriately structured. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627-28 (1997) (emphasizing the need for structural assurances of adequate representation through proper subclassing).

5. FED. R. CIV. P. 23(b)(1)(B) advisory committee's note.

6. *See, e.g., Ortiz*, 527 U.S. at 820-21 (examining a situation where plaintiffs sought certification, for settlement purposes, of a mandatory Rule

limited fund class actions.<sup>7</sup>

Rather, it is on a variant of the insufficient-assets notion.<sup>8</sup> The term "limited generosity" has been coined to describe situations in which a *legal limit* on liability (rather than defendant's capacity to pay) creates the ceiling on recovery that might justify a Rule 23(b)(1)(B) certification.<sup>9</sup> If limitations on liability imposed by the law would eliminate or restrict the ability of later plaintiffs to recover against the defendant, the interests of the later plaintiffs would have been disposed of, impaired, or impeded, in a manner that arguably would justify certifying a class of all those whose interests were endangered by the law-imposed limitation on liability.

Two parenthetical remarks: first, the limited generosity concept typically has been mentioned in connection with possible legal limits on punitive damages, but in theory it is equally applicable to legal limits on the recovery of compensatory damages. Nonetheless, as a practical matter, legislatures and courts have seldom imposed aggregate limitations upon compensatory damages, so the greatest re-

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23(b)(1)(B) "limited fund" class of persons who had personal injury claims arising out of their exposure to defendant's asbestos products); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977) (certifying under Rule 23(b)(1)(B) where claims in excess of \$16 million had been asserted for injuries and deaths resulting from a supper club fire and the court figured that if liability were found, the total damages would far exceed the defendant's assets), *mandamus denied*, 588 F.2d 543 (6th Cir. 1978), *appeal dismissed*, 443 U.S. 913 (1979); see also 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2d § 1774 n.7 (1986 & Supp. 2001) (citing cases). The Court in *Ortiz* found, however, that "the Advisory Committee did not contemplate that the mandatory class action codified in subdivision (b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale." *Ortiz*, 527 U.S. at 843. While the *Ortiz* Court did not decide whether Rule 23(b)(1)(B) ever may be used to aggregate individual tort claims, it did infer from the Advisory Committee's Notes that the Rule's historical antecedents should be viewed as imposing requirements for (b)(1)(B) certification, rather than as merely illustrating situations sufficient to satisfy the Rule. See *id.* at 842-44. These conclusions have implications for the certifiability of limited generosity classes as well.

7. The insufficient assets contention also might be plausible in some of the same cases in which defendants might argue for a "limited generosity" constraint upon the award of punitive damages.

8. See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005-06 (3d Cir. 1986) (noting that limited generosity theory is a variation, and functional equivalent, of the limited fund notion, for Rule 23(b)(1)(B) purposes), *cert. denied sub nom. Celotex Corp. v. Sch. Dist. of Lancaster*, 479 U.S. 852 (1986).

9. *Sch. Asbestos*, 789 F.2d at 1004-05 (referring to "limited generosity" theory, an apparent reference to limiting a jury's "generosity" in awarding punitive damages); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, C.J., dissenting) (speaking of the concept as a basis for (b)(1)(B) certification, without using the words "limited generosity"), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988 (1982). Other courts and commentators have referred to the same notion as "punitive damages overkill," or as "limited punishment" theory. See Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2013 (2000); see also *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-41 (2d Cir. 1967).

alistic potential for limited generosity theory is in connection with punitive damages.<sup>10</sup> In light of the purposes of the symposium of which this Article is a part, this writing will restrict its attention to limited generosity mandatory classes seeking punitive damages.

Second, while, on its face, a limited generosity class is certified for the benefit of the class members and to ensure equitable distribution of the monies that the law permits to be recovered,<sup>11</sup> the underlying concept—that the law does (or should be held to) impose a limit on liability for punitive damages for a particular course of conduct—is advocated by defendants, in the service of their own pecuniary interests. In addition, because Rule 23(b)(1)(B) classes are “mandatory,” that is, members of those classes are not permitted to “opt out,”<sup>12</sup> (b)(1)(B) certification is a boon to defendants in that it protects them from the burdens and uncertainties of multiple pieces of litigation seeking punitive damages, brought by those within the class definition.<sup>13</sup>

I seek here to do three things: (1) to present my findings on the reality behind this theory: What, if any, legal limits have the courts actually found to constrain punitive damages awards?; (2) to consider whether such legal limits as the courts have found properly constitute a predicate for Rule 23(b)(1)(B) class certification; and (3) to examine the scope and limits upon courts’ power to enjoin the commencement or prosecution of separate actions by class members who assert punitive damages claims within the scope of a mandatory class action.<sup>14</sup> If legal limits on punitive damages do properly

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10. *But see* 42 U.S.C. § 2210 (1994) (limiting total damages for certain accidents involving nuclear energy to \$500 million, excluding costs of investigation and settlement of claims, which the statute limits to \$60 million).

11. *See Ortiz*, 527 U.S. at 839 (noting that a common characteristic of classic limited fund cases was that “the claimants identified by a common theory of recovery were treated equitably among themselves”).

12. *See* FED. R. CIV. P. 23(c)(2), (3) (authorizing class members to exclude themselves from classes certified under Rule 23(b)(3), but not under Rules 23(b)(1)(A), (b)(1)(B), or (b)(2)).

13. *See infra* notes 205-94 and accompanying text (regarding the ability of courts to enjoin the commencement or prosecution of separate actions by class members who seek to assert claims within the scope of a mandatory class action). Defendants may have additional reasons that they do not publicize to favor the certification of mandatory punitive damages classes. A leading commentator on class actions has argued that the certification of a Rule 23(b)(1)(B) mandatory punitive damages class usually works to the defendant’s advantage in at least two respects. First, the absence of punitive damage awards in individual suits will postpone financial pressure on defendants, which, in turn, will “deter or defer prompt classwide settlements.” In addition, “as [a] practical matter, [it] will result in the class as a whole receiving less . . . punitive damages than if the defendants were exposed to punitive damages judgments in individual suits by class members who were able to opt out of the class,” or to no punitive damages at all. 3 HERBERT B. NEWBERG & ALBA CONTE, *NEWBERG ON CLASS ACTIONS* § 17.38, at 115 (3d ed. 1992).

14. Many other questions could be asked about mandatory punitive damages classes. For example, one could examine whether and when due process

constitute a predicate for Rule 23(b)(1)(B) class certification, the ability of courts to enter anti-suit injunctions against separate litigation that would undermine mandatory punitive damages classes takes on great importance.

## II. LEGAL LIMITS ON LIABILITY FOR PUNITIVE DAMAGES

### A. *Statutory and Common Law Limits*

Because law-imposed limits on liability for punitive damages are the linchpin of limited generosity classes, it is essential to understand what limits the law actually imposes. Several states have legislated limits on the recovery of punitive damages.<sup>15</sup> Frequently, the substantive caps on punitive damages liability form part of legislation that also mandates particular procedures to be utilized in connection with the possible imposition of punitive damages liability.<sup>16</sup>

A perusal of Appendix A reveals that the caps one finds in legislation tend to confine punitive damages to either a multiple of compensatory damages (or to a multiple of a subset of compensatory damages, such as "economic" damages) or to a specified number of dollars. State legislation sometimes disallows punitive damages altogether or in specified circumstances, such as those in which a claimant elects to have her recovery multiplied under other statutory authority. Some legislation requires that subsequent punitive damages awards be reduced by the amount of earlier such awards for the same act or course of conduct.

Further perusal of state legislation concerning punitive damages reveals that many provisions codify principles that initially were developed by the courts as a matter of common law: principles governing the legal wrongs for which and the circumstances under which a person may be held liable for punitive damages, the mental states that are threshold predicates for punitive damages liability, and other factors that the trier of fact and reviewing judges should consider in determining liability for punitive damages and their amount.

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requirements would preclude a particular court, or any court, from exercising personal jurisdiction over all the persons who ought to be members of a mandatory punitive damages class, if that class is to serve the purposes for which it would be certified. One could examine whether due process requirements would preclude any court from certifying a punitive damages class which is mandatory, that is, from which members could not "opt out." Both of these questions were suggested by the Court's decision in *Phillips Petroleum Co. v. Shutts*, and neither has been authoritatively answered. 472 U.S. 797, 811-12 n.3 (1985) (expressly leaving open what due process requires in order to bind members of classes other than Rule 23(b)(3) classes wholly or predominantly for money damages). Such questions are beyond the scope of this Article.

15. See *infra* Appendix A (quoting a number of these pieces of legislation).

16. *Id.*



If a single state's substantive law governing punitive damages applies to all of the claims presented in a class action, that simplifies management of the class suit and facilitates equitable apportionment of any capped award among the class members. On the other hand, if, under applicable choice of law principles, different bodies of substantive law govern punitive damages—if different caps apply and some relevant bodies of law do not cap punitive damages at all—with some members' claims being governed by one state's law while other members' claims are governed by other states' laws, the problems created go beyond administration to more fundamental issues of equitable apportionment. One *could* conclude that it is equitable for class members who are factually similarly situated to recover differing amounts of punitive damages if such differing amounts are mandated by the law that constitutionally must or may govern their claims.<sup>17</sup> Whether such a regime would be consistent with a Rule 23(b)(1)(B)-type class will be discussed below.<sup>18</sup>

As mentioned earlier, punitive damages legislation often provides procedural protections to defendants. Such provisions may:

1. impose special pleading rules;
2. condition or postpone a plaintiff's opportunity to discover facts relevant only to a punitive damages award;
3. require the plaintiff to produce a specified measure of proof of liability for compensatory damages, or obtain a verdict that awards compensatory damages and is based on findings of particular facts, before plaintiff may introduce evidence pertinent only to a punitive damages award;
4. dictate the trier of fact on punitive damages;
5. allocate functions between trial judge and jury on related issues;
6. require specific findings of fact by a judge who permits a jury to consider punitive damages;
7. establish a burden of proof greater than preponderance of the evidence for matters pertinent to a punitive damages award, or specify burdens of proof when a defendant seeks to be credited with amounts previously paid for punitive damages arising out of the same course of conduct as then in controversy;

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17. Choice of law principles are constrained by some constitutional, due process, principles. See *Shutts*, 472 U.S. at 818-23 (concluding that a class action court must have "a 'significant contact or . . . aggregation of contacts' to the claims asserted by each [class] member, . . . 'creating state interests,' to ensure that the choice of [forum] law is not arbitrary or unfair," that the expectation of the parties concerning governing law is an important consideration, and that application of forum law to every claim in *Shutts* exceeded constitutional limits); *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-13 (1981) (articulating the need for forum contacts that the Court applied in *Shutts*).

18. See *infra* notes 163-203 and accompanying text.

8. authorize, or even mandate, separate trial of issues relating to punitive damages, and address the admissibility of evidence in each portion of such a bifurcated proceeding;
9. ordain what the jury may or may not be informed as to the substantive and procedural law pertaining to an award of punitive damages; and
10. specify the judicial review that trial judges and appellate judges must make of punitive damages awards, including the factors such judges should consider, and impose fact-finding responsibilities or other responsibilities triggered when a defendant seeks to be credited with amounts previously paid for punitive damages arising out of the same course of conduct as then in controversy.

While a state court usually is obliged to utilize the procedures that have been promulgated or developed to govern the courts of *that* state<sup>19</sup> and ordinarily would not be bound, or even permitted, to follow the procedural prescriptions attendant upon possible imposition of punitive damages enacted for another court system<sup>20</sup> (just as federal courts use the procedures promulgated or developed for their use, even when hearing cases in which state substantive law governs the merits),<sup>21</sup> state courts would be bound to enforce the sub-

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19. EUGENE F. SCOLES & PETER HAY, *CONFLICT OF LAWS* 57 (2d ed. 1992) (asserting that "a court will apply foreign law only to the extent that it deals with the substance of the case, i.e., affects the outcome of the litigation, but will rely on forum law to deal with the 'procedural' aspects of the litigation") (footnotes omitted). That leaves some maneuvering room in characterizing particular aspects of the law as substantive or procedural. See generally Walter Wheeler Cook, "Substance" and "Procedure" in the Conflict of Laws, 42 *YALE L.J.* 333 (1933) (discussing the drawing of lines between substantive and procedural law).

20. See RUSSELL J. WEINTRAUB, *COMMENTARY ON THE CONFLICT OF LAWS* § 3.2C, at 59 (4th ed. 2001) (noting that part of territorially-oriented choice of law analysis is to decide how much of the law selected by a choice of law rule should be applied, indicating that what "is 'substantive' [is] to be governed by the law selected by [choice] of law analysis, and what is 'procedural' is to be determined by the law of the . . . forum," as such). Weintraub argues, "[i]f . . . the foreign rule in issue is not especially difficult to find and apply and if there is any probability that the rule may affect the outcome, the rule should be considered as 'substantive' . . ." *Id.* § 3.2C1, at 59; see also McMahan v. Toto, 256 F.3d 1120, 1132 (11th Cir. 2001) (observing that "a finding that a matter is substantive or procedural for *Erie* purposes does not compel the same characterization for choice of law purposes").

21. See *Hanna v. Plumer*, 380 U.S. 460, 473 (1965) (holding that federal courts are to apply valid Federal Rules of Civil Procedure and indicating by implication that they should apply valid Federal Rules of Appellate Procedure and other such promulgated sets of procedural rules, even if the forum state uses rules that conflict with the Federal Rules and the difference in rules may alter the outcome of a case); *Erie R.R. v. Tompkins*, 304 U.S. 64, 78 (1938) (holding that federal courts must apply substantive state law, whether common law, statutory or constitutional, where state law properly applies).

stantive caps on punitive damages liability enacted by (or otherwise the law in) other states when the substantive law of those states governed, under applicable choice of law principles.<sup>22</sup> Moreover, given the difficulties that often attend the task of differentiating between substance and procedure, one easily can imagine that courts may have trouble drawing the line between the aspects of sister-state law concerning punitive damages awards that they must apply

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22. Federal courts would be similarly bound. The obligation of federal courts derives from the *Erie* line of cases, which also indicates the breadth of federal courts' obligation. The obligation of state courts is to apply substantive law that is selected consistently with the states' own choice of law principles and that may constitutionally be applied, consistent with the due process clause. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 821 (1985). "When the forum's choice-of-law rule refers to the law of another jurisdiction, the questions [may] arise[ ] as to the extent of that reference: does it include both the foreign substantive and procedural law . . . ?" SCOLES & HAY, *supra* note 19, at 57.

Moreover, when states must apply substantive federal law and enforce federally-created rights, they sometimes also must apply "procedural baggage," so as not to undermine the substantive federal law. See *Dice v. Akron, Canton & Youngstown R.R.*, 342 U.S. 359, 363 (1952) (holding, *inter alia*, that in adjudicating an action arising under the Federal Employers' Liability Act, a state court had to send to the jury fact questions concerning the fraudulence of releases-of-liability, notwithstanding contrary state practice). The characterization of legal rules as substantive or procedural in the context of choice of law, and the implications of those characterizations under the due process clause and for purposes of full faith and credit obligations, also has come before the Court on occasion. See, e.g., *Sun Oil Co. v. Wortman*, 486 U.S. 717, 729 (1988) (holding that applying forum state statute of limitations to a multi-state class action violated neither full faith and credit nor due process); *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953) (holding that forum state's application of its own statute of limitations to claims arising under another state's statute did not violate full faith and credit, even if the other state's limitations period was built into its statute); *John Hancock Mut. Life Ins. Co. v. Yates*, 299 U.S. 178, 183 (1936) (holding breach of contract defense created by foreign state statute to be a substantive right, entitled to full faith and credit from forum state); *Home Ins. Co. v. Dick*, 281 U.S. 397, 410 (1930) (holding forum state's statute of limitations that extinguished a contract right created in a foreign jurisdiction to violate due process); *M'Elmoyle v. Cohen*, 38 U.S. (13 Pet.) 312, 328 (1839) (holding foreign state judgment entitled to full faith and credit, while execution of the judgment was governed by the law of the forum state); see generally WEINTRAUB, *supra* note 20, §§ 9.2B, 9.3C, at 640 (commenting, *inter alia*, that "[a] court ought not to be able to escape the mandate of full faith and credit through the device of classifying the rule that it wishes to apply as 'procedural'").

For a discussion of what full faith and credit requires in the choice of law context, see *Allstate Ins. Co. v. Hague*, 449 U.S. 302, 308-13 (1981) (plurality opinion recognizing that the Due Process Clause and the Full Faith and Credit Clause provide modest restrictions on choice of law); *id.* at 332-36 (Powell, J., dissenting) (opining that due process prohibits application of a law that is only casually or slightly related to the litigation; full faith and credit also requires a forum to respect the law of other states, subject to the forum's own interests in furthering its public policies). See generally WEINTRAUB, *supra* note 20, § 9.3.

and those that they need not, and ought not, to apply.<sup>23</sup>

Whether or not applicable state law imposes a cap on punitive damages, constitutional constraints set an upper limit.<sup>24</sup> As the next section demonstrates, some of the impulses that underlie the states' substantive and the procedural constraints on punitive damages awards also are reflected in the constitutional doctrine concerning punitive damages that the Supreme Court has articulated.

### B. Constitutional Limits

Although this is not the place for a detailed examination of the Supreme Court's decisions concerning constitutional limits on punitive damages, a sketch of that jurisprudence is essential undergirding for the discussion of mandatory class certification that follows.

In recent years, the Court has made decisions concerning the demands of both procedural and substantive due process upon the award of punitive damages. It also decided, back in 1973, that the First Amendment has a role to play in limiting punitive damages: it prohibits states from permitting the recovery of punitive damages for defamation, unless liability is based on knowledge of falsity or reckless disregard for the truth, the standard of "malice" articulated in *New York Times Co. v. Sullivan*.<sup>25</sup> On the other hand, the Court

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23. Indeed, *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415 (1996), provides an excellent example, by analogy. That case posed the question whether, under the *Erie* doctrine, a federal district court, sitting in diversity, was obliged to apply state law that empowered trial and appellate courts to review the size of jury verdicts and to order new trials when a jury award "deviates materially from . . . reasonable compensation," or whether such appellate review would violate the Re-examination Clause of the Seventh Amendment to the Constitution. *Id.* at 668. That clause provides that "no fact tried by a jury shall be otherwise re-examined in any . . ." federal court "than according to the rules of the common law." *Id.* The Court held that federal *district* court judges should apply the state review standard (in effect, holding that standard to fall on the substantive side of the substance/procedure divide, in order to avoid allowing significantly larger recoveries in federal court than those that would withstand scrutiny in the state courts), and that the Seventh Amendment would not be violated so long as the federal appeals court reviewed the district court decision under an abuse of discretion standard. *Id.* at 668-69. *Gasperini* is not binding on the states, which operate outside the *Erie* regime, but it suggests that matters that go to the quantification of punitive damages should *not* be treated as procedural for conflicts purposes.

24. As to the constitutional limits on punitive damages, see *infra* notes 25-72 and accompanying text.

25. 376 U.S. 254 (1964); see *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348-50 (1974). The Court in *Gertz* noted that punitive damages are not compensation for injury but "are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence." *Id.* at 350. Such damages exacerbate the danger of media self-censorship and are irrelevant to the state interest in compensating individuals for injury to reputation. As a result, the policies that permit liability for compensatory damages under a less demanding standard than knowledge of falsity or reckless disregard for the truth do not apply to punitive damages. See *id.*

has held that the Excessive Fines Clause of the Eighth Amendment does not constrain punitive damages awards in civil cases between private parties, because that Clause "was intended to limit only those fines directly imposed by, and payable to, the government."<sup>26</sup>

The Court addressed both substantive and procedural due process challenges to punitive damages awards in *Pacific Mutual Life Insurance Co. v. Haslip*<sup>27</sup> and *TXO Production Corp. v. Alliance Resources Corp.*<sup>28</sup> In *Haslip*, the Court concluded, among other things, that the common-law method for assessing punitive damages—under which the amount of the award is initially made by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct, and the jury's determination is reviewed for reasonableness—"is [not] so inherently unfair as to deny due process and be *per se* unconstitutional."<sup>29</sup> The Court disclaimed ability to "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable,"<sup>30</sup> but advised that "general concerns of reasonableness and adequate guidance from the court . . . properly enter into the constitutional calculus."<sup>31</sup> Reviewing the constitutionality of the award in *Haslip*, the Court concluded that: (1) the fact that, under state law, punitive damages were imposed for purposes of retribution and deterrence did not render them violative of the Due Process Clause;<sup>32</sup> (2) instructions that informed the jury of punitive damages' nature and purpose, required the jury to consider the character and degree of the wrong, and explained that their imposition was not compulsory, sufficiently confined the jury's discretion;<sup>33</sup> (3) state supreme court case law that specified factors for trial and appellate courts to consider when scrutinizing punitive damages awards ensured meaningful and adequate review and imposed a "sufficiently definite and meaningful constraint on the discretion of Alabama factfinders";<sup>34</sup> and (4) the state supreme court's review ensured that punitive damages awards were "not grossly out of proportion to the severity of the offense and ha[d] some understandable relationship to compensatory damages,"<sup>35</sup> by using standards providing "a rational relationship in determining whether a particular award is greater than reasonably necessary to punish and deter."<sup>36</sup> Where defendant had received the benefit of all these procedural protections, the award was not unconstitutional al-

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26. *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 268 (1989).

27. 499 U.S. 1 (1991).

28. 509 U.S. 443 (1993).

29. *Haslip*, 499 U.S. at 15-17.

30. *Id.* at 18.

31. *Id.*

32. *Id.* at 19.

33. *Id.* at 19-20.

34. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991).

35. *Id.*

36. *Id.*

though it was more than four times the amount of compensatory damages awarded, more than 200 times Haslip's out-of-pocket expenses, and far in excess of the fine that could have been imposed under state statutes governing insurance fraud (which was involved there).<sup>37</sup>

In *TXO*, the Court again affirmed a punitive damages award, this one 526 times the actual damages awarded by the jury.<sup>38</sup> Three Justices reaffirmed the approach taken in *Haslip*, rejecting the particular tests proposed by the parties for determining whether a punitive damages award is grossly excessive and presumptively unconstitutional, one a rational basis standard, the other a heightened scrutiny approach that encompassed application of specified "objective" criteria.<sup>39</sup> In examining the particular award being challenged, these Justices advised, "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."<sup>40</sup> The disparity between the punitive award and the potential harm that defendant threatened did not jar the Court's constitutional sensibilities,<sup>41</sup> particularly in light of defendant's wealth and the jury's ability to have determined reasonably that defendant acted maliciously and fraudulently, in bad faith, and that the scheme employed was part of a larger pattern of fraud and deceit.<sup>42</sup> A plurality of the Justices refused to hold the trial judge's failure to articulate the basis of his denial of motions for judgment notwithstanding the verdict and for remittitur to be constitutional violations and rejected other arguments concern-

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37. *Id.* at 23-24.

38. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993).

39. *Id.* at 455-58. Justice Kennedy, concurring in part and concurring in the judgment, expressed a preference for a constitutional inquiry that would not focus on the amount of money a jury awards but on its reasons, so that a punitive award that reflects bias, passion, or prejudice, rather than a rational concern for deterrence and retribution, would be unconstitutional. On the facts, he found sufficient evidence of willful and malicious conduct by the defendant, and sufficient reason to believe that the jury was motivated to punish and deter *TXO*, that he voted to affirm the award. *Id.* at 467-69 (Kennedy, J., concurring). Justice Scalia, joined by Justice Thomas, concurred in the judgment and took the view that the due process challenges had to fail because the jury had been instructed on the purposes of punitive damages under state law and its award had been reviewed for reasonableness. These Justices rejected the view that due process contains a substantive right not to be subjected to excessive punitive damages. *Id.* at 470-71 (Scalia, J., concurring in the judgment). Justice O'Connor dissented in an opinion joined by Justice White, and parts of which were joined by Justice Souter. In brief, she favored more rigorous standards and believed that neither the size of the award here nor the procedures that produced it were consistent with the principles of *Haslip*. *Id.* at 473 (O'Connor, J., dissenting).

40. *Id.* at 460 (emphasis in original).

41. *See id.* at 462.

42. *Id.*

ing the adequacy of the state court review of the award.<sup>43</sup> A plurality also shared the view that, "the notice component of the Due Process Clause is satisfied if prior law fairly indicated that a punitive damages award might be imposed in response to egregiously tortious conduct,"<sup>44</sup> which state law did here. Reading the case narrowly to stand only for the propositions which a majority of the Justices supported,<sup>45</sup> it speaks only to procedural, not substantive, due process.

However, more recently in *Honda Motor Co. v. Oberg*,<sup>46</sup> the Court, in an opinion joined by seven Justices, firmly stated that its recent cases had recognized "that the Constitution imposes a substantive limit on the size of punitive damages awards."<sup>47</sup> Focusing here, however, not on the standard that will identify unconstitutionally excessive awards but on the procedures necessary to ensure that punitive damages are not imposed arbitrarily, the Court held violative of due process an Oregon constitutional prohibition against judicial review of the amount of punitive damages awarded by a jury, except where the court finds no evidence to support the verdict.<sup>48</sup> The Court found that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded,"<sup>49</sup> and continues to so operate in every other state, while Oregon provides "no procedure for reducing or setting aside" a punitive damages award as excessive or arbitrary in amount.<sup>50</sup> The Court then held that Oregon's abrogation of this well-established common-law protection against arbitrary deprivations of property, without providing any substitute procedure and without having concluded that the danger of arbitrary awards had subsided, violated due process.<sup>51</sup> The Court rejected the adequacy of other supposed safeguards provided by Oregon: a limitation of punitive damages to the amount specified in the complaint, a requirement of clear and convincing proof, a "pre-verdict determination of maximum allowable punitive awards" (which the Court found was not made by Oregon courts), and proper jury instruc-

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43. *Id.* at 465.

44. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 465-66 (1993).

45. *Marks v. United States*, 430 U.S. 188, 193 (1977) (stating that the holding of a fragmented Court reflects the narrowest grounds of concurrence in the judgment); *DeStefano v. Emergency Hous. Group, Inc.*, 247 F.3d 397, 418-19 (2d Cir. 2001); *Kemp v. Medtronic, Inc.*, 231 F.3d 216, 224 (6th Cir. 2000), *petition for cert. filed*, 70 U.S.L.W. 3036 (U.S. May 24, 2001) (No. 00-1766); *Fernandes v. Costa Bros. Masonry, Inc.*, 199 F.3d 572, 580 (1st Cir. 1999) (stating that lower federal courts should give effect to the narrowest ground on which a majority of Justices agree when they issue a plurality opinion).

46. 512 U.S. 415 (1994).

47. *Id.* at 420.

48. *See id.* at 418, 420.

49. *Id.* at 421.

50. *Id.* at 427-29.

51. *Id.* at 431-32.

tions.<sup>52</sup>

In *BMW of North America, Inc. v. Gore*,<sup>53</sup> the Court returned to the standards for identifying unconstitutionally excessive awards, while also addressing matters of procedural due process, and held a \$2 million punitive damages award to one automobile purchaser to be grossly excessive, in violation of due process.<sup>54</sup> The decision is of particular relevance to mass tort claims. The punitive damages award in *Gore* had been imposed in response to BMW's nationwide policy of not advising its dealers or their customers of pre-delivery damage to new cars when the cost of repair did not exceed 3% of the car's suggested retail price.<sup>55</sup> However, the award was made to the purchaser of but one of the affected cars. Emphasizing that gross excessiveness must be judged in relation to a state's legitimate interests in punishing and deterring conduct and that, consistent with principles of state sovereignty and comity, one state may not impose its policy choices on other states, the Court concluded that the economic penalties a state inflicts, including punitive damages, must be supported by the state's interest in protecting its own consumers and economy, and may not be used to protect the consumers or economies of other states.<sup>56</sup> The Court concluded that the sanction imposed was too severe to satisfy due process,<sup>57</sup> in light of this circumscription of the jury's field of vision and several other factors: the low degree of reprehensibility of BMW's conduct found by the Court,<sup>58</sup> the very high ratio of the punitive damages award to the

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52. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432-33 (1994).

53. 517 U.S. 559 (1996).

54. *Id.* at 575.

55. *Id.* at 563-64, 567-68 n.11, 573.

56. *Id.* at 568-74. The Court observed that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States," and that an attempt by Alabama to alter BMW's nationwide policy through the imposition of a punitive damages award would infringe on the policy choices of other states. *Id.* at 572. Thus, Alabama lacked "power" to punish BMW for conduct lawful where it occurred and that had no impact on Alabama or its residents, or to impose punitive damages on BMW in an effort to deter it from conduct that is lawful in other jurisdictions. *Id.* at 572-73.

57. *See id.* at 585-86. Four Justices dissented. Justice Scalia, joined by Justice Thomas, reiterated their view that the Fourteenth Amendment's Due Process Clause is not a repository of substantive guarantees against the unfairness of a punitive damages award. *See id.* at 598-607 (Scalia, J., dissenting). Justice Ginsburg, joined by Chief Justice Rehnquist, dissented for reasons including the Alabama Supreme Court's already having made clear the impropriety of assessing punitive damages by reference to out-of-state occurrences not shown to be unlawful, and the ill-equippedness of the Court to correct misapplication of properly stated rules of law concerning punitive damages. *See id.* at 607-14 (Ginsburg, J., dissenting).

58. *See BMW*, 517 U.S. at 575-80 (citing, *inter alia*, the purely economic nature of the harm done to plaintiff, the reasonableness of BMW's views that disclosure requirements did not demand disclosure of minor repairs in the absence of state court determinations to the contrary and that omission of such disclo-



plaintiff's compensatory damages award,<sup>59</sup> the great difference between the former award and the sanctions that Alabama and other states imposed for misconduct similar to that of BMW's,<sup>60</sup> the absence of reason to believe that a more modest sanction would not have been sufficient,<sup>61</sup> and the fact that BMW was not on notice that it might be subjected to a multimillion dollar sanction for its conduct—a conclusion that had its roots, in part, in the Court's limitation of the scope of the wrong that Alabama courts could punish.<sup>62</sup>

Finally, in May, 2001, in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*,<sup>63</sup> eschewing substantive due process review of a \$4.5 million punitive damages award imposed in connection with a \$50,000 verdict for compensatory damages<sup>64</sup> and leaving that review to be re-done on remand, the Court decided as a matter of procedural due process that a court of appeals should review de novo a district court's determination of the constitutionality of a punitive damages award,<sup>65</sup>—while deferring to findings of fact unless they are clearly erroneous.<sup>66</sup> The Court reversed the court of appeals' use

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sures was not fraudulent because the matter omitted was not material, the absence of evidence that BMW acted in bad faith, the absence of evidence that BMW persisted in a course of conduct after it had been adjudged unlawful, and the absence of deliberately false statements or concealment of improper motivation).

59. *Id.* at 580-83 (emphasizing that the punitive award was 500 times the amount of actual harm to the plaintiff, as found by the jury, and that no additional harm was threatened). In dicta, the Court commented, however, that a higher ratio of punitive to compensatory damages may be supportable if "a particularly egregious act has resulted in only a small amount of economic damages" or when injuries are hard to detect or the monetary value of noneconomic harm is difficult to determine. *Id.* at 582.

60. *Id.* at 583-85.

61. *Id.* at 584-85.

62. *See id.* at 574-75, 585.

63. 121 S. Ct. 1678 (2001).

64. *See id.* at 1682 (indicating that the Court had chosen not to grant the petition for writ of certiorari insofar as it sought review of the punitive award under the criteria that the Court previously had announced).

65. That is, review de novo the district court's application of the test elaborated by the Court in *BMW*. *See Leatherman*, 121 S. Ct. at 1688 n.14.

66. *Leatherman*, 121 S. Ct. at 1688 n.14. Note, however, that clear error is the standard of review typically used by federal courts to review findings of fact by a judge; findings of fact by a jury normally receive even greater deference. *See, e.g.*, FED. R. CIV. P. 52(a) (stating that findings of fact by the court "shall not be set aside unless clearly erroneous"). By contrast, judgment as a matter of law, after a jury verdict, is to be granted only if there is no legally sufficient evidentiary basis for a reasonable jury to find as it did. *See, e.g.*, FED. R. CIV. P. 50(a), (b). A motion for a new trial, however, typically may be granted, based on conduct of the jury, if a jury verdict "appears to be against the weight of the evidence or is legally excessive or inadequate in amount." JACK H. FRIEDENTHAL, ET AL., CIVIL PROCEDURE 575 (3d ed. 1999) (citations omitted); *see also* *Duncan v. Duncan*, 377 F.2d 49, 52 (6th Cir.) (indicating that a jury's determination of damages should not be disturbed if there is any legitimate basis in the evidence to support it), *cert. denied*, 389 U.S. 913 (1967); *Lewis v. Bd. of Sedgwick County Comm'rs*, 140 F. Supp. 2d 1125, 1139 (D. Kan. 2001) (citing

of an abuse of discretion standard of review where appellant had argued that the award of punitive damages was grossly excessive, in violation of its due process rights.<sup>67</sup> The Court grounded its decision on what its own practice has been, that is, independently and non-deferentially examining the relevant criteria for determining whether a punitive damages award is excessive.<sup>68</sup> More importantly, the Court relied upon the policies that underlie the selection of a standard of review. In the latter regard, the Court looked to (1) the need for appellate courts to give substantive content to the concept of "gross excessiveness" by applying it in particular contexts, thereby clarifying and controlling that principle;<sup>69</sup> (2) the policy-making aspects of punitive damages awards that distinguish them from pure fact-findings;<sup>70</sup> and (3) the relative competencies of trial and appellate judges to evaluate punitive damages awards.<sup>71</sup> Although the Court had denied certiorari insofar as petitioners sought review of the punitive award under the substantive due process criteria the Court previously had announced, the Court commented upon errors of law that the district court appeared to have made in its jury instructions and otherwise, ostensibly to illustrate why the standard of review might affect the outcome of this case.<sup>72</sup> The Court then remanded to the court of appeals for reconsideration of the case under the proper standard of review.

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*Duncan*, and adding that a court nonetheless has a duty to grant a new trial, when a verdict is against the weight of the evidence, to prevent a miscarriage of justice). In *Leatherman*, the punitive damages award had been made by a jury. 121 S. Ct. at 1680.

67. *Leatherman*, 121 S. Ct. at 1682-83.

68. *Id.* at 1684-85.

69. *Id.* at 1685-86.

70. *Id.* at 1686-87. The Court distinguished here between the notion that determinations of punitive damages should be left to juries because those determinations are fact-sensitive, and the notion that "the amount of punitive damages imposed . . . is itself a 'fact' within the meaning of the Seventh Amendment's Re-examination Clause." *Id.* at 1686 n.11; see *supra* note 23 (explaining that the Re-examination Clause prohibits federal courts from re-examining any fact tried by a jury except according to the rules of the common law).

The Court also responded to the argument that the Court's decision in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), rested on the assumption that punitive damages awards are findings of fact. See *supra* notes 46-52 and accompanying text. Although the Court in *Honda* had held that an Oregon constitutional provision that prohibited the re-examination of any fact tried by a jury violated due process because it disallowed review of the constitutionality of punitive damages awards, the *Leatherman* Court sought to undercut the apparent inconsistency by contending that it was the Oregon Supreme Court's interpretation of the state constitution that compelled the Court to treat punitive damages as "covered" by the prohibition on re-examination. *Leatherman*, 121 S. Ct. at 1686 n.10.

71. *Leatherman*, 121 S. Ct. at 1687-88.

72. *Id.* at 1688-89.

### III. DO SUCH LEGAL LIMITS CONSTITUTE A PREDICATE FOR RULE 23(b)(1)(B) CLASS CERTIFICATION?

Insofar as legislatures or courts impose firm, aggregate, limitations on a defendant's liability for particular conduct or a particular course of conduct, at first glance the situation presented would seem to fall squarely within the language of and the policies underlying Rule 23(b)(1)(B): the prosecution of separate actions by individual members of the class of persons injured by that conduct or course of conduct *would* create a risk of adjudications that would, as a practical matter, dispose of the interests of other members who were not parties to the earlier adjudications or substantially impair or impede the ability of those other members to protect their interests. However, we must examine whether the case antecedents of Rule 23(b)(1)(B) and the cases decided under that Rule authorize such class actions. This examination reveals a minefield of issues.

#### A. *Case Antecedents to Rule 23(b)(1)(B)*

None of the case antecedents of (b)(1)(B) class certification cited by the Supreme Court in its important 1999 decision in *Ortiz v. Fibreboard Corp.*<sup>73</sup> appear to have involved a law-imposed limit on liability. None of the case antecedents of (b)(1)(B) class certification that I found involved a law-imposed (as opposed to an assets-insufficiency) limit on liability, either.<sup>74</sup> Perhaps the closest historical antecedent of limited fund (b)(1)(B) classes were creditors' and legatees' bills whose purposes included ensuring equality of treatment among creditors.<sup>75</sup> The task in these cases was to compare total claims with total assets and proportionately to reduce the former in the event of insufficient assets.<sup>76</sup> Common interests in ferreting out the assets usually were viewed as predominating over any con-

73. 527 U.S. 815 (1999).

74. See, e.g., Geoffrey C. Hazard, Jr. et al., *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. PA. L. REV. 1849 (1998) (tracing the English antecedents of the class suit, and American doctrine, in both federal and state courts, both before 1853 and in time periods up through the decision of *Hansberry v. Lee*, 311 U.S. 32 (1940)).

75. See *id.* at 1886-93, 1915-16. The *Ortiz* Court also described, as classic examples of cases involving risk of impairment to the interest of persons not parties,

suits brought to reorganize fraternal-benefit societies, . . . actions by shareholders to declare a dividend or otherwise to "fix [their] rights," . . . and actions charging "a breach of trust by an indenture trustee or other fiduciary similarly affecting the members of a large class" of beneficiaries, requiring an accounting or similar procedure "to restore the subject of the trust.

*Ortiz*, 527 U.S. at 833-34 (citations omitted). None of these seem more similar to limited generosity classes than the limited fund, an example of suits "involving 'the presence of property which call[ed] for distribution or management.'" *Id.* at 834 (citations omitted).

76. See Hazard, *supra* note 74, at 1890.

flicts among creditors/legatees, and thus as justifying a representative suit to collect the assets and regulate their distribution.<sup>77</sup> Starting in the late 1820s, these cases came to be viewed as “in rem,” a characterization that, at the time, shifted the basis of the court’s authority away from the joinder of parties other than a representative and to the existence of a “res” before the court.<sup>78</sup>

The Court of Appeals for the Second Circuit has concluded that classic instances of limited funds were exemplified by situations in which a group of claimants asserted aggregate claims that “would deplete a fixed sum of money.”<sup>79</sup> It views class certification pursuant to the limited generosity theory as resembling traditional limited fund class actions *more* closely than limited assets classes resemble such traditional actions,<sup>80</sup> explaining that “[w]ith respect to aggregate claims in excess of a fixed sum of money, a (b)(1)(B) class action is appropriate to avoid an unfair preference for the early claim-

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77. *Id.* at 1891.

78. *See id.* at 1887-90. Today, of course, under *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), and *Shaffer v. Heitner*, 433 U.S. 186 (1977), the characterization as in rem does not “do the same work” as it once did in satisfying due process requirements concerning notice/opportunity to be heard, and it may not “do the same work” as it earlier did in creating the minimum contacts necessary to assert personal jurisdiction over interested parties so that the court can make a binding adjudication of their rights and interests in the property. In *Mullane*, the Court made clear that the characterization of an action as in rem or in personam does not alter the need to afford to those whose interests will be affected such notice and opportunity to be heard as due process requires, and that notice by publication often will not suffice. *See Mullane*, 339 U.S. at 310-15. In *Shaffer*, the Court concluded that, even when actions are quasi-in-rem, a court cannot assert jurisdiction over defendants whose interests in that property are at stake, absent minimum contacts between the defendants and the forum state. In dicta, the Court indicated that the same would be true in in rem cases, although the presence of the seized property in the forum state might create sufficient contacts to render the assertion of jurisdiction constitutional. *See Shaffer*, 433 U.S. at 207-08; *id.* at 217 (Powell, J., concurring); *id.* at 218 (Stevens, J. concurring). This in rem categorization nonetheless has been important in connection with class action courts’ ability to enjoy actions that would interfere with their jurisdiction. *See infra* notes 218-22 and accompanying text.

79. *In re Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d 721, 735 (2d Cir. 1992), *modified*, 993 F.2d 7 (2d Cir. 1993).

80. The court said:

Though the potential amount of aggregate punitive damages had not yet been determined, that amount was finite . . . . The (b)(1)(B) class was thought appropriate because the recoveries of early successful claimants for punitive damages would quickly reach a total sufficient to assure deterrence, thereby precluding later claimants as a matter of law.

*Id.* at 736-37. *Accord* *Cabraser & Sobol*, *supra* note 9, at 2021 (“At least in the mass tort context, . . . where the number of claimants is large, the pool of available punitive damages dollars is a classic limited fund warranting ‘limited punishment’ through Rule 23(b)(1)(B) certification for a single punitive damages trial or a comprehensive settlement of punitive damages liability.”).

ants,"<sup>81</sup> whereas "insolvency does not present the classic instance of a limited fund."<sup>82</sup> The Second Circuit has found that certification of a mandatory class when the defendant is insolvent poses very substantial questions about the circumvention of bankruptcy law-and-protections, and even more substantial questions when the claims of creditors vis-à-vis one another would be involved.<sup>83</sup>

Thus, it may be that the early creditors' and legatees' bills, and other early limited fund class actions,<sup>84</sup> more closely resemble a limited generosity class than they do the modern limited fund class action predicated on insolvency. Certainly, nothing I saw in the antecedents to Rule 23(b)(1)(B) appears to be inconsistent with, much less preclusive of, limited generosity classes. Nonetheless, insofar as my research did not turn up early cases involving *legal limits* because such cases did not exist, the absence of such cases could pose an obstacle to (b)(1)(B) class certifications *if* the courts closely observe, and narrowly construe, the warning in *Ortiz* that the classic characteristics of (b)(1)(B) classes are presumptively necessary.<sup>85</sup>

#### B. Cases Decided Under Rule 23(b)(1)(B)

If one focuses upon cases decided *under* Rule 23(b)(1)(B), one finds that, while most are limited fund cases,<sup>86</sup> several have discussed, and a few have embraced, limited generosity theory. These latter cases (and others, in which punitive damages awards were challenged by defendants) often marshal the arguments for mandatory punitive damages classes. From defendants' or the courts' perspective, it is said that multiple punitive damages awards are excessive<sup>87</sup> and violate something—policy,<sup>88</sup> common law,<sup>89</sup> due process,<sup>90</sup>

81. *Joint E. & S. Dist. Asbestos Litig.*, 982 F.2d at 735.

82. *Id.*

83. *See id.* at 736-39.

84. The *Ortiz* Court cites, as examples of classic limited fund class actions, suits on behalf of "claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, [and] proceeds of a ship sale in a maritime accident suit." *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (citations omitted).

85. *Id.* at 842.

86. 1 NEWBERG & CONTE, *supra* note 13, § 4.09, at 4-31.

87. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967) (expressing grave difficulty in perceiving how claims for punitive damages in a multiplicity of actions throughout the nation could be administered so as to avoid "overkill" in a mass tort case, unless there were a way in which all cases could be assembled before a single court, where a jury could make one award for "appropriate distribution among all successful plaintiffs"); *Campbell v. ACandS, Inc.*, 704 F. Supp. 1020, 1022-23 (D. Mont. 1989) (failing to persuade the court that liability for punitive damages should not go to the jury, defendants had argued for a holding as a matter of law that further imposition of punitive damages upon them in asbestos litigation in Montana would be unreasonable and excessive because, on the facts, deterrence would not be fostered and defendant had been adequately punished); *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 899 (N.D. Cal. 1981) (observ-

protections against double jeopardy<sup>91</sup> or the Excessive Fines Clause of the Eighth Amendment,<sup>92</sup> and that less extreme measures to com-

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ing that a series of separate actions arising out of a mass tort may result in disproportionate punishment of the defendant), *vacated by* 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

88. *See, e.g., Campbell*, 704 F. Supp. at 1021-22 (concluding that the propriety of a punitive award rests with the trier of fact, the court rejected the defendants' argument that public policy dictated that multiple punitive damages awards that would lead to its virtual demise as a viable commercial enterprise not be permitted); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984) (denying mandamus petition to vacate certification order), *cert. denied*, 465 U.S. 1067 (1984) (opining that there must be some limit, as a matter of policy or due process, to the number of times defendants may be punished for a single transaction).

89. *See, e.g., Dalkon Shield*, 526 F. Supp. at 898 (stating that there "is an implied in law ceiling on the amount of punitive damages that may be assessed"), *vacated by* 693 F.2d 847 (9th Cir. 1982).

90. *See, e.g., Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277 (2d Cir.) (rejecting defendant's arguments that a second award of punitive damages would violate due process where the first such award did not necessarily aim to punish the defendant for the full extent of its misconduct and the record neither supported the argument that prior awards approached the limit due process would impose nor demonstrated that the same misconduct had been the focus of prior actions; in addition, rejecting a procedural due process challenge based on the standards given to the jury, the use of a preponderance of the evidence burden of proof, and the judicial oversight employed), *cert. dismissed*, 497 U.S. 1057 (1990); *Man v. Raymark Indus.*, 728 F. Supp. 1461 (D. Haw. 1989) (rejecting defendant's arguments that an award of punitive damages would violate due process where meaningful standards limited the award, defendants were not being repeatedly punished for a single act but for a series of acts and decisions over decades, involving repeated failures to conform to their duties, there was no evidence that a prior punitive award was based on the full extent of defendant's misconduct, and the court was concerned with under-detering such conduct); *Campbell*, 704 F. Supp. at 1023-24 (rejecting defendant's arguments that an award of punitive damages would violate due process because the substantive state standard for such damages was void for vagueness and, coupled with bias against corporations, increased juries' tendencies to take from the rich and give to the poor); *Dalkon Shield*, 526 F. Supp. at 899 (opining that the interests underlying the due process rights of defendants can constitute an interest warranting the limitation or even elimination of multiple punitive damages awards, and that defendants have a due process right to be protected against unlimited multiple punishment for the same act, because such violates fundamental fairness), *vacated by* 693 F.2d 847 (9th Cir. 1982).

91. *See, e.g., In re Sch. Asbestos Litig.*, 789 F.2d 996, 1004 (3d Cir.) (noting that the parallel between exposure of mass tort defendants to repetitious punitive damages awards and fines for criminal activities has led some courts and commentators to suggest that the concepts of double jeopardy and excessive punishment should be invoked), *cert. denied sub nom. Celotex Corp. v. Sch. Dist. of Lancaster*, 479 U.S. 852 (1986), and *cert. denied sub nom. National Gypsum Co. v. Sch. Dist. of Lancaster*, 479 U.S. 915 (1986); 2 AM. LAW INST., REPORTERS' STUDY, ENTERPRISE RESPONSIBILITY FOR PERSONAL INJURY 260 (1991) (concluding that repeatedly penalizing corporate defendants for a single wrongful judgment or action is "antithetical to the protection against double jeopardy that characterizes overtly penal regimes").

92. *See, e.g., Eichenseer v. Reserve Life Ins. Co.*, 881 F.2d 1355, 1363 (5th

bat the foregoing evils are ineffectual and create problems of their own.<sup>93</sup> From the courts' or plaintiffs' collective perspective,<sup>94</sup> it is

Cir. 1989) (involving a challenge to a punitive damages award as violative of Eighth Amendment Excessive Fines Clause), *stay on damages granted*, 494 U.S. 1023 (1990), *vacated*, 499 U.S. 914 (1991) (requiring damages to be re-evaluated consistently with *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991)), *damages award aff'd*, 934 F.2d 1377 (1991); *Kraus v. Santa Fe S. Pac. Corp.*, 878 F.2d 1193, 1200 (9th Cir. 1989) (involving a challenge to a punitive damages award as violative of Eighth Amendment Excessive Fines Clause), *cert. dismissed*, 493 U.S. 1051 (1990); *FDIC v. W.R. Grace & Co.*, 877 F.2d 614, 622 (7th Cir. 1989) (involving a challenge to a punitive damages award as violative of Eighth Amendment Excessive Fines Clause), *cert. denied*, 494 U.S. 1056 (1990). However, the Supreme Court in *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.* rejected the argument that punitive damages awards in civil litigation between private parties can violate the Excessive Fines Clause of the Eighth Amendment. 492 U.S. 257, 275 (1989).

Similar reasoning would likely rebut the contention of a violation of double jeopardy. *See Hudson v. United States*, 522 U.S. 93, 99 (1997) (holding double jeopardy protections to apply only to multiple criminal actions); *United States v. Halper*, 490 U.S. 435, 451 (1989) (holding protections against double jeopardy not to be "triggered by litigation between private parties"). Defendants also may have additional reasons that they do not publicize to favor the certification of mandatory punitive damages classes. *See supra* note 13.

93. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1386-87 (3d Cir. 1993) (en banc), *modified*, 13 F.3d 58 (3d Cir. 1993) (observing that courts have recognized, with some frustration, that no single court or state legislature can effectively respond to the punitive damages problems created by mass exposure to defective products, and that to preclude any particular plaintiff from recovering punitive damages is arbitrary, particularly when other courts and other state legislatures may permit later-coming plaintiffs to recover such damages), *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993); *Sch. Asbestos*, 789 F.2d at 999, 1001 (noting that attempts by single states to impose equitable apportionment are discouraged by the lack of assurance that other states will do the same and by potential unfairness to their own citizenry); *Juzwin v. Amtorg Trading Corp.*, 718 F. Supp. 1233, 1234-36 (D.N.J. 1989) (on reconsideration, vacating order striking plaintiffs' claims for punitive damages against any defendant who presented proof that it already had paid an award of punitive damages for the same wrongful course of conduct), *cert. denied*, 498 U.S. 896 (1990). In *Juzwin*, the initial order had been entered on the grounds that multiple awards in such circumstances violated defendants' due process rights. On reconsideration, the court concluded that the remedy provided was unworkable, citing the lack of timely notice to those who were adversely affected, the inability of the court to determine whether the conditions necessary to bar a plaintiff from asserting a punitive damages claim had been met, the court's inability to provide uniform treatment to similarly situated plaintiffs outside its jurisdiction, and its inability to protect the due process rights of defendants not to have repetitive punitive damage awards made against them.

Accord AM. LAW INST., REPORTERS' STUDY, *supra* note 91, at 261, 265 (for similar reasons supporting a federal legislative authorization of mandatory class actions for punitive damages arising out of mass torts). The ALI Reporters' Study concluded that single-state action is ineffectual because one state cannot control what others do, and states that limit the recovery of punitive damages while other states do not do so may act at the expense of their own citizens, "a situation that hardly provides much law reform incentive for state legislators." *Id.* at 261; *see also* Howard M. Erichson, *Enough is Enough, Solving the Problem of Punitive Overkill in Multiple-Plaintiff Litigation*, 152

said that such mandatory classes are the best, and probably the only, way to achieve distributive justice among similarly situated plaintiffs and effect an equitable allocation of punitive damages, rather than provide a windfall to some plaintiffs, to the detriment of other plaintiffs.<sup>95</sup> For all of these reasons, an all-inclusive mandatory punitive damages class often is seen as the best solution.<sup>96</sup>

Despite the strong appeal of these arguments, limited generosity theory actually has provided the rationale for certifying few class actions under Rule 23(b)(1)(B). In *In re Agent Orange Product Li-*

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N.J.L.J. 246 (1998) (opining that bifurcation of trials, keeping defendant's wealth and past punitive awards out of evidence until defendant's liability and the award of compensatory damages have been decided, and perhaps even until liability for punitive damages has been established, "offers a partial but inadequate solution to concerns about informing jurors of past punitive awards").

94. Some individual plaintiffs benefit from a system in which those first to judgment gain a disproportionate amount of the punitive damages awarded.

95. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839-40 (2d Cir. 1967) (speaking of the unfairness of unequal distributions among equally worthy plaintiffs); *In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (observing that, if no class were certified under (b)(1)(B), persons who opted out of the (b)(3) compensatory damages class could receive all of the punitive damages or none at all); *Dalkon Shield*, 526 F. Supp. at 898 (predicting that an award of punitive damages in one case will alter the potential recovery of a plaintiff in a later suit, because the first amount awarded may represent an implied finding of the maximum amount that the defendant may be punished); see also 2 AM. LAW INST., REPORTERS' STUDY, *supra* note 91, at 261 (noting that systems that give the lion's share of punitive damages to the first victim to judgment are unfair to subsequent plaintiffs and may provide too little deterrence).

Because plaintiffs, in theory, are fully compensated by compensatory damages, recovery of any punitive damages is, in some sense, a windfall. However, when "windfall" is used in the context of punitive damages, it generally refers to inequitable distribution such that some plaintiffs recover punitive damages, or an amount of punitive damages, that is disproportionately great as compared with the punitive damages received by others who are equally "deserving." See Briggs L. Tobin, *The "Limited Generosity" Class Action and a Uniform Choice of Law Rule: An Approach to Fair and Effective Mass-Tort Punitive Damage Adjudication in the Federal Courts*, 38 EMORY L.J. 457, 458 n.10, 464-65 (1989) (so indicating, while also noting that punitive damages also can be seen as a windfall to the extent that they are highly disproportionate to a compensatory damages award).

96. See, e.g., *Dalkon Shield*, 526 F. Supp. at 900 (opining that the class action is the best device available to protect the interests of all parties where defendant otherwise runs the risk of multiple punitive damages awards for the same acts); see also 2 AM. LAW INST., REPORTERS' STUDY, *supra* note 91, at 262-65 (advocating mandatory class actions for punitive damages arising out of large-scale mass torts, to determine and distribute an appropriate amount of punitive damages for all tort claims arising out of the defendant's single course of conduct). In so advocating, the Reporters' Study agreed with recommendations in the Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association, *Punitive Damages: A Constructive Examination* 71-85 (1986), and the American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 20-26 (1989).



*ability Litigation*,<sup>97</sup> in support of a Rule 23(b)(1)(B) certification of a punitive damages class, along with the certification of a Rule 23(b)(3) certification of a compensatory damages class, Chief Judge Weinstein found that: (1) there was a substantial probability that punitive damages would be recoverable; (2) division of such an award among all who ultimately recovered compensatory damages would be equitable; (3) without a mandatory class certification, persons who opted out might receive either all of the recoverable punitive damages or none at all; and (4) "There must . . . be some limit, either as a matter of policy or as a matter of due process, to the amount[sic] of times defendants may be punished for a single transaction."<sup>98</sup> On these bases, he certified a (b)(1)(B) class for punitive damages.

As this description shows, Chief Judge Weinstein was unclear about the source of the limit on multiple punitive damages awards for "a single transaction." He also did not address in this opinion whether or how a single "policy" applied to limit the claims of this more-than-nationwide class of Vietnam War veterans<sup>99</sup> and their family members, who sued under state laws to recover damages for injuries allegedly suffered as a result of the veterans' exposure to herbicides in Vietnam. In the portion of his opinion dealing with Rule 23(b)(3) certification of a class insofar as it sought other-than-punitive damages, Chief Judge Weinstein opined that sufficient consensus existed in the substantive law of the states to provide a "national substantive rule" governing the main issues in the case.<sup>100</sup> It is unclear whether Chief Judge Weinstein believed that there was a parallel similarity in the punitive damages laws of the states that would avoid choice-of-law problems in the context of a (b)(1)(B) punitive damages class.<sup>101</sup> The Court of Appeals for the Second Circuit

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97. 100 F.R.D. 718 (E.D.N.Y. 1983), *mandamus denied sub nom. In re Diamond Shamrock Chems. Co.*, 725 F.2d 858 (2d Cir. 1984).

98. *Id.* at 728.

99. The plaintiff class was defined to include persons who were in the United States, New Zealand or Australian armed forces during a specified time period, who were injured in or near Vietnam by exposure to Agent Orange or certain other herbicides, and family members directly or derivatively injured as a result. *Id.* at 729.

100. *Id.* at 724.

101. *In re "Agent Orange" Prod. Liab. Litig.*, 580 F. Supp. 690, 705-13 (E.D.N.Y. 1984), *cert. denied sub nom. Diamond Shamrock Chems. Co. v. Ryan*, 465 U.S. 1067 (1984). Chief Judge Weinstein opined that a national consensus or federal law would govern punitive damages in the case. Reasoning that the states of the veterans' domiciles were concerned solely with compensating the injured victims, he concluded that the only jurisdictions with interests in the assessment of punitive damages, relevant for choice-of-law purposes, were the United States, the defendant corporations' states of incorporation and principal places of business, the states of product manufacture, and locations where defendants' "conspiracy of silence" may have had effect. Because Chief Judge Weinstein found no reasonable way to choose among these various states' laws, and an overriding federal interest in the assessment of punitive damages, he

affirmed, in the sense that it declined to grant mandamus to vacate the (b)(1)(B) and (b)(3) certifications.<sup>102</sup> Its opinion on the mandamus denial did suggest agreement with Chief Judge Weinstein's reasoning that the likely inability of some plaintiffs to recover punitive damages (absent class certification), because of the likely refusal of future juries to make multiple punitive damages awards, justified the mandatory certification.<sup>103</sup> The case later settled and, when the appeals court heard the appeal challenging the class settlement, it affirmed, but did so without specifically approving the punitive damages class.<sup>104</sup>

More recently, the District of Alaska certified a mandatory punitive damages class predicated on the limited generosity theory in a case involving the Exxon Valdez oil spill.<sup>105</sup> The court also stayed any other proceedings for punitive damages, brought by class members.<sup>106</sup> The action was tried to a jury in a three-phase trial. The first phase determined recklessness; the second assessed the amount of compensatory damages attributable to the spill, to guide the jury in fixing punitive damages; and the third culminated in a \$5 billion punitive damages award.<sup>107</sup> The Court of Appeals for the Ninth Circuit recently vacated the district court's allocation plan and remanded for reconsideration in light of the court's holdings, but nothing in its decision was critical of the class certification.<sup>108</sup>

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concluded that application of a federal law or national consensus law was justified. *Id.*

102. *In re Diamond Shamrock Chems. Co.*, 725 F.2d 858, 862 (2d Cir.), *cert. denied*, 465 U.S. 1067 (1984).

103. *Id.* (finding that evidence of prior punitive damages payments might induce juries to reduce such damages to later claimants and concluding therefore that "adjudication with respect to individual members of the class . . . would as a practical matter be dispositive of the interests of the other members not parties to the adjudication," quoting *In re Agent Orange Prod. Liab. Litig.*, 100 F.R.D. 718, 725 (1983)). The Second Circuit also concluded that, in light of the large number of potential claimants and because punitive damages ought to be distributed among plaintiffs on a basis other than their date of judgment, mandamus was not justified. *See id.* at 861-62.

104. *Agent Orange*, 818 F.2d at 167, *cert. denied sub nom. Pinkney v. Dow*, 484 U.S. 1004 (1988) (specifically finding that, because the court's disposition excluded any possibility of an award of punitive damages, the court did not need to address the propriety of the certification under Rule 23(b)(1)(B)).

105. *See In re Exxon Valdez*, 229 F.3d 790, 793 (9th Cir. 2000) (noting the certification, ordered by the district court on April 19, 1994); Cabraser & Sobol, *supra* note 9, at 2022 (reporting that the order was predicated on limited punishment theory, citing *In re The Exxon Valdez*, No. A89-0095-CV (HRH), 1995 WL 527990, at \*9 (D. Alaska 1995)).

106. Cabraser & Sobol, *supra* note 9, at 2022 (citing *In re The Exxon Valdez*, No. A89-0095-CV (HRH), Order No. 180 Supplement at 1 (D. Alaska Mar. 8, 1994)). For further discussion of such anti-suit injunctions, *see infra* notes 205-94 and accompanying text.

107. *In re Exxon Valdez*, 229 F.3d at 793-94.

108. The court vacated the allocation plan because the district court erroneously failed to enforce a cede back agreement between Exxon and certain plaintiffs, and erroneously instructed the jury about that agreement. *Id.* at 795-801.

For a variety of reasons, certification predicated on the limited generosity theory has been declined in a greater number of cases. Although the district court was persuaded to certify a limited generosity class in the *Dalkon Shield* litigation,<sup>109</sup> the Court of Appeals for the Ninth Circuit vacated that order, at the behest of plaintiffs. In addition to finding Rule 23(a) problems that (it held) precluded certification,<sup>110</sup> the court held (b)(1)(B) certification of the punitive damages class to be erroneous because the record did not demonstrate that separate punitive damages awards *inescapably* would affect later such awards.<sup>111</sup> Finding that "no rule of law limits the amount of punitive damages a jury may award,"<sup>112</sup> that no traditional limited fund of assets had been proven, and that a class action is not the only way to protect a defendant from liability for unreasonable punitive damages, the court vacated the (b)(1)(B) certification.<sup>113</sup> As other commentators have pointed out,

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109. *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prod. Liab. Litig., 526 F. Supp. 887, 902-03 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

110. *See In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 850-51 (9th Cir. 1982).

111. *See id.* at 851-52. Other courts have criticized this standard as unduly stringent and inconsistent with the language of the Rule. *See, e.g., In re* Agent Orange Prod. Liab. Litig., 100 F.R.D. 718, 726 (E.D.N.Y. 1983) (preferring a standard of substantial probability that, if damages were awarded, early litigants would exhaust the defendants' assets), *aff'd*, 818 F.2d 145 (2d Cir. 1987), *cert. denied*, 484 U.S. 1004 (1988). In *Ortiz v. Fibreboard Corp.*, the Court found it premature to decide the appropriate standard, because the class certification in that case could not stand under either formulation, 527 U.S. 815, 848-49 n.26 (1999).

112. *Dalkon Shield*, 693 F.2d at 852. Although one can cite as counterexamples to this proposition the Supreme Court cases articulating limits on the imposition of punitive damages, the Ninth Circuit's statement in *Dalkon Shield* is, to some degree, circumstantially supported by the many decisions that have declined to strike punitive damages awards on the ground that they constituted repetitive punishment for the same conduct. *See, e.g., Dunn v. HOVIC*, 1 F.3d 1371, 1386-87 (3d Cir.) (en banc), *modified*, 13 F.3d 58 (3d Cir.) (finding defendant's evidence to fall far short of demonstrating a due process violation in the entry of punitive damages awards against it, and listing several cases, decided by both state and federal courts, that declined to strike punitive damages awards on the ground that they constituted repetitive punishment, after stating that the majority of courts to have addressed the issue have declined to strike punitive damages awards on that ground), *cert. denied sub nom.* Owens-Corning Fiberglas Corp. v. Dunn, 510 U.S. 1031 (1993); *see also* RESTATEMENT (SECOND) OF TORTS § 908 cmt. e (1977) (not precluding successive punitive damages awards for the same course of conduct, but permitting consideration of prior such awards in assessing punitive damages); *see generally* Andrea G. Nadel, Annotation, *Propriety of Awarding Punitive Damages to Separate Plaintiffs Bringing Successive Actions Arising out of Common Incident or Circumstances Against Common Defendant or Defendants* ("One Bite" or "First Comer" Doctrine), 11 A.L.R. 4th 1261, 1262 (1982 & Supp. 2000) (noting frequent judicial conclusion that previous or potential awards of punitive damages for the same conduct do not preclude a plaintiff from recovering such damages).

113. *Dalkon Shield*, 693 F.2d at 857.

Absent any evidentiary record or effort on behalf of the plaintiff class to satisfy the Rule 23(b)(1)(B) requirements, it is difficult to believe that the *Dalkon Shield* court could squarely have been confronted with the question of how to delineate the requirements that were not tested by the facts or the litigants' presentations.<sup>114</sup>

Days earlier, the Court of Appeals for the Eighth Circuit had vacated a class certification order that, in part, had certified a punitive damages class under Rule 23(b)(1)(B) (as to both liability for and amount of punitive damages) in *In re Federal Skywalk Cases*.<sup>115</sup> In that case, uncertainty under Missouri law as to whether plaintiffs could recover multiple punitive damages awards based upon a single wrongful act of the defendant was one, but only one, of the grounds upon which the district court had so certified the class.<sup>116</sup> Rather than review the certification in and of itself, the appeals court focused upon the district court's express prohibition of class member settlements of their punitive damages claims and its order enjoining plaintiffs from pursuing pending state court actions concerning liability and the amount of punitive damages they could recover.<sup>117</sup> The Eighth Circuit's conclusion that this injunction violated the Anti-Injunction Act ("AIA")<sup>118</sup> was the basis of its vacation of the class certification order. For present purposes, it is important that, in the course of its reasoning to the conclusion that the injunction in support of class certification had violated the AIA, the court rejected the analogy to a limited fund.<sup>119</sup> The court took the position that, where a "class has an uncertain claim for punitive damages against defendants who have not conceded liability[,] . . . [the] claim does not qualify as a limited fund," declaring that, "the premise that the possibility of defendants being required to pay only one punitive damage award is comparable to the limited fund concept underlying federal interpleader . . . is erroneous."<sup>120</sup>

In *In re School Asbestos Litigation*,<sup>121</sup> the district court had certified under Rule 23(b)(1)(B) a mandatory, nationwide, class of school districts seeking punitive damages from asbestos manufacturers and distributors. The trial court sought thereby to avoid "overkill" and create parity of treatment for the plaintiffs, although it permitted plaintiffs who opted out of the (b)(3) class for compensatory

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114. Cabraser & Sobol, *supra* note 9, at 2015.

115. 680 F.2d 1175 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 459 U.S. 988 (1982).

116. *Id.* at 1179.

117. *Id.* at 1180.

118. 28 U.S.C. § 2283 (1994). For further discussion of the AIA, see *infra* notes 204, 216-51 and accompanying text.

119. *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir.), *cert. denied sub nom.* Stover v. Rau, 459 U.S. 988 (1982).

120. *Id.*

121. 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

damages to settle their punitive damages claims against the defendants.<sup>122</sup> The Court of Appeals for the Third Circuit vacated the mandatory class certification.<sup>123</sup> It assumed, without deciding, that the various arguments favoring prevention of repetitive punitive damages awards "might provide a threshold justification for the exercise of discretion in certifying a nationwide (mandatory) Rule 23(b)(1)(B) class for punitive damages."<sup>124</sup> Although holding open the possibility of such classes in other circumstances,<sup>125</sup> the court ultimately held that "neither the record nor the . . . findings" made in this case were "adequate to support the procedure" here.<sup>126</sup> The lack of fact findings as to the potential amount of punitive damages and, most importantly, the under-inclusiveness of the plaintiff class, doomed the certification because the court could neither protect the defendants nor equitably allocate the award among plaintiffs. The class did not include all property damage claimants or any personal injury claimants, and the court believed that all of those persons would be subject to any limit placed on the total punitive damages liability of the asbestos defendants.<sup>127</sup> The court concluded that "a mandatory class predicated on a potential legal limit to punitive damages would logically include all litigants who seek such awards,"<sup>128</sup> but the court could not see how the class could be expanded to encompass all the necessary parties.<sup>129</sup> The court also was concerned that, under the circumstances, those included in the mandatory class would actually be disadvantaged by the delay entailed in being involved in such a suit, rather than being able to proceed individually.<sup>130</sup> Finally, the court worried that the use of limited generosity theory might violate the parties' substantive rights, in violation of *Erie Railroad v. Tompkins*.<sup>131</sup> It declared, "if we cannot make a reasonable prediction that state courts will uniformly accept the limited generosity theory, a class may not be certified

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122. *Id.* at 999, 1003.

123. *Id.* at 1011.

124. *Id.* at 1005.

125. *Id.* at 1008.

126. *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1005-07 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

127. *See id.* at 1005-06.

128. *Id.* at 1006.

129. *See id.* The court commented that under-inclusiveness of the class might not always and necessarily be fatal, but that it was an insurmountable obstacle in this case. *See id.* at 1007.

130. *See id.* at 1006-07.

131. 304 U.S. 64 (1938) (requiring federal courts sitting in diversity to apply substantive state law, for reasons of policy, statutory interpretation, and constitutionality). The *School Asbestos* court was concerned that the trial court had not fully taken into account the potentially differing legal requirements for and limits upon punitive damages of the fifty states from which class members came. *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1007 (3d Cir.), *cert. denied*, 479 U.S. 852 (1986).

with that concept as its underlying justification.<sup>132</sup> For all of these reasons, the court vacated the (b)(1)(B) certification.<sup>133</sup>

One immediate comment I would make about the *School Asbestos* case is that, for reasons discussed further below,<sup>134</sup> the court was correct to be concerned about the use of a limited generosity basis for a Rule 23(b)(1)(B) class certification when the states whose punitive damages laws properly apply vary in the limitations, if any, that they impose on the recovery of punitive damages. However, I think that the court was wrong to be concerned about whether the pertinent states uniformly accepted (or were likely soon to accept) limited generosity theory *per se*, for that theory is merely an interpretation of a procedural rule (Rule 23(b)(1)(B) and state law analogues); it is not substantive law that the federal courts would be obliged to follow in cases within diversity subject matter jurisdiction.

The latest word from the Supreme Court on Rule 23(b)(1)(B) class certifications came in *Ortiz v. Fibreboard Corp.*<sup>135</sup> In *Ortiz*, the Court found that the requirements of Rule 23 were not satisfied, and overturned a global agreement settling the personal injury claims of a large class of persons who had sued Fibreboard for asbestos exposure.<sup>136</sup> Pursuant to an agreement negotiated by plaintiffs' attorneys with defendants (Fibreboard and certain insurance companies), a group of named plaintiffs had filed an action in federal district court seeking certification of a mandatory settlement class comprised of certain persons with personal injury claims attributed to asbestos exposure.<sup>137</sup> The parties had presented the court with a Global Settlement Agreement.<sup>138</sup> After notice to potential class members and intervention by objectors, the court had held a fairness hearing, after which it certified the proposed class under Rule 23(b)(1)(B) and approved the settlement.<sup>139</sup> The Fifth Circuit affirmed.<sup>140</sup> Its decision was vacated and remanded for further consideration in light of

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132. *Sch. Asbestos*, 789 F.2d at 1007.

133. *See id.* at 1007-08. In light of its conclusions, the court did not reach other issues that had been argued: (1) whether a mandatory class would be inconsistent with the due process considerations discussed in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and (2) whether certification of such a class would violate the Anti-Injunction Act, 28 U.S.C. § 2283 (1994). *Id.* The court did not indicate whether the issues it had in mind related to matters of personal jurisdiction or to choice of law, both of which were involved in *Shutts*. *Id.*

134. *See infra* notes 163-69 and accompanying text.

135. 527 U.S. 815 (1999).

136. *Id.* at 821.

137. *Id.* at 825-26.

138. *Id.* at 824-25. The Global Settlement provided for \$1.525 billion to be contributed by Fibreboard's insurers, and for Fibreboard to contribute \$10 million, all but \$500,000 of which would come from other insurance proceeds. The money was to be paid to personal injury claimants who alleged harm from Fibreboard's asbestos products. *Id.*

139. *Id.* at 827-28.

140. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 828 (1999).

*Amchem Products, Inc. v. Windsor*.<sup>141</sup> On remand, the Fifth Circuit again affirmed.<sup>142</sup> The Supreme Court granted certiorari and reversed.

The Supreme Court examined the varieties of suits traditionally encompassed by Rule 23(b)(1)(B) and discerned three characteristics that typify "limited fund" class actions and whose presence justifies (b)(1)(B) certification. The three characteristics are:

- (1) a fund with a definitely ascertained limit which, at its maximum, is demonstrated to be exceeded by aggregate liquidated claims, set at their maxima;
- (2) *all* of which (fund) is to be distributed to those with liquidated claims that are based on a common theory of liability; and
- (3) all claimants sharing a common theory of recovery to be treated equitably among themselves, typically (historically) by a pro rata distribution of the fund.<sup>143</sup>

The Court concluded that these characteristics are presumptively necessary for limited fund (b)(1)(B) certification, that courts should presume that the drafters intended courts to "stay close to the historical model,"<sup>144</sup> and that a proponent of any departure from these norms would have the burden of justifying that departure.<sup>145</sup> This conservative approach appeared to be tied to the Court's perception that the Advisory Committee did not contemplate that (b)(1)(B) would be used for unliquidated tort claims.<sup>146</sup>

Having laid down these precepts, the Court concluded that the record in *Ortiz* did not support the essential premises of mandatory limited fund actions. It failed to demonstrate that the fund was limited, except by the agreement of the parties.<sup>147</sup> Moreover, both exclusions from the class and the allocations of assets were at odds with the concept of limited fund treatment and with the structural protections of Rule 23(a) that the Court had explained in *Amchem*.<sup>148</sup>

Specifically, the lower courts erred in uncritically adopting figures agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy.<sup>149</sup> Without adequate showings of both the aggregate claims and the upper limit of the fund, no showing of the insufficiency of the latter was possible. Parties wishing to obtain and maintain approval of a limited fund class action suit for

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141. 521 U.S. 591 (1997).

142. *Flanagan v. Ahearn*, 134 F.3d 668, 669-70 (1998).

143. *Ortiz*, 527 U.S. at 838-39.

144. *Id.* at 842.

145. *Id.*

146. *Id.* at 843-44 n.20.

147. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 848 (1999).

148. *Id.*

149. *Id.* at 848.

money damages must present *evidence* from which the district court can ascertain both the limit of the fund and its insufficiency, and the district court must make findings of fact concerning both of these elements, following a proceeding in which the evidence put on by the parties is subject to challenge by opponents (persons who object to a proposed settlement and perhaps to the certification itself).<sup>150</sup>

The Court next found that the certification of the *Ortiz* class fell short of the requirement that equity would be done in the distribution of the limited fund. It fell short both because the certified class was under-inclusive and because the lower courts had failed to mandate procedures to resolve how differently situated claimants could be treated fairly. With respect to the first, the Court stated emphatically that,

there can be no question that such a mandatory settlement class will not qualify when in the very negotiations aimed at a class settlement, class counsel agree to exclude what could turn out to be as much as a third of the claimants that negotiators thought might eventually be involved, a substantial number of whom class counsel represent.<sup>151</sup>

In other words, because the very purpose of a limited fund class action of this type is to equitably divide a limited fund among claimants suing on a common legal theory, a limited fund class action could not properly be certified if a substantial number of those who "ought" to be within the class action were excluded from it. The Court left unresolved "how far a natural class may be depleted by prior dispositions of claims and still qualify as a mandatory limited fund class."<sup>152</sup> The Court added that, even if there were parity between the benefits received by class members with present claims and those received by those left out of the class, the certification would have to fall if, as here, the district court failed to assure that subclasses with conflicting interests were independently represented.<sup>153</sup>

The second major problem with the certification that the Court analyzed under the rubric of the equity required in limited fund class actions was (as just noted) that the court and the parties had failed to assure that subclasses with conflicting interests were independently represented. Such "structural protection" is essential and, despite *Amchem* having made clear that holders of present claims and holders of future claims have diverging interests that require they be separated into subclasses and separately represented, that protection had not been afforded here.<sup>154</sup> Moreover, as *Amchem*

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150. *Id.* at 848-49.

151. *Id.* at 854.

152. *Id.*

153. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 855 (1999).

154. *Id.* at 856-57.



had indicated, the interest of all class members in securing contested insurance funds for the payment of claims, or a conclusion that the overall settlement was fair, did not eliminate the need for subclasses.<sup>155</sup> Rule 23(a)'s and (b)'s requirements could not be "swallowed" or obviated by a determination that a settlement was fair.<sup>156</sup>

Finally, the Court noted that the fund provided here was smaller than the value of the assets understood by the Court of Appeals to be available for payment of the mandatory class members' claims, and that this was a marked departure from limited fund precedents.<sup>157</sup> The Court found no need to decide whether this feature alone would be fatal to the Global Settlement Agreement, but it spoke in strong language to make clear that such an arrangement

seems irreconcilable with the justification of necessity in denying any opportunity for withdrawal of class members whose jury trial rights will be compromised, whose damages will be capped, and whose payments will be delayed. With Fibreboard retaining nearly all its net worth, it hardly appears that such a regime is the best that can be provided for class members.<sup>158</sup>

I have discussed *Ortiz* as extensively as I have in order to extract as many lessons as possible from it in evaluating the viability of mandatory limited generosity classes. Before turning to such an independent evaluation, I briefly note what lower courts considering limited fund or limited generosity class certification have made of *Ortiz*, insofar as relevant here. Some have noted that, while the Court ostensibly left open whether (b)(1)(B) ever may be used to aggregate individual tort claims,<sup>159</sup> the Court's advocacy of strict adherence to the traditional model may sound "the death knell for mass tort suit" certifications under this portion of the Rule.<sup>160</sup> Insofar as claims for punitive damages arising out of mass torts are, for present purposes, indistinguishable from unliquidated claims for compensatory damages for the underlying torts, their certification under (b)(1)(B) would be equally threatened. However, punitive damages claims may be distinguished by the limitations placed upon

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153. *Id.* at 857-58.

156. *Id.* at 858-59.

157. *Id.* at 859.

158. *Id.* at 860.

159. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 844, 864 (1999).

160. *Doe v. Karadzic*, 192 F.R.D. 133, 140 (S.D.N.Y. 2000); see also *Wish v. Interneuron Pharms., Inc. (In re: Diet Drugs Prods. Liab. Litig.)*, No. 98-20594, 1999 U.S. Dist LEXIS 14881 (E.D. Pa. Sept. 27, 1999) (tracking the reasoning of *Ortiz* in vacating a conditional class certification and a stay of all state and federal court proceedings against defendant). Where the court could not determine the true scope of the "fund" or defendant's potential liability and could not ascertain whether the class was receiving the best possible deal, the proposed retention by the class of a creditor's interest in defendant's ongoing business was "alien to the nature of a limited fund under Rule 23," *id.* at \*28, and various circumstances made equitable distribution of the fund difficult.

them by state and federal constitutional law. Some mandatory punitive damages classes have been maintained in the wake of *Ortiz*.<sup>161</sup>

*C. The Viability of Limited Generosity Theory as a Predicate for (b)(1)(B) Certification*

Neither *Ortiz*, nor *Amchem*, nor any other Supreme Court decision disallowed, or even addressed, mandatory punitive damages classes certified under Rule 23(b)(1)(B). Let us first consider how well limited generosity classes might satisfy the three characteristics of "limited fund" class actions that typify, and whose presence suffices to justify, (b)(1)(B) limited fund certification, according to *Ortiz*.

*1. A Fund with a Definitely Ascertained Limit which, at its Maximum, is Exceeded by Aggregate Liquidated Punitive Damages Claims*<sup>162</sup>

In considering the prove-ability of a fund with a definitely ascertained limit that, at its maximum, is demonstrated to be exceeded by aggregate liquidated claims set at their maxima, several issues arise. The first is the existence of a definitely ascertainable and ascertained limit.

*a. State Law/Multiple Law Complications*

If, under applicable choice of law principles constitutionally applied, different state punitive damages laws, including caps in some instances, would have to govern the claims of sub-groups of class members, it is not entirely clear (to me) how a court would combine or coordinate those differing caps, and perhaps absences thereof, to come up with a definitely ascertained limit.<sup>163</sup> Perhaps it would not

161. See, e.g., *Baker v. Exxon Corp.*, 239 F.3d 985, 988 (9th Cir. 2001) (in a case involving a mandatory punitive damages claim, upholding defendants' ability to recover on punitive damage claims assigned to them by plaintiffs in partial settlement of the action, despite defendant having provided the punitive damages fund).

162. Consistent with the Court's finding this to be a core characteristic of limited fund class actions traditionally encompassed by Rule 23(b)(1)(B), the Court also admonished that mandatory class treatment is justified only when there is a fund with a definitely ascertained limit, all of which would be distributed by an equitable, pro rata distribution, to satisfy those with *liquidated* claims (based on a common theory of liability). *Ortiz*, 527 U.S. at 841.

163. While in many contexts the variation in states' laws is not great, and class plaintiffs' claims can be gathered into a manageable number of groups (avoiding unmanageability or predominance of individual, over common, questions, for example) (see, e.g., Larry Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U. L. REV. 547, 584 (1996)), in the context under discussion it is less clear whether a reduction of the applicable limits on punitive damages from 50 to 4, for example, would solve the problem of how the remaining limits would be combined or coordinated. Similarly, although state-by-state class actions or sub-classes have been proposed as a solution to the certification problems posed by application of various states' laws, see, e.g., Erichson, *supra* note 93, it re-

be too difficult: for example, if, in state A, the applicable limit on punitive damages for harm done there was X dollars, and, in state B, the limit on punitive damages was twice the compensatory damages suffered by injured parties in or from that state, one could add all the limits together to derive an aggregate limit. This solution would entail having the court or the jury<sup>164</sup> make all the necessary determinations: the punitive damages awarded for conduct doing harm in state A, the compensatory damages suffered by those in or from state B, etc. The court would have to guard against overlap (so that damages to Plaintiff 1 "from" state B but injured in state A were not double-counted), however, and, if maximum punitive damages were to be determined before (some) compensatory damages were assessed, it is hard to see how the court could determine (other than by estimation, extrapolation, or the like) punitive damages that are a multiple of compensatory damages, in order to add them into the equation.<sup>165</sup>

Thus, if a forum state's choice of law principles led to the selection of a single state's punitive damages law to govern the punitive damages to be awarded for a mass tort course of conduct, or if Congress legislated the application of such a single body of law, and if that single selection were constitutional,<sup>166</sup> one could have a "fund" with a definitely ascertained limit. One could continue the analysis of whether a limitation upon punitive damages contained within the governing law would create a situation in which mandatory class certification under Rule 23(b)(1)(B) would be appropriate. However, if no such single body of punitive damages law will govern the puni-

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mains unclear how courts would combine or coordinate the limits on punitive damages that the applicable laws would dictate.

164. I "fudge" here on who the deciding person or entity would be; one normally would not have a jury making findings as a predicate to whether a particular sort of class ought to be certified.

165. As indicated by the earlier discussion of Supreme Court cases, factfinders who are imposing punitive damages are permitted to consider potential harm that a defendant's conduct would have caused had defendant's wrongful plans succeeded, and possible harms that might have resulted if similar future behavior were not deterred. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 460 (1993). For a discussion of *TXO*, see *supra* notes 28-45 and accompanying text. Thus, as a matter of substantive due process, punitive damages do not have to be closely tied to compensatory damage awards. The text of this Article is focusing at this point on state law dictates concerning the calculation and limits upon punitive damages.

166. Congress might be able to reach this end either by legislating a substantive body of punitive damages law to apply in specified circumstances involving mass torts, or by legislating a choice of law rule for such cases. See AM. LAW INST., *COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS* 310 (1994) (asserting that three constitutional sources support the enactment of federal statutory choice of law rules for complex litigation: The Commerce Clause, U.S. CONST. art. I, § 8; the Full Faith and Credit Clause, U.S. CONST. art. IV, § 1; and the Judicial Power Clause, U.S. CONST. art. III, § 2, as implemented by the Necessary and Proper Clause, U.S. CONST. art. I, § 8; and exploring each of these).

tive damages to be awarded for a mass tort course of conduct, mandatory class certification under Rule 23(b)(1)(B) might be "dead in the water" "right off the bat" (to mix metaphors), unless a court could combine or coordinate the differing caps, so as to arrive at a "fund" with a definitely ascertained limit.

*The Possibility of a Single Substantive Law Governing Punitive Damages Claims in Multi-State Mass Tort Litigation*

In mass tort cases touching only one state, a single substantive law governing punitive damages certainly could apply. It also seemed possible that, in some multi-state mass tort cases, a court constitutionally could select a single substantive law to govern all of the punitive damages claims. For example, in *Simon v. Philip Morris*,<sup>167</sup> alleging, *inter alia*, a conspiracy among tobacco companies to dispute and deflect attention from evidence of smoking's harmful effects, Judge Jack Weinstein issued a memorandum opinion holding preliminarily that New York law constitutionally could be applied to all the liability claims (aside from the damages issues), notwithstanding plaintiffs' domiciles around the country and allegations of nationwide harm. He also opined that the number of individual compensatory claims tried in the Eastern District of New York might provide a basis to project total probable compensatory damages nationwide, adequate to allow a jury in his court to fix total allowable punitive damages for the nation in the non-opt-out punitive damages class certified in the companion case known as *Simon II*.<sup>168</sup> Perhaps the reasons supporting application of New York law to the elements of liability (should it hold up on appeal) also would suffice to validate the application of New York law to all punitive damages claims in the case.<sup>169</sup>

Earlier, in *In re Northern District of California "Dalkon Shield" IUD Products Liability Litigation*,<sup>170</sup> the district court had failed to find any true conflict between the general policies underlying the various state standards for awarding punitive damages, and had concluded that, in the absence of such a true conflict or compelling interests of other states in having their law applied, either Califor-

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167. 124 F. Supp. 2d 46 (E.D.N.Y. 2000).

168. *Simon II* refers to *In re Simon II Litigation*, No. 00 CV 5332, 2000 U.S. Dist. LEXIS 12611 (E.D.N.Y. Sept. 6, 2000). See *Simon v. Philip Morris*, No. 99 CV 1988, 2000 U.S. Dist. LEXIS 16713, at \*7 (E.D.N.Y. Nov. 16, 2000). Judge Weinstein contemplated that, as ultimately amended, *Simon II* "would then cover all private claims for injury as a result of Tobacco's activities, with some exceptions." *Id.*

169. The court stated that choice of law considerations as to punitive damages would be addressed in a separate opinion. See *Simon*, No. 99 CV 1988, 2000 U.S. Dist. LEXIS 16713, at \*18-19. But see *infra* notes 163-69 and accompanying text.

170. 526 F. Supp. 887, 915-17 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co. v. Abed, 459 U.S. 1171 (1983).

nia law or a compromise standard should be applied.<sup>171</sup> However, the Ninth Circuit agreed with plaintiffs' argument that punitive damages standards vary among the states, and "can range from gross negligence to reckless disregard to various levels of willfulness and wantonness."<sup>172</sup> Based in part on this variance, the court held it to have been error to certify a nationwide class of punitive damages claimants.

There is now even further reason to fear that no single state's punitive damages law could constitutionally be applied to a course of conduct causing nationwide or even just multi-state harm. The Supreme Court's decision in *BMW of North America, Inc. v. Gore*<sup>173</sup> indicated clearly that the economic penalties that a state inflicts, including punitive damages, have to be supported by the state's interest in protecting its own consumers and economy, and may not be used to protect the consumers or economies of other states.<sup>174</sup> That reasoning seems to imply that a single state's punitive damages law cannot be the basis for a punitive damages award that reflects a defendant's conduct, or the harm caused or threatened by a defendant's conduct, nationwide or even in multiple states. The Court's reasoning, with its reliance on state sovereignty and comity, individual states' interests and policies, and protection of a state's own consumers and economy, but nothing more,<sup>175</sup> seems almost to guarantee that the punitive damages laws of multiple states must be invoked to provide the basis for punitive damages that arise from multi-state or national harm. Although others have viewed *Gore* as facilitating class-wide assessment of punitive damages because it

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171. See also *In re Air Crash Disaster Near Chicago, Illinois*, on May 25, 1979, 644 F.2d 633, 637 n.5 (7th Cir. 1981) (concluding, in a multi-district litigation, after surveying the choice of law doctrines of many states, that all of them would apply Illinois law to determine plaintiffs' right to recover prejudgment interest); AM. LAW INST., *supra* note 166, at 315-16 (proposing that, where otherwise applicable laws conflict in transferred cases, transferee judge choose a single law to control particular issues that cut across cases); *id.* § 6.01 (providing guidelines for mass torts); *id.* § 6.06 (proposing guidelines for punitive damages).

172. *Dalkon Shield*, 693 F.2d at 850. At least one commentator has argued that federal courts must be free to formulate and apply a uniform standard of punitive damages liability to entire plaintiff classes. See Tobin, *supra* note 95, at 480-87. Tobin's argument in support of this plea seems flawed to me, but it is clear why he would like such a uniform standard to apply. In support of his argument, Tobin contends that the rule of *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941), requiring federal courts in diversity cases to apply the choice of law rules of the state in which they are sitting, should be held inapplicable; that federal courts should characterize the punitive damage standard that they use as procedural(!)—perhaps he confuses the possibility that choice-of-law could be procedural with the standard for punitive damages being procedural; and that the law of the defendant's principal place of business should dictate the standard of punitive damages liability. *Id.*

173. 517 U.S. 559 (1996).

174. See *id.* at 568-74.

175. See *id.* at 572-73.

implies that “the temporal and geographic scope of a defendant’s conduct properly before a court for assessment of punitive damages must be commensurate with the scope of the plaintiff group actually in court,”<sup>176</sup> the Court’s reasoning, as it bears upon choice of law, seems to be more an obstacle than a boon to multi-state or national class actions. So, while a jury in a nationwide class action could consider defendant’s conduct, wherever in the nation it occurred, as well as the nationwide consequences of that conduct, the potential application of multiple bodies of punitive damages law remains problematic.

#### b. Limitations Imposed by Due Process

Absent a suitable limit predicated on state law, one or more of the parties and the court could seek a definitely ascertainable limit deriving from federal due process principles. Do the cases provide that? They demand certain procedural protections, which the class court can be expected to afford. The substantive due process requirements that the Court has articulated look to reasonableness in light of such factors as punitive damages’ nature and purpose, the character and degree of the defendant’s wrongs, the harm defendant did and might have caused and the harm that might result if similar future behavior were not deterred, the relationship to compensatory damages, the defendant’s wealth, and the culpability of defendant’s state of mind. Moreover, “while courts have thus far declined to construe the Due Process Clause as a per se prohibition against multiple punitive awards for the same conduct, they have uniformly acknowledged [and some state legislatures have mandated]<sup>177</sup> that earlier punitive awards must be considered in mitigation of later ones.”<sup>178</sup> Are the requirements of substantive due process sufficient to create a fund with a definitely ascertainable maximum? The factors that go into the substantive due process analysis seem to allow considerable latitude. Still, the idea is that due process does impose a limit, a maximum, beyond which punitive damages for a particular act or course of conduct would be unconstitutional. That very concept posits that courts can arrive at a definite, ascertainable limit on punitive damages, which is one of the necessary predicates for a limited generosity class.

#### c. Liquidation of Aggregate Punitive Damages Claims

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176. Cabraser & Sobol, *supra* note 9, at 2019-20.

177. See Appendix.

178. Cabraser & Sobol, *supra* note 9, at 2019 (footnotes omitted) (citing such cases as *Dunn v. HOVIC*, 1 F.3d 1371, 1386-87 (3d Cir. 1993) (en banc), *modified*, 13 F.3d 58 (3d Cir. 1993), *cert. denied sub nom. Owens-Corning Fiberglas Corp. v. Dunn*, 510 U.S. 1031 (1993) (for a discussion of *Dunn v. HOVIC*, see *supra* note 93); and *Morgan v. Woessner*, 997 F.2d 1244, 1257 & n.14 (9th Cir. 1993) (indicating that other civil awards against the defendant, for the same conduct, should be taken into account, in mitigation)).

If the case law does allow the courts to determine a definitely ascertained limit on punitive damages derived from due process or from state law, the next question would be whether parties could demonstrate that that fund is exceeded by the plaintiffs' aggregate liquidated claims, set at their maximum. In other words, could the parties demonstrate that the maximum amount of punitive damages that governing state law or due process would permit to be awarded is exceeded by plaintiffs' aggregate "liquidated" claims for punitive damages?

The claims involved in the antecedents to Rule 23(b)(1)(B) apparently all were liquidated, a characteristic upon which the *Ortiz* Court placed some emphasis.<sup>179</sup> By contrast, the punitive damages claims that we are considering normally would be *unliquidated* at the time of class certification. This should give pause to those who would like to feel certain that "limited generosity" situations will become regular occasions for class certification under Rule 23(b)(1)(B). But should this lack of immediate liquidation be fatal?

It seems to me that there are significant problems here. Ordinarily, it would be impracticable to stay class-wide pursuit of punitive damages until all pertinent mass tort claims had been liquidated by adjudication or settlement, for that might take many years, even decades, in the context of hundreds, thousands, even millions of compensatory damages claims, particularly if those could not be resolved on a class-wide basis<sup>180</sup> or if assertion of some of the claims had to await the manifestation of injury after a long latency period. If a mandatory punitive damages class action could proceed in advance of the determination of (some) class members' claims for compensatory damages—and decide, *inter alia*, liability for punitive damages—it would be possible to determine, to "liquidate," each class member's claim for punitive damages, concurrently with the determination of his or her compensatory damages, by application of a predetermined formula that would, for example, make punitive

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179. See *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 835-37 (1999) (citing *Dickinson v. Burnham*, 197 F.2d 973 (2d Cir.) (involving class plaintiffs who had fully ascertained damages that allowed equitable pro rata distribution), *cert. denied*, 344 U.S. 875 (1952)); *Guffanti v. Nat'l Surety Co.*, 90 N.E. 174, 176 (N.Y. Ct. App. 1909) (allowing plaintiff class to seek restitution of lost deposits on equitable, pro rata basis, from surety bond funds); *Ross v. Crary*, 1 Paige Ch. 416, 417-18 (N.Y. Ch. 1829) (concluding that consolidation of similarly situated legatees' claims against limited estate assets allowed equitable distribution of funds); *cf. City & County of San Francisco v. Market St. R.R. Co.*, 213 P.2d 780 (Cal. Ct. App. 1950) (allowing plaintiff class to seek injunction to prevent defendant with limited assets from providing cash dividends to shareholders, because all plaintiffs had "common and general" interest in potential tort judgments that would benefit any member of the class)).

180. Certification of classes seeking to assert mass tort compensatory damage claims often is denied upon judicial findings of lack of typical claims, lack of adequate representative parties, an absence of predominating common questions, or upon the conclusion that the class action device is not a superior approach to resolving the claims. See *supra* note 4.

damages a multiple of the compensatory damages award.<sup>181</sup> On that basis, or perhaps on the basis of an educated extrapolation from past compensatory damages awards to persons in the punitive damages class, at some point in time a court could judge whether aggregate punitive damages recoverable by the class would exceed the punitive damages "fund," at its maximum. Moreover, insofar as punitive damages do not need to be a function of, or bear a particular relationship to, compensatory damages, punitive damages might be liquidated without awaiting the determination of compensatory damages. This is a stretch from past law but one which may be worth making, in view of all the benefits of mandatory punitive damages classes, if there are no other insurmountable hurdles.

It should be noted parenthetically that, if there is no definitely ascertained limit on punitive damages, or if such a limit is not exceeded by aggregate liquidated punitive damages claims, then there is no need for a mandatory class, and none should be certified.

## 2. *All of the Fund to be Distributed to Those with (Liquidated) Claims that are Based on a Common Theory of Liability*

### a. Common Theory

The classic characteristic that the fund would be distributed to satisfy the claims of those suing on a common theory of liability also might pose an obstacle to (b)(1)(B) certification in an era when theories of liability have multiplied and similarly-situated persons may sue on a variety of differing legal theories. Plaintiffs' lawyers should be able to deal with this requirement, however, by having the class seek punitive damages on one or more common theories of liability, rather than having different class members assert different theories. If courts were narrowly to interpret "common theory of liability" to imply that only persons suing under a single state's tort law could be basing their claims on a common theory of liability, that would cause difficulty; but the better view would be that all who are asserting gross negligence (or some other legal theory) should be viewed as basing their claims on a common theory of liability, notwithstanding that the laws of different states would apply to the claims.

### b. Under-inclusiveness

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181. See, e.g., *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 299-300 (5th Cir. 1998) (noting that the trial court planned, in phase I of the trial, to decide whether a punitive damages multiplier should be imposed before determining compensatory damages for individual class members); *Jenkins v. Raymark Indus.*, 782 F.2d 468, 471-75 (5th Cir. 1986) (upholding a multi-phase trial structure in which the first phase was to include, *inter alia*, the fixing of a punitive damages multiplier, to be applied later to future compensatory damages verdicts).



More fundamental to the idea that all of the fund must be distributed to a similarly-situated group of claimants is the concern that inequitable results not be permitted to result from under-inclusiveness of the class. Implicit in the notion that all claimants are to be treated equitably among themselves is the requirement that all of the claimants who "should" be included within the class are included. When mandatory (b)(1) class certification is sought, the court has to satisfy itself that the proposed class is sufficiently inclusive to fulfill the purposes of the certification. Otherwise, people outside the class may be either unduly advantaged or unduly disadvantaged as compared with what distributive justice and equitable allocation would provide, and the defendant also will lose the protections that a mandatory class is intended to afford. In some mass tort cases it is not difficult to describe the persons who belong in the mandatory class. It should not be difficult, for example, in mass accident cases where a single incident (a fire, an airplane crash) injures a describable and ascertainable group of individuals. In other mass tort cases, where the underlying misconduct and injuries occur over a long period of time and over a large geographic area, where causation is controverted and the alleged injuries are varied, it may be difficult to decide how the class should be defined, and to include everyone whom the court concludes should be included. This was one of the problems in the *School Asbestos* case, discussed above.<sup>182</sup> That difficulties would arise in some cases is not, of course, a reason to disapprove mandatory punitive damages classes across the board, but it does point out that parties and courts may not be able to make such classes work as often as they might like.

### c. Defining the Course-of-Conduct

A similar, and indeed overlapping and contributory, problem arises from the sometimes-difficult task of determining what conduct falls within the course of conduct for which a particular class can seek and recover punitive damages. If a defendant has manufactured and distributed cigarettes, asbestos, or some drug for decades, should all who were damaged by its product and its tortious conduct be included in one punitive damages class? Perhaps defendant's conduct became more culpable at a certain point than it had been before, and those plaintiffs who were injured after that time "should" get greater punitive damages than those who were injured earlier. Those problems seem manageable through sub-classes. Putting them aside, defendants will want the court to utilize as encompassing a course of conduct and corresponding class as possible so that its liability for punitive damages, as determined in the class action, will protect it from the maximum number of "other" potential claims for punitive damages.

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182. See *supra* notes 121-33 and accompanying text.

Plaintiffs will not necessarily share the interest in a maximally-encompassing class, although plaintiffs' attorneys might maximize *their* earnings by maximizing the size of the punitive damages class. Plaintiffs' interest is in maximizing, and in equitable distribution of, the punitive damages pot that is held to be available for the victims of whatever particular course of conduct the action focuses upon. Potential plaintiffs left outside the class definition would be left with the burden of bringing their own (class or individual) litigation, with the attendant costs and litigation risks.<sup>183</sup> So long as there is not an insufficient assets problem, they should not (otherwise) be adversely affected by being left outside the borders of the first mandatory punitive damages class. What is important is that it be clear what conduct the defendant already has been punished for, and who was included, and who excluded, from prior mandatory punitive damages classes. The lack of clarity in one or both of these regards has been one of the factors in courts' reluctance to limit multiple punitive damages awards.<sup>184</sup>

3. *All Claimants Sharing a Common Theory of Recovery to be Treated Equitably Among Themselves, Typically (Historically) by a Pro Rata Distribution of the Fund*

Historically and traditionally in limited fund cases, all claimants were to be treated equitably among themselves.<sup>185</sup> This typically translated into "pro rata" distribution of the fund. Proportionate distribution of a punitive damages award could be effected by the use of a predetermined ratio of punitive to compensatory dam-

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183. They might make some headway via collateral estoppel insofar as issues in their case are identical to issues that were litigated and necessarily decided against the defendant in the first mandatory punitive damages class action. See *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979) (indicating the circumstances under which a nonparty can assert collateral estoppel against the entity that was a defendant in a prior action, and looking to matters including: (1) whether the nonparty could have joined the prior litigation; (2) whether the subsequent litigation was foreseeable so that the defendant had every incentive vigorously to defend the first action; (3) whether the judgment being relied upon is consistent with prior judgments against the defendant; and (4) whether there are procedural opportunities available to the defendant in the subsequent action that did not exist in the earlier suit, and that might result in a different outcome).

184. See, e.g., *Simpson v. Pittsburgh Corning Corp.*, 901 F.2d 277, 280-81 (2d Cir.) (positing that, if the factfinder making the first award understood its task to be to award a sum appropriate to punish a tortfeasor for the full extent of its wrongful conduct, due process might indicate that a subsequent award be stricken; however, the issue would be posed only when the defendant could demonstrate that the original factfinder had a complete record of the full extent of the wrongdoing, and was instructed to make an award appropriate to punish the totality of the misconduct), *cert. dismissed*, 497 U.S. 1057 (1990); see also *supra* notes 90, 112.

185. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 839 (1999).

ages.<sup>186</sup> A problem could arise if there were a conflict between this principle and the dictates of state law, applicable to various class members, commanding that particular class members receive either more or less than their pro rata share.<sup>187</sup> However, if the governing principle is equitable distribution, as opposed to pro rata distribution, then an allocation of punitive damages that follows the dictates of applicable bodies of state law could satisfy the requirement of equitable distribution.

Another problem, arising at a pragmatic level, could be courts' inability to determine class members' shares. Even if the court had "liquidated" the aggregate punitive damages claims (and determined that they exceeded the punitive damages "fund" at its maximum, since the aggregate punitive damages claims would exceed the monies legally available to pay them), each claimant would have to receive less than his theoretical "entitlement." How much less could only be estimated until each member's theoretical share had been determined, based, for example, upon a predetermined ratio of punitive to compensatory damages. Courts would therefore probably have to make conservative tentative distributions, maintaining a reserve for the payment of class members whose theoretical entitlement was determined later and for distribution of any excess to all class members, when all claims had been established.<sup>188</sup>

#### 4. *Other Arguments in Favor of Limited Generosity (b)(1)(B) Class Certifications*

It would be possible to argue that the classic characteristics of (b)(1)(B) classes that the *Ortiz* Court declared to be presumptively necessary play that role only when certification is sought on the grounds of an insufficient-assets type of limited fund, and would not be an obstacle when certification is sought because of legally-imposed limitations on liability. The Court acknowledged that "the text of Rule 23(b)(1)(B) is . . . open to a more lenient limited fund concept,"<sup>189</sup> and it left the door open to litigants who propose departures from the traditional norms to overcome the presumptive necessity of all the traditional qualities of a limited fund class.<sup>190</sup> In the "limited generosity" context, one (arguably) would have a fund with a definitely ascertainable limit (assets of the defendant, capped

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186. *Id.* at 839-41.

187. State law might, for example, cap a class member's punitive damages award at less than her pro rata share.

188. *Cf. Tobin, supra* note 95, at 466 n.39 (proposing that the "size of each punitive share will depend upon estimates as to the total number of potential victims and the total compensatory recovery. In other words, the size of a punitive share will be determined by multiplying the plaintiff's compensatory recovery by the total punitive damage fund and dividing that sum by the total (estimated) compensatory fund.").

189. *Ortiz*, 527 U.S. at 842.

190. *See id.*

by law), creating a situation in which punitive damages judgments for one or more claimants would create a risk of serious prejudice to others similarly situated, and in which courts would seek equitably to distribute all of the fund. Arguably, those elements should be sufficient, *if* one avoids conflict with the Rules Enabling Act and constitutional concerns.

5. *Other Concerns Fostering Conservative Handling of (b)(1)(B) Certification Motions*

Two of the factors that reinforced the *Ortiz* Court's inclination toward conservative treatment of (b)(1)(B) certifications were the desire to avoid potential conflict with the Rules Enabling Act<sup>191</sup> and constitutional problems, such as failures to comply with the Seventh Amendment.<sup>192</sup>

a. The Rules Enabling Act

The Rules Enabling Act prohibits rules that "abridge, enlarge or modify any substantive right."<sup>193</sup> Since the legal limits imposed upon the fund to be distributed would be founded in substantive (usually state) law or in constitutional due process,<sup>194</sup> perhaps the case could be made that a procedure designed to respect those limits could not violate the Rules Enabling Act. However, that argument may finesse too much. Even if designed to respect and enforce state law or even constitutionally-mandated limits on punitive damages, it is possible that a class action mechanism compelling equitable distribution of a legally-capped fund would abridge or modify the substantive rights that tort victims have enjoyed under substantive state tort law. Such tort law may, for example, allow the award of punitive damages to those persons who first successfully bring their compensatory damages tort claims to judgment, and who are awarded punitive damages under non-erroneous and constitutional application of the state's standards regarding such damages—even if those awards afford a disproportionate percentage of the total legally permissible pot available for punitive damages. In other words, under state substantive law, individual tort victims might enjoy the right to recover punitive damages until the legal cap is hit, with the greatest potential benefits being available to those who get their cases to judgment early. However inequitable this system might be, changing it could abridge or modify substantive law in violation of the Rules Enabling Act. The question would be whether

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191. 28 U.S.C. § 2072 (1994) (providing the Supreme Court with power to prescribe general rules of practice and procedure for cases in the district courts and courts of appeals, and providing that such rules shall not abridge, enlarge, or modify any substantive right).

192. See *Ortiz*, 527 U.S. at 845-46.

193. 28 U.S.C. § 2072 (1994).

194. See *supra* notes 17-72 and accompanying text.

such a change would have a merely incidental, and hence permissible, effect on substantive rights.<sup>195</sup>

b. Unconsented-to Compromise of Constitutional Rights

In addition, the constitutional issues that concerned the *Ortiz* Court would remain at issue in at least some cases in which "limited generosity" theory could be argued in support of (b)(1)(B) certification of a punitive damages class. The *Ortiz* Court was concerned that, in a mandatory class action raising legal issues, the Seventh Amendment rights of class members who have future claims could be compromised without their consent.<sup>196</sup> The entitlement to punitive damages upon the occasion of a defendant's tortious conduct is a legal issue to which the Seventh Amendment right to jury trial<sup>197</sup> attaches,<sup>198</sup> in a class action, as well as in an individual suit.<sup>199</sup> That right presumably could be compromised by a settlement with the defendants, entered into by the class representatives.<sup>200</sup> The consent of class members to that compromise might well be lacking in the case of future claimants, who might even be unborn.<sup>201</sup>

Even the consent of absent class members with present claims is subject to some doubt. The Supreme Court never has resolved what due process requires in order for the absent members of man-

195. See *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941) (according to Edward H. Cooper, *Enabling Act Authority for Addressing Overlapping Class Actions*, CLASS ACTION LITIG. REP., June 22, 2001, 458, 459, indicating that the Rules Enabling Act "authorizes rules that affect substantial and important 'rights' so long as the purpose is to serve the 'speedy, fair and exact determination of the truth'"); *id.* (finding that, "[t]he Enabling Act is not violated by the incidental effect on substantive rights"). Moreover, some authority addresses the wisdom of allowing class certification to affect the applicable choice of law. See *Kramer*, *supra* note 163, at 549 (arguing that choice of law should not change to foster administrative convenience and efficiency in aggregate litigation); Richard L. Marcus, *They Can't Do That, Can They? Tort Reform Via Rule 23*, 80 CORNELL L. REV. 858, 872-82 (1995) (exploring whether and when mass tort settlement regimes properly can supplant state law that otherwise would apply).

196. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999).

197. The Seventh Amendment provides,

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

U.S. CONST. amend. VII.

198. See *City of Monterey v. Del Monte Dunes, Ltd.*, 526 U.S. 687, 729 (1999) (stating that "a tort action for money damages is entitled to jury trial under the Seventh Amendment"); *Arkwright Mut. Ins. Co. v. Philadelphia Elec. Co.*, 427 F.2d 1273, 1275 (3d Cir. 1970) (noting that common law right to jury trial exists for all tort claims).

199. See *Ross v. Bernhard*, 396 U.S. 531, 532-34, 538 (1970) (holding that Seventh Amendment right to jury trial attaches based upon legal nature of the claim to be tried, rather than upon the historic character of the action).

200. See *Ortiz*, 527 U.S. at 847.

201. See *id.* (speaking of the consent issue); *id.* at 856 (speaking of the unborn).

datory classes to be bound by a judgment.<sup>202</sup> Rule 23 does not require that they be given notice of the action, nor an opportunity to opt out (opt-out being the antithesis of the mandatory nature of certain class actions, including those certified under Rule 23(b)(1)(B)). Failure to exercise the right to opt out can be the basis for an inference of consent to prosecution of a suit on a class member's behalf.<sup>203</sup> Absent the right, the occasion *not* to opt out never arises, and the failure-to-exercise basis for an inference of consent is lacking. Nor may it be necessary, as a matter of due process, for Rule 23(b)(1)(B) claimants to have minimum contacts with the forum state; for if one limited the class to those who do, one would defeat the very purposes and reasons for the class having been made mandatory. Certainly, adequate representation would be necessary to bind absent class members, but it is not clear that such representation is also sufficient to bind them. Thus, the Seventh Amendment issues and the consent issues that concerned the *Ortiz* Court and inclined it to interpret and apply Rule 23(b)(1)(B) conservatively also would lurk in some, and perhaps all, cases in which the "limited generosity" theory could be argued in support of (b)(1)(B) certification of a punitive damages class.

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Whether mandatory limited generosity classes are legally viable under rules like Rule 23(b)(1)(B) thus remains very much in doubt. If we *can* get over or around all the hurdles, the next question becomes the permissibility of anti-suit injunctions to prevent the undermining of mandatory punitive damages classes by the prosecution of separate actions by class members who would seek to assert punitive damages claims within the scope of the class action. The Article now turns to that question.

#### IV. INJUNCTIONS OF PROCEEDINGS IN WHICH PUNITIVE DAMAGES ARE SOUGHT FOR THE SAME COURSE OF CONDUCT

When a mandatory punitive damages class is certified, that certification may be regarded implicitly as enjoining the filing and the prosecution of pending cases in which punitive damages are sought for the same course of conduct as has been put in controversy by the certified mandatory class. Alternatively, the court certifying that mandatory class may want to enter an explicit injunction against such litigation. When a federal court is the would-be enjoining

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202. See *Phillips Petroleum v. Shutts*, 472 U.S. 797, 812 (1985) (holding that in a Rule 23(b)(3) class action, absent plaintiff class members can be bound consistently with the requirements of due process only if the members receive notice, an opportunity to be heard, an opportunity to opt-out, and adequate representation; explicitly reserving the question of what process is necessary to bind, *inter alia*, absent members of Rule 23(b)(1)(B) classes).

203. See *id.* at 813.

court, it is constrained by the Anti-Injunction Act.<sup>204</sup> When a state court is the would-be enjoinder, it is constrained by common law principles predicated on notions of comity.

### A. *Federal Injunctions of State Court Proceedings*

#### 1. *The All Writs Act, The Anti-Injunction Act, and The Ability to Protect Mandatory Class Actions*

##### a. *The All Writs Act*

The All Writs Act<sup>205</sup> provides in part that, "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."<sup>206</sup> Generally speaking, the Supreme Court has construed the Act to authorize a federal court to "issue such commands . . . as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained."<sup>207</sup> The writs contemplated by the Act are of numerous varieties, including writs of injunction, mandamus, and prohibition.<sup>208</sup> In appropriate circumstances, the Act empowers federal courts to issue anti-suit injunctions directed to either federal or state courts or the parties thereto, unless those injunctions are elsewhere prohibited.<sup>209</sup> The

204. 28 U.S.C. § 2283 (1994).

205. § 1651(a), 62 Stat. 944 (1948) (current version at 28 U.S.C. § 1651(a) (1994)).

206. 28 U.S.C. § 1651(a) (1994).

207. *United States v. N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

208. A writ of *coram nobis* brings before the court that rendered a judgment matters of fact which, if known at the time the judgment was rendered, would have prevented its rendition. The less common writs include writs of *audita querela* (the initial process in an action by a judgment defendant to obtain relief from the judgment, typically by virtue of some matter arising since rendition of the judgment), *certiorari* (a writ issued by a superior court to an inferior court, requiring a certified record of a case, to enable the issuing court to determine whether there have been any irregularities), *habeas corpus ad prosequendum* and *testificandum* (process to bring a prisoner before the court for trial or to testify), and *ne exeat* (writ forbidding its addressee from leaving, or from removing property from, the jurisdiction of the court). See 28 U.S.C.A. § 1651 (1994), annotations 621-667; BLACK'S LAW DICTIONARY 131, 226, 709, 1031 (6th ed. 1990) (parenthetical explanations respectively).

209. See, e.g., *In re Johns-Manville Corp.*, 27 F.3d 48, 48-49 (2d Cir. 1994) (affirming a stay of all litigation against a personal injury settlement trust); *Wesch v. Folsom*, 6 F.3d 1465, 1470-74 (11th Cir. 1993) (affirming, as in aid of jurisdiction and to effectuate the judgment, an injunction of the prosecution of a state court action in which plaintiffs sought to have congressional districts redrawn, where a federal court had imposed redistricting that was to remain in effect until the state legislature adopted a valid redistricting plan), *cert. denied*, 510 U.S. 1046 (1994); *United States v. BNS, Inc.*, 858 F.2d 456, 461-62 (9th Cir. 1988) (upholding, as modified, a preliminary injunction to preserve the federal court's jurisdiction under the Antitrust Procedure and Penalties Act).

writs issued may extend to persons who are “in a position to frustrate the implementation of a court order or the proper administration of justice,” whether or not they were parties to the action in which the order was entered.<sup>210</sup> In the situation of a mandatory punitive damages class action court entering an injunction against class members’ pursuit of punitive damages claims outside the class action, the court ordinarily would not need to enjoin persons not parties to the federal class action—so long as absent class members are not treated as non-parties<sup>211</sup>—but perhaps cases would arise in which this breadth of power would be needed.

At times, the Court has spoken very expansively of the judicial action permissible under the Act. For example, in a 1977 case, the Court quoted 1940s decisions for the propositions that the statute is a “legislatively approved source of procedural instruments designed to achieve ‘the rational ends of law,’”<sup>212</sup> and that, “[u]nless appropriately confined by Congress, a federal court may avail itself of all auxiliary writs as aids in the performance of its duties, when the use of such historic aids is calculated in its sound judgment to achieve the ends of justice entrusted to it.”<sup>213</sup>

Nonetheless, the power conferred by the Act has limits. For example, it is clear in theory that the Act does not authorize courts to issue writs as a means of acquiring jurisdiction when the courts previously had acquired none.<sup>214</sup> In general, when matters of jurisdiction have been at issue, the Court has confined the Act to “filling the interstices of the federal judicial power when those gaps threatened to thwart the otherwise proper exercise of federal courts’ jurisdiction.”<sup>215</sup>

#### b. The Anti-Injunction Act and the Ability to Protect Mandatory Class Actions

The Anti-Injunction Act (“AIA”) provides: “A court of the United

210. *N.Y. Tel. Co.*, 434 U.S. at 174.

211. See *infra* notes 291-94 and accompanying text.

212. *N.Y. Tel. Co.*, 434 U.S. at 174 (quoting *Harris v. Nelson*, 394 U.S. 286, 299 (1969) (quoting *Price v. Johnston*, 334 U.S. 266, 282 (1948))).

213. *Id.* at 172-73 (quoting *Adams v. United States ex rel. McCann*, 317 U.S. 269, 273 (1942)).

214. See, e.g., *Clinton v. Goldsmith*, 526 U.S. 529 (1999) (holding an injunction issued by the Court of Appeals for the Armed Services to be beyond the CAAF’s appellate jurisdiction; stating that the All Writs Act does not enlarge a court’s statutory jurisdiction); *Pennsylvania Bureau of Corr. v. United States Marshals Serv.*, 474 U.S. 34, 41 (1985) (rejecting use of the All Writs Act to enable the Court to review a lower court’s determination where jurisdiction did not lie under an express statutory authorization of appeal).

215. *Pennsylvania Bureau of Corr.*, 474 U.S. at 41 (describing the Court’s early view of the scope of the provision). However, any argument that an injunction against the pursuit of litigation that would interfere with federal judicial control of a mandatory punitive damages class enlarges federal jurisdiction should be rejected. See also *infra* note 290.



States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.<sup>216</sup>

The "necessary in aid" exception of the AIA and its judicial interpretation is of particular relevance to this Article. It paradigmatically permits federal courts to enjoin state judicial proceedings when the federal court has first acquired jurisdiction over real property that is the subject of a case.<sup>217</sup> By extension, this exception also applies in litigation to marshal assets, administer trusts or liquidate estates, or otherwise control particular property.<sup>218</sup> The Court has quite consistently insisted that this exception applies only in instances where a federal court has in rem jurisdiction, and does not apply where the court has in personam jurisdiction over the parties.<sup>219</sup> However, the Court has not been entirely consistent in so

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216. 28 U.S.C. § 2283 (1994).

217. However, the Supreme Court has yet to uphold "an injunction against state proceedings on this basis." RICHARD H. FALLON, JR. ET AL., HART & WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1201 (4th ed. 1996) (citation omitted).

218. See *Princess Lida v. Thompson*, 305 U.S. 456, 466-67 (1939) (holding that the filing of trust accounts gave a state court quasi in rem jurisdiction, which empowered it to enjoin a later federal action against the trustees for an accounting and other relief). The holding in *Princess Lida* is an exception to the general rule that "state courts are completely without power to restrain federal-court proceedings in in personam actions." *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964); see also *Gen. Atomic Co. v. Felter*, 434 U.S. 12 (1977) (holding it beyond the power of state courts and in conflict with the Supremacy Clause for state courts to enjoin litigants from filing or prosecuting in personam actions in federal courts, and stating that rights conferred by Congress cannot be abridged by state court injunctions). See generally Alan D. Hornstein & P. Michael Nagle, *State Court Power to Enjoin Federal Judicial Proceedings: Donovan v. City of Dallas Revisited*, 60 WASH. U. L.Q. 1 (1982).

219. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 641-42 (1977) (plurality opinion) (noting that the Court "never has viewed parallel in personam actions as interfering with the jurisdiction of either [the state or the federal] court," and that no decision of the Court ever has held an injunction to preserve an in personam case or controversy to fit within the "necessary in aid of its jurisdiction" exception); *Atl. Coast Line R.R. v. Brotherhood of Locomotive Eng'rs*, 398 U.S. 281, 294-95 (1970) (stating the principle recited in the text); *Mandeville v. Canterbury*, 318 U.S. 47, 49 (1943) (stating that this exception is necessary "to prevent the impasse which would arise if the federal court were unable to maintain its possession and control of the property, which are indispensable to the exercise of the jurisdiction it has assumed"); *Kline v. Burke Constr. Co.*, 260 U.S. 226, 229, 230 (1922) ("Where the action is in rem . . . the exercise by the state court of jurisdiction over the same *res* necessarily impairs, and may defeat, the jurisdiction of the federal court already attached. . . . But a controversy is not a thing . . . and an action brought to enforce . . . a [personal] liability does not tend to impair or defeat the jurisdiction of the court in which a prior action for the same cause is pending."). But see *Transouth Fin. Corp. v. Bell*, 149 F.3d 1292, 1296 (11th Cir. 1998) (emphasizing that the *Vendo* opinion commanded only a plurality, and that the concurrence did not adopt the position that the "in aid of jurisdiction" exception applies exclusively to in rem pro-

limiting its application of the "necessary in aid" section of the statute. In particular, it has held the AIA to permit injunctions of vexatious state court litigation involving in personam actions for damages.<sup>220</sup> State court litigation in which plaintiffs seek punitive damages for conduct encompassed within the course of conduct that is the subject of a federal mandatory punitive damages class might possibly come within this exception to the requirement of in rem jurisdiction.

The in rem application of the "necessary in aid" exception pertains to the problems addressed in this Article insofar as courts now stretch the in rem category and regard other cases as *tantamount* to falling within in rem jurisdiction.<sup>221</sup> Some courts have analogized the subject matter of an action or even the litigation itself to a "res,"

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ceedings). See generally ERWIN CHEMERINSKY, FEDERAL JURISDICTION §11.2, at 699-703 (3d ed. 1999).

For criticism of the in rem limitation, see, e.g., William T. Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 357-63 (1978) (criticizing, as redolent of mysticism, illogical, contrary to the language of the statute and to Congressional intent, and of little relevance to federalism, the limitation on the utility of the "in aid of jurisdiction" exception imposed by application only to protect a "res"); Martin H. Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 746-48 (1977) (stating that, for suit injunction purposes, the distinction between in rem and in personam actions is dubious, *inter alia* because the cases have not persuasively explained why the impairment of a federal court's jurisdiction is greater when concurrent actions are in rem, and the binding effects of res judicata and collateral estoppel seem equally to confine or impair federal jurisdiction in the two contexts); Diane P. Wood, *Fine-Tuning Judicial Federalism: A Proposal for Reform of the Anti-Injunction Act*, 1990 BYU L. REV. 289, 302 (criticizing the in personam/in rem distinction *inter alia* on the ground that it is exceedingly artificial, as recognized by the Court in the context of decisions concerning personal jurisdiction, such as *Shaffer v. Heitner*, 433 U.S. 186 (1977), and *Mullane v. Central Hanover Bank*, 339 U.S. 306 (1950)).

220. See *Sovereign Camp Woodmen of the World v. O'Neill*, 266 U.S. 292, 298 (1924) (holding that the Anti-Injunction Act does not bar injunctions against vexatious multiple state court litigation involving in personam actions for damages).

221. See, e.g., *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 881-82 (11th Cir. 1989) (finding lengthy litigation that had generated "mountains of paperwork . . . similar to a res to be administered"); *In re Baldwin-United Corp.*, 770 F.2d 328, 337-38 (2d Cir. 1985) (finding lengthy litigation to have become the virtual equivalent of a res, where state court actions threatened to impair the federal court's authority to approve settlements in multi-district class litigation; also analogizing the jurisdiction of a multidistrict court to courts acting in rem). Both these cases rejected, as unsupported by case law holdings, the contention that this exception to the anti-injunction act applies only to "true" in rem proceedings; see also *In re Joint E. & S. Dist. Asbestos Litig.*, 120 B.R. 648, 657 (E.D.N.Y. & S.D.N.Y. 1990) (enjoining all proceedings against a personal injury settlement trust created in a bankruptcy proceeding and also relying upon the district court's continuing jurisdiction over the settlement trust's reorganization). See generally 17 CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: JURISDICTION AND RELATED MATTERS § 4225, at 528-33 (2d ed. 1988 & Supp. 2001).

or to situations that can be made subject to the federal interpleader statute, which has been held to be an expressly authorized exception to the AIA.<sup>222</sup> Some commentators have straightforwardly urged that the "necessary in aid" exception be read more broadly than the Court has read it; and a substantial number of lower federal courts have so construed it in order to enjoin state proceedings that would interfere with continuing federal court jurisdiction over, and management of, protracted and complex litigation. The protected federal litigations often involved ongoing equitable relief, and sometimes involved class actions or multi-district litigation.<sup>223</sup> In some in-

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222. See *In re Sch. Asbestos Litig.*, 789 F.2d 996, 1006 n.8 (3d Cir.) (in reasoning to the conclusion that a Rule 23(b)(1)(B) class for punitive damages should not have been certified because the class did not include all potential claimants for property damage resulting from the presence of asbestos products in buildings and structures, nor claimants for personal injury from the same cause, commenting that, "[t]he situation here is somewhat analogous to the problem presented by an interpleader action in which all claimants to the fund have not been made parties"), *cert. denied sub nom. Celotex Corp. v. Sch. Dist.*, 479 U.S. 852 (1986); *In re Joint E. & S. Dist. Asbestos Litig.*, 134 F.R.D. 32, 38 (E.D.N.Y. 1990) (concluding that "[l]imited fund class actions closely resemble interpleader actions" and that consequently, "a stay of state proceedings would be warranted under the 'necessary in aid of jurisdiction' exception" to the Anti-Injunction Act). *But see In re Fed. Skywalk Cases*, 680 F.2d 1175, 1182 (8th Cir.) (rejecting the argument that the action was akin to interpleader where the law might limit plaintiffs to recovery of one punitive damages award from defendant, *inter alia* because the plaintiffs' claim to punitive damages was unclear and liability was not conceded), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988 (1982); *In re: Orthopedic Bone Screw Prods. Liab. Litig.*, No. 93-7074, 1995 U.S. Dist. LEXIS 22042, at \*25 n.10 (E.D. Pa. Feb. 22, 1995) (rejecting, for the reasons stated in *Federal Skywalk*, *supra*, the argument that certification of a limited fund class is functionally equivalent to an interpleader). See also Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 820 (1997) (characterizing (b)(1)(B) actions as "the plaintiffs' interpleader—a mechanism by which to avoid the 'run on the bank' risk when outstanding liabilities can be expected to outstrip available assets").

223. See, e.g., *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202-03 (7th Cir. 1996) (concluding, in dicta, that a district court in multi-district litigation could issue an injunction to protect the integrity of pre-trial discovery orders, so long as the injunction was narrowly tailored to prevent specific abuses that threatened the court's ability to effectively manage the litigation); *Wesch v. Folsom*, 6 F.3d 1465, 1470-71 (11th Cir. 1993) (holding that an exception to the Anti-Injunction Act permitted federal court to enjoin state suit that sought congressional redistricting, where federal court had issued a redistricting order to remain in effect until state legislature replaced it with a valid plan), *cert. denied*, 510 U.S. 1046 (1994); *In re Corrugated Container Antitrust Litig.*, 659 F.2d 1332, 1334-35 (5th Cir. 1981) (approving injunction of state proceedings by plaintiffs who were parties to consolidated federal multidistrict litigation and who were asserting state law claims substantially similar to claims whose settlement had been approved, although no final judgment had yet been entered in the federal litigation), *cert. denied sub nom. Three J Farms, Inc. v. Plaintiffs' Steering Comm.*, 456 U.S. 936 (1982). See generally Steven M. Larimore, *Exploring the Interface Between Rule 23 Class Actions and the Anti-Injunction Act*, 18 GA. L. REV. 259, 292-303 (1984) (arguing that, because injunctions of state court proceedings issued in relation to properly certified mandatory class ac-

stances, the federal court had approved a settlement, or was close to doing so, and the court regarded the injunction of state court proceedings as necessary to protect and effectuate the judgments resulting from these actual or imminent settlements.<sup>224</sup> As reported by Professors Marcus and Sherman, "a modest expansion of federal courts' antisuit injunctive powers through application and interpre-

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tions usually will be necessary to aid a federal court's jurisdiction, courts should strongly presume that injunctions in such cases are proper, but courts also should consider case-by-case the extent of federal and state interests in the respective litigations, the litigants' interests, and systemic and policy concerns such as efficiently providing adequate relief to the greatest number of injured parties); Redish, *supra* note 219, at 748-60 (arguing for liberalized interpretation of the "in aid of jurisdiction" clause to give federal courts *power* to enjoin any concurrent state proceeding that threatens the effective exercise of federal jurisdiction, but constraining exercises of that power by the sound use of discretion).

Many of the cases cited above involved post-judgment federal injunctions of state court litigation, defensible under the re-litigation exception to the Anti-Injunction Act. As such, the courts' conclusions concerning the "necessary in aid of jurisdiction" exception were, at most, alternative holdings, and have less authoritative effect than they would have if the "necessary in aid" exception were the sole basis for the decisions. See *Lovilia Coal Co. v. Harvey*, 109 F.3d 445, 453 (8th Cir. 1997) (stating that, under federal preclusion principles, holdings in the alternative, either of which independently would be sufficient to support the result of a case, are not conclusive with respect to either issue standing alone, since neither determination is essential to the judgment), *cert. denied*, 523 U.S. 1059 (1998); RESTATEMENT (SECOND) OF JUDGMENTS § 27 cmt. i (1982) (explaining that "a determination in the alternative may not have been as carefully or rigorously considered as it would have been if it had been necessary to the result" and that the principle recommended in the *Restatement (Second) of Judgments*, by limiting issue preclusion, discourages appeals). But see Howard M. Erichson, *Interjurisdictional Preclusion*, 96 MICH. L. REV. 945, 969 & n.104 (1998) (finding through empirical study that, notwithstanding the view taken by the *Restatement (Second) of Judgments*, many and perhaps most federal courts give issue preclusive effect to each alternative holding).

224. See, e.g., *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1024-25 (9th Cir. 1998) (holding court empowered by the All Writs Act, the Anti-Injunction Act, and Fed. R. Civ. P. 23(d), to stay a state class action that directly contravened a prior injunction against such a proceeding, entered in a nationwide class action, and further holding the temporary approval of a nationwide settlement in the federal class action to have stayed the state class action); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 202-04 (3d Cir. 1993) (holding that district court could preliminarily enjoin plaintiff class members from prosecuting similar state court class action in light of imminent settlement of federal action after years of negotiation, plaintiffs' effort to challenge propriety of federal suit in state court, and plaintiffs' right to opt out of the federal suit). But see *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1181-83 (8th Cir.) (reversing, as in violation of the Anti-Injunction Act, a mandatory class certification which prohibited class members from settling punitive damages claims and effectively enjoined state plaintiffs from pursuing pending state court actions on issues of liability), *cert. denied sub nom. Stover v. Rau*, 459 U.S. 988 (1982); *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 903 F. Supp. 16, 17-18 (W.D.N.C. 1995) (holding that Anti-Injunction Act prohibited federal court from enjoining federal class members from continuing in personam state actions concerning same issues, although it permitted an injunction against the institution of new state proceedings).

tation of the Anti-Injunction Act and of the All-Writs Act" has occurred in two situations: bankruptcy, and when injunction of competing litigation was necessary to allow a federal court to preserve the assets available for settlement.<sup>225</sup>

The Supreme Court has not yet addressed the applicability of the "necessary in aid" exception to duplicative complex litigation. The Court has said, however, that any injunction must be "necessary to prevent a state court from so interfering with a federal court's consideration or disposition of a case as to seriously impair the federal court's flexibility and authority to decide that case."<sup>226</sup> While limiting, this pronouncement also holds promise for allowing injunctions of state court proceedings that, while not in rem, do threaten seriously to interfere with a federal court's ability to decide a case or cases pending before it.<sup>227</sup>

In the class action context, strong arguments have been made in favor of injunctions to protect mandatory class actions, including those properly certified under Rule 23(b)(1)(B), to protect a limited fund. The arguments in support of injunctions against potentially interfering state suits, made under the "necessary in aid of jurisdiction" exception to the AIA and relevant to (b)(1)(B) classes, include the ideas that, absent the ability to enjoin previously commenced state court litigation, mandatory classes are not truly mandatory,<sup>228</sup> and that an anti-suit injunction is necessary to protect the court's jurisdiction to determine and equitably allocate punitive damages.<sup>229</sup>

One also could argue that, by making certain types of classes mandatory, Congress has expressly authorized an injunction of other suits by class members asserting the same claims.<sup>230</sup>

225. RICHARD L. MARCUS & EDWARD F. SHERMAN, *COMPLEX LITIGATION: CASES AND MATERIALS ON ADVANCED CIVIL PROCEDURE* 369-71 (3d ed. 1998).

226. *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs.*, 398 U.S. 281, 295 (1970) (emphasizing that federal courts lack inherent and unlimited power to ignore the bounds of anti-injunction statutes and to stay state court proceedings).

227. *But see* Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1160 n.49 (1998) (questioning such reliance on this language because of the Court's view that parallel in personam cases do not interfere with one another or with either court's exercise of jurisdiction).

228. *Fed. Skywalk*, 680 F.2d at 1191-93 (Heaney, J., dissenting). While a plaintiff can simultaneously pursue duplicative litigation in state and federal courts, if the state court action goes to judgment first, deciding the asserted claim and determining what relief is appropriate, that will effectively remove the particular plaintiff from the federal class action and, by so doing, effectively undermine the mandatory nature of membership in the plaintiff class.

229. *See, e.g., id.* at 1192 (Heaney, J., dissenting) (observing that restricting class members so that they are unable to pursue punitive damages claims in independent actions is absolutely necessary to the class action court's jurisdiction over the punitive damages issue).

230. *Mitchum v. Foster*, 407 U.S. 225, 238 (1972) (describing the test to be applied to determine whether a federal statute expressly authorizes an injunction of state court proceedings as "whether an Act of Congress, clearly creating

But arguments also run to the contrary: nothing in the Federal Rules of Civil Procedure governing class actions explicitly permits district courts to enjoin overlapping state court actions,<sup>231</sup> and nothing in the AIA expressly treats class actions any differently than other litigation. Although the "necessary in aid" exception might be very useful in situations where mandatory class actions are appropriate, the longstanding (if dubious) principle that in personam actions may proceed concurrently<sup>232</sup> has posed a substantial obstacle to federal injunction of most state court suits that arguably would interfere with federal jurisdiction over class actions.<sup>233</sup> The prohibition against construction of the Federal Rules to extend the jurisdiction of the district courts<sup>234</sup> also has been argued to preclude an expansive reading of the Anti-Injunction Act's "necessary in aid" exception that would allow injunctions of in personam state suits where the jurisdiction to be protected is made possible by Rule 23.<sup>235</sup> I, however, find this argument unpersuasive. While Rule 23 authorizes class actions, it does not expand the jurisdiction of the federal courts. Only those class actions that satisfy the requirements for federal question or diversity jurisdiction can be pursued. Thus, the *jurisdiction* to be protected when federal courts are adjudicating class actions is made possible by the usual jurisdictional statutes, although the scope of the action to be protected is made possible by Rule 23.<sup>236</sup> I believe that the arguments in support of anti-suit injunctions entered to protect federal jurisdiction over properly certified mandatory class actions should carry the day.

With respect to the argument that Rule 23(b)(1) is an express congressional authorization of injunctions under the AIA, additional hurdles are posed: namely, (a) whether Rule 23(b)(1) is sufficiently

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a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding").

231. See FED. R. CIV. P. 23. By contrast, statutory interpleader provides that a district court may restrain all claimants "from instituting or prosecuting any proceeding in any State or United States court affecting the property, instrument or obligation involved in the interpleader action." 28 U.S.C. § 2361 (1994).

232. See *supra* note 219 and accompanying text.

233. See, e.g., *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1182-83 (8th Cir.), cert. denied *sub nom.* *Stover v. Rau*, 459 U.S. 988 (1982). In order to avoid exhaustion of the defendant's available assets and avoid legal restrictions that might curtail the ability of some class members to recover punitive damages, the district court had enjoined class members from settling punitive damages claims they had asserted in other litigation, until the class action trial was concluded. See *id.* at 1177-80. The appeals court vacated the injunction, rejecting the argument that the injunction was necessary in aid of the court's jurisdiction, relying in part on the principle cited in the text. *Id.* at 1182-83.

234. FED. R. CIV. P. 82 (providing in part that the Federal Rules of Civil Procedure "shall not be construed to extend . . . the jurisdiction of the United States district courts").

235. See Wood, *supra* note 219, at 315.

236. See also *infra* note 262.

explicit to satisfy the AIA; (b) whether Rule 23 constitutes an Act of Congress for purposes of the AIA exception allowing injunctions expressly authorized by Act of Congress; and (c) whether reading Rule 23 as the basis of an exception to the AIA would "abridge, enlarge, or modify" a substantive right, in violation of the Rules Enabling Act.<sup>237</sup> Under the test articulated in *Mitchum v. Foster*<sup>238</sup> it easily can be found that Rule 23(b)(1)(B) could not be given its intended scope, absent the stay of competing state court proceedings, in light of the ability of such proceedings entirely to frustrate the purposes of the class certification. However, whether the Rule creates a federal right or remedy enforceable in a federal court of equity (as required by *Mitchum*) is more debatable. One reasonably could argue that allowance of a class action for the purpose of preventing adjudications that would (1) dispose of the interests of other persons not party thereto, or (2) substantially impair or impede the ability of those other persons to protect their interests, is the creation of a right or remedy, and it is enforceable in a federal court of equity. I return later to the issues labeled (b) and (c) above, in connection with discussion of a proposed new subsection of Rule 23 that would explicitly authorize federal class action courts to enjoin other litigation, in described circumstances.<sup>239</sup>

Like the "necessary in aid" exception, the authorization of injunctions to protect or effectuate federal judgments, the third excep-

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237. See HART & WECHSLER, *supra* note 217, at 1206 n.9 (posing these questions). Federal statutes explicitly authorizing federal injunctions of state court proceedings are the Interpleader Act, 28 U.S.C. § 2361 (1994), and bankruptcy law, 11 U.S.C. § 362 (1994 & Supp. 1999), whose injunctive provisions are intended to permit all claims to a limited fund that has been made the subject of a statutory interpleader action or a bankruptcy proceeding, respectively, to be decided in one action so as to prevent inconsistent determinations or inequitable distribution of the limited fund. 42 U.S.C. § 1983 is the only statute that the Court has found to imply a power to enjoin state court proceedings. See CHEMERINSKY, *supra* note 219, at 698.

As to Federal Rules of Civil Procedure and orders entered pursuant to them, see *In re Temple*, 851 F.2d 1269, 1272 n.3 (11th Cir. 1988) (in a case in which the court issued mandamus to vacate district court orders certifying a Rule 23(b)(1)(B) class action and staying all related litigation, concluding in dicta that these orders did not seem to be authorized by Act of Congress, or necessary in aid of the court's jurisdiction); see also Larimore, *supra* note 223, at 278-84 (discussing the argument of express authorization by Congress and possible difficulties with it, including the fact that the Federal Rules of Civil Procedure are not literally an act or acts of Congress although, by otherwise providing by law, Congress can prevent any proposed Rule from being promulgated; see 28 U.S.C. § 2074(a) (1994)); cf. *Piambino v. Bailey*, 610 F.2d 1306, 1331-32 (5th Cir.) (refusing to construe Rule 23(d), authorizing trial courts to make whatever orders are appropriate to manage a class action, as an express exception to the Anti-Injunction Act, on the grounds that the Rule fails the test laid down in *Mitchum v. Foster*, cert. denied, 449 U.S. 1011 (1980); *In re Baldwin-United Corp.*, 770 F.2d 328, 335 (2d Cir. 1985) (same as *Piambino*, *supra*).

238. 407 U.S. 225 (1972); see *supra* note 230 and accompanying text.

239. See *infra* notes 259-68 and accompanying text.

tion to the AIA, is intended to ensure the effectiveness and supremacy of federal law,<sup>240</sup> while also helping to prevent parties from engaging in harassing relitigation tactics.<sup>241</sup> It allows federal courts to enjoin state proceedings if, but only insofar as, necessary to ensure the preclusive effect of earlier federal decisions on the merits.<sup>242</sup> Founded upon *res judicata* and collateral estoppel, this exception "was designed to permit a federal court to prevent state litigation of an issue . . . previously . . . decided by the federal court,"<sup>243</sup> and to limit harassment, by repetitious litigation, of successful federal litigants. While this provision would have relevance when a mandatory punitive damages class action has gone to judgment, federal courts would want to stop competing punitive damages suits *before* the class action went to judgment.

The Court has found that the three statutory exceptions to the AIA are exclusive,<sup>244</sup> except when the Act is inapplicable.<sup>245</sup>

240. *Choo v. Exxon Corp.*, 486 U.S. 140, 146 (1988) (citing the need to ensure supremacy of federal law as a reason for the "necessary in aid" exception).

241. See JEAN R. STERNLIGHT, *Forum Shopping for Arbitration Decisions: Federal Courts' Use of Antisuit Injunctions Against State Courts*, 147 U. PA. L. REV. 91, 127 (1998). The exception also serves interests in efficiency. *Id.* at 124.

242. See 22 U.S.C. § 2283 (1994); *Choo*, 486 U.S. at 146-51 (rejecting an injunction against state court proceedings insofar as it was broader than necessary to protect or effectuate the federal court's forum non conveniens dismissal, but permitting the injunction insofar as it effectuated the federal court's choice of law decision regarding another of plaintiff's claims); *Atl. Coast Line R.R. v. Bhd. of Locomotive Eng'rs.*, 398 U.S. 281, 290 (1970) (overturning an injunction against the enforcement of a state court injunction where the prior district court order had not addressed the propriety of a state court injunction); see also *Steans v. Combined Ins. Co.*, 148 F.3d 1266, 1271 (11th Cir. 1998) (holding improper a district court's judgment purporting to bind nonparties over whom it lacked jurisdiction, and enjoining those persons from seeking punitive damages from the defendant in state court based on a need to protect its prior judgment), *cert. denied sub nom.* *Combined Ins. Co. v. Aldridge*, 526 U.S. 1068 (1999). See generally CHEMERINSKY, *supra* note 219, § 11.2.4, at 703-05.

The lower federal courts are slightly split as to whether the relitigation exception applies to only those matters that were actually litigated or to all litigation that is precluded; *res judicata* may bar matters that could have been litigated but were not. CHEMERINSKY, *supra* note 219, § 11.2.4, at 705 (noting the confusion in the lower federal courts); 17 WRIGHT ET AL., *supra* note 221, § 4226, at 541-46 (commenting on lower federal courts' diverse application of the relitigation exception).

243. *Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988).

244. See, e.g., *Amalgamated Clothing Workers v. Richman Bros.*, 348 U.S. 511, 514-16 (1955).

245. The Court has held it to be inapplicable in some suits brought by the United States or federal agencies and when the party requesting injunctive relief was neither a party, nor in privity with a party, to the state court proceeding sought to be enjoined. *County of Imperial v. Munoz*, 449 U.S. 54, 59-60 (1980) (implying that the AIA does not bar injunctions sought by strangers to the state court proceeding sought to be enjoined); *NLRB v. Nash-Finch Co.*, 404 U.S. 138, 144-47 (1971) (holding that an injunction sought by the NLRB against state court action preempted by the National Labor Relations Act falls within



Of course, even when an injunction *may* issue under the All Writs and Anti-Injunction Acts, that permissibility “does not mean that [an injunction] *must* issue.”<sup>246</sup> Traditional equity doctrines—such as those requiring irreparable injury if the injunction did not issue and lack of an adequate remedy at law—constrain the federal courts’ issuance of anti-suit injunctions,<sup>247</sup> as they do the exercise of any power under the All Writs Act.<sup>248</sup> Thus, the decision whether to grant an anti-suit injunction may be influenced by such factors as whether the state suit is vexatious, whether the party seeking an injunction has so delayed in seeking relief as to have waived the right to seek an injunction or to be estopped from doing so, and whether there is need for speedier or surer relief than a state court plea of *res judicata* or collateral estoppel is likely to afford.<sup>249</sup>

When an anti-suit injunction does issue from a federal court, states are theoretically obligated to honor it under the Constitution’s Supremacy Clause and full faith and credit principles,<sup>250</sup> although

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the exception to the Anti-Injunction Act for suits brought by the United States); *Leiter Minerals, Inc. v. United States*, 352 U.S. 220, 225-26 (1957) (concluding that the Act does not prohibit the U.S. from obtaining an injunction of state proceedings to prevent threatened irreparable injury to a national interest). Certain other parties and proceedings also have been held to be beyond the scope of the Act. See LINDA MULLENIX ET AL., UNDERSTANDING FEDERAL COURTS AND JURISDICTION § 12.02[5] (1998).

246. *Choo*, 486 U.S. at 151 (emphasis in original).

247. See, e.g., *Merle Norman Cosmetics, Inc. v. Victa*, 936 F.2d 466, 468 (9th Cir. 1991) (observing that the issuance of an injunction is discretionary and that “general principles of equity, comity and federalism” should guide a court empowered by the All Writs and the Anti-Injunction Acts to grant an injunction); *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 731 F.2d 909, 927 (D.C. Cir. 1984) (stating that “[t]he equitable circumstances surrounding each request for an injunction must be carefully examined to determine whether . . . the injunction is required to prevent an irreparable miscarriage of justice”).

248. See *Clinton v. Goldsmith*, 526 U.S. 529, 537 (1999) (stating that “[t]he All Writs Act invests a court with a power essentially equitable and, as such, not generally available to provide alternatives to other, adequate remedies at law”).

249. See, e.g., *Quintero v. Klaveness Ship Lines*, 914 F.2d 717, 720-21 (5th Cir. 1990) (upholding exercise of discretion to enjoin relitigation of choice of law issue, made pursuant to a forum non conveniens dismissal, where cost of relitigation would have irreparably injured the defendant), *cert. denied sub nom. Quintero v. Torvald Klaveness & Co. A/S*, 499 U.S. 925 (1991); *Harrelson v. United States*, 613 F.2d 114, 116 (5th Cir. 1980) (affirming exercise of discretion to enjoin litigants who are harassing their opponents from undertaking any future litigation on any claims arising from the facts at issue). See generally 17 WRIGHT ET AL., *supra* note 221, § 4226, at 548, 552-53 (noting relevance of bad faith, multiplicity of suits, or other evidence of harassment, as well as the possibility of waiver or estoppel).

250. U.S. CONST. art. VI, cl.2 (declaring that the “Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land”); see HART & WECHSLER, *supra* note 217, at 1203-04 (the Supremacy Clause obliges state courts to stay their proceedings if federal law so dictates); see also *Niagara Mohawk Power Corp. v. Tonawanda*

the enforcement of such an injunction typically is left to the court that entered it.<sup>251</sup>

## 2. Proposed Amendments to Rule 23

In April, 2001, the Advisory Committee on Civil Rules of the U.S. Judicial Conference approved proposed changes to Rule 23, some of which have relevance to the issues under discussion here. However, at the request of the Advisory Committee, the Standing Committee of the Conference deferred consideration of the provisions relevant to this Article. The plan is for the Subcommittee on Class Actions to revise and re-submit these proposals.<sup>252</sup> Most pertinent is proposed Rule 23(g) which, as originally submitted to the Standing Committee, provided:

(g) Related class actions. (1) When a person sues or is sued as a representative of a class, the court may—before deciding whether to certify a class or after certifying a class—enter an order directed to any member of the proposed or certified class that prohibits filing or pursuing a class action in any other court that involves the class claims, issues, or defenses [but the court may not prohibit a class member from filing or pursuing a state-court action on behalf of persons who reside or were injured in the forum state and who assert claims that arise under the law of the forum state]. In entering an order under this Rule 23(g)(1) the court must make findings that:

(A) the other litigation will interfere with the court's ability to achieve the purposes of the class litigation,

(B) the order is necessary to protect against interference by other litigation, and

(C) the need to protect against interference by other litigation is greater than the class member's need to pursue other litigation.

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Band of Seneca Indians, 94 F.3d 747, 754 (2d Cir. 1996) (stating that federal law determines whether and to what extent federal judgments have preclusive effects in subsequent state court litigation); *Withrow v. Concannon*, 942 F.2d 1385, 1388 (9th Cir. 1991) (indicating that a federal injunction requiring adherence to the federal law imposes no inappropriate burden on a state); *Haskins v. Stanton* 794 F.2d 1273, 1277 (7th Cir. 1986) (stating that where a federal statute imposes a burden on a state, an injunction requiring the state to comply with the statute "merely seeks to prevent the defendants from shirking their responsibilities under it").

251. See *Baker ex rel Thomas v. General Motors Corp.*, 522 U.S. 222, 236 (1998) (noting that sanctions for violation of an injunction generally are imposed by the court that issued the injunction).

252. Cooper, *supra* note 195, at 457.

(2) In lieu of an order under Rule 23(g)(1), the court may stay its own proceedings to coordinate with proceedings in another court, and may defer the decision whether to certify a class notwithstanding Rule 23(c)(1)(A).

(3) The court may consult with other courts, state or federal, in determining whether to enter an order under Rule 23(g)(1) or (2).<sup>253</sup>

This is obviously not the place for a thorough evaluation of this proposal.<sup>254</sup> A few points, however, are worth making. First, this provision is among those proposed to help address the various problems created by duplicative class litigation in state court. The threats of multiple and excessive punitive damages awards, inequitably distributed, are among the problems created by parallel litigation in multiple fora. Thus, to the extent that proposed Rule 23(g)'s prohibition on filing and pursuit of overlapping class actions would be effective, it would help to avoid those punitive damages problems.<sup>255</sup> The Advisory Notes also indicate that the powers conferred in proposed Rule 23(g) are intended to fulfill the purposes of the class action, specifically to provide protection that is most evidently needed in (b)(1) classes, which themselves were established "for the very purpose of protecting against the effects of competing litigation that may . . . prevent effective protection of all class members' rights."<sup>256</sup>

Indeed, the Advisory Committee could well have had punitive damages awards in mind when it wrote, "[s]pecial occasions to protect the federal action may arise when a (b)(1) or (b)(2) class presents pressing needs to achieve uniformity of obligation and to en-

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253. Other proposed amendments allow federal courts to direct that no other court certify a class substantially similar to that which the directing court has refused to certify (or has decertified) to pursue substantially similar claims or defenses unless a difference of law or fact changes the certification issue, Proposed Rule 23(c)(1)(D), and, absent changed circumstances, prohibits any court from approving substantially the same settlement that another federal court has refused to approve for a certified class, Proposed Rule 23(e)(5). Still other of the proposed amendments address: the timing of certification decisions, Rule 23(c)(1) and of notice, Rule 23(c)(2); judicial oversight of settlements, Rule 23(e); attorney appointment, Rule 23(h); and attorney compensation, Rule 23(i).

254. Professor Edward Cooper of the University of Michigan Law School and Reporter for the Advisory Committee on Civil Rules has prepared memoranda addressing, *inter alia*, the consistency of these provisions with the Rules Enabling Act and the Anti-Injunction Act. See Cooper, *supra* note 195, at 462. Other evaluations will surely follow.

255. The language bracketed within the proposed Rule is said to "attempt to acknowledge the important interest of the states in controlling truly in-state litigation while recognizing that the federal interest in managing the class action before the federal court may take precedence over a competing multi-state class action brought in state court." Proposed FED. R. CIV. P. 23(g) advisory committee's notes.

256. *Id.*

sure equality among class members," and "[e]ven in state-law cases, a federal court may be concerned to protect against the consequences of pursuing claims arising out [of] multistate events in many independent actions."<sup>257</sup> A rather gaping hole in that protection seems to exist in the Rule's failure to authorize injunctions against individual (that is, non-class) suits. However, proposed Rule 23(g) addresses only related class actions. As this Article has discussed above, federal courts already have the power to enjoin litigation that falls within one of the exceptions to the AIA, including when necessary in aid of the federal court's jurisdiction.<sup>258</sup> That provision may suffice to empower federal courts to enjoin individual litigation that would interfere with mandatory punitive damages class actions.

In a memorandum addressing Rules Enabling Act authority to deal with overlapping class actions in this manner among others, Professor Cooper has tentatively opined that proposed Rule 23(g) *would* be properly promulgated; that is, that it (1) would really regulate procedure, "the judicial process for enforcing rights and duties recognized by substantive law and for justly administering remedy and redress,"<sup>259</sup> in the "interest of speedy, fair and exact determination of the truth,"<sup>260</sup> for its purpose is to support the procedural goals of Rule 23; and (2) that it would not abridge, enlarge or modify a substantive right, in violation of the Act, for any effect that it would have on substantive rights would be incidental; nor (3) would it impermissibly expand federal subject matter jurisdiction.<sup>261</sup> Noting that, "it seems to be accepted that Rule 23 itself is generally within Enabling Act authority,"<sup>262</sup> and finding traces of evidence that the Supreme Court is attentive to the purposes of class actions and would support amendments designed to better fulfill those purposes, Professor Cooper set forth the argument that

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257. *Id.*

258. *See supra* notes 217-36 and accompanying text.

259. *Sibbach v. Wilson & Co.*, 312 U.S. 1, 14 (1940).

260. *Id.*

261. Cooper, *supra* note 195, at 459-62. Cooper also wrote:

[t]here is substantial authority that § 2283 does not limit subject-matter jurisdiction, but operates only to limit the injunction remedy. *See* 17 Federal Practice & Procedure 2d, § 4422, p. 514. To that extent, a rule that qualifies a remedial limit does not expand jurisdiction. And there is little force to the possible argument that federal jurisdiction is enlarged by an injunction that, by ousting state-court jurisdiction, effectively transforms a statutory grant of concurrent federal jurisdiction into an unauthorized assertion of exclusive federal jurisdiction. The injunction is simply an exercise of established jurisdiction, such as occurs in any other situation where an anti-suit injunction is proper because a § 2283 exception applies or because § 2283 itself does not apply.

*Id.* at 465.

262. Cooper, *supra* note 195, at 460.

[a] federal court, if it certifies a class, is acting within the framework of a general procedural rule to create a legal construct—the class—that can fulfill the reasons for its creation only if protected against the intrusion of other class litigation . . . . Fulfillment of the procedure, and effective implementation of the jurisdictional authority that supports resort to federal procedure, require that the class be protected in much the same way that a court is authorized to protect the res that supports in rem jurisdiction.<sup>263</sup> . . . Proposed Rule 23(g) is necessary to maintain the integrity of federal class-action procedure.<sup>264</sup>

In so arguing, Professor Cooper simultaneously supported the validity of proposed Rule 23(g) under the Enabling Act, and argued for the propriety of the proposed Rule under the “necessary in aid” prong of the AIA. Having done so, he reminded the reader that even so, the *wisdom* of adopting the proposed Rule (and implicitly, wise application of the Rule), which “touches highly sensitive relationships between federal and state courts . . . depend[s] on the severity and persistence of the threats [that] competing litigation poses to fulfillment of Rule 23’s purposes.”<sup>265</sup>

In a separate memorandum, Professor Cooper addressed, *inter alia*, whether such a Rule could constitute an express authorization by Congress, within the meaning of the first exception to the AIA. He proffered the argument that a Rule that

legitimately implements Enabling Act authority may seem to fit. It is the Enabling Act that expressly authorizes the rule that expressly authorizes stays and like orders addressed to members of a federal class. [And] [t]he supercession provision<sup>266</sup> . . . underscores the status of Enabling Act rules as the equivalent of Acts of Congress.<sup>267</sup>

Finally, Professor Cooper added that, if the argument that the Rule constitutes an express authorization by Congress fails, injunctions entered under the Rule can remain valid as within the AIA exception for injunctions necessary in aid of the federal courts’ juris-

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263. *Id.* at 461.

264. *Id.* at 462.

265. *Id.* Professor Cooper goes further (as I read him) to say that “the broader anti-injunction policy of § 2283, drawn from deeply rooted concepts of comity and federalism, must be considered in determining *whether* proposed Rule 23(g) really is a rule of practice and procedure, and really does not impermissibly abridge, enlarge or modify any substantive right.” (emphasis added).

266. The Rules Enabling Act, 28 U.S.C. § 2072(b), provides in part that, “[a]ll laws in conflict with such rules shall be of no further force or effect after such rules have taken effect.” *Id.* at 464

267. Cooper, *supra* note 195, at 464. These arguments *assume* the validity of the proposed Rule under the Enabling Act; however, this is not free from doubt.

diction.<sup>268</sup>

The need for federal judicial authority to enjoin litigation that would interfere with properly certified mandatory classes is reflected in the now-tabled proposed amendments to Rule 23. If it is determined that mandatory punitive damages classes can be properly certified, one can hope that the courts will protect those certifications, utilizing their powers under the All Writs Act, under amendments to Rule 23, should they become law, and under exceptions to the AIA.

### B. State Court Injunctions of State Court Proceedings

State courts ordinarily lack power to enjoin federal judicial proceedings.<sup>269</sup> They are not similarly disabled from enjoining persons from filing or prosecuting proceedings pending in the courts of another state or states,<sup>270</sup> but will do so only in limited circumstances. The verbal formulations describing when state courts will enjoin actions in other states include such phrases as: "sparingly," "only in the most compelling circumstances,"<sup>271</sup> and where "a clear equity is presented requiring the interposition of the court to prevent a manifest wrong and injustice."<sup>272</sup> Appropriate circumstances may exist when the litigation to be enjoined is viewed as vexatious or harassing, and when the goal is to prevent a multiplicity of suits,<sup>273</sup> to protect the court's own jurisdiction or prevent evasion of important pub-

268. *Id.* at 465.

269. The general rule is that "state courts are completely without power to restrain federal-court proceedings in in personam actions." *Donovan v. City of Dallas*, 377 U.S. 408, 413 (1964); *see also* *Gen. Atomic Co. v. Felter*, 434 U.S. 12, 16 (1977) (holding it beyond the power of state courts, and in conflict with the Supremacy Clause, for state courts to enjoin litigants from filing or prosecuting in personam actions in federal courts; stating that rights conferred by Congress cannot be abridged by the states). *But see* *Princess Lida v. Thompson*, 305 U.S. 456, 466-68 (1939) (holding that the filing of trust accounts gave a state court quasi in rem jurisdiction which empowered it to enjoin a later federal action against the trustees for an accounting and other relief). *See generally* *Hornstein & Nagle*, *supra* note 218.

270. *See, e.g., Gannon v. Payne*, 706 S.W.2d 304, 305-06 (Tex. 1986) (concluding that state courts have power to restrain persons from proceeding with suits filed in other states); *Eddy ex rel. Pfeifer v. Christian Sci. Bd. of Dirs.*, 379 N.E.2d 653, 654-55 (Ill. App. Ct. 1978) (same). Even if courts sometimes speak in terms of injunctions against actions or against the prosecution of actions, these injunctions are directed to parties, rather than to courts. *Kleinschmidt v. Kleinschmidt*, 99 N.E.2d 623, 626 (Ill. App. Ct. 1951) (so stating).

271. *See, e.g., Gannon*, 706 S.W.2d at 306 (stating the standard as "sparingly and only by reason of very special circumstances"; also referring to "most compelling circumstance[s]").

272. *Royal League v. Kavanagh*, 84 N.E. 178, 181 (Ill. 1908); *see also Gannon*, 706 S.W.2d at 307 (asking whether an "injunction is required to prevent an irreparable miscarriage of justice").

273. *See, e.g., Gannon*, 706 S.W.2d at 307 (discussing the appropriateness of an injunction to prevent multiplicity or to protect against vexatious or harassing litigation).

lic policies of the forum state,<sup>274</sup> or to restrain a state citizen from prosecuting, in the court of a foreign state, an action that will result in a fraud, gross wrong, or oppression.<sup>275</sup>

The reticence of states to attempt injunctions of proceedings in other states is attributable, at least in part, to the understanding that the court in which an enjoined action is pending may proceed with the litigation nonetheless, at least in the absence of a final judgment which is entitled to recognition under the Full Faith and Credit Clause of the U.S. Constitution.<sup>276</sup> The Court in dicta specifically addressed anti-suit injunctions in *Baker v. General Motors Corp.*,<sup>277</sup> in the context of holding that an injunction barring a former GM employee from testifying against GM did not control proceedings outside Michigan, the state of the court that entered the injunction.<sup>278</sup> It noted that "anti-suit injunctions regarding litigation elsewhere, even if compatible with due process as a direction constraining parties to the decree . . . in fact have not controlled the second court's actions regarding litigation in that court."<sup>279</sup> In a footnote, the Court added, "[t]his Court . . . has not yet ruled on the credit due to a state-court injunction barring a party from maintaining litigation in another State."<sup>280</sup> State courts that have dealt with the question have, in the main, regarded antisuit injunctions as outside the full faith and credit ambit.<sup>281</sup>

The reasoning in *Baker*, including its concern that the courts of one state not interfere with the jurisdiction of courts of other states,<sup>282</sup> indicates agreement with this weight of authority. It ap-

274. See, e.g., *id.* (referring to courts that have entered anti-suit injunctions on these bases, and looking to these factors itself); see also *Kleinschmidt*, 99 N.E.2d at 627-28 (discussing similar principles).

275. See, e.g., *Kavanagh*, 84 N.E. at 181 (so stating).

276. U.S. CONST. art. IV, § 1. The Court in *Baker ex rel Thomas v. General Motors Corp.* indicated that equity decrees are within the ambit of the states' full faith and credit obligations. 522 U.S. 222, 234 (1998).

277. 522 U.S. 222 (1998).

278. *Id.* at 236

279. *Id.* (citing, in support of the latter proposition, *James v. Grand Trunk W. R.R.*, 152 N.E.2d 858, 867 (Ill. 1958); and *SCOLES & HAY*, *supra* note 19, at 981). See generally 17 *WRIGHT ET AL.*, *supra* note 221, § 4467, at 635 (1981 & 2001 Supplement) (noting that "[a] second state need not directly enforce an injunction entered by another state . . .").

280. *Baker*, 522 U.S. at 236 n.9 (citing Ginsburg, *Judgments in Search of Full Faith and Credit: The Last-in-Time Rule for Conflicting Judgments*, 82 HARV. L. REV. 798, 823 (1969); Reese, *Full Faith and Credit to Foreign Equity Decrees*, 42 IOWA L. REV. 183, 198 (1957) ("urging that . . . 'full faith and credit does not require dismissal of an action whose prosecution has been enjoined,' for to hold otherwise 'would mean in effect that the courts of one state can control what goes on in the courts of another'").

281. *Baker*, 522 U.S. at 236 n.9 (citing Ginsburg, *supra* note 280, for the view that the current state of the law, permitting issuance of anti-suit injunctions but not compelling deference to them outside the rendering state, may be the most reasonable compromise position).

282. See *id.* at 240.

pears that, just as the Michigan decree in *Baker* could not command obedience elsewhere because the Michigan courts lacked authority to determine who could testify before the courts of another state,<sup>283</sup> an anti-suit injunction cannot command obedience elsewhere because the injunction-issuing court lacks authority to decide whether particular cases shall proceed before the tribunals of another state. Thus, the court that enters an injunction has no power to ensure that sister-state proceedings will cease in the manner it has directed, although it can sanction parties before it who have disobeyed its injunction.<sup>284</sup> Another state may respect an anti-suit injunction as a matter of comity, although it is not obligated to do so.<sup>285</sup>

All of the same reasons that "argue" that a federal court should be able to enjoin state court proceedings that would interfere with the federal court's jurisdiction over a defendant's liability for punitive damages, occasioned by a particular course of conduct, when the court has properly certified a mandatory punitive damages class,<sup>286</sup> apply with equal force when a state court has properly certified the mandatory punitive damages class. In light of the injunction-entering court's impotence to enforce its injunction except through the imposition of sanctions upon disobedient parties, one can only hope that the courts of sister states would be wise enough to decline to proceed with litigation that has been enjoined in these circumstances, both in the interest of comity and in the interests of the plaintiffs and the defendants who gain protection from a single court's control over punitive damages for a defined course of conduct.

### C. *Personal Jurisdiction to Enjoin*

It appears to be well accepted that a federal court may exercise personal jurisdiction over persons who are or were full-fledged parties to federal court litigation, for the purpose of enjoining those individuals from commencing or prosecuting state court litigation<sup>287</sup> that would interfere with the jurisdiction the federal court is exer-

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283. *Id.* at 241.

284. *See id.* at 236 (stating that "[s]anctions for violations of an injunction . . . are generally administered by the court that issued the injunction"); *Leman v. Krentler-Arnold Hinge Last Co.*, 284 U.S. 448, 452 (1932) (holding valid a Massachusetts district court's assessment of a penalty against a party who violated that court's injunction in Michigan); *see also Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963) (indicating that enforcement is left to the injunction-rendering forum).

285. *See, e.g., Gannon v. Payne*, 706 S.W.2d 304, 306-07 (Tex. 1986); *Kleinschmidt v. Kleinschmidt*, 99 N.E.2d 623, 626 (Ill. App. Ct. 1951).

286. *See supra* notes 217-68 and accompanying text.

287. The Anti-Injunction Act does not apply until state proceedings have begun, but the consequence is that a federal court may restrain a party from instituting state proceedings, with no interference by the Anti-Injunction Act. *See* 17 WRIGHT ET AL., *supra* note 221, § 4222, at 506-07.



cising or with a federal court judgment, if one has been entered.<sup>288</sup> The same should be true of similarly situated state courts. The personal jurisdiction exercised over defendants pursuant to applicable long-arm statutes and the U.S. Constitution, and over plaintiffs by virtue of their consensual submission to the court's jurisdiction in the initial litigation, should be understood to encompass jurisdiction to enjoin those same parties from commencing or pursuing state court litigation that would interfere with the class action court's jurisdiction or judgment.

When a federal court enters an anti-suit injunction that purports to enjoin persons who were strangers to the federal litigation or persons who were among the absent members of a class on whose behalf, or against whom, the federal suit was litigated, the court's

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288. See, e.g., *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110-12 (1969) (injunction is ineffective insofar as it is directed at persons over whom the court lacks personal jurisdiction); *Winkler v. Eli Lilly & Co.*, 101 F.3d 1196, 1202-03 (7th Cir. 1996) (holding an anti-suit injunction of a parallel state court suit to be appropriate to protect a § 1407 transferee court's discovery order as to, but only as to, those persons and counsel whose cases were or had been part of the multidistrict litigation); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 832 (2d Cir. 1930) (stating that, "no court can make a decree which will bind any one but a party . . . [If] a court of equity [or of law assumes to] enjoin the world at large, . . . the decree is *pro tanto brutum fulmen*, and the persons enjoined are free to ignore it."). Rule 65 of the Federal Rules of Civil Procedure purports to allow federal courts to enjoin not only parties but also those persons in active concert or participation with them who receive actual notice of the order by personal service or otherwise. FED. R. CIV. P. 65(d). On occasion, that provision may be invoked in cases involving anti-suit injunctions against the absent members of plaintiff classes. See, e.g., *In re Bolar Pharm. Co., Generic Drug Consumer Litig.*, MDL No. 849, 1994 WL 326522, at \*3 (E.D. Pa. July 5, 1994).

If no state proceeding exists when the federal court is asked to enter an injunction, but a state action is commenced before the federal court enters the injunction, the circuits are split on whether the court may enter the injunction only if an exception to the Anti-Injunction Act applies. The First, Seventh, and Eighth Circuits have held the AIA to be inapplicable in the circumstances described. See *Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 842 n.6 (1st Cir. 1988) (citing *Barancik* and *National City Lines* with approval; for a discussion of *Barancik* and *National City Lines*, see *infra*); *Nat'l City Lines, Inc. v. LLC Corp.*, 687 F.2d 1122, 1127 (8th Cir. 1982) ("The Anti-Injunction Act is inapplicable when a federal court has first obtained jurisdiction of a matter in controversy by the institution of suit."); *Barancik v. Investors Funding Corp.*, 489 F.2d 933, 937-38 (7th Cir. 1973) (reasoning that if the AIA applied upon the mere commencement of a state action, then "a federal court [taking] time for fair consideration of the merits of a request for an injunction [would] deliberate at its peril; its authority to rule on the pending motion could be terminated by the action of one of the litigants"). The Sixth Circuit has held the other way. See *Roth v. Bank of the Commonwealth*, 583 F.2d 527, 532-34 (6th Cir. 1978) (rejecting the *Barancik* rationale on the grounds that it "runs afoul of the language of the Act and of clear authority which insists that the language be read literally"); see also *Nat'l City Lines*, 687 F.2d at 1135 (Arnold, J., dissenting) (arguing against "any steps that erode the independence and autonomy of the state courts").

jurisdiction to enjoin those persons from commencing or pursuing state court litigation is far less clear, particularly if those individuals lack minimum contacts with the relevant sovereign. I have elsewhere explored these personal jurisdiction issues as they arise in opt-out and in mandatory class actions, and have considered whether it matters whether the litigation to be enjoined is a collateral attack on a class action judgment or merely related or overlapping litigation.<sup>289</sup> In the context of mandatory limited generosity classes, my view is this: although there is some uncertainty as to the circumstances under which a judgment in a Rule 23(b)(1) class action will satisfy due process and bind the members of the class,<sup>290</sup> I believe that, when those circumstances are present, they should suffice to subject the class members to the personal jurisdiction of the class court for purposes of being enjoined from commencing or prosecuting state court litigation, the injunction of which is otherwise proper under the AIA. This should be the result in order to give meaning to the notion that these members are to be bound by the judgment. If these class members are to be so bound, it must be

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289. See Joan Steinman, *The Newest Frontier of Judicial Activism: Removal Under the All Writs Act, Part II: Special Considerations Applicable to Anti-Suit Injunctions*, 80 B.U. L. REV. 773, 855-73 (2000).

290. It typically is said that the members of mandatory classes are bound by the judgment so long as their due process rights are fulfilled, but the Supreme Court has not definitively determined what due process requires. These class members must be adequately represented but, under Rule 23, such class members are not entitled to notice of the action or the concomitant opportunities to be heard or to opt out; and the Court never has held that they must have minimum contacts with the forum. The Rule contemplates that they will be bound without their having manifested any consent to the court's jurisdiction. See generally Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 YALE L.J. 1 (1986) (proposing, *inter alia*, a four-factor analysis for determining the propriety of mandatory class certifications); 17 WRIGHT ET AL., *supra* note 221, § 1789, at Supp. 43 (noting that the issue whether there is a constitutional right to opt out is acute when actions involving money damages are certified under Rule 23(b)(1) or (2), and that, over a dissent joined by four Justices, the Supreme Court dismissed certiorari as improvidently granted in a case—*Ticor Title Ins. Co. v. Brown*, 511 U.S. 117 (1994) (O'Connor, J., dissenting)—that could have posed that question).

One argument that at least sometimes could be made in support of jurisdiction absent minimum contacts, although not without constitutionally adequate notice and opportunity to be heard, would be based on an analogy to *Mullane v. Cen. Hanover Bank*, 339 U.S. 306 (1950), where the Court upheld jurisdiction, concluding that:

the interest of each state in providing means to close trusts that exist by the grace of its laws and are administered under the supervision of its courts is so insistent and rooted in custom as to establish beyond doubt the right of its courts to determine the interests of all claimants, resident or nonresident . . . .

*Id.* at 313. In cases certified under Rule 23(b)(1) and (2), there often is a practical necessity that there be one forum that can decide the controversy and bind all interested parties.

within the court's power to bind them to it by enjoining litigation activity that otherwise would undermine the federal court's jurisdiction or its judgment.<sup>291</sup> This conclusion is defensible in part because the injunctions at issue here are more like mandatory or prohibitory orders entered as a matter of case management (to which class members certainly are subject) than they are to injunctions of non-litigation activity, the propriety of which rests on a determination of the merits.<sup>292</sup> It is highly likely that anti-suit injunctions are not the sort of coercive judicial action to which defendants are subject as a remedy for wrongdoing, and vulnerability to which requires such procedural protections as the minimum contacts requirement.<sup>293</sup>

Thus, judicial clarification of what is necessary for courts to assert personal jurisdiction to enjoin absent class members should suffice. However, if, in order for federal courts to enjoin all the litigation that it is desirable for them to enjoin, it is necessary for federal courts to be able to exercise a broader scope of personal jurisdiction than is currently available, that lack of authority is amenable to a

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291. See *supra* note 226.

292. Compare, with the position taken in the text, the definition of an injunction within the meaning of 28 U.S.C. § 1292(a)(1) (1994) as an order directed to a party, enforceable by contempt, and designed to afford some or all of the substantive relief sought by a complainant. See 17 WRIGHT ET AL., *supra* note 221, § 3922, at 65; see also *id.* § 3922.2, at 95 (stating that "[f]inal judgment doctrine regularly denies appeal from orders designed to control the conduct of litigation as a matter of procedure"). Ironically, however, anti-suit injunctions are generally held to be appealable as injunctions. See *id.* § 3922.2, at 113; § 3923, at 123-25 (citing cases where anti-suit injunctions were appealed). But see *Hershey Foods Corp. v. Hershey Creamery Co.*, 945 F.2d 1272, 1278-79 (3d Cir. 1991) (rejecting an appeal from an injunction against prosecution of another proceeding because the order did not grant any part of the relief requested on the merits and was better viewed as relating primarily to venue). In their treatise, Wright, Miller & Cooper compliment the reasoning, but disapprove the *Hershey* decision because of the severity of the intrusion on the court whose proceedings are enjoined, because of the particular intolerability of that intrusion when a federal court restrains proceedings in the courts of a state, and because this approach would require case-by-case determination of whether anti-suit injunctions involved relief on the merits. See 17 WRIGHT ET AL., *supra* note 221, § 3923, at 123-24 n.1. The first two of these factors also might influence how stringently one determines personal jurisdiction to enjoin, but I think that the analysis proposed in the text is sufficiently stringent.

293. For a contrasting view, see 2 NEWBERG ON CLASS ACTIONS § 9.26, at 268 (2d ed. 1985) (opining that a class action court lacks personal jurisdiction to enjoin class members except insofar as the court obtains personal jurisdiction over individual class members by individual service of process). On this view, courts lack personal jurisdiction to enjoin at least the inactive absent members of certified classes of any variety from initiating or pursuing related litigation in other fora, absent minimum contacts between the class members and the class action forum. Since most absent class members do not engage in litigation activity from which general consent fairly can be inferred, the courts would be hard pressed to find a personal jurisdictional basis to enjoin most class members, unless they happened to have minimum contacts with the forum.

legislative cure.<sup>294</sup> None of this is to say that the class members need not be given notice and an opportunity to be heard on the question whether their litigation should be enjoined; they should, particularly since, on this matter, they will not be adequately represented by the class representative parties or the class attorney.

Finally, I believe that much of what was said in the preceding two paragraphs applies equally to state courts that certify mandatory (limited generosity) punitive damages classes. For the same reasons as stated above, these courts should be recognized to have personal jurisdiction to enjoin class members from commencing or prosecuting litigation in other states' courts when a judgment by the class action court, on the merits of that action, will satisfy due process and bind the members of the class, and when an anti-suit injunction is necessary in aid of the state court's jurisdiction. However, state legislatures cannot authorize state courts to assert jurisdiction over persons who lack minimum contacts with the forum state. Thus, in some cases, state courts might not be able to enjoin all litigation that would undermine a mandatory punitive damages class.

## V. CONCLUSION

The virtues of mandatory limited generosity classes in enabling courts to impose large but appropriate punitive damages awards upon culpable defendants, avoid "overkill," equitably distribute the damages among injured parties, and conserve judicial and party resources seem to far outweigh the drawbacks. Whether such classes are legally viable under rules like Rule 23(b)(1)(B) nonetheless remains in doubt. Difficulties attend certification of mandatory limited generosity classes based upon state law limits on punitive damages, when choice of law principles dictate that the laws of multiple states be applied. Even when federal due process principles avoid multiple-law problems, issues crop up at various points along the way in (1) determining a definitely ascertained limit which, at its

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294. See, e.g., 28 U.S.C. § 1407 (1994); *Mississippi Publ'g Corp. v. Murphree*, 326 U.S. 438, 442 (1946) (indicating that Congress may enact legislation authorizing federal courts to exercise nationwide personal jurisdiction). The ALI Complex Litigation Project similarly proposed to expand the jurisdictional power of transferee courts by authorizing them to serve persons nationwide in order to allow those courts the authority to enjoin non-parties, if necessary, wherever they might be located.

Insofar as a potential antisuit injunction may run against persons who are not parties to any of the litigation in the transferee court, the authorization for the court to issue a binding order effectively expands the jurisdictional power of the transferee court to allow that limited authority over nonparties wherever they may be located. Similar nationwide authority is contained in the antisuit injunction statute tied to interpleader suits.

AM. LAW INST., COMPLEX LITIGATION: STATUTORY RECOMMENDATIONS AND ANALYSIS, Reporter's Notes to Comment b § 5.04, at 268-69 (citations omitted).

maximum, is exceeded by aggregate liquidated punitive damages claims, and which is (2) to be distributed equitably, and perhaps pro rata, (3) to all those who should share in the award; and in doing all this (4) without violating the federal Rules Enabling Act (or state law analogues) and (5) without abrogating Seventh Amendment guarantees, or analogous state law. I am optimistic, but far from certain, that the issues can be resolved so as to allow such limited generosity classes. If the current rules do not permit such classes, there would seem to be sufficient reason to amend the rules to authorize them. Such amendments would not however overcome obstacles that derive from fundamental limits on the scope of procedural rules or constitutional guarantees of jury trial.

If we *can* get over or around those hurdles, the next question should be the permissibility of anti-suit injunctions to prevent such mandatory punitive damages classes from being undermined by the prosecution of separate actions by class members who would seek to assert punitive damages claims that are within the scope of the class action. If mandatory punitive damages classes can properly be certified, the certifying courts, whether federal or state, should have power—so far as due process requirements for personal jurisdiction will permit—to enjoin the prosecution of separate actions that assert punitive damages claims within the scope of the class action. The courts supervising such competing litigation would be wise to respect those injunctions. As is the case with limited generosity class certifications themselves, the law “isn’t quite there” yet, but it is close. If the courts do not take the necessary steps themselves, legislatures can assist with authorization of injunctions, limited (especially in the case of state courts) by restrictions on exercises of personal jurisdiction to enjoin. Where action is necessary that is beyond the powers of any state court, federal courts may be able to do the certifying and the enjoining. Then we may have both mandatory punitive damages classes and the injunctive tools to enable those classes to serve their laudable purposes.

## APPENDIX A

(The substantive limitations on punitive damages are **bolded**; the procedural prescriptions that attend the possible imposition of punitive damages appear in ordinary typeface. Reasonable minds may differ, however, as to what is substantive and what is procedural.)

## CALIFORNIA

CAL. CIV. CODE § 3294. Exemplary damages; when allowable; definitions provides, in part, that:

- (a) In an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant.

§ 3295. Protective order; prima facie case of liability prerequisite to certain evidence; discovery limitations; evidence of profits or financial condition

- (a) The court may, for good cause, grant any defendant a protective order requiring the plaintiff to produce evidence of a prima facie case of liability for damages pursuant to Section 3294, prior to the introduction of evidence of:
  - (1) The profits the defendant has gained by virtue of the wrongful course of conduct of the nature and type shown by the evidence.
  - (2) The financial condition of the defendant.
- (b) Nothing in this section shall prohibit the introduction of prima facie evidence to establish a case for damages pursuant to Section 3294.
- (c) No pretrial discovery by the plaintiff shall be permitted with respect to the evidence referred to in paragraphs (1) and (2) of subdivision (a) unless the court enters an order permitting such discovery pursuant to this subdivision. However, the plaintiff may subpoena documents or witnesses to be available at the trial for the purpose of establishing the profits or financial condition referred to in subdivision (a), and the defendant may be required to identify documents in the defendant's possession which are relevant and admissible for that purpose and the witnesses employed by or related to the defendant who would be most competent to testify to those facts. Upon motion by the plaintiff supported by appropriate affidavits and after a hearing, if the court deems a hearing to be necessary, the court may at any time enter an order permitting the discovery otherwise prohibited by this subdivision if the court finds, on the basis of the supporting and opposing affidavits presented, that the

plaintiff has established that there is a substantial probability that the plaintiff will prevail on the claim pursuant to Section 3294. Such order shall not be considered to be a determination on the merits of the claim or any defense thereto and shall not be given in evidence or referred to at the trial.

- (d) The court shall, on application of any defendant, preclude the admission of evidence of that defendant's profits or financial condition until after the trier of fact returns a verdict for plaintiff awarding actual damages and finds that a defendant is guilty of malice, oppression, or fraud in accordance with Section 3294. Evidence of profit and financial condition shall be admissible only as to the defendant or defendants found to be liable to the plaintiff and to be guilty of malice, oppression, or fraud. Evidence of profit and financial condition shall be presented to the same trier of fact that found for the plaintiff and found one or more defendants guilty of malice, oppression, or fraud.
- (e) No claim for exemplary damages shall state an amount or amounts.

CAL. CIV. CODE §§ 3294(a), 3295(a)-(e) (Deering 1984 & Supp. 2001).

#### CONNECTICUT

CONN. GEN. STAT. ANN. § 52-240(b)

Punitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller's reckless disregard for the safety of product users, consumers or others who were injured by the product. 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.**

CONN. GEN. STAT. ANN. § 52-240(b) (West 1991).

#### FLORIDA

FLA. STAT. 768.73. Punitive damages; limitation.

- (1) (a) **Except as provided in paragraphs (b) and (c), an award of punitive damages may not exceed the greater of:**
  - 1. **Three times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or**
  - 2. **The sum of \$ 500,000.**
- (b) **Where the fact finder determines that the wrongful conduct proven under this section was motivated solely by unreasonable financial gain and determines that the unreasonably dangerous nature of the conduct, together with the high like-**

likelihood of injury resulting from the conduct, was actually known by the managing agent, director, officer, or other person responsible for making policy decisions on behalf of the defendant, it may award an amount of punitive damages not to exceed the greater of:

1. Four times the amount of compensatory damages awarded to each claimant entitled thereto, consistent with the remaining provisions of this section; or
2. The sum of \$ 2 million.

(c) Where the fact finder determines that at the time of injury the defendant had a specific intent to harm the claimant and determines that the defendant's conduct did in fact harm the claimant, there shall be no cap on punitive damages.

(d) This subsection is not intended to prohibit an appropriate court from exercising its jurisdiction under s. 768.74 in determining the reasonableness of an award of punitive damages that is less than three times the amount of compensatory damages.

(2) (a) Except as provided in paragraph (b), punitive damages may not be awarded against a defendant in a civil action if that defendant establishes, before trial, that punitive damages have previously been awarded against that defendant in any state or federal court in any action alleging harm from the same act or single course of conduct for which the claimant seeks compensatory damages. For purposes of a civil action, the term "the same act or single course of conduct" includes acts resulting in the same manufacturing defects, acts resulting in the same defects in design, or failure to warn of the same hazards, with respect to similar units of a product.

(b) In subsequent civil actions involving the same act or single course of conduct for which punitive damages have already been awarded, if the court determines by clear and convincing evidence that the amount of prior punitive damages awarded was insufficient to punish that defendant's behavior, the court may permit a jury to consider an award of subsequent punitive damages. In permitting a jury to consider awarding subsequent punitive damages, the court shall make specific findings of fact in the record to support its conclusion. In addition, the court may consider whether the defendant's act or course of conduct has ceased. Any subsequent punitive damage awards must be reduced by the amount of any earlier punitive damage awards



**rendered in state or federal court.**

- (3) The claimant attorney's fees, if payable from the judgment, are, to the extent that the fees are based on the punitive damages, calculated based on the final judgment for punitive damages. This subsection does not limit the payment of attorney's fees based upon an award of damages other than punitive damages.
- (4) The jury may neither be instructed nor informed as to the provisions of this section.
- (5) The provisions of this section shall be applied to all causes of action arising after the effective date of this act.

FLA. STAT. ANN. CH. 768.73 (West Supp. 2001).

### GEORGIA

GA. CODE ANN. § 51-12-5.1. Punitive damages (e) (1) **In a tort case in which the cause of action arises from product liability, there shall be no limitation regarding the amount which may be awarded as punitive damages. Only one award of punitive damages may be recovered in a court in this state from a defendant for any act or omission if the cause of action arises from product liability, regardless of the number of causes of action which may arise from such act or omission.**

GA. CODE ANN. § 51-12-5.1(e)(1) (2001). *But see* McBride v. General Motors Corp., 737 F. Supp. 1563, 1579 (M.D. Ga. 1990) (holding the one-award provision set forth in the second sentence of paragraph (e)(1) to be unconstitutional, null and void, because violative of the equal protection and due process clauses of the Georgia and federal constitutions).

### ILLINOIS

§ 735 ILL. COMP. STAT. 5/2-1115.05. Limitations on recovery of punitive damages in cases other than healing art or legal malpractice cases

Sec. 2-1115.05. Limitations on recovery of punitive damages in cases other than healing art or legal malpractice cases.

- (a) In all cases on account of bodily injury, or physical damage to property based on negligence, or product liability based on any theory or doctrine, other than those cases described in Section 2-1115 [735 ILCS 5/2-1115], punitive damages may be awarded only if actual damages are awarded. **The amount of punitive damages that may be awarded for a claim in any civil action subject to this Section shall not exceed 3 times the amount awarded to the claimant for the economic damages on which such claim is based.**
- (b) To recover punitive damages in cases described in subsec-

tion (a), a plaintiff must show by clear and convincing evidence that the defendant's conduct was with evil motive or with a reckless and outrageous indifference to a highly unreasonable risk of harm and with a conscious indifference to the rights and safety of others. "Clear and convincing evidence" means that measure or degree of proof that will produce in the mind of the trier of fact a high degree of certainty as to the truth of the allegations sought to be established. This evidence requires a greater degree of persuasion than is necessary to meet the preponderance of the evidence standard.

- (c) In any action including a claim for punitive damages, a defendant may request that the issues relating to punitive damages be tried separately from the other issues in the action. If such a request is made, the trier of fact shall first hear evidence relevant to, and render a verdict upon, the defendant's liability for compensatory damages and the amount thereof. If the trier of fact makes an award of actual damages, the same trier of fact shall immediately hear any additional evidence relevant to, and render a verdict upon, the defendant's liability for punitive damages and the amount thereof. If no award of actual damages is made, the claim for punitive damages shall be dismissed. If the defendant requests a separate proceeding concerning liability for punitive damages pursuant to this Section, and the proceeding is held, evidence relevant only to the claim of punitive damages shall be inadmissible in any proceeding to determine whether compensatory damages are to be awarded.
- (d) **The limitations of subsection (a) shall not apply in a case in which a plaintiff seeks damages against an individual on account of death, bodily injury, or physical damage to property based on any theory or doctrine due to an incident or occurrence for which the individual has been charged and convicted of a criminal act for which a period of incarceration is or may be a part of the sentence.**
- (e) Nothing in this Section shall be construed to create a right to recover punitive damages.
- (f) This amendatory Act of 1995 applies to causes of action accruing on or after its effective date.

§ 735 ILL. COMP. STAT. ANN. 5/2-1115.05 (West Supp. 2001). The Act was approved March 9, 1995 and is applicable to causes of action as specified in each Section or part of the Act.

#### MINNESOTA

#### MINN. STAT. § 549.20. Punitive damages Subdivision 1.

- (a) Punitive damages shall be allowed in civil actions only upon

clear and convincing evidence that the acts of the defendant show deliberate disregard for the rights or safety of others.

- (b) A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:
- (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
  - (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if:

Subd. 3. Any award of punitive damages shall be measured by those factors which justly bear upon the purpose of punitive damages, including the seriousness of hazard to the public arising from the defendant's misconduct, the profitability of the misconduct to the defendant, the duration of the misconduct and any concealment of it, the degree of the defendant's awareness of the hazard and of its excessiveness, the attitude and conduct of the defendant upon discovery of the misconduct, the number and level of employees involved in causing or concealing the misconduct, the financial condition of the defendant, and the total effect of other punishment likely to be imposed upon the defendant as a result of the misconduct, including compensatory and punitive damage awards to the plaintiff and other similarly situated persons, and the severity of any criminal penalty to which the defendant may be subject.

Subd. 4. Separate proceeding. In a civil action in which punitive damages are sought, the trier of fact shall, if requested by any of the parties, first determine whether compensatory damages are to be awarded. Evidence of the financial condition of the defendant and other evidence relevant only to punitive damages is not admissible in that proceeding. After a determination has been made, the trier of fact shall, in a separate proceeding, determine whether and in what amount punitive damages will be awarded.

Subd. 5. Judicial review. The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them. The appellate court, if any, also shall review the award in light of the factors set forth in that subdivision. Nothing in this section may be construed to restrict either court's authority to limit punitive damages.

MINN. STAT. § 549.20 (2000).

## MISSISSIPPI

MISS. CODE ANN. § 11-1-65. Punitive damages

(1) In any action in which punitive damages are sought:

- (a) Punitive damages may not be awarded if the claimant does not prove by clear and convincing evidence that the defendant against whom punitive damages are sought acted with actual malice, gross negligence which evidences a willful, wanton or reckless disregard for the safety of others, or committed actual fraud.
- (b) In any action in which the claimant seeks an award of punitive damages, the trier of fact shall first determine whether compensatory damages are to be awarded and in what amount, before addressing any issues related to punitive damages.
- (c) If, but only if, an award of compensatory damages has been made against a party, the court shall promptly commence an evidentiary hearing before the same trier of fact to determine whether punitive damages may be considered.
- (d) The court shall determine whether the issue of punitive damages may be submitted to the trier of fact; and, if so, the trier of fact shall determine whether to award punitive damages and in what amount.
- (e) In all cases involving an award of punitive damages, the fact finder, in determining the amount of punitive damages, shall consider, to the extent relevant, the following: the defendant's financial condition and net worth; the nature and reprehensibility of the defendant's wrongdoing, for example, the impact of the defendant's conduct on the plaintiff, or the relationship of the defendant to the plaintiff; the defendant's awareness of the amount of harm being caused and the defendant's motivation in causing such harm; the duration of the defendant's misconduct and whether the defendant attempted to conceal such misconduct; and any other circumstances shown by the evidence that bear on determining a proper amount of punitive damages. The trier of fact shall be instructed that the primary purpose of punitive damages is to punish the wrongdoer and deter similar misconduct in the future by the defendant and others while the purpose of compensatory damages is to make the plaintiff whole.
- (f) Before entering judgment for an award of punitive damages the trial court shall ascertain that the award is reasonable in its amount and rationally related to the purpose to punish what occurred giving rise to the award and to deter its repetition by the defendant and others.
  - (ii) In determining whether the award is excessive, the court shall take into consideration the following factors:

1. Whether there is a reasonable relationship between the punitive damage award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred;
  2. The degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct;
  3. The financial condition and net worth of the defendant; and
  4. In mitigation, the imposition of criminal sanctions on the defendant for its conduct and the existence of other civil awards against the defendant for the same conduct.
- (g) The seller of a product other than the manufacturer shall not be liable for punitive damages unless the seller exercised substantial control over that aspect of the design, testing, manufacture, packaging or labeling of the product that caused the harm for which recovery of damages is sought; the seller altered or modified the product, and the alteration or modification was a substantial factor in causing the harm for which recovery of damages is sought; the seller had actual knowledge of the defective condition of the product at the time he supplied same; or the seller made an express factual representation about the aspect of the product which caused the harm for which recovery of damages is sought.
- (3) The provisions of Section 11-1-65 shall not apply to:
- (a) Contracts;
  - (b) Libel and slander; or
  - (c) Causes of action for persons and property arising out of asbestos.

MISS. CODE ANN. § 11-1-65 (Supp. 2001).

#### MISSOURI

MO. REV. STAT. § 510.263. Bifurcated trial may be requested by any party if punitive damages involved, procedure—post-trial motion for credit on punitive damages, procedure—credit not allowed, when—doctrine of remittitur and additur applied to awards

1. All actions tried before a jury involving punitive damages shall be conducted in a bifurcated trial before the same jury if requested by any party.
2. In the first stage of a bifurcated trial, in which the issue of punitive damages is submissible, the jury shall determine liability for compensatory damages, the amount of compensatory damages, including nominal damages, and the liability of a defendant for punitive damages. Evidence of defendant's financial condition shall not be admissible in the first stage of such trial unless admissible for a proper purpose other than the amount of punitive damages.

3. If during the first stage of a bifurcated trial the jury determines that a defendant is liable for punitive damages, that jury shall determine, in a second stage of trial, the amount of punitive damages to be awarded against such defendant. Evidence of such defendant's net worth shall be admissible during the second stage of such trial.
4. Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based. At any hearing, the burden on all issues relating to such a credit shall be on the defendant and either party may introduce relevant evidence on such motion. Such a motion shall be determined by the trial court within the time and according to procedures applicable to motions for new trial. If the trial court sustains such a motion the trial court shall credit the jury award of punitive damages by the amount found by the trial court to have been previously paid by the defendant arising out of the same conduct and enter judgment accordingly. If the defendant fails to establish entitlement to a credit under the provisions of this section, or the trial court finds from the evidence that the defendant's conduct out of which the prior punitive damages award arose was not the same conduct on which the imposition of punitive damages is based in the pending action, or the trial court finds the defendant unreasonably continued the conduct after acquiring actual knowledge of the dangerous nature of such conduct, the trial court shall disallow such credit, or, if the trial court finds that the laws regarding punitive damages in the state in which the prior award of punitive damages was entered substantially and materially deviate from the law of the state of Missouri and that the nature of such deviation provides good cause for disallowance of the credit based on the public policy of Missouri, then the trial court may disallow all or any part of the credit provided by this section.
5. The credit allowable under this section shall not apply to causes of action for libel, slander, assault, battery, false imprisonment, criminal conversation, malicious prosecution or fraud.
6. The doctrines of remittitur and additur, based on the trial judge's assessment of the totality of the surrounding circumstances, shall apply to punitive damage awards.

## NEBRASKA

NEB. CONST. ART. VII, § 5. Fines, penalties, and license money; allocation; use of forfeited conveyances

Except as provided in subsections (2) and (3) of this section, all fines, penalties, and license money arising under the general laws of the state, except fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways of this state, shall belong and be paid over to the counties respectively where the same may be levied or imposed, and all fines, penalties, and license money arising under the rules, bylaws, or ordinances of cities, villages, precincts, or other municipal subdivision less than a county shall belong and be paid over to the same respectively. All such fines, penalties, and license money shall be appropriated exclusively to the use and support of the common schools in the respective subdivisions where the same may accrue, except that all fines and penalties for violation of laws prohibiting the overloading of vehicles used upon the public roads and highways shall be placed as follows: Seventy-five per cent in a fund for state highways and twenty-five per cent to the county general fund where the fine or penalty is paid.

Fifty per cent of all money forfeited or seized pursuant to enforcement of the drug laws shall belong and be paid over to the counties for drug enforcement purposes as the Legislature may provide.

Law enforcement agencies may use conveyances forfeited pursuant to enforcement of the drug laws as the Legislature may provide. Upon the sale of such conveyances, the proceeds shall be appropriated exclusively to the use and support of the common schools as provided in subsection (1) of this section.

NEB. CONST. ART. VII, § 5 (2000). According to *Distinctive Printing & Packaging Co. v. Cox*, 443 N.W. 3d 566, 574 (Neb. 1989), Nebraska imposes a total ban on "punitive, vindictive, or exemplary damages."

## NEVADA

NEV. REV. STAT. ANN. § 42.005. Exemplary and punitive damages: In general; limitations on amount of award; determination in subsequent proceeding

Except as otherwise provided in NRS 42.007, in an action for the breach of an obligation not arising from contract, where it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud or malice, express or implied, the plaintiff, in addition to the compensatory damages, may recover damages for the sake of example and by way of punishing the defendant. **Except as otherwise provided in this section or by specific statute, an award of exemplary or punitive damages made pursuant to this section may not exceed: (a) Three times the amount of compensatory damages awarded to the**

plaintiff if the amount of compensatory damages is \$100,000 or more; or (b) Three hundred thousand dollars if the amount of compensatory damages awarded to the plaintiff is less than \$100,000.

The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against: (a) A manufacturer, distributor or seller of a defective product; (b) An insurer who acts in bad faith regarding its obligations to provide insurance coverage; (c) A person for violating a state or federal law prohibiting discriminatory housing practices, if the law provides for a remedy of exemplary or punitive damages in excess of the limitations prescribed in subsection 1; (d) A person for damages or an injury caused by the emission, disposal or spilling of a toxic, radioactive or hazardous material or waste; or (e) A person for defamation.

If punitive damages are claimed pursuant to this section, the trier of fact shall make a finding of whether such damages will be assessed. If such damages are to be assessed, a subsequent proceeding must be conducted before the same trier of fact to determine the amount of such damages to be assessed. The trier of fact shall make a finding of the amount to be assessed according to the provisions of this section. The findings required by this section, if made by a jury, must be made by special verdict along with any other required findings. The jury must not be instructed, or otherwise advised, of the limitations on the amount of an award of punitive damages prescribed in subsection 1.

Evidence of the financial condition of the defendant is not admissible for the purpose of determining the amount of punitive damages to be assessed until the commencement of the subsequent proceeding to determine the amount of exemplary or punitive damages to be assessed.

5. For the purposes of an action brought against an insurer who acts in bad faith regarding its obligations to provide insurance coverage, the definitions set forth in NRS 42.001 are not applicable and the corresponding provisions of the common law apply.  
NEV. REV. STAT. ANN. § 42.005 (2001)

#### NEW HAMPSHIRE

N.H. REV. STAT. ANN. § 507:16. Punitive Damages Outlawed  
**No punitive damages shall be awarded in any action, unless otherwise provided by statute.**

N.H. REV. STAT. ANN. § 507:16 (2000).

#### NEW JERSEY

N.J. STAT. ANN. § 2A:15-5.13. Bifurcated trial at defendant's request

- a. Any actions involving punitive damages shall, if requested by any defendant, be conducted in a bifurcated trial.



- b. In the first stage of a bifurcated trial, the trier of fact shall determine liability for compensatory damages and the amount of compensatory damages or nominal damages. Evidence relevant only to the issues of punitive damages shall not be admissible in this stage.
- c. Punitive damages may be awarded only if compensatory damages have been awarded in the first stage of the trial. An award of nominal damages cannot support an award of punitive damages.
- d. In the second stage of a bifurcated trial, the trier of fact shall determine if a defendant is liable for punitive damages.
- e. In any action in which there are two or more defendants, an award of punitive damages must be specific as to a defendant, and each defendant is liable only for the amount of the award made against that defendant.

N.J. STAT. ANN. § 2A:15-5.13 (2001).

#### NORTH DAKOTA

N.D. CENT. CODE, § 32-03.2-11. When court or jury may give exemplary damages; multiple defendants

1. In any action for the breach of an obligation not arising from contract, when the defendant has been guilty by clear and convincing evidence of oppression, fraud, or actual malice, the court or jury, in addition to the actual damages, may give damages for the sake of example and by way of punishing the defendant. Upon commencement of the action, the complaint may not seek exemplary damages. After filing the suit, a party may make a motion to amend the pleadings to claim exemplary damages. The motion must allege an applicable legal basis for awarding exemplary damages and must be accompanied by one or more affidavits or deposition testimony showing the factual basis for the claim. The party opposing the motion may respond with affidavit or deposition testimony. If the court finds, after considering all submitted evidence, that there is sufficient evidence to support a finding by the trier of fact that a preponderance of the evidence proves oppression, fraud, or actual malice, the court shall grant the moving party permission to amend the pleadings to claim exemplary damages. For purposes of tolling the statute of limitations, pleadings amended under this section relate back to the time the action was commenced.
2. If either party so elects, the trier of fact shall first determine whether compensatory damages are to be awarded before addressing any issues related to exemplary damages. Evidence relevant only to the claim for exemplary damages is not admissible in the proceeding on liability for compensatory damages. If an award of compensatory damages has been made, the trier of fact shall determine whether exemplary damages

- are to be awarded.
3. Evidence of a defendant's financial condition or net worth is not admissible in the proceeding on exemplary damages.
  4. **If the trier of fact determines that exemplary damages are to be awarded, the amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater;** provided, however, that no award of exemplary damages may be made if the claimant is not entitled to compensatory damages. In a jury trial, the jury may not be informed of the limit on damages contained in this subsection. Any jury award in excess of this limit must be reduced by the court.
  5. In order for a party to recover exemplary damages, the finder of fact shall find by clear and convincing evidence that the amount of exemplary damages awarded is consistent with the following principles and factors:
    - a. Whether there is a reasonable relationship between the exemplary damage award claimed and the harm likely to result from the defendant's conduct as well as the harm that actually has occurred;
    - b. The degree of reprehensibility of the defendant's conduct and the duration of that conduct; and
    - c. Any of the following factors as to which evidence is presented:
      - (1) The defendant's awareness of and any concealment of the conduct;
      - (2) The profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; and
      - (3) Criminal sanctions imposed on the defendant for the same conduct that is the basis for the exemplary damage claim, these to be taken into account if offered in mitigation of the exemplary damage award.
  6. Exemplary damages may not be awarded against a manufacturer or seller if the product's manufacture, design, formulation, inspection, testing, packaging, labeling, and warning complied with:
    - a. Federal statutes existing at the time the product was produced;
    - b. Administrative regulations existing at the time the product was produced that were adopted by an agency of the federal government which had responsibility to regulate the safety of the product or to establish safety standards for the product pursuant to a federal statute; or
    - c. Premarket approval or certification by an agency of the federal government.
  7. The defense in subsection 6 does not apply if the plaintiff

proves by clear and convincing evidence that the product manufacturer or product seller:

- a. Knowingly and in violation of applicable agency regulations withheld or misrepresented information required to be submitted to the agency, which information was material and relevant to the harm in question; or
  - b. Made an illegal payment to an official of the federal agency for the purpose of securing approval of the product.
8. Exemplary damages may be awarded against a principal because of an act by an agent only if at least one of the following is proved by clear and convincing evidence to be true:
- a. The principal or a managerial agent authorized the doing and manner of the act;
  - b. The agent was unfit and the principal or a managerial agent was reckless in employing or retaining the agent;
  - c. The agent was employed in a managerial capacity and was acting in the scope of employment; or
  - d. The principal or managerial agent ratified or approved the doing and manner of the act.
9. In a civil action involving a motor vehicle accident resulting in bodily injury, it is sufficient for the trier of fact to consider an award of exemplary damages against the driver under the motion procedures provided in subsection 1 if clear and convincing evidence indicates that the accident was caused by a driver who, within the five years immediately preceding the accident has been convicted for violation of section 39-08-01 and who was operating or in physical control of a motor vehicle:
- a. With an alcohol concentration of at least ten one-hundredths of one percent by weight;
  - b. Under the influence of a controlled substance unless a drug that predominantly caused impairment was used only as directed or cautioned by a practitioner who legally prescribed or dispensed the drug to the driver;
  - c. Under the influence of alcohol and refused to take a test required under chapter 39-20; or
  - d. Under the influence of a volatile chemical as listed in section 12.1-31-06. At the trial in an action in which the trier of fact will consider an award of exemplary damages, evidence that the driver has been convicted of violating section 39-08-01 or an equivalent statute or ordinance is admissible into evidence.

## TEXAS

TEX. CIV. PRAC. &amp; REM. CODE ANN. §§41.001-41.004, 41.007

§ 41.001. Definitions

In this chapter:

- (1) "Claimant" means a party, including a plaintiff, counter-claimant, cross-claimant, or third-party plaintiff, seeking recovery of exemplary damages. In a cause of action in which a party seeks recovery of exemplary damages related to injury to another person, damage to the property of another person, death of another person, or other harm to another person, "claimant" includes both that other person and the party seeking recovery of exemplary damages.
- (2) "Clear and convincing" means the measure or degree of proof that will produce in the mind of the trier of fact a firm belief or conviction as to the truth of the allegations sought to be established.
- (3) "Defendant" means a party, including a counterdefendant, cross-defendant, or third-party defendant, from whom a claimant seeks relief with respect to exemplary damages.
- (4) "Economic damages" means compensatory damages for pecuniary loss; the term does not include exemplary damages or damages for physical pain and mental anguish, loss of consortium, disfigurement, physical impairment, or loss of companionship and society.
- (5) "Exemplary damages" means any damages awarded as a penalty or by way of punishment. "Exemplary damages" includes punitive damages.
- (6) "Fraud" means fraud other than constructive fraud.
- (7) "Malice" means:
  - (A) a specific intent by the defendant to cause substantial injury to the claimant; or
  - (B) an act or omission:
    - (i) which when viewed objectively from the standpoint of the actor at the time of its occurrence involves an extreme degree of risk, considering the probability and magnitude of the potential harm to others; and
    - (ii) of which the actor has actual, subjective awareness of the risk involved, but nevertheless proceeds with conscious indifference to the rights, safety, or welfare of others.

§ 41.002. Applicability

- (a) This chapter applies to any action in which a claimant seeks exemplary damages relating to a cause of action.
- (b) This chapter establishes the maximum exemplary damages that may be awarded in an action subject to this chapter, including an action for which exemplary damages are awarded under another law of this state. This chapter does

not apply to the extent another law establishes a lower maximum amount of exemplary damages for a particular claim.

- (c) Except as provided by Subsections (b) and (d), in an action to which this chapter applies, the provisions of this chapter prevail over all other law to the extent of any conflict.
- (d) Notwithstanding any provision to the contrary, this chapter does not apply to Section 15.21, Business & Commerce Code (Texas Free Enterprise and Antitrust Act of 1983), an action brought under the Deceptive Trade Practices- Consumer Protection Act (Subchapter E, Chapter 17, Business & Commerce Code) except as specifically provided in Section 17.50 of that Act, or an action brought under Chapter 21, Insurance Code.

§ 41.003. Standards for Recovery of Exemplary Damages

- (a) Except as provided by Subsection (c), exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from:
  - (1) fraud;
  - (2) malice; or
  - (3) willful act or omission or gross neglect in wrongful death actions brought by or on behalf of a surviving spouse or heirs of the decedent's body, under a statute enacted pursuant to Section 26, Article XVI, Texas Constitution. In such cases, the definition of "gross neglect" in the instruction submitted to the jury shall be the definition stated in Section 41.001(7)(B).
- (b) The claimant must prove by clear and convincing evidence the elements of exemplary damages as provided by this section. This burden of proof may not be shifted to the defendant or satisfied by evidence of ordinary negligence, bad faith, or a deceptive trade practice.
- (c) If the claimant relies on a statute establishing a cause of action and authorizing exemplary damages in specified circumstances or in conjunction with a specified culpable mental state, exemplary damages may be awarded only if the claimant proves by clear and convincing evidence that the damages result from the specified circumstances or culpable mental state.

§ 41.004. Factors Precluding Recovery

- (a) Except as provided by Subsection (b), exemplary damages may be awarded only if damages other than nominal damages are awarded.
- (b) A claimant may recover exemplary damages, even if only nominal damages are awarded, if the claimant establishes

by clear and convincing evidence that the harm with respect to which the claimant seeks recovery of exemplary damages results from malice as defined in Section 41.001(7)(A). **Exemplary damages may not be awarded to a claimant who elects to have his recovery multiplied under another statute.**

...

§ 41.007. Prejudgment Interest Prejudgment interest may not be assessed or recovered on an award of exemplary damages.

TEX. CIV. PRAC. & REM. CODE ANN. §§41.001-41.004, 41.007 (West, 2001).