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# BIG ABORTION: WHAT THE ANTIABORTION MOVEMENT CAN LEARN FROM BIG TOBACCO

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Judge Casey's opinion in *National Abortion Federation v. Ashcroft*[1] epitomizes abortion law at the beginning of the twenty-first century.[2] In *National Abortion Federation*, Judge Casey considered the constitutionality of the federal Partial-Birth Abortion Ban Act of 2003[3] (2003 Ban) in light of *Stenberg v. Carhart*.[4] Judge Casey began by noting that partial-birth abortion[5] "has been described by many, including Justices of the Supreme Court, as gruesome, inhumane, brutal, and barbaric."[6] Yet, fifty-five pages later, Judge Casey struck down the 2003 Ban.[7] He conceded that "[w]hile medical science and ideology are no more happy companions than [*Roe v. Wade*[8]] and its progeny have shown law and ideology to be, *Stenberg* remains the law of the land. Therefore,

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1. 330 F. Supp. 2d 436 (S.D.N.Y. 2004).

2. *See id.* at 493.

3. 18 U.S.C.A. § 1531 (West Supp. 2004). President Bush signed the Partial-Birth Abortion Ban Act of 2003 (2003 Ban) into law on November 5, 2003. Pub. L. No. 108-105, 117 Stat. 1201 (2003) (codified at 18 U.S.C.A. § 1531 (West Supp. 2004)).

4. *See Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 452-58 (detailing the facts and opinions of *Stenberg v. Carhart*, 530 U.S. 914 (2000)). In *Stenberg*, the Supreme Court held by a five to four majority that a Nebraska statute prohibiting certain abortion procedures was unconstitutional because it did not contain a health exception and because it imposed an undue burden on women seeking abortions. Stenberg v. Carhart, 530 U.S. 914, 929-30 (2000).

5. Throughout this Comment, the term "abortion" refers to intentionally induced abortion.

6. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 439. Among the 2003 Ban challenges in the Northern District of California, Planned Parenthood Fed'n v. Ashcroft, 320 F. Supp. 2d 957 (N.D. Cal. 2004), the District of Nebraska, Carhart v. Ashcroft, 331 F. Supp. 2d 805 (D. Neb. 2004), and the Southern District of New York, *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 436, antiabortion advocates believed their best chance of prevailing was with Judge Casey in the Southern District of New York. *See Planned Parenthood Fed'n*, 320 F. Supp. 2d at 957; *'Partial-Birth Abortion' Law Rejected by Judge*, WASH. POST, Aug. 27, 2004, at A4 (observing that among the three judges hearing the issue, Judge Casey "was considered by some observers to be the best legal hope for the law's supporters"); Cynthia L. Cooper, *Women-Health: 'Fetal Pain' Bill New Item on Anti-Choice Agenda*, INTER PRESS SERVICE, Aug. 19, 2004, 2004 WL 59285031 (noting that Judge Casey is "embraced as [an] all[y] by the anti-choice Web sites, where [his] comments are widely quoted").

7. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 493.

8. 410 U.S. 113 (1973).

the Act is unconstitutional."[9] Two other federal courts that decided the same question reached the same conclusion: The 2003 Ban is unconstitutional.[10]

These three decisions highlight the dilemma antiabortion[11] advocates face. Before the Supreme Court decided *Roe* in 1973,[12] many states had enforced long-standing abortion laws.[13] State legislatures handled abortion as a state-law issue through principles of representative democracy.[14] However, in *Roe*, the Supreme Court declared a federal constitutional right to abortion.[15] By identifying abortion as a fundamental right,[16] *Roe* established a strict standard of scrutiny for

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9. *Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 493. In striking down the 2003 Ban, Judge Casey also confessed that "*Stenberg* obligates this Court and Congress to defer to the expressed medical opinion of a significant body of medical authority." *Id.*

10. *See Carhart*, 331 F. Supp. 2d at 1048; *Planned Parenthood Fed'n*, 320 F. Supp. 2d at 1034-35.

11. While groups advocating for or against abortion use many names to describe themselves and their opponents, including pro-life, pro-choice, anti-choice, pro-abortion, and antiabortion, the author chooses "abortion rights" and "antiabortion" for the following reasons: (1) both terms refer directly to the subject of the debate and (2) both sides are more likely to use different labels to describe themselves. *See* Kerry Dougherty, *"Choose" and "Life" Add Up to Two Extremely Politically Prickly Words*, VIRGINIAN-PILOT & LEDGER-STAR, Mar. 1, 2003, at B1, 2003 WL 6155538 (recognizing that abortion rights advocates want to be labeled pro-choice and antiabortion advocates want to be labeled pro-life); Heather Sokoloff, *Focus Groups Used for Rebranding Abortion Rights*, NAT'L POST (Ontario, Can.), Jan. 11, 2003, at B8 (describing how the abortion rights advocacy group National Abortion and Reproductive Rights Action League (NARAL) recently changed its name to NARAL Pro Choice America to better market itself to "target audiences"). The Sokoloff article cites a survey indicating that only one newspaper permitted its reporters to refer to the respective positions as "pro-life" and "pro-choice." *See* Sokoloff, *supra*; *see also* ASSOCIATED PRESS, STYLEBOOK AND BRIEFING ON MEDIA LAW 5 (Norm Goldstein ed., 40th ed. 2005) ("Use *anti-abortion* instead of *pro-life* and *abortion rights* instead of *pro-abortion* or *pro-choice*.").

12. *Roe*, 410 U.S. 113.

13. *See* B.J. George, Jr., *State Legislatures Versus the Supreme Court: Abortion Legislation into the 1990s*, *in* ABORTION, MEDICINE, AND THE LAW 3, 9-17 (J. Douglas Butler & David F. Walbert eds., rev. 4th ed. 1992) (discussing numerous state statutes prohibiting or regulating abortion).

14. *See id.* at 3 (observing that "[a]bortion regulation was a matter exclusively for state legislatures until 1973, when the United States Supreme Court brought medically indicated abortions within the protection of the fourteenth amendment in *Roe v. Wade* and *Doe v. Bolton*.").

15. *See Roe*, 410 U.S. at 152-53. The *Roe* majority found the right to abortion derived from the right to privacy "founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action." *Id.* at 153.

16. *Id.* at 152-53 (declaring that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty[]' . . . are included in this guarantee of personal privacy" and finding that the right to abortion is within the right of privacy (citation omitted) (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937))). *But see id.* at 174 (Rehnquist, J., dissenting) ("[T]he asserted right to an abortion is not 'so

abortion legislation; when a statute infringed upon the right, the legislature had to demonstrate a "compelling state interest" for the statute to survive judicial review.[17] Consequently, *Roe* invalidated most contemporary state laws prohibiting abortion.[18]

Later, in *Planned Parenthood v. Casey*,[19] the Supreme Court weakened *Roe*'s strict standard of scrutiny by holding that legislatures may not place an "undue burden" on a woman seeking an abortion.[20] Despite the weaker standard of scrutiny, courts still view abortion as a fundamental constitutional right.[21] As a result, abortion rights advocates continue to challenge abortion restrictions on federal constitutional grounds, frustrating the will of elected state and federal legislatures.[22]

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rooted in the traditions and conscience of our people as to be ranked as fundamental.'" (quoting Snyder v. Massachusetts, 291 U.S. 97, 105 (1934))).

17. *See id.* at 155 (explaining how state regulation of fundamental rights triggers "compelling state interest" scrutiny, which means "legislative enactments must be narrowly drawn to express only the legitimate state interests at stake").

18. *See* George, *supra* note 13, at 15-16, 21-23 (describing how most states, despite anticipating the invalidation of their pre-1973 abortion legislation, were impacted by *Roe*).

19. 505 U.S. 833 (1992).

20. *See id.* at 876-77.

21. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 920-22 (2000) (summarizing how fundamental individual liberty required the Court to invalidate Nebraska's partial-birth abortion statute).

22. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 492 (S.D.N.Y. 2004) (insisting that, "[w]hile Congress and lower courts may disagree with the Supreme Court's constitutional decisions, that does not free them from their constitutional duty to obey the Supreme Court's rulings"); *see also* Bernard Harris, *Pitts Cheers Major Abortion 'Victory'*, LANCASTER NEW ERA (Pennsylvania), June 5, 2003, 2003 WL 4813329 (noting that about thirty states had partial-birth abortion bans, and "abortion-rights groups said they had been successful in court challenges in about 20 states"). In 2003, the Center for Reproductive Rights litigated thirty-five abortion cases, covering such issues as "[f]unding for [a]bortion," "[b]ans on [a]bortion," and "[m]edical [a]bortion [r]estrictions." *See* CENTER FOR REPRODUCTIVE RIGHTS, 2003 ANNUAL REPORT 6, *available at* http://www.reproductiverights.org/pdf/annual_2003.pdf. The Center for Reproductive Rights' *2003 Annual Report* included a letter from the Center's president, Nancy Northrup. *Id.* at 3. In addressing her constituents, Ms. Northrup summarized developments in abortion law in 2003:

> This is a difficult time for the reproductive rights movement. With a federal government and state legislatures pushing harder than ever to restrict women's reproductive health care choices both in the United States and abroad, the Center aggressively challenged laws and policies to limit women's reproductive freedom. Despite our opponents' unrelenting efforts to roll back the gains we fought so hard to attain, we have reason to celebrate.
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> . . . .
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> . . . Our opponents label us 'undemocratic' for securing judicial protection of constitutional and human rights. Court-bashing misunderstands the critical role of human rights and the judiciary in free and fair democracies. It is not majority rule that defines a healthy democracy—majority rule can be wielded for good or

Consequently, thirty-one years after *Roe*, antiabortion advocates struggle to change social policy in the abortion arena.[23] Yet, they fail to achieve significant reforms because federal courts strike down legislation restricting abortion on constitutional grounds.[24]

In this new century, antiabortion advocates must consider a new approach to counteract the constitutional protection of abortion.[25] Antiabortion advocates should adopt the strategy used by antitobacco

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ill. We will continue to fight for the full realization of the commitment of human rights in law and in the hearts and minds of the public.

*Id.* Implicit in Ms. Northrup's statement is the assumption that the Center for Reproductive Rights does, when necessary, oppose "majority rule" to win "human rights in law," including abortion rights. *Id.*

In contrast, Norma McCorvey, the woman known as Jane Roe in *Roe*, recently brought a motion in the United States District Court for the Northern District of Texas to reconsider and overturn the *Roe* decision. *See* McCorvey v. Hill, No. Civ. A. 303CV1340N, 2003 WL 21448388, at *1, *3 (N.D. Tex. June 19, 2003) (denying Rule 60(b) Motion for Relief from Judgment). The district court denied McCorvey's motion, and the Fifth Circuit dismissed her appeal. McCorvey v. Hill, 385 F.3d 846, 850 (5th Cir. 2004) (3-0 decision), *cert. denied* 125 S. Ct. 1387 (2005). Although Judge Edith Jones concurred in the outcome, she expressed frustration with current abortion law:

> [B]ecause the Court's rulings have rendered basic abortion policy beyond the power of our legislative bodies, the arms of representative government may not meaningfully debate McCorvey's evidence. The perverse result of the Court's having determined through constitutional adjudication this fundamental social policy, which affects over a million women and unborn babies each year, is that the facts no longer matter. This is a peculiar outcome for a Court so committed to "life" that it struggles with the particular facts of dozens of death penalty cases each year.

*Id.* at 852 (Jones, J., concurring). Judge Jones' concurrence "gave anti-abortion advocates a glimmer of hope." Joe Gyan, Jr., *Judge's Remarks Offer Abortion Foes Hope*, ADVOCATE (Baton Rouge, La.), Sept. 24, 2004, at 11B.

23. *See, e.g.*, Gyan, *supra* note 22 (describing how Norma McCorvey, the plaintiff in *Roe*, brought a lawsuit to overturn *Roe*, an attempt that was rejected by a Fifth Circuit panel).

24. *See supra* notes 9-10 and accompanying text.

25. The antiabortion movement already recognizes this strategy of circumventing constitutional barriers: "Since the legal and political opposition to abortion [during the 1970s and 1980s] failed to yield the results that abortion foes expected, abortion opponents switched from trying to make abortion illegal to trying to make it impossible." Heather A. Smith, *A New Prescription for Abortion*, 73 U. COLO. L. REV. 1069, 1073-76 (2002); *see also* A.J. Stone, *Consti-Tortion: Tort Law As an End-Run Around Abortion Rights After* Planned Parenthood v. Casey, 8 AM. U. J. GENDER SOC. POL'Y & L. 471, 472-74 (2000) (describing attempts by legislators and antiabortion advocates to circumvent the constitutional right to an abortion by "us[ing] . . . tort law to restrict abortion rights"); Jennifer L. Achilles, Comment, *Using Tort Law To Circumvent* Roe v. Wade *and Other Pesky Due Process Decisions: An Examination of Louisiana's Act 825*, 78 TUL. L. REV. 853, 854-59, 880-82 (2004) (discussing the Louisiana state legislature's Act 825, which imposes tort liability on abortion providers, impeding the availability of abortion services and, thereby, the right to an abortion).

advocates during the 1990s:[26] mass tort class action litigation.[27] This Comment proposes that the antiabortion movement pursue mass tort class action litigation against abortion providers (Big Abortion) to reform social policy.[28]

This Comment begins by surveying the historical and legal framework for the three waves of Big Tobacco litigation. It then outlines how the constitutional right to an abortion developed. After outlining the Supreme Court's abortion jurisprudence, the Comment examines the potential psychological and physical harms that face women who have abortions. Next, this Comment evaluates recent attempts to use litigation and legislation to restrict Big Abortion. After establishing the foundation of Big Tobacco and Big Abortion, this Comment analyzes Big Abortion from the perspectives of (1) the people involved; (2) the legal principles at issue; and (3) the strategic conditions necessary for success. Finally, the Comment concludes by articulating why antiabortion advocates should pursue Big Abortion litigation.

## I. NON-REPRESENTATIVE SOCIAL POLICY REFORM IN THE TOBACCO AND ABORTION INDUSTRIES

### *A. Big Tobacco: A Study in Social Policy Reform Through Mass Tort Class Action Litigation*

Big Tobacco litigation is a paradigm for reforming social policy through class action litigation.[29] It encompasses hundreds of lawsuits,[30]

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26. This Comment can be compared to Graham E. Kelder and Richard A. Daynard's *Tobacco Litigation As a Public Health and Cancer Control Strategy*, 51 J. AM. MED. WOMEN'S ASS'N 57 (1996), which proposed litigation against the tobacco industry to reform social policy and analyzed the practical aspects of executing such litigation, *id.* at 57-62.

27. *See* discussion *infra* Part I.A.3.

28. *See* Justin Torres, *Abortion Industry: The Next Target of Tobacco-Like Lawsuits?*, CNSNEWS.COM, Aug. 9, 2000, *at* http://www.cnsnews.com/ViewNation.asp?Page=/Nation/archive/NAT20000809d.html (suggesting that "[a] lawsuit against an abortion clinic in Fargo, North Dakota, might be an opening for a series of class action suits against the abortion industry for failing to disclose the dangers of the procedure"). The term "social policy reform," as used here, will mean: (1) changing public perception towards a social issue; (2) changing governmental treatment of the issue; and (3) changing industry dynamics.

29. *See* Peter D. Jacobson & Soheil Soliman, *Litigation As Public Health Policy: Theory or Reality?*, 30 J. L. MED. & ETHICS 224, 230 tbl.1 (2002) (listing, as of August 1, 2001, fifteen hundred individual lawsuits, twenty-eight class actions, and fifty-two health-care cost recovery lawsuits against tobacco company Philip Morris); *see also* Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 2 (2000) ("The tobacco litigation is the most massive in a string of mass torts including asbestos, Dalkon

multiple billion-dollar settlements and jury verdicts,[31] and numerous written commentaries.[32] This Comment now examines the development of Big Tobacco litigation.

### *1. The Impending Tobacco Health Crisis and the Corresponding Lack of Social Policy Reform*

The story of Big Tobacco litigation begins on January 11, 1964, when United States Surgeon General Luther L. Terry released the *Surgeon General's Report on Smoking and Health* (Report).[33] The Report stated, in revolutionary terms, that "[c]igarette smoking is causally related to lung cancer in men; the magnitude of the effect of cigarette smoking far outweighs all other factors. The data for women, though less extensive, point in the same direction."[34] The Committee issuing the Report concluded that "[c]igarette smoking is a health hazard of sufficient importance in the United States to warrant appropriate remedial action."[35] From January 11, 1964 onward, America was on notice of the serious health risks of smoking.[36]

Despite the Report's revelations about the dangers of smoking, neither the United States government,[37] nor the American public,[38] nor the

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Shield, and breast implants; it is arguably the most important public health matter ever litigated.").

30. *See* Jacobson & Soliman, *supra* note 29, at 227-31 (calculating the number of Big Tobacco lawsuits).

31. *See id.* at 231 (describing individual plaintiff verdicts and the state and federal government settlements).

32. *See, e.g.*, DONLEY T. STUDLAR, TOBACCO CONTROL 176 tbl.5-1 (2002) (listing thirty-three books about tobacco politics); James Cahoy, *Tobacco Liability Pathfinder*, WEST'S LEGAL NEWS, June 11, 1996, *at* 1996 WL 311656 (providing a list of published legal and news articles about Big Tobacco).

33. *See* OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., HISTORY OF THE 1964 SURGEON GENERAL'S REPORT ON SMOKING AND HEALTH, *available at* http://www.cdc.gov/tobacco/30yrsgen.htm (last reviewed Jan. 26, 2005).

34. PUB. HEALTH SERV., U.S. DEP'T OF HEALTH, EDUC., & WELFARE, PUB. NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE 37 (1964), *available at* http://www.cdc.gov/tobacco/sgr/sgr_1964/sgr64.htm.

35. *Id.* at 33.

36. Arguably, by the Report's release, Americans were already on constructive notice of the link between smoking and cancer. *See* Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 856-57 (1992). In 1952, *Reader's Digest* published an article that forecast smoking-related deaths could reach catastrophic numbers. *Id.* at 856.

37. Milo Geyelin & Gordon Fairclough, *Taking a Hit: Yes, $145 Billion Deals Tobacco a Huge Blow, but Not a Killing One*, WALL ST. J., July 17, 2000, at A1 ("The surgeon general's famous 1964 antismoking report led not to a government crackdown but to health-warning labels, which the industry has used effectively as a shield against many smokers' claims of ignorance about health risks.").

tobacco companies[39] responded effectively to this health disaster of epidemic proportions.[40] Congress failed to enact strong smoking restrictions, choosing instead to require generic warnings on cigarette packages and advertisements.[41] The American public continued to consume cigarettes at a pace comparable to the pre-Report era, with only a gradual reduction in consumption over decades.[42] Finally, because they faced little real regulatory or consumer pressure, the major tobacco companies continued their wholesale promotion of cigarettes.[43] Moreover, the tobacco companies established two non-profit entities, the Council for Tobacco Research-USA, Inc. and the Tobacco Institute, which they presented as objective research centers.[44] In reality, the tobacco companies used these organizations to misinform the public of the health risks of smoking.[45] The general apathy of the government, the public, and the tobacco industry had created a void where social policy reform was desperately needed.

*2. The Three Waves of Big Tobacco Litigation*

The answer to the lack of democratic social policy reform in the tobacco industry arrived in three waves of litigation.[46] Even before the Report, this litigation began with individual plaintiffs bringing tort suits

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38. *See infra* note 42 and accompanying text.

39. *See* FRANK V. TURSI ET AL., LOST EMPIRE 99, 102-05 (Ken Otterbourg ed. 2000) (detailing how the tobacco industry responded to the Report by (1) creating a Committee of Counsel composed of six lawyers whose only task was "to keep the tobacco companies out of court"; (2) hiring a public relations firm to maintain "doubt about the causes of cancer"; (3) controlling tobacco research to be consistent with the industry's positions; and (4) donating to members of both major political parties to influence politics).

40. *See* Graham E. Kelder, Jr. & Richard A. Daynard, *The Role of Litigation in the Effective Control of the Sale and Use of Tobacco*, STAN. L. & POL'Y REV., Winter 1997, at 63, 66-70 (1997) (describing how the tobacco industry influenced lawmakers to protect the tobacco industry).

41. *See* STUDLAR, *supra* note 32, at 36 (describing the diluted warning requirements passed by Congress during the 1960s).

42. *See* OFFICE ON SMOKING & HEALTH, U.S. DEP'T OF HEALTH & HUMAN SERVS., REDUCING TOBACCO USE: A REPORT OF THE SURGEON GENERAL 33 fig.2.1, 42 (2000), *available at* http://www.cdc.gov/tobacco/sgr/sgr_2000/FullReport.pdf.

43. *See* TURSI ET AL., *supra* note 39, at 96-97.

44. OFFICE ON SMOKING & HEALTH, *supra* note 42, at 230, 237.

45. Kelder & Daynard, *supra* note 40, at 79-80 (detailing how tobacco companies used the Council for Tobacco Research to screen research it claimed was unbiased); Press Release, The State Tobacco Information Center, Vacco Files Suit Against Tobacco Industry: Slaps Companies for Targeting Youth (Jan. 27, 1997), *available at* http://stic.neu.edu/Ny/VaccoPr1.html (asserting that the Tobacco Institute and Council for Tobacco Research were established to misinform the public).

46. *See* Peter D. Jacobson & Kenneth E. Warner, *Litigation and Public Health Policy Making: The Case of Tobacco Control*, 24 J. HEALTH POL. POL'Y & L. 769, 775-77 (1999); Kelder & Daynard, *supra* note 40, at 70.

against the tobacco companies, and, eventually, it evolved to include class action litigation and statutory litigation by state and federal attorneys general.[47] Therefore, while the government, the public, and the tobacco industry expressed unwillingness to reform social policy, smokers led the way with non-representative litigation.

Although plaintiffs in the first two waves of tobacco litigation put the tobacco companies on the defensive, they were unsuccessful in obtaining favorable outcomes.[48] In the first wave, from 1954 to 1973, the tobacco companies consistently out-spent and out-strategized individual plaintiffs and their lawyers.[49] During the second wave, from 1983 to 1992, plaintiffs brought product liability claims, but courts rejected both design and manufacturing defect theories of liability.[50] At the end of the second wave came *Cipollone v. Ligett Group, Inc.*[51] While the *Cipollone* plaintiff was unsuccessful in recovering damages, the Supreme Court's decision in that 1992 case offered plaintiffs hope.[52] The *Cipollone* Court held that mandatory federal warnings on cigarette packages and advertisements did not preempt state law causes of action based on express warranty, conspiracy, and fraud, thereby allowing future plaintiffs to sue under state law.[53]

In the third wave of tobacco litigation, the balance shifted away from the tobacco companies as a result of the filing of the *Castano v. American Tobacco Co.*[54] class action in 1994.[55] According to one commentator, *Castano* represents the end of the defendant advantage in tobacco litigation, an advantage that led both courts and juries over the previous thirty years to reject smokers' claims.[56] In *Castano*, a group of law firms,

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47. *See* Ed Dawson, Note, *Legigation*, 79 TEX. L. REV. 1727, 1729-31 (2001).

48. *See* Rabin, *supra* note 36, at 857-59.

49. *Id.* at 859; *see also* Jacobson & Warner, *supra* note 46, at 775 ("During the first wave of litigation (1954-1973), the industry successfully defended negligence charges by arguing that smokers assumed the risk and should not be able to recover.").

50. Jacobson & Warner, *supra* note 46, at 775-76.

51. 505 U.S. 504 (1992).

52. *Id.* at 519-20; *see also* Dawson, *supra* note 47, at 1730.

53. *Cipollone*, 505 U.S. at 530-31 (plurality opinion); *see also* Kelder & Daynard, *supra* note 40, at 72 (noting that the Third Circuit overturned the $400,000 verdict in *Cipollone* before the Supreme Court interpreted the preemptive effect of the federal tobacco advertising statutes).

54. 870 F. Supp. 1425 (E.D. La. 1994).

55. *Id.* at 1430. Despite the pressure building toward the third wave of Big Tobacco litigation, CEOs from seven tobacco companies "testified [on April 14, 1994, before a congressional subcommittee] under oath that they believed nicotine is not addictive and that smoking has not been shown to cause cancer." Kelder & Daynard, *supra* note 40, at 76.

56. Howard M. Erichson, *The End of the Defendant Advantage in Tobacco Litigation*, 26 WM. & MARY ENVTL. L. & POL'Y REV. 123, 123 (2001) (declaring that "[t]he tobacco

eventually numbering over sixty, each contributed $100,000 to fund the national class action lawsuit against the major tobacco companies.[57] Initially, the federal trial court certified the class.[58] However, upon reviewing the certification, the Fifth Circuit characterized the *Castano* class central allegation as a "novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."[59] This theory produced "nine causes of action: fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, negligence and negligent infliction of emotional distress, violation of state consumer protection statutes, breach of express warranty, breach of implied warranty, strict product liability, and redhibition pursuant to the Louisiana Civil Code."[60]

Although the Fifth Circuit decertified the class, *Castano* signaled four strategic developments in tobacco litigation that ended the tobacco companies' advantage:[61] (1) the capitalization of the plaintiff's bar; (2)

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litigation has established, above all, that the systematic defendant advantage in mass tort litigation is dead").

57. *See id.* at 131.

58. *See* Castano v. Am. Tobacco Co., 160 F.R.D. 544, 560-61 (E.D. La. 1995), *rev'd*, 84 F.3d 734 (6th Cir. 1996). The judge ruled that the plaintiffs satisfied Federal Rule of Civil Procedure 23(a)'s prerequisites for certification and then certified the class under Rule 23(b)(3). *Id.* at 550-51; *see also* Susan E. Kearns, Note, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1359 (1999) (naming the prerequisites for a class action lawsuit: "numerosity, commonality, typicality, and adequacy of representation"). Federal Rule of Civil Procedure 23(a) reads:

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

FED. R. CIV. P. 23(a). Federal Rule of Civil Procedure 23(b)(3) requires that

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

FED. R. CIV. P. 23(b)(3).

59. *Castano*, 84 F.3d at 737.

60. *Id.* Redhibition is a civil code action for rescission of the sale of a defective or faulty product. *See* 77A C.J.S. *Sales* § 128 (1994).

61. Erichson, *supra* note 56, at 138, 141.

the coordination of the plaintiff's bar; (3) the participation of government in litigation against the defendants; and (4) the ingenuity of the plaintiff's bar in pursuing class actions, flaunting appellate reluctance to certify such classes.[62] As the third wave of tobacco litigation evolved, the four developments led to new class action lawsuits in state courts.[63] Lawyers chose to bring class actions in state courts to avoid pitfalls they faced earlier, such as federal appellate antagonism to class certification and difficulties maintaining a nationwide class.[64]

In 2000, the jury in *Engle v. RJ Reynolds Tobacco*[65] awarded a class of 700,000 Florida smokers approximately $12 million in compensatory damages and $145 billion in punitive damages.[66] Another Florida class action, *Broin v. Philip Morris Cos.*,[67] brought by flight attendants exposed to second-hand cigarette smoke,[68] settled for $300 million to establish a research and detection center for tobacco diseases and $49 million in attorneys' fees and costs.[69]

During the third wave, state attorneys general, inspired by the revelation that the tobacco companies concealed knowledge that cigarette smoking is addictive and has harmful health effects, filed suits to recover Medicaid expenditures for treatment of tobacco-related illnesses.[70] In a settlement with Minnesota, Big Tobacco agreed to a broad range of restrictions, including the dissolution of the Council for Tobacco Research, numerous restrictions on advertising, with a specific reference to not advertising to minors, and an agreement to cease

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62. *Id.* at 123. Professor Howard Erichson suggests mass tort litigation will someday be described as "pre-tobacco and post-tobacco" because the four developments in the plaintiff's bar leveled the playing field between "David" (plaintiffs) and "Goliath" (corporate defendants). *Id.* at 141.

63. *See id.* at 136-39.

64. *See id.* at 138-39 (suggesting that "it appears that mass tort class actions have met with greater success in state court than in federal court"); Kelder & Daynard, *supra* note 40, at 85-86 (asserting that statewide class actions are preferable to nationwide class actions because statewide class actions are more manageable and do not pose choice of law concerns).

65. No. 94-08273 CA-22, 2000 WL 33534572 (Fla. Cir. Ct. Nov. 6, 2000), *rev'd sub nom.* Liggett Group, Inc. v. Engle, 853 So. 2d 434 (Fla. Dist. Ct. App. 2003), *review granted*, 873 So. 2d 1222 (Fla. 2004).

66. *Id.* at *31-*32; *see also Engle*, 853 So. 2d at 440, 442. A Florida district court of appeals reversed the jury verdict. *Id.* at 470. The decision is currently pending before the Florida Supreme Court. *See Engle*, 873 So. 2d at 1222.

67. 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

68. *Id.* at 889.

69. *See* Bob Van Voris, *Secondhand Smoke Deal Draws Fire*, NAT'L L. J., Oct. 27, 1997, at A7.

70. Dawson, *supra* note 47, at 1731.

misrepresenting the health consequences of smoking.[71] Further pressure from the states forced Big Tobacco to the negotiating table where, in 1998, forty-six states approved a $206 billion Master Settlement Agreement (MSA).[72] The MSA included concessions by Big Tobacco to limit its advertising, to disclose industry research, and to support programs to deter smoking, help smokers quit, and prevent tobacco-related diseases.[73]

### *3. The State of Non-Representative Social Policy Reform in the Tobacco Industry*

Commentators debate how successful litigation is in reforming social policy.[74] In the short term, some reforms attributed to the third wave of tobacco litigation include: (1) elimination of the tobacco companies' "independent" advocacy and research institutions;[75] (2) increases in cigarette prices, leading to a measurable decrease in consumption;[76] and (3) government involvement in prosecuting claims against Big Tobacco.[77]

## *B. Big Abortion: A Consideration of Opportunities for Social Policy Reform*

The constitutional right to an abortion in the United States was first recognized more than thirty years ago with *Roe v. Wade*.[78] Since then, state and federal legislatures have continued to challenge the constitutional limits imposed by *Roe*.[79] Nevertheless, the core constitutional doctrine protecting the right to an abortion remains

71. OFFICE ON SMOKING & HEALTH, *supra* note 42, at 239-40.

72. *See* Margaret A. Little, *A Most Dangerous Indiscretion: The Legal, Economic, and Political Legacy of the Governments' Tobacco Litigation*, 33 CONN. L. REV. 1143, 1171 (2001).

73. OFFICE ON SMOKING & HEALTH, *supra* note 42, at 193-94.

74. *See, e.g.*, Jacobson & Soliman, *supra* note 29, at 224 ("The litigation has achieved some of its avowed public health policy goals, but there has been no major breakthrough indicating litigation's viability or likely dominance as a long-term policy strategy. For a variety of reasons, this conclusion is at best tentative and is certainly debatable.").

75. *See* OFFICE ON SMOKING & HEALTH, *supra* note 42 at 193, 239.

76. *See* Geyelin & Fairclough, *supra* note 37 (attributing a seven percent decrease in cigarette consumption during 1999 to the states' Master Settlement Agreement (MSA) and other settlements).

77. *See supra* text accompanying notes 70-73.

78. 410 U.S. 113, 153 (1973).

79. *See, e.g.*, Stenberg v. Carhart, 530 U.S. 914, 920-21 (2000); Planned Parenthood v. Casey, 505 U.S. 833, 844 (1992); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 439 (S.D.N.Y. 2004).

intact.[80] More recently, just as plaintiffs reformed social policy by suing Big Tobacco, several plaintiffs have sued Big Abortion to reform social policy.[81]

### *1. Abortion's Origins in Constitutional Law and Its Future in Courts and Legislatures*

The Supreme Court announced the federal constitutional right to an abortion in *Roe*.[82] The *Roe* majority established a trimester test which prohibited the state from interfering with a woman's decision to obtain an abortion during the first trimester of her pregnancy.[83] Furthermore, the state could not restrict abortion if the woman's "life or health," as defined by *Doe v. Bolton*,[84] was threatened.[85] The Court's decisions in

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80. *See Casey*, 505 U.S. at 845-46 (affirming *Roe*'s "essential holding"); *see also Stenberg*, 530 U.S. at 920-21 (noting serious disagreement in public opinion but citing "established principles" to uphold "the right to an abortion").

81. *See infra* text accompanying notes 133-50.

82. *Roe*, 410 U.S. at 153. Justice Blackmun, writing for *Roe*'s seven-justice majority, identified the constitutional right to an abortion:

> This right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.

*Id.* The day the Court decided *Roe*, it also decided *Doe v. Bolton*, 410 U.S. 179 (1973). Justice Blackmun noted that *Roe* and *Doe* should be interpreted as integral constitutional doctrine. *Roe*, 410 U.S. at 165. *Doe* invalidated procedural restrictions Georgia imposed on women who wanted to obtain abortions under a health exception to the state law proscribing abortion. *Doe*, 410 U.S. at 181-84, 194, 198-200 (invalidating requirements of accreditation, board review, second medical opinions, and residency). Additionally, the *Doe* majority broadly interpreted the health exception to include evaluation of factors relevant to the woman's well-being including her physical, emotional, psychological, and familial status, as well as her age. *Id.* at 191-92.

83. *Roe*, 410 U.S. at 163-64. The trimester test divided the woman's pregnancy into three phases: during the first trimester, the state was barred from interfering with the decision of the woman and her physician whether to abort her fetus; during the second phase, which ran from the end of the first trimester until viability, the State could regulate abortion procedures by regulations that were "reasonably related to" the woman's health; during the third phase, post-viability, the State could "regulate, and even proscribe, abortion except where it is necessary, in appropriate medical judgment, for the preservation of the life or health of the mother." *Id.* at 164-65.

84. 410 U.S. 179 (1973).

85. *Roe*, 410 U.S. at 163-64; *Doe*, 410 U.S. at 192. Although the *Roe* health exception could have been interpreted narrowly, the Court defined it in *Doe* to include an assessment of "all factors – physical, emotional, psychological, familial, and the woman's age," allowing a wide range of justifications for abortion during any stage of pregnancy. *Id.* at 192.

*Roe* and other abortion cases invalidated most state statutes restricting abortion.[86]

Later, in *Planned Parenthood v. Casey*,[87] the Court refused the opportunity to overturn *Roe*.[88] Instead, the Court eliminated the trimester test and replaced it with the undue burden test.[89] The undue burden test allows a state to regulate abortion at any point during pregnancy as long as the regulation does not impose an undue burden upon the woman.[90] However, the *Casey* Court left the *Roe* health exception intact, allowing women to obtain abortions at any point during their pregnancies if their medical conditions satisfy *Doe's* broad definition of "health."[91]

As a result of Supreme Court precedent, lower courts continue to impose constitutional limitations upon a state's ability to restrict abortion.[92] Although a change in the Supreme Court's configuration might give states more discretion to restrict abortion, it is unlikely that

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86. *See, e.g.*, *Roe*, 410 U.S. at 176 n.2 (listing states with abortion statutes first enacted on or before 1868 and in effect in 1970); *see also* George, *supra* note 13, at 15-17, 22 (discussing state statutes proscribing abortion and regulating abortion providers and concluding that only three jurisdictions had no restrictions on abortion and were thus not impacted by the Court's decisions in *Roe* and *Doe*; consequently, "[m]ost [state] legislatures . . . revamped their statutes in response to or anticipation of judicial invalidation of pre-1973 legislation").

87. 505 U.S. 833 (1992).

88. *Id.* at 873-74 (holding that *Roe* should not be overruled, despite Chief Justice Rehnquist's willingness to do so).

89. *Id.* at 843-46. An undue burden is "a state regulation [that] has the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus." *Id.* at 877.

90. *Id.* at 878. *Casey* modified the doctrinal limits of *Roe* by (1) establishing an undue burden test for state regulation of abortion during the pre-viability phase and (2) allowing states to freely regulate or proscribe abortion during the post-viability phase. *Id.* at 878-79.

Despite this new doctrinal structure, *Casey* affirmed the constitutional right to an abortion and the health exception first enunciated in *Roe*. *See id.* at 846, 878-79. Additionally, the *Casey* Court continued to follow the precedent *Roe* established by striking down some legislative restrictions on abortion. *Id.* at 844, 901 (invalidating spousal notification and reporting requirements of Pennsylvania's Abortion Control Act of 1982 while leaving the rest of the statute intact).

91. *Id.* at 879 (holding that state can proscribe abortion post-viability unless the health exception applies); *see also Roe*, 410 U.S. at 153, 164-65 (establishing the health exception and citing to *Doe* as an integral part of the doctrinal picture).

92. *See* Carhart v. Ashcroft, 331 F. Supp. 2d 805, 1048 (D. Neb. 2004) (finding Congress's 2003 Ban unconstitutional because it does not have a health exception); Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 492-93 (S.D.N.Y. 2004) (same); Planned Parenthood Fed'n v. Ashcroft, 320 F. Supp. 2d 957, 1034-35 (N.D. Cal. 2004) (same).

On September 28, 2004, the Department of Justice announced plans to appeal the Nebraska decision to the Eighth Circuit; that appeal may eventually reach the Supreme Court. *See* Dan Eggen, *Washington in Brief*, WASH. POST, Sept. 29, 2004, at A6.

this constitutional framework will disappear within the foreseeable future.[93] Additionally, even if a new conservative majority overturned *Roe* and *Casey*, finding the right to abortion did not exist, abortion would again become a state issue, and states could continue to allow abortion.[94]

*2. Health Concerns Related to Abortion*

Although the federal courts and abortion advocates consider protecting the pregnant woman's health to be a legal justification for abortion,[95] studies have shown abortion may actually harm women's

93. *See* David G. Savage, *As* Roe vs. Wade *Turns 30, Ruling's Future is Unsure*, L.A. TIMES, Jan. 21, 2003, at A1; David Von Drehle, *O'Connor Used Vote To Entrench Right to Abortion*, WASH. POST, July 2, 2005, at A10. With Justice Sandra Day O'Connor on the bench, a majority of the Supreme Court recognized the constitutional right to an abortion. *See* Savage, *supra* (counting the votes for and against abortion on the Supreme Court as 6-3 or 5-4 in favor of abortion). Advocates for both sides speculate on how President George W. Bush's reelection in 2004 will impact the Court. *Id.* Some commentators suggest a new conservative majority could overturn *Roe*. *Id.* Others believe it is unlikely *Roe* will be overturned. *Id.* Justice O'Connor's retirement continues to generate speculation because of her central role in the Supreme Court's abortion jurisprudence, particularly her opinion in *Casey* and her vote in *Stenberg*. *See* Von Drehle, *supra*. Abortion is expected to be a central issue during the confirmation process for President Bush's nominee to replace Justice O'Connor. *Id.* Although a change in the Supreme Court's makeup may give states more discretion to restrict abortion, it is unlikely to lead to complete reversal of the right to abortion. *See id.* (quoting a conservative appellate judge who is a potential Supreme Court nominee as saying that the right to abortion is "as settled as any issue can be in constitutional law").

94. *See* Lawrence v. Texas, 539 U.S. 558, 591-92 (2003) (Scalia, J., dissenting) (explaining that overruling *Roe* would not make abortion unlawful, but would allow the states to prohibit, restrict, or allow abortion on a state-by-state basis). As Justice Scalia has written, women would still be able to get abortions if *Roe* was overruled, either in their own states or in one of the numerous states that "would unquestionably have declined to prohibit abortion [or] would not have prohibited it within six months (after which the most significant reliance interests would have expired)." *Id.* at 591-92 (Scalia, J., dissenting).

95. *See Casey*, 505 U.S. at 846 (affirming "the principle that the State has legitimate interests from the outset of the pregnancy in protecting the health of the woman"); *Roe*, 410 U.S. at 149-51, 153 (recognizing that early American abortion laws originally may have been enacted to protect women from a dangerous medical procedure, while emphasizing the "[s]pecific and direct harm medically diagnosable" that could affect a pregnant woman if the state was allowed to ban abortion in 1973); *see also Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 452-53 (discussing how the health exception is the principle behind the Supreme Court's decision in *Stenberg*).

Abortion advocates also consider the health of the pregnant woman to be a legal justification for the right to abortion. *See* PLANNED PARENTHOOD FED. OF AM., INC., NINE REASONS WHY ABORTIONS ARE LEGAL, *at* http://www.plannedparenthood.org/pp2/portal/files/portal/medicalinfo/abortion/pub-abortion-legal.xml (last updated Nov. 2004) (listing the first two reasons why abortions are legal as "1. Laws against abortion kill women" and "2. Legal abortions protect women's health"); *see also* Press Release, National Organization for Women, Federal Abortion Ban Declared Unconstitutional in Nebraska; Conservatives' Latest Attempt To Politicize Women's Health Fails (Sept. 8, 2004), http://www.now.org/press/09-04/09-08.html (referring to the *Carhart* decision,

health.[96] In 1987, President Ronald Reagan asked Surgeon General C. Everett Koop to investigate and "to prepare a comprehensive report on the health effects of abortion on women."[97] In 1989, Koop noted in a letter responding to President Reagan that "considerable attention is being paid to possible mental health effects of abortion" and that researchers had conducted studies about the physical effects of abortion.[98] However, Koop concluded that "the scientific studies do not provide conclusive data about the health effects of abortion on women."[99] He therefore "recommend[ed] that consideration be given to going forward with an appropriate prospective study."[100] That study was never completed,[101] and the studies available today remain inadequate to evaluate the full health consequences of abortion on women.[102]

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National Organization for Women President Kim Gandy said, "'Judge Kopf's poignant decision reminds us that preserving women's health is the most important factor in this case—not an extremist and insular right-wing agenda'").

96. *See infra* notes 106-32 and accompanying text. *But see* NARAL, SCIENCE AND WOMEN'S HEALTH, *at* http://www.naral.org/Issues/science/index.cfm (last visited June 26, 2004). NARAL asserts that:

> In addition to blocking scientific advancement, anti-choice groups often turn science on its head in their effort to portray legal abortion as unsafe for American women. In reality, legal abortion is one of the safest and most common medical procedures available today. Legal abortion entails half the risk of death involved in a tonsillectomy and one-hundredth the risk of death involved in an appendectomy. . . . And although anti-choice groups often try to link abortion with the risk of developing breast cancer, the largest and most comprehensive study on the subject concluded that "induced abortions have no overall effect on the risk of breast cancer."

*Id.*

97. Letter from C. Everett Koop, Surgeon General of the United States Public Health Service, to Ronald Reagan, President of the United States, (Jan. 9, 1989) [hereinafter Koop Letter], *in* ABORTION, MEDICINE, AND THE LAW, *supra* note 13, at 731.

98. *Id.* at 733-34.

99. *Id.* at 734.

100. *Id.* Surgeon General Koop described the general details that such a comprehensive study should entail and concluded that the best study would cost $100 million and the minimum study would cost $10 million. *Id.*; *cf.* ELIZABETH RING-CASSIDY & IAN GENTLES, WOMEN'S HEALTH AFTER ABORTION, 6-9 (2d ed. 2003) (describing "[l]imitations in the [a]vailable [l]iterature" that studies "the physical after-effects of abortion on women").

101. Lauren Schulz, *Abortion, Death Rate Linked in Study*, WASH. TIMES, Sept. 8, 2002, at A4 (recalling how Koop's proposal for "a sweeping government study" of abortion's health effects "died in Congress").

102. *See* RING-CASSIDY & GENTLES, *supra* note 100, at 5 (noting that "[t]he lifelong risks of repeat, induced, and late-term abortions on women's health are not being addressed in the [medical] research literature, and further studies need to be done on the long-term effects of abortion"). Another commentator explains:

> Most of the medical literature published since the legalization of induced abortion has focused on short-term surgical complications, improvement of

However, the limited research available points to three serious health concerns for women obtaining abortions: (1) severe psychological problems;[103] (2) increased risk of breast cancer;[104] and (3) side effects from the abortifacient drug RU-486.[105]

The first health concern is the severe psychological problems that may result from having an abortion.[106] Several studies show that women who have had abortions exhibit higher rates of psychiatric admission,[107] suicide,[108] depression,[109] emotional distress,[110] and generalized anxiety.[111]

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surgical techniques and training of abortion providers. The two commissioned studies that attempted to summarize the long-term consequences of induced abortion concluded only that future work should be undertaken to research such effects.

Elizabeth M. Shadigian, *Reviewing the Evidence, Breaking the Silence: Long-Term Physical and Psychological Health Consequences of Induced Abortion*, *in* THE COST OF CHOICE 63, 63 (Erika Bachiochi ed., 2004). Two of the reasons such long-term studies are not more numerous are (1) medical issues surrounding abortion are highly politicized on both sides of the debate and (2) abortion is an elective procedure, so researchers face challenges in designing methodologically sound studies). *Id.* at 63-64.

103. *See infra* notes 106-14 and accompanying text.

104. *See infra* notes 115-24 and accompanying text.

105. *See infra* notes 125-32 and accompanying text.

106. *See* Koop Letter, *supra* note 97, at 733 (noting, in 1989, that "considerable attention is being paid to possible mental health effects of abortion. For example, there are almost 250 studies reported in the scientific literature which deal with the psychological aspects of abortion"). Koop concluded the "data" was insufficient to support a finding. *Id.*

The question on which research in this area often focuses is whether normal childbirth or abortion causes greater psychological problems. *See* David C. Reardon et al., *Psychiatric Admissions of Low-Income Women Following Abortion and Childbirth*, 168 CAN. MED. ASS'N J. 1253, 1255-56 (2003).

107. Reardon et al., *supra* note 106, at 1253-56 (comparing medical records from low–income California women who gave birth to women who had abortions and finding "psychiatric admission rates subsequent to the target pregnancy event were significantly higher for women who had had an abortion compared with women who had delivered during every time period examined").

108. *See* Mika Gissler et al., *Suicides After Pregnancy in Finland, 1987-94: Register Linkage Study*, 313 BRIT. MED. J. 1431, 1431-34 (1996), *available at* http://bmj.bmjjournals.com/cgi/content/ full/313/7070/1431 (claiming that "[t]he increased risk of suicide after an induced abortion indicates either common risk factors for both or harmful effects of induced abortion on mental health"). The study concluded "[o]ur data clearly show, however, that women who have experienced an abortion have an increased risk of suicide, which should be taken into account in the prevention of such deaths." *Id.* at 1434.

109. John M. Thorpe, Jr. et al., *Long-Term Physical and Psychological Health Consequences of Induced Abortion: Review of the Evidence*, 58 OBSTETRICAL & GYNECOLOGICAL SURV. 67, 74 (2003) ("Other studies tabulated that demonstrated increased risk of depression or emotional problems after induced abortion in certain subgroups may explain the psychopathology that culminates in deliberate self harm.").

110. *See id.* at 73 tbl.7 & 74 (summarizing in tabular format ten studies about women's mental health after induced abortions).

Research also shows that health professionals can predict some psychological reactions to abortion using known risk factors.[112] Nevertheless, research in this field is controversial and contested.[113] Scientifically sound, long-term medical scholarship is still needed.[114]

A second health concern related to abortion is the potential link between abortion and breast cancer, often abbreviated as the "ABC link."[115] One detailed scholarly analysis of the ABC link's legal implications appeared in the *Wisconsin Law Review* in 1998.[116] The author concluded that although the medical evidence was insufficient to prove the ABC link with certainty, it was sufficient to establish that "abortion providers have a duty to inform women considering the procedure about this significant health risk before an abortion is performed."[117]

Contrary to the aforementioned article, several studies have stated conclusively that the ABC link does not exist.[118] However, critics in the

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111. Jesse R. Cougle et al., *Generalized Anxiety Following Unintended Pregnancies Resolved Through Childbirth and Abortion: A Cohort Study of the 1995 National Survey of Family Growth*, 19 J. ANXIETY DISORDERS 137, 138 (2005). In an analysis of the National Survey of Family Growth, the study found "higher rates of subsequent generalized anxiety among aborting women, compared to women who carried an unintended pregnancy to term." *Id.* at 141.

112. David C. Reardon, *Abortion Decisions and the Duty To Screen: Clinical, Ethical, and Legal Implications of Predictive Risk Factors of Post-Abortion Maladjustment*, 20 J. CONTEMP. HEALTH L. & POL'Y 33, 37 (2003); *see also* Cougle et al., *supra* note 111, at 142.

113. *See* Brenda Major, *Psychological Implications of Abortion—Highly Charged and Rife with Misleading Research*, 168 CAN. MED. ASS'N J. 1257, 1257 (2003) ("Abortion and its psychological implications are highly controversial, politically charged issues."). The *Canadian Medical Association Journal* published an issue illustrating this controversy. *See id.*; Reardon et al., *supra* note 106, at 1253. *Compare Improving Women's Health: Understanding Depression After Pregnancy: Hearing Before the Subcomm. on Health of the House Comm. on Energy and Commerce*, 108th Cong. 25 (2004) (statement of Nada L. Stotland, Professor of Psychiatry and Professor of Obstetrics and Gynecology, Rush Medical Center) (testifying that the most accurate studies of the psychological effects of abortion on women indicate that "abortions are not a significant cause of mental illness"), *with* Post-Abortion Depression Research and Care Act, H.R. 4543, 108th Cong. §§ 101(a), 201(a), 204 (2004) (allocating funds for the National Institute of Health to sponsor studies of the psychological effects of abortion on women).

114. *See* RING-CASSIDY & GENTLES, *supra* note 100, at 132.

115. *See, e.g.*, John Kindley, Comment, *The Fit Between the Elements for an Informed Consent Cause of Action and the Scientific Evidence Linking Induced Abortion with Increased Breast Cancer Risk*, 1998 WIS. L. REV. 1595, 1599.

116. *Id.* at 1601.

117. *Id.* at 1644.

118. *See* Valerie Beral et al., *Breast Cancer and Abortion: Collaborative Reanalysis of Data from 53 Epidemiological Studies, Including 83,000 Women with Breast Cancer from 16 Countries*, 363 LANCET 1007, 1014 (2004) (finding that abortion does not increase the risk of breast cancer); Timothy L. Lash & Aliza K. Fink, *Null Association Between*

medical community have challenged these studies.[119] Another consideration is that medical science has yet to identify all causes of breast cancer, so research in the field is ongoing and may lead to new findings.[120] A final consideration is that a distinction has developed between the potential ABC link caused by abortion and the "protective effect" against breast cancer resulting from a woman carrying her first pregnancy to term.[121]

The findings of medical science on the ABC link are inconclusive; researchers continue to dispute the validity and implications of specific studies.[122] Consequently, research on the ABC link, like the research on the connection between abortion and psychological problems, remains highly controversial,[123] and questions surrounding the ABC link are unlikely to disappear before further research is conducted.[124]

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*Pregnancy Termination and Breast Cancer in a Registry-Based Study of Parous Women*, 110 INT'L J. CANCER 443, 446-47 (2004) (finding no association between abortion and breast cancer); Mads Melbye et al., *Induced Abortion and the Risk of Breast Cancer*, 336 NEW ENG. J. MED. 81, 83-84 (1997) (finding that women who had abortions did not have a greater risk of developing breast cancer).

119. *See* Angela Lanfranchi, *The Abortion-Breast Cancer Link: The Studies and the Science*, *in* THE COST OF CHOICE, *supra* note 102, at 72, 74, 81-83 (finding "methodological flaws" in studies concluding that the ABC link does not exist); David C. Reardon, *Abortion and Breast Cancer*, 363 LANCET 1910, 1910-11 (2004) (disputing an ABC link study as using too broad a population index); *cf.* Thorpe et al., *supra* note 109, at 71, 74-75 (finding that although there are problems with many of the studies purporting to find a link between abortion and breast cancer, a full-term delivery early in life provides a well-documented protective effect against breast cancer, and women should at least be informed of this development in making their decision).

120. *See* Joyce Howard Price, *Breast Cancer Study Will Analyze Sisters*, WASH. TIMES, Oct. 19, 2004, at A9 (reporting on a ten-year, $150 million study being conducted by the National Institute of Environmental Health Sciences on fifty thousand sisters to determine, among other things, whether environmental factors contribute to the causes of breast cancer).

121. AM. ASS'N OF PRO LIFE OBSTETRICIANS & GYNECOLOGISTS, INDUCED ABORTION AND THE SUBSEQUENT RISK OF BREAST CANCER (2002), *at* http://www.aaplog.org/ABC.htm; *see also* Thorpe et al., *supra* note 109, at 75-76 (arguing that the protective effect of having a full-term delivery rather than an abortion early in life on future breast cancer development is "undisputed," and therefore, women should be informed that having an abortion will destroy this protection and should also be informed that having an abortion is an "independent risk factor" for breast cancer).

122. *See, e.g.*, RING-CASSIDY & GENTLES, *supra* note 100, at 21-26.

123. *See, e.g.*, *Carcinogenesis; Experts Dispute Link Between Abortion and Breast Cancer*, WOMEN'S HEALTH WKLY., Jan. 1, 2004, 2004 WL 55163781 (describing the political furor over a statement posted on Minnesota's Health Department website which suggested an ABC link may exist).

124. *See* Thorpe et al., *supra* note 109, at 75 (concluding that further research into the ABC link should be completed, but that young women considering an abortion should be informed of the loss of the protective effect against breast cancer if they have abortions).

A third health concern related to abortion is that the frequently used abortifacient drug RU-486[125] could have serious physical side effects.[126] The FDA officially approved RU-486 in a highly politicized process[127] on September 28, 2000.[128] Since then, no long-term study has been done on the health effects of using RU-486.[129] However, the drug has been linked to several deaths,[130] and some evidence suggests that RU-486 may cause

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Regardless of whether further research is conducted, the ABC link may be developing into a component of legal claims against abortion providers. *See, e.g.*, *Coalition on Abortion/Breast Cancer Applauds Australian Settlement*, TENNESSEE RIGHT TO LIFE.ORG., Dec. 31, 2001, *at* http://tennesseerighttolife.org/news_center/archives/1231 2001-02.htm. For example, in December 2001, an Australian woman received what allegedly was the first settlement in an informed consent case that included a claim she should have been informed about the ABC link. *Id.* *But see* Joyce Arthur, *Abortion and Breast Cancer: A Forged Link*, HUMANIST, Mar./Apr. 2002, at 7, 9 (2002) (insisting the Australian case settled for reasons other than the ABC link). In what may be the first American settlement to include a claim based on the loss of the protective effect of giving birth at a young age on the risk of future development of breast cancer, a young woman settled her lawsuit against the clinic where she had an abortion. *See* Press Release, Women's Injury Network, Inc., Abortion Doctor Settles Malpractice Suit (Oct. 20, 2003), *at* http://www.womensinjurynetwork.org/prwin.htm. A portion of the confidential settlement amount will be used to screen the young woman for breast cancer later in life. *Id.*

125. RU-486's generic name is mifepristone. Jeremy Manier, *Teen's Death Rekindles Abortion Pill Battle*, CHI. TRIB., Nov. 30, 2003, at 14. RU-486 is marketed in the United States as Mifeprex and must be administered with the drug misoprostol to be an effective abortifacient. Sarah Lueck, *Abortion Foes Face Tough Battle Against RU-486 Drug*, WALL ST. J., Feb. 12, 2001, at A28. RU-486 is also known as the "morning-after pill." William Lowther, *Bush Backs Tighter Law on Morning After Pill*, DAILY MAIL (London), Feb. 8, 2001, 2001 WL 2867976.

126. *See infra* text accompanying notes 129-32.

127. *See, e.g.*, Jan Cienski, *U.S. Restrictions Proposed for Abortion Pill: Controversial RU-486*, NAT'L POST (Ontario), Feb. 8, 2001, at A14 (reporting on complaints by Republican lawmakers that the Clinton administration and the United States Food and Drug Administration "caved in to political pressure" in approving RU-486 without proper safety restrictions or adequate testing).

128. Press Release, Food and Drug Administration, FDA Approves Mifepristone for the Termination of Early Pregnancy (Sept. 28, 2000), *at* http://www.fda.gov/bbs/topics/news/NEW00737.html. The drug was developed by the French pharmaceutical company Roussel-Uclef in 1985. RING-CASSIDY & GENTLES, *supra* note 100, at 106.

Planned Parenthood Federation of America (PPFA) states that the number of women it provided with RU-486 more than doubled from 2001 to 2002, with almost twelve thousand women using the drug during the first half of 2002. *See* Barbara Sibbald, *Popularity of "Abortion Pill" Grows in US*, 168 CAN. MED. ASS'N J. 211, 211 (2003).

129. RING-CASSIDY & GENTLES, *supra* note 100, at 107.

130. *See* Michael Day & Susan Bisset, *Revealed: Two British Women Die After Taking Controversial New Abortion Pill*, SUNDAY TELEGRAPH (Sydney), Jan. 18, 2004, at 1 (stating that seven deaths occurring in France, Britain, and the United States have been linked to RU-486).

cancer.[131] Moreover, if surgical abortions are causally linked to breast cancer, as the ABC link suggests, then RU-486 could create an even stronger link to breast cancer because of its potentially serious physical side effects.[132]

*3. Recent Attempts to Reform Social Policy Through Litigation*

Within the past two years, three quasi-class action lawsuits challenging abortion have included elements of social policy reform. In *Kjolsrud v. MKB Management Corp.*,[133] a plaintiff sued a reproductive health care services provider, MKB Management Corporation, doing business as Red River Women's Clinic (MKB), under a North Dakota false advertising statute.[134] Plaintiff sued MKB "on 'behalf of herself, women seeking abortions, and the general public.'"[135] The complaint alleged MKB misled its clients and the public by distributing brochures stating that "'[n]one of [the] claims [regarding the ABC link] are supported by medical research or established medical organizations.'"[136] Plaintiff requested injunctive relief prohibiting MKB from distributing the brochures and requiring MKB to publish information supporting the ABC link.[137] The trial "court found the information contained in MKB's brochures was neither untrue nor misleading. The court denied [plaintiff's] request for injunctive relief and dismissed her action."[138] On appeal, the North Dakota Supreme Court affirmed the trial court's dismissal for lack of standing without addressing the plaintiff's substantive claims.[139]

In *Bernardo v. Planned Parenthood Federation*,[140] a California lawsuit similar to *Kjolsrud*, plaintiffs brought a claim for injunctive relief against an abortion provider that allegedly posted misleading information on its

131. *See* CHRIS KAHLENBORN, BREAST CANCER 111-12 (2000); Jihan A. Youssef & Mostafa Z. Badr, *Hepatocarcinogenic Potential of the Glucocorticoid Antagonist RU486 in B6C3F1 Mice: Effect on Apoptosis, Expression of Oncogenes and the Tumor Suppressor Gene p53*, MOLECULAR CANCER, Jan. 3, 2003, *at* http://www.molecular-cancer.com/content/2/1/3; *see also* RU-486 Suspension and Review Act of 2003, S. 1930, 108th Cong. § 2; RU-486 Suspension and Review Act of 2003, H.R. 3453, 108th Cong. § 2.

132. *See* KAHLENBORN, *supra* note 131, at 111-12.

133. 669 N.W.2d 82 (N.D. 2003).

134. *Id.* at 83-84.

135. *Id.* at 83.

136. *Id.* (emphasis omitted).

137. *Id.* at 83-84.

138. *Id.* at 84.

139. *Id.* at 88. The North Dakota Supreme Court found that plaintiff "had not read the brochures before filing her action" and "[h]er amended supplemental complaint does not allege she has suffered an injury from MKB's putatively illegal action." *Id.*

140. 9 Cal. Rptr. 3d 197 (Ct. App. 2004), *review denied*, S123182, 2004 Cal. LEXIS 3097 (Cal. Apr. 14, 2004), *cert. denied*, 125 S. Ct. 373 (2004).

website suggesting a lack of evidence for the ABC link.[141] The California Fourth District Court of Appeal dismissed the lawsuit, finding that plaintiffs failed to offer sufficient proof validating the ABC link or demonstrating that the websites were commercial speech.[142]

In the third case, *Marie v. McGreevey*,[143] named plaintiffs brought a claim in New Jersey individually and "on behalf of all women similarly situated."[144] However, *Marie* is different from *Kjolsrud* and *Bernardo* because the plaintiffs in *Marie* argued that New Jersey's Wrongful Death Act (WDA), which did not authorize a cause of action for the death of a fetus, violated the Equal Protection and Due Process clauses of the Fourteenth Amendment.[145] The plaintiffs sought recovery under the WDA, alleging they had abortions performed in the absence of their grant of informed consent.[146] They also claimed that New Jersey's informed consent laws violated equal protection and due process by providing "affirmative protection" to doctors performing wrongful abortions.[147] On appeal, the Third Circuit rejected all of plaintiffs' claims, but noted that plaintiffs' "allegations would seem to give rise to certain state-law causes of action."[148] The court reasoned that "[w]omen who believe they submitted to abortions without informed consent may be able to sue for damages under New Jersey law."[149] However, the Third Circuit did not speculate further about the merits of the informed consent causes of action.[150]

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141. *Id.* at 203. The three female plaintiffs sued under California's Unfair Competition Law and False Advertising Law, claiming that the national and local websites for Planned Parenthood violated the advertising statutes by misrepresenting the evidence related to the ABC link. *Id.*

142. *Id.* at 228. The court ruled defendants were entitled to have the lawsuit dismissed under California's strategic lawsuits against public participation statute (anti-SLAPP). *Id.*

143. 314 F.3d 136 (3d Cir. 2002), *cert. denied*, 539 U.S. 910 (2003).

144. *Id.* at 136. The Third Circuit noted that "[p]laintiffs also seek class certification of individuals similarly situated to both groups of named plaintiffs. The District Court dismissed plaintiffs' complaint without reaching this issue." *Id.* at 139 n.1.

145. *Id.* at 139.

146. *Id.* at 139-40. First, the plaintiffs argued "that [they and those similarly situated had] been discriminated against in being denied the ability to recover damages in a wrongful death action on behalf of their aborted fetuses under New Jersey law." *Id.* at 140. Second, the plaintiffs argued that New Jersey violated their due process and equal protection rights because the state did not have stricter informed consent requirements before a doctor performed an abortion. *Id.* at 142. Plaintiffs believed doctors should inform women that the fetus was a "human being." *Id.* at 142-43.

147. *Id.* at 142-43.

148. *Id.* at 139.

149. *Id.*

150. *See id.* at 139-40.

*4. Recent Legislative Developments in Social Policy Reform*

While legislation restricting or banning abortion procedures faces substantial constitutional barriers,[151] a recent legislative development may pave the way for widespread tort litigation against abortion providers.[152] A Louisiana statute creates a civil cause of action that allows a woman to sue an abortion doctor for performing an abortion on her, even if she signed a consent form.[153] The statute survived constitutional challenges in state[154] and federal[155] appellate courts on standing grounds.[156] With this precedent, other states may pass similar statutes.[157]

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151. *See supra* Part I.B.1.

152. *See infra* notes 153-57 and accompanying text.

153. *See* LA. REV. STAT. ANN. § 9:2800.12 (West Supp. 2005); Achilles, *supra* note 25, at 854-55. The statute reads:

> A. Any person who performs an abortion is liable to the mother of the unborn child for any damage occasioned or precipitated by the abortion, which action survives for a period of three years from the date of discovery of the damage with a peremptive period of ten years from the date of the abortion.
>
> B. For purposes of this Section:
>
> (1) "Abortion" means the deliberate termination of an intrauterine human pregnancy after fertilization of a female ovum, by any person, including the pregnant woman herself, with an intention other than to produce a live birth or to remove a dead unborn child.
>
> (2) "Damage" includes all special and general damages which are recoverable in an intentional tort, negligence, survival, or wrongful death action for injuries suffered or damages occasioned by the unborn child or mother.
>
> (3) "Unborn child" means the unborn offspring of human beings from the moment of conception through pregnancy and until termination of the pregnancy.
>
> C. (1) The signing of a consent form by the mother prior to the abortion does not negate this cause of action, but rather reduces the recovery of damages to the extent that the content of the consent form informed the mother of the risk of the type of injuries or loss for which she is seeking to recover.
>
> (2) The laws governing medical malpractice or limitations of liability thereof provided in Title 40 of the Louisiana Revised Statutes of 1950 are not applicable to this Section.

§ 9:2800.12.

154. Women's Health Clinic v. State, 825 So. 2d 1208 (La. Ct. App. 2002).

155. Okpalobi v. Foster, 244 F.3d 405 (5th Cir. 2001).

156. *Id.* at 409 (plurality opinion); *Women's Health Clinic*, 825 So. 2d at 1212-13. One commentator concludes that "[u]nlike the unconstitutional statutes before it, however, Act 825 cannot be challenged facially because it contemplates a private cause of action. Even more significantly, however, it is unlikely this statute will ever be challenged at all." *See* Achilles, *supra* note 25, at 883. While conceding that a facial challenge may not be successful, the commentator believes the statute is unconstitutional. *See id.* at 880.

157. *See* Achilles, *supra* note 25, at 882.

*5. The State of the Abortion Industry Today*

Big Abortion is big business. According to recent figures, approximately 1.31 million abortions were performed in the United States during the year 2000.[158] The average cost of an abortion is $372, so the abortion industry generates an estimated $487 million in annual revenue.[159] A total of 1,819 facilities performed abortions in 2000.[160] Abortion clinics and other clinics, which consist of forty-six percent of facilities performing abortions, performed ninety-three percent of abortions, or 1,219,910 abortions.[161]

The embodiment of Big Abortion is Planned Parenthood Federation of America, Inc. (Planned Parenthood).[162] Planned Parenthood's affiliates performed a reported 227,375 abortion procedures in 2002, an increase of 6.7% over the previous year.[163] Planned Parenthood's total revenue for the fiscal year 2003 was $766.6 million,[164] and it has "125

158. *See* Lawrence B. Finer & Stanley K. Henshaw, *Abortion Incidence and Services in the United States in 2000*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 6, 9 (2003), *available at* http://www.agi-usa.org/pubs/journals/3500603.pdf. The Center for Disease Control and Prevention, which has no mandatory reporting requirement, calculated 857,475 "legally induced abortions" were performed in 2000. *See* Laurie D. Elam-Evans et al., U.S. Dep't of Health & Human Servs., *Abortion Surveillance—United States, 2000*, MORBIDITY & MORTALITY WKLY. REP., Nov. 28, 2003, at 1, 2, 4, 8-9. The higher figure of 1.31 million abortions is from The Alan Guttmacher Institute, which performs its own direct research. *See id.* at 9. Although a more recent figure is available, the author chooses the year 2000 number of 1.31 million abortions because this figure is linked to other data about abortion incidence and abortion providers.

159. *See* Lawrence B. Finer & Stanley K. Henshaw, *The Accessibility of Abortion Services in the United States, 2001*, 35 PERSP. ON SEXUAL AND REPROD. HEALTH 16, 19 (2003), *available at* http://www.agi-usa.org/pubs/journals/3501603.pdf. Multiplying 1.31 million abortions by the average cost of $372 produces a figure of $487.32 million. *See id.*

160. *See* Finer & Henshaw, *supra* note 158, at 12 tbl.5. The total number of abortion providers includes 447 abortion clinics, 386 other clinics, 603 hospitals, and 383 physicians' offices. *Id.*

161. *See id.* The remaining seven percent of abortions are performed in hospitals and physicians' offices, which compose fifty-four percent of the total number of abortion facilities. *See id.*

162. *See* PLANNED PARENTHOOD FED'N OF AM., 2002-2003 ANNUAL REPORT 6-7, 16-17 (Jon Knowles & Barbara Snow eds., 2003) (detailing Planned Parenthood's financial condition and activities including (1) performing 213,026 abortions at affiliated centers in 2001; (2) forming a campaign to protect *Roe* by opposing "the nomination of anti-choice judges"; (3) generating total annual revenue of $766.6 million; and (4) supporting The Alan Guttmacher Institute, which specializes in "reproductive health research, policy analysis, and public education").

163. *See id.* at 6. Planned Parenthood affiliates perform approximately eighteen percent of all abortions in the United States. *Compare id.* at 6 (227,375 Planned Parenthood abortions), *with* THE ALAN GUTTMACHER INST., INDUCED ABORTION IN THE UNITED STATES (2005) (1.29 million total abortions in 2002), *available at* http://www.agi-usa.org/pubs/fb_induced_abortion.pdf.

164. *See* PLANNED PARENTHOOD FED'N OF AM., *supra* note 162, at 16 tbl.

affiliates [who] manage 866 health centers and have a presence in all 50 states and the District of Columbia."[165] Additionally, Planned Parenthood partially supports The Alan Guttmacher Institute,[166] a non-profit research center on women's health and reproductive issues that advocates for abortion rights.[167]

In contrast to the detailed information about abortion providers that is available, the identities of corporations involved in the development, production, and distribution of RU-486 in the United States are difficult to discover.[168] However, the manufacturer is a Chinese company, Hua Lian Pharmaceutical,[169] and the American distributor is Danco Laboratories.[170] Other companies may be implicated in the network of development, manufacture, and distribution.[171]

## II. MASS TORT CLASS ACTION LITIGATION AGAINST BIG ABORTION AS A TOOL FOR SOCIAL POLICY REFORM

Big Tobacco is the paradigm for social policy reform through mass tort class action litigation. Therefore, comparing and contrasting Big Tobacco with Big Abortion provides a method for assessing whether Big Abortion litigation can succeed. To analyze Big Tobacco and Big Abortion, this Comment considers the people involved—the plaintiffs, defendants, lawyers, and experts. Next, this Comment examines the law at issue—the causes of action, the Class Action Fairness Act of 2005, the class certification prerequisites, and the class certification requirements. Finally, this Comment explores the strategic conditions necessary for success—the state of science, the development of class action law, and the political climate.

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165. *Id.* at "About PPFA." Planned Parenthood is a not-for-profit organization. *Id.*

166. *See id.* at 17 ("The Alan Guttmacher Institute, a special affiliate to which Planned Parenthood supplies some support, is an independent, not-for-profit corporation for reproductive health research, policy analysis, and public education."). Planned Parenthood lists its expenses for The Alan Guttmacher Institute as $8.1 million. *See id.* at 16 tbl.

167. *See, e.g.*, Rachel Benson Gold, *Lessons from Before* Roe*: Will Past Be Prologue?*, GUTTMACHER REP. ON PUB. POL'Y, Mar. 2003, at 8, 11 (arguing, as "conclusions and opinions" of The Alan Guttmacher Institute, that making abortion constitutional benefited women), *available at* http://www.guttmacher.org/pubs/tgr/06/1/gr060108.pdf.

168. *See* NAT'L RIGHT TO LIFE COMM., RU-486: THE PILL, THE PROCESS, THE PROBLEMS, *at* http://www.nrlc.org/ru486all.html (last visited June 27, 2005).

169. *See* Philip P. Pan, *Chinese Factory Makes RU-486 for U.S. Market*, DENVER POST, Oct. 15, 2000, 2000 WL 25831171 (describing how the FDA attempted to hide the identity of RU-486's manufacturer for "safety and security" reasons).

170. *See* Manier, *supra* note 125.

171. *See, e.g.*, NAT'L RIGHT TO LIFE COMM., *supra* note 168 (describing how Roussel-Uclef, the French developer of RU-486, eventually merged into pharmaceutical mega-giant Aventis).

### A. The People Involved

#### 1. The Plaintiffs

The plaintiff class in a class action must be defined strategically and selected carefully to survive the certification process.[172] As a general rule, the broader the class, the harder it will be to meet the prerequisites for certification. Therefore, in the Big Abortion context, a national class may be too big, while a narrower, state class may survive certification. Similarly, the lead plaintiffs for a Big Abortion class should be selected carefully.[173] *Kjolsrud* demonstrated that a lead plaintiff must clearly have suffered harm under the alleged theories of liability or the suit will fail.[174]

#### 2. The Defendants

The strategic thinking required to define the plaintiff class and select the lead plaintiffs is also required to choose the defendants. The Big Tobacco litigation focused on the Big Six tobacco companies,[175] who together generate billions of dollars in revenue a year and account for the majority of cigarettes consumed in America.[176] Contrast this to Big Abortion, which has one central player, Planned Parenthood, and hundreds of smaller players.[177] By itself, Planned Parenthood would be the Big Six of abortion. A large-scale abortion class action would almost certainly be directed, if not exclusively, then substantially, at Planned Parenthood.

#### 3. The Lawyers

When it comes to plaintiffs' lawyers, one is looking for lawyers who are willing to collaborate and invest financially in the litigation.[178] Big Tobacco plaintiffs' lawyers learned that by coordinating with each other

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172. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 740-52 (5th Cir. 1996) (decertifying the class created by the trial court for failure to appropriately analyze the predominance and superiority elements of certification).

173. *See* discussion *infra* note 236.

174. *See* Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82, 88 (N.D. 2003) (affirming dismissal of plaintiff's complaint because she did not suffer any harm from the brochure that she claimed stated false information about the ABC link).

175. *See, e.g.*, *Castano*, 84 F.3d at 737 n.3. The Big Six are American, Brown & Williamson, Liggett & Myers, Lorillard, Philip Morris, and RJ Reynolds. TURSI ET AL., *supra* note 39, at 90-91.

176. *See, e.g.*, Shirley A. Lazo, *Show Me The Money*, BARRON'S, Aug. 30, 2004, at 25 (noting that "Reynolds American has a 32% market share, versus 50% for Altria's Philip Morris unit"); Vanessa O'Connell, *Altria Profit Falls 43% As It Pays Price for Cigarette Promotions*, WALL ST. J., Oct. 17, 2003, at B5 (stating Philip Morris' 2003 third quarter revenue of $4.44 billion was from 48.9 billion cigarette units sold).

177. *See supra* notes 162-67 and accompanying text.

178. *See* Erichson, *supra* note 56, at 131.

and heavily investing their own resources, they could overcome the advantages the Big Six defendants used to defeat individual plaintiffs.[179] Similarly, Big Abortion lawyers must be prepared to collaborate and invest.[180]

*4. The Experts*

Finally, experts play a crucial role in mass tort litigation.[181] Some experts testify in dozens of similar cases, giving them trial experience, but also opening the door for questioning their motives.[182] Because expert testimony is essential to mass tort litigation and because experts testify in many cases, the selection of expert witnesses is a vital part of the strategic coordination of plaintiffs' lawyers.[183]

### *B. The Law at Issue*

*1. The Causes of Action*

The causes of action that could arise in the Big Abortion context may share similarities with the Big Tobacco causes of action. *Castano*'s main factual premise was that the tobacco companies withheld information about the addictive nature of nicotine.[184] One of the main premises behind a Big Abortion class action might be that abortion providers knew or should have known that abortion causes severe psychological problems or breast cancer and the providers should have disclosed this risk to women obtaining abortions.[185]

In contrast to Big Tobacco, the central cause of action against Big Abortion would most likely be medical malpractice for lack of informed consent.[186] Informed consent actions are governed by specific duties of

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179. *See id.* at 123-32; *see also* Rabin, *supra* note 36, at 867-68. The $6,000,000 investment made by law firms into the *Castano* class fueled the litigation and helped turn the tide of the defendant advantage. Erichson, *supra* note 56, at 131.

180. *See supra* notes 57, 61-69 and accompanying text.

181. *See* PAUL D. RHEINGOLD, MASS TORT LITIGATION § 11:2, at 11-3 (1996) ("Virtually every MTL has been deeply involved with scientific testimony of a medical or technological nature. . . . [I]t is the nature of the mass tort to intensify, perhaps to aggravate, the usual problems with expert testimony and scientific proof.").

182. *See* Susan Finch, *Big Tobacco's Lawyers Have Their Turn; Expert's Motive Questioned in Class-Action Suit*, TIMES-PICAYUNE (New Orleans), Jan. 29, 2003, at A-2.

183. *Cf.* Erichson, *supra* note 56, at 131 (discussing the positive effects of coordinating litigation efforts).

184. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

185. *Cf.* Marie v. McGreevey, 314 F.3d 136, 139-40 (3d Cir. 2002) (stating that a lack of informed consent and a "cause of action for the emotional injuries suffered" by women who have abortions could be valid causes of action under New Jersey law).

186. *See* 3 J.D. LEE & BARRY A. LINDAHL, MODERN TORT LAW § 25:34 (2d ed. 2002) (describing the general requirements of informed consent).

care that doctors owe to their patients, and these standards are jurisdictionally dependent,[187] another reason to avoid creating a national, *Castano*-like class.[188] The informed consent cause of action may lead to claims of negligence,[189] fraud,[190] "[m]ental or emotional injury,"[191] as well as statutory claims,[192] such as those brought in *Kjolsrud* and *Bernardo* under consumer protection statutes.[193]

In a traditional informed consent action, an individual plaintiff presents proof of the elements as they relate to that plaintiff.[194] However, the class action context presents new challenges for this action, just as *Castano* raised a "novel and wholly untested theory" for holding Big Tobacco liable.[195] Although it is impossible to predict how the law will react to a Big Abortion class action, it is possible to identify the elements of that action: lack of informed consent, causation, and injury.[196]

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187. *See id.* §§ 25:45-:46 (describing professional and lay standards used by different jurisdictions).

188. *See Castano*, 84 F.3d at 740-44 (finding lack of analysis of state law variances in multi-jurisdiction litigation a reason to decertify the class). A national Big Abortion mass tort with a medical malpractice cause of action would face serious choice of law decisions based on the differences between the professional and lay standards for medical malpractice. *See* 3 LEE & LINDAHL, *supra* note 186, §§ 25:45-46.

189. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:38; *supra* text accompanying note 60.

190. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:38; *supra* text accompanying note 60.

191. 3 LEE & LINDAHL, *supra* note 186, § 32:2; *supra* text accompanying note 60.

192. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:38; 4 *id.* § 32:2.

193. *Compare* Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82, 83 (N.D. 2003) (concerning an alleged violation of a North Dakota false advertising statute), *and* Bernardo v. Planned Parenthood Fed'n, 9 Cal. Rptr. 3d 197, 204 (Ct. App. 2004) (concerning an alleged violation of California's unfair competition and false advertising laws), *with Castano*, 84 F.3d at 737 (concerning an alleged violation of state consumer protection statutes).

194. 3 LEE & LINDAHL, *supra* note 186, § 25.35. Traditionally,

> [t]o establish a prima facie case of failure to comply with the informed consent requirement, the plaintiff must prove:
>
> —The existence of a material risk unknown to the patient;
>
> —Failure to disclose that risk;
>
> —Causation, i.e. that disclosure of the risk would have lead a reasonable patient to reject the medical procedure or chose a different course of treatment; and
>
> —Injury.

*Id.*

195. *See Castano*, 84 F.3d at 737.

196. *See supra* note 194. Mass tort actions typically involve products liability, while an action against Big Abortion would be based upon medical malpractice. *Cf.* 32B AM. JUR. 2D *Federal Courts* § 1863 (1996) (discussing mass tort litigation and class certification in the context of products liability). However, the characteristics of a Big Abortion suit make mass tort law a useful model for analyzing causes of action. *Cf.* RHEINGOLD, *supra* note 181, §§ 1:1-8.

First, plaintiffs must prove lack of informed consent.[197] Lack of informed consent means that a material risk existed, and the defendant did not disclose that risk to the plaintiff.[198] The duty to disclose a risk varies by jurisdiction.[199] Because plaintiffs might lack the resources to prove this duty for each woman's situation, plaintiffs might need to convince the court to depart from traditional medical malpractice law.[200] Plaintiffs must argue that all Big Abortion defendants knew or should have known of the risk of harm and chose to ignore or hide that risk.[201] Plaintiffs must also argue that abortion providers had a duty to disclose the risk regardless of the individual plaintiff's situation.

Second, plaintiffs must establish causation, sometimes referred to as proximate causation.[202] Causation is established when it is shown that the plaintiff would not have had the medical procedure if the risk had been disclosed.[203] In some jurisdictions, this standard is based on what the actual plaintiff would have done, and in other jurisdictions it is based on what a reasonable patient faced with the plaintiff's circumstances would have done.[204] The best argument for the plaintiffs might be that under the latter standard, any reasonable woman would have refused to have an abortion, knowing the risk involved, regardless of what any particular woman's circumstances were. However, this element is difficult to satisfy in the class action context because it is traditionally plaintiff-specific.[205]

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197. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:35 (outlining the elements of an informed consent action).

198. *See id.* § 25:35.

199. Laurent B. Frantz, Annotation, *Modern Status of Views as to General Measure of Physician's Duty To Inform Patient of Risks of Proposed Treatment*, 88 A.L.R.3D 1008, §2(a) (2004). The traditional approach for what constitutes a material risk that must be disclosed is a physician-based "professional medical standard," but some states allow a patient-based standard. *Id.*

200. *See id.* (specifying that under traditional medical malpractice law, a plaintiff has to prove "[t]he existence of a material risk unknown to the patient," "[f]ailure to disclose that risk," and "that disclosure of the risk would have lead a reasonable patient to reject the medical procedure").

201. *Cf. supra* notes 59-60 and accompanying text (explaining the argument in Big Tobacco litigation that the defendants knew and failed to disclose nicotine's addictive quality).

202. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:35 ("[D]isclosure of the risk would have led a reasonable patient to reject the medical procedure or chose a different course of treatment."); Frantz, *supra* note 199, § 2(b).

203. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:35.

204. *See* Frantz, *supra* note 199, § 2(b).

205. *See id.* ("[E]vidence that the particular patient would not have consented to the treatment had he known of the undisclosed risk will be essential in some jurisdictions and should be helpful even in those in which it is not required.").

Finally, plaintiffs must establish injury.[206] Plaintiffs must prove that abortion harmed them by causing or contributing to their injuries.[207] Injury divides plaintiffs into two groups: (1) those who experienced actual harm, such as psychological trauma or breast cancer and (2) those who have not yet experienced harm but are subject to an increased risk of future harm.[208] Plaintiffs have yet to convince courts that an increased risk of future harm warrants recovery.[209]

A standard informed consent medical malpractice action focuses on proof of individual harm, but plaintiffs in an abortion class action must convince the court that it should accept epidemiological proof.[210] As mass tort law continues to become more accepting of epidemiological evidence to prove causation, better chances will exist to establish a causal link between abortion and the harm to women who obtain abortions.[211]

Although critics might argue that traditional tort law is unreceptive to actions like the one just described, several points warrant against quick dismissal. First, class action litigation and mass tort law are evolving to allow new theories of liability based on social concerns, such as the tobacco health crisis.[212] Second, legislative changes can rapidly alter the development of tort law.[213] An example of such legislation is the Louisiana statute that provides a civil cause of action to women who have had abortions.[214] This statute is particularly effective because the

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206. *See* 3 LEE & LINDAHL, *supra* note 186, § 25:35.

207. *See id.*

208. *See supra* notes 106-24 and accompanying text. If the proof shows that abortion does cause psychological problems or breast cancer, then women who had an abortion but have not yet suffered harm could face an increased risk of future harm. *See, e.g.*, Shadigian, *supra* note 102, at 63-64.

209. *Compare* Geoffrey P. Kirshbaum, Comment, *Increased Risk of Disease As an Independent Cause of Action in Toxic Tort Cases*, 43 S. TEX. L. REV. 273, 274-76, 278-79 (2001) (elaborating on the reluctance of traditional tort law to recognize the tort of increased risk of future harm and proposing solutions within the toxic tort context), *with* Shirley K. Duffy, *"Risk Assessment": A Methodology for Deciding Claims for Increased Risk of Cancer*, 11 PA. ST. ENVTL. L. REV. 213, 213-14, 249-50 (2003) (arguing that equity should motivate courts to use risk assessment to compensate plaintiffs for increased risk of harm in toxic tort cases).

210. *See* RHEINGOLD, *supra* note 181, § 11:4. Individual proof that abortion caused injury in each particular plaintiff would become prohibitively expensive.

211. *Cf.* Roger S. Fine & Theodore M. Grossman, *Mass Torts*, *in* 4 SUCCESSFUL PARTNERING BETWEEN INSIDE AND OUTSIDE COUNSEL § 73:7 (Robert L. Haig ed., 2003) (discussing the increased use of epidemiological proof in mass tort cases, where courts are "[c]onfronted with claims that many individuals have been injured by a product, but where the precise mechanism of causation is unknown").

212. *See id.* § 73:6 (suggesting that mass tort litigation has evolved in the face of changes in the community tolerance of risk).

213. *See, e.g.*, *supra* notes 152-57 and accompanying text.

214. *See supra* notes 152-57 and accompanying text.

legislature defined damages broadly, defined the informed consent defense narrowly, and precluded other medical malpractice law from applying.[215] Third, while courts have rejected previous attempts to bring class actions in *Kjolsrud*, *Bernardo*, and *McGreevey*,[216] the Third Circuit in *McGreevey* acknowledged the potential for state law tort claims based on those plaintiffs' allegations.[217]

Finally, the Big Abortion cause of action that most resembles Big Tobacco litigation would be a products liability action against manufacturers and distributors of RU-486, alleging that the drug is defective because it causes unacceptable side effects in consumers.[218]

*2. The Class Action Fairness Act of 2005*

The Class Action Fairness Act of 2005 (Class Action Act) went into effect on February 18, 2005.[219] The Class Action Act affects many aspects of class action litigation, from jurisdiction to attorneys' fees.[220]

The Class Action Act allows a party to remove state class actions to federal court if the parties are diverse and the amount in controversy is at least $5 million.[221] This change is expected to allow defendants to remove nationwide class actions filed in state court to federal court, where they are likely to be dismissed.[222] This is a setback for potential Big Abortion plaintiffs because the Class Action Act is likely to make it difficult to keep class actions in state court, where plaintiffs had more success in the Big Tobacco litigation.[223]

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215. *See supra* note 153.

216. *See supra* Part I.B.3.

217. *See* Marie v. McGreevey, 314 F.3d 136, 139 (3d Cir. 2002). The Third Circuit explained that "[e]ach of the women plaintiffs contends she had an abortion without fully understanding the procedure." *Id.* The court continued, "[a]t least one plaintiff claims to have been threatened and coerced into having an abortion." *Id.* The court concluded that "[t]hese allegations would seem to give rise to certain state-law causes of action." *Id.*

218. *See* 63 AM. JUR. 2D *Products Liability* §§ 1, 3, 7, 8 (1997) (introducing the products liability doctrine and noting in Section 7 that "[t]he general requirements concerning the necessity of proving defectiveness or harmfulness in a products liability action have been applied to cases involving . . . (8) drugs or medicines"); *supra* notes 125-32 and accompanying text. Further discussion of this topic is beyond the scope of this Comment.

219. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.A. (West, WESTLAW through P.L. 109-57)).

220. *See* PAUL D. RHEINGOLD, MASS TORT LITIGATION § 8:5.3 (Supp. 2005) (discussing changes brought about by the Class Action Act).

221. 28 U.S.C.A. § 1332(d)(2) (West, WESTLAW through P.L. 109-57).

222. *See* RHEINGOLD, *supra* note 220, § 8:5.3 (discussing changes brought about by the Class Action Act).

223. *See supra* notes 64-69.

Another reform is that attorneys' fees are more restricted in settlements.[224] This reform should not impact Big Abortion litigation because it addresses coupon settlements, rather than traditional tort damages.[225]

Finally, the Class Action Act creates federal district court jurisdiction for a new class of cases called "mass actions."[226] The definition of a mass action is imprecise, and it is unclear how mass actions could affect future mass tort litigation.[227] Time is needed to assess the extent of the new legislation's impact on class action litigation.[228]

*3. The Prerequisites for Certification*

One of the first major procedural hurdles that class actions face is certification.[229] The Class Action Act makes it more likely that a Big Abortion class action would end up in federal court, where Rule 23 of the Federal Rules of Civil Procedure would apply.[230] Additionally, because many states use class action rules similar to Rule 23, that rule provides a useful model for analyzing how the prerequisites and requirements for certification might apply to a Big Abortion class action suit.[231] Therefore, this Comment next considers the prerequisites and requirements for Rule 23 certification.

All federal class actions must satisfy the four prerequisites of Rule 23(a) for certifying a class: "numerosity, commonality, typicality, and adequacy of representation."[232] In the Big Abortion context, numerosity

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224. *See* 28 U.S.C.A. §§ 1712, 1713 (imposing strict requirements on the awarding of attorneys' fees in coupon settlements and requiring the trial judge to evaluate whether a class member will have to pay more in attorneys' fees than the class member received as a settlement).

225. *Id.* § 1712.

226. Id. § 1332(d)(11) (defining "mass action" as "any civil action . . . in which monetary relief claims of 100 or more persons are proposed to be tried jointly on the ground that the plaintiffs' claims involve common questions of law or fact").

227. *See* RHEINGOLD, *supra* note 220, § 8:5.3 (noting that key terms in the definition of "mass action" are undefined and speculating about the impact of mass actions on mass tort actions).

228. *See id.* (admitting the difficulty of predicting the Class Action Act's impact on class actions and suggesting that the Class Action Act would not impact mass torts that are separate from class actions).

229. *See, e.g.*, Castano v. Am. Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (reversing, on interlocutory appeal, the district court's certification of the class).

230. *See* RHEINGOLD, *supra* note 220, § 8:5.3 (describing how the Class Action Act allows for removal of state class actions meeting certain minimum requirements).

231. *See* RHEINGOLD, *supra* note 181, § 3:100 (noting that many state courts have patterned their class action laws after Rule 23); Kearns, *supra* note 58, at 1343 n.33 ("Most states have adopted Rule 23 almost verbatim.").

232. *See* Kearns, *supra* note 58, at 1359.

most likely could be satisfied in many, but not all, states.[233] On the other hand, the commonality of claims requirement is called the "battleground on mass tort class action proposals" because persuasive arguments usually can be made for and against commonality.[234] Next, "[t]ypicality means that the named parties are typical of the other plaintiffs in the class,"[235] if plaintiffs' lawyers choose the named plaintiffs carefully, they should satisfy this element.[236] Finally, "adequacy of representation," the

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233. *See* 32B AM. JUR. 2D *Federal Courts* § 1810 (1996) (suggesting that, while a class must be large enough "to make joinder impractical," the class must not be so large as to make necessary tasks, such as notification of class members, impractical). A million-member class has been considered acceptable where "the issues involved are few and simple, the identities of members of the class are readily available from the defendant's records, and the amount to which each class member is entitled may readily be determined." *Id.*

Under the Big Tobacco framework, a million-strong class "clearly met the numerosity requirement," but raised "questions [concerning] the practicability, or mere possibility, of a statewide or nationwide tobacco class action," because of its massive size. Kearns, *supra* note 58, at 1359-60. In comparison, the annual number of statewide abortions in the year 2000 ranged from 236,060 reported abortions in California to 100 reported abortions in Wyoming. Finer & Henshaw, *supra* note 158, at 9 tbl.2. The number of reported abortions for approximately half of the states fell between 12,270 and 164,630 abortions. *See id.* (listing, for the year 2000, Kansas as reporting 12,270 abortions and New York as reporting 164,630 abortions, with 23 other states in between these figures).

234. RHEINGOLD, *supra* note 181, § 3:5 (highlighting the reality that "[j]udges are . . . capable of giving differing interpretations to mass torts on the commonality requirement"). Instead of emphasizing the similarities between the actions, judges often "cite[] the disparate facts and law as standing in the way of determining that commonality is met." *Id.* Big Abortion plaintiffs could emphasize the inherent commonalities in one or more of the three medical concerns from abortion: the psychological effects, the ABC link, and the harmful side effects of RU-486. *See supra* notes 103-05 and accompanying text. Defendants would point to "injury and damages" as areas of difference between class members. *See* RHEINGOLD, *supra* note 181, § 3:5.

235. *See* RHEINGOLD, *supra* note 181, § 3:6 ("Typicality means that the named parties are typical of the other plaintiffs in the class.").

236. *See id.* Typicality is a matter of strategy—selecting a plaintiff that has the "typical injury." *See id.* One of the strategic failures in *Kjolsrud* was that the plaintiff was not "typical"; she "had not read the [abortion] brochures" upon which she based her case. *See* Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82, 88 (N.D. 2003); *supra* notes 133-39 and accompanying text.

Beyond the strategic failure in *Kjolsrud*, it is worth considering how medical science could affect typicality. For example, the typical plaintiff in Big Abortion might be a female who has breast cancer. *See supra* notes 115-24 and accompanying text. If the plaintiffs' claim is that they were not informed of the risk of losing the protective effect that giving birth at a young age might offer them against developing breast cancer, then the class should include women who had an abortion at an early age, and the lead plaintiff should be one of them. *See supra* note 121 and accompanying text. If the class includes women who had their first abortion later in life, typicality would be defeated because the abortions could not have caused them to lose the protective effect that giving birth at a young age provides. *See id.* Therefore, plaintiffs' attorneys should consider carefully how medical science affects both typicality and the dimensions of the class.

fourth prerequisite of Rule 23(a), asks whether "the representative parties will fairly and adequately protect the interests of the class."[237] The answer is likely to be in the affirmative for Big Abortion, but satisfying this requirement may involve political wrangling among plaintiffs and between plaintiffs' lawyers.[238]

*4. The Requirements for Certification*

Once the certification prerequisites are met, the class must also satisfy certification requirements in Rule 23(b) of the Federal Rules of Civil Procedure, which articulates three types of classes.[239] Plaintiffs' lawyers might argue for Rule 23(b)(3) class certification because it allows the class to be defined broadly.[240]

A Rule 23(b)(3) class must meet predominance and superiority requirements.[241] Under the predominance requirement, the court must decide whether "questions common to the class predominate over questions affecting individual members."[242] Under the superiority requirement, the court must decide whether a class action is better than other possible forms of adjudication.[243] Rule 23(b)(3) includes four non-exclusive factors which courts should consider when deciding whether to certify the class.[244] In the Big Abortion context, it appears that the factors could support a finding of predominance and superiority, but

237. FED. R. CIV. P. 23(a)(4); *see also* Kearns, *supra* note 58, at 1359, 1361 ("The adequacy of representation requirement inquires into both the competence of class counsel and the existence of any conflicts of interest between class representatives and absentee members.").

238. *See* RHEINGOLD, *supra* note 181, § 3:7. Big Abortion litigation would require substantial funding. *Cf. supra* notes 49, 57 and accompanying text (discussing the role of finances in Big Tobacco). Therefore, it is again worthwhile to recognize that only with proper coordination would plaintiffs' attorneys be likely to overcome any defendant advantage. *See supra* notes 61-62 and accompanying text (attributing part of plaintiffs' success in Big Tobacco litigation to the coordination of the plaintiffs' attorneys).

239. *See* FED. R. CIV. P. 23(b); Michael E. Solimine & Christine Oliver Hines, *Deciding To Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV. 1531, 1540 (2000).

240. *See* Solimine & Hines, *supra* note 239, at 1541-42; FED. R. CIV. P. 23(b)(3).

241. FED. R. CIV. P. 23(b)(3); 32B AM. JUR. 2D *Federal Courts* § 1978 (1996). A Rule 23(b)(3) class action is subject to other requirements, such as the notice requirement under Rule 23(c)(2). *See* FED. R. CIV. P. 23(c)(2); 32B AM. JUR. 2D *Federal Courts* § 2055 (1996).

242. 32B AM. JUR. 2D *Federal Courts* § 1981 (1996).

243. *Id.* ("The superiority requirement does not mean simply that a class action device must be adequate, but rather that such device must be superior to, and not just as good as, other methods for fair and efficient adjudication of a controversy.").

244. FED. R. CIV. P. 23(b)(3).

courts may consider additional factors that could weigh against certification.[245]

### *C. The Strategic Conditions Necessary for Success*

One lesson to learn from *Kjolsrud* and *Bernardo* is that for Big Abortion class actions to succeed, a number of strategic conditions must be favorable.[246] To succeed, Big Abortion litigants must consider the state of science, the development of class action law, and the political climate.

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245. *See* 32B AM. JUR. 2D *Federal Courts* § 2009 (1996) (noting that the four "factors are only suggestive, and not exhaustive of the factors that should be considered in deciding whether to allow a class action under FED. R. Civ P 23(b)(3)").

The first factor to consider is "the interest of members of the class in individually controlling the prosecution or defense of separate actions." FED. R. CIV. P. 23(b)(3)(A). Here this interest could be outweighed by the potential benefits of strategic litigation. As in the Big Tobacco context, strategic litigation would require capitalization by and coordination among plaintiffs' attorneys. *Cf. supra* notes 61-62.

The second factor is "the extent and nature of any litigation concerning the controversy already commenced by or against members of the class." FED. R. CIV. P. 23(b)(3)(B). Few suits concerning this factor have been filed in the United States. *See, e.g.*, Margaret E. Vroman, Annotation, *Medical Malpractice in Performance of Legal Abortion*, 69 A.L.R.4TH 875, §§ 1-10 (2004) (assembling "cases in which the courts have specifically addressed the issue of physician malpractice as a result of the performance, or attempted performance, of a therapeutic or otherwise legally sanctioned abortion").

The third factor is "the desirability or undesirability of concentrating the litigation of the claims in the particular forum." FED. R. CIV. P. 23(b)(3)(C). Here, the difficulty that the *Castano* plaintiffs faced because their claims were multi-jurisdictional could be mitigated by bringing only a state-wide class action, thereby minimizing variations in state law. *See* Castano v. Am. Tobacco Co., 84 F.3d 734, 740-44 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance.").

The final factor is "the difficulties likely to be encountered in the management of a class action." FED. R. CIV. P. 23(b)(3)(D). This is a pragmatic inquiry that "involves the weighing of the judicial efficiency or benefits the class action will produce against the corresponding administrative complexity that may arise." 32B AM. JUR. 2D *Federal Courts* § 2014 (1996). One benefit may be that funding by the attorneys may allow more plaintiffs to bring their claims. *See* Erichson, *supra* note 56, at 131.

246. *See* discussion *infra* Parts II.C.1-3. *Kjolsrud* and *Bernardo* are prime examples of cases in which strategic conditions were unfavorable, leading to an unsatisfactory outcome. *See* Kjolsrud v. MKB Mgmt. Corp., 669 N.W.2d 82, 83-84, 87-88 (N.D. 2003) (holding plaintiff lacked standing); Bernardo v. Planned Parenthood Fed'n, 9 Cal. Rptr. 3d 197, 204, 211, 219-20, 235 (Ct. App. 2004) (finding that the challenged speech was protected by First Amendment). In both cases, plaintiffs lost at the trial and appellate level on issues that might have been addressed before filing the litigation. *See Kjolsrud*, 669 N.W.2d at 83-84, 87-88; *Bernardo*, 9 Cal. Rptr. 3d at 204, 211, 219-20, 235. If *Kjolsrud* had been brought by a different plaintiff and if *Bernardo* had used better scientific evidence of the ABC link and brought a claim that was not protected by the First Amendment, then the outcomes of these cases might have been different. *See Kjolsrud*, 669 N.W.2d at 83-84, 87-88; *Bernardo*, 9 Cal. Rptr. 3d at 204, 211, 219-20, 235.

*1. The State of Science*

As *Bernardo* demonstrates, a Big Abortion class action can only succeed if the science is settled.[247] By way of analogy, the 1964 Report stated conclusively that smoking caused lung cancer,[248] but it did not resolve issues of causation and damages for individual plaintiffs at subsequent trials.[249] Currently, the ABC link is too tenuous to support a class action, but the medical literature on psychological problems linked to abortion is stronger, if not yet complete enough, to warrant a class action.[250]

*2. The Development of Class Action Law*

Big Abortion litigants must monitor class action law for both judicial and legislative developments and adapt accordingly. When facing judicial opposition, Big Abortion litigants should remember how, during the third wave of Big Tobacco litigation, plaintiffs' lawyers found ways around unfavorable appellate rulings.[251] Plaintiffs' attorneys also must monitor legislative and judicial developments in class action law.[252] Republican proposals to cap medical malpractice tort damages are a recent example.[253] Paradoxically, because many Republican legislators are antiabortion, they may wish to modify or delay damage caps to allow Big Abortion litigation to proceed unimpeded.[254]

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247. *Bernardo*, 9 Cal. Rptr. 3d at 219, 219-21. When *Bernardo* was decided, the court declared "the claimed ABC link [is] a matter of genuine scientific debate," and consequently, plaintiff could not prevail. *Id.*

248. *See* PUB. HEALTH SERV., *supra* note 34, at 37.

249. *See, e.g.*, *Castano*, 84 F.3d at 737. For example, the *Castano* suit focused on the addictive nature of nicotine and the way tobacco companies manipulated nicotine content, facts that remained hidden from plaintiffs until the 1990s. *Id.*; *cf.* OFFICE ON SMOKING & HEALTH, *supra* note 42, at 17, 257-58.

250. *See* discussion *supra* Part I.B.2.

251. Erichson, *supra* note 56, at 123-24.

252. *See, e.g.*, Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified in scattered sections of 28 U.S.C.A. (West, WESTLAW through P.L. 109-57)) (reforming class action law); *see also* Donald W. Ricketts, *The Ebb and Flow of Class Action Lawsuits*, L.A. LAW., June 2004, at 12, 14-16 (discussing the development of class action law in California and the Class Action Fairness Act that passed the House in 2003 but never reached a vote in the Senate).

253. *See* Sarah Avery, *AMA's New Leader Likes Odds for Liability Reform*, NEWS & OBSERVER (Raleigh), Nov. 15, 2004, at 1B.

254. *See* Bill Broadway, *Religious Views Polarize Congress Moderates Lack Voice, Survey of Voting Finds*, J. GAZETTE (Fort Wayne, Ind.), Sept. 18, 2004, at 1C (counting eighty percent of Republican senators and representatives in 1996 among those opposed to abortion).

*3. The Political Climate*

Big Abortion litigants must also understand how politics can play a key role in litigation, as it has in Big Tobacco litigation.[255] Politics affect when and how the government becomes involved in a social issue, such as smoking or abortion.[256] Government involvement, for example, was one of the factors that turned the tide against Big Tobacco.[257] The wild card in the Big Abortion political process is the impending nomination of new Supreme Court justices, which could alter the constitutional protection currently afforded the right to abortion.[258]

## III. WHY MASS TORT CLASS ACTION LITIGATION SHOULD BE USED TO REFORM SOCIAL POLICY IN THE ABORTION CONTEXT

If one believes Big Abortion litigation is a possibility, the question that must still be answered is "why?" The "why" question has both a practical and a theoretical component. The practical question is "why *would* Big Abortion mass tort litigation reform social policy?" The theoretical question is "why *should* anti-abortion advocates turn to Big Abortion mass tort litigation to reform social policy?"

### *A. The Practical "Why?"*

*1. Government Involvement*

First, Big Abortion class action litigation may motivate more government involvement.[259] When Big Tobacco litigation took off in the 1990s, many states and the federal government became involved in creating reforms, including those in the states' MSA.[260] If Big Abortion class action litigation is successful, the federal government and many states, eager to pass legislation restricting abortion, might participate in

255. *See* Little, *supra* note 72, at 1166-71.

256. *See id.* In the third wave of Big Tobacco litigation, state attorneys general chose to pursue Medicaid recovery claims against the tobacco companies on behalf of their states. *See supra* notes 70-73 and accompanying text.

257. *See* Little, *supra* note 72, at 1166-71; *supra* notes 70-73 and accompanying text.

258. *See* Brian Kates, *Bet on Prez To Reshape High Court*, N.Y. DAILY NEWS, Nov. 4, 2004, at 19 (noting predictions that Bush's Supreme Court nomination or nominations will alter the balance of power, leading to "radical changes in such pivotal areas as . . . abortion rights"). Both abortion rights and antiabortion advocates have predicted how President Bush's re-election may change the composition of the Supreme Court. *See* Savage, *supra* note 93.

259. *See supra* notes 70-73, 254-57 and accompanying text.

260. *See supra* notes 70-73 and accompanying text. The states' MSA was instrumental in obtaining social policy reforms, such as restricting advertising and helping people to quit smoking. *See* OFFICE ON SMOKING & HEALTH, *supra* note 42, at 193.

shaping new reforms.[261] Government involvement might take the form of new restrictions on abortion or government lawsuits to recover Medicaid costs attributable to abortion, similar to Big Tobacco government lawsuits.[262]

*2. Settling for Money*

While plaintiffs' attorneys must enter class action litigation prepared to take the case to trial, the optimum result is a settlement due to the risks of losing at the trial and appellate levels.[263] Big Abortion settlements would be substantially smaller than those obtained in the Big Tobacco litigation, but could still reach into the millions of dollars.[264]

*3. Social Policy Reforms*

Arguably, to be effective, Big Abortion litigation should create social policy reform.[265] With Big Tobacco litigation, some reform came from concrete agreements in the MSA,[266] while the indirect effect of the massive settlements against the Big Six was to raise cigarette prices, thereby decreasing consumption of cigarettes.[267] Big Abortion litigation might have a similar double effect in (1) establishing concrete social

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261. *See, e.g.*, Partial-Birth Abortion Ban Act of 2003, 18 U.S.C.A. § 1531 (West Supp. 2004); Planned Parenthood v. Casey, 505 U.S. 833, 875-79 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). Governmental willingness to enact abortion restrictions and subsequently defend them against constitutional challenges makes it more likely that government would try to participate in new reforms. *Cf. supra* note 92.

262. *See supra* notes 70-73 and accompanying text. If Big Abortion class actions lead to verdicts based upon the negative health consequences of abortion, such as psychological harm, these civil litigation verdicts might provide government a new, stronger health rationale to restrict abortion, leading to Big Tobacco-like reforms such as tighter advertising laws and programs to provide alternatives to abortion. *See supra* notes 71-77 and accompanying text. Moreover, private Big Abortion class actions might motivate federal and state government to pursue their own recovery suits, as they did against Big Tobacco. *See supra* notes 70-73 and accompanying text.

263. *See* RHEINGOLD, *supra* note 181, § 14:1 ("Most tort cases settle. Most mass tort litigations (MTLs) also settle, probably at a higher rate than tort cases generally."). One of the lessons of Big Tobacco is that massive jury verdicts might not survive appellate review. *See* OFFICE ON SMOKING & HEALTH, *supra* note 33, at 239-41.

264. *Compare supra* notes 159, 164 and accompanying text *with supra* notes 66-69, 72, 174 and accompanying text. Although abortion services generate an estimated $487 million annually, Planned Parenthood's revenue of $766.6 million in 2003, exceeded that figure. *See supra* notes 159, 164 and accompanying text.

265. *See supra* notes 23-28.

266. *See supra* notes 72-73 and accompanying text.

267. *See supra* note 76 and accompanying text.

policy reforms[268] and (2) lowering demand for abortion through higher prices.[269]

First, if the parties agree to settle, the settlement terms should include better disclosure laws explaining the health consequences of abortion.[270] Another concession could be related to The Alan Guttmacher Institute, which claims it is independent[271] but is partially funded by Planned Parenthood and advocates for abortion.[272] While no evidence exists today, litigation might uncover parallels between The Alan Guttmacher Institute and the Council for Tobacco Research in terms of deception or failure to disclose information damaging to the abortion industry.[273]

Second, if a verdict or settlement sum is large enough, then, as with the Big Tobacco litigation, the average cost of an abortion could rise, which may result in fewer women obtaining abortions.[274] Part of the increase in cost may come from malpractice insurers, who might raise rates, forcing providers out of business, which would further limit the accessibility of abortion services.[275]

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268. *Compare* Stone, *supra* note 25, at 472-74 (describing attempts by legislators and antiabortion advocates to circumvent the constitutional right to an abortion by using tort law to restrict abortion rights), *and* Achilles, *supra* note 25, at 854-60, 880-83 (discussing the Louisiana state legislature's Act 825, which imposes tort liability on abortion providers, impeding the availability of abortion services and, thereby, the right to an abortion), *with supra* notes 75-77 and accompanying text.

269. *Compare* Finer & Henshaw, *supra* note 159, at 16 (explaining that "[b]esides distance from a provider, cost is the most obvious tangible barrier [to obtaining an abortion]"), *with supra* note 76. For many reasons, the majority of women pay out-of-pocket for abortion-related expenses. Finer & Henshaw, *supra* note 159, at 23. Only about twenty-six percent of abortions are covered by Medicaid or private insurance. *See id.* at 20 tbl.3. Big Tobacco raised prices to pay for its settlements, and this would be a logical method for Big Abortion to recoup settlement costs. *See* Tara Parker-Pope, *Major Tobacco Companies Increase Cigarette Prices by Five Cents a Pack*, WALL ST. J., May 12, 1998, at B12. However, the demand for cigarettes is highly resilient to price increases, and it is not clear whether abortion would follow this pattern or prove more or less responsive to price increases. *Compare id.*, *with* Finer & Henshaw, *supra* note 159, at 16.

270. For example, the settlement terms could require doctors to describe in detail the psychological harm that some women have faced after getting an abortion. *See supra* notes 106-14 and accompanying text.

271. *See* THE ALAN GUTTMACHER INSTITUTE, FREQUENTLY ASKED QUESTIONS, *at* http://www.agi-usa.org/about/faq.html (last visited November 19, 2004) (defending its own objectivity by stating "The Alan Guttmacher Institute neither accepts direct project support from profit-making organizations that might benefit from its findings nor allows specific funding agencies to influence its agenda").

272. *See supra* notes 166-67 and accompanying text.

273. *Compare supra* notes 166-67 and accompanying text, *with supra* notes 44-45, 71, 75 and accompanying text.

274. *See supra* notes 76, 269 and accompanying text.

275. *See* Marilyn Werber Serafini, *Still Counting Votes on Malpractice Caps*, 36 NAT'L J. 3450, 3450 (2004). Many Republican legislators and some doctors blame medical malpractice lawsuits for sharp increases in the cost of malpractice insurance. *Id.* Some

### *B. The Theoretical "Why?"*

As a matter of theory, the antiabortion movement should care about Big Abortion litigation. Judge Casey's opinion in *National Abortion Federation* highlights the current challenge the antiabortion movement faces.[276] As long as *Casey* is controlling precedent, a constitutional fence surrounds state and federal legislatures that try to restrict or prohibit abortion.[277] Meanwhile, abortion rights advocates will continue attempting to build that fence by vetting judges for their positions on abortion and fiercely opposing antiabortion nominees.[278] Thirty-one years after *Roe*, a reading of Judge Casey's opinion might convince one that the constitutional fence appears impenetrable.[279] Therefore, it is time for the antiabortion movement to consider how it might dig under the constitutional fence through civil, non-constitutional litigation.[280]

## IV. CONCLUSION

The Supreme Court's opinion in *Stenberg* compelled Judge Casey to find the 2003 Ban unconstitutional. The decision should not surprise antiabortion advocates, because it is consistent with a recurring cycle in the abortion debate. Legislatures enact statutes restricting or prohibiting certain types of abortion, and judges find the legislation unconstitutional. Now, the antiabortion movement must consider alternatives to reform social policy. Big Tobacco litigation provides one of these alternatives: mass tort class action litigation. Although some aspects of Big Abortion litigation need further development, particularly the medical science, if Big Tobacco litigation offers a glimmer of hope to antiabortion advocates, it is that soon it may be time to take on Big Abortion.

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Republicans further argue that the rising costs are to blame for a physician shortages. *Id.* Meanwhile, some Democrats blame the insurance industry. *Id.* The Alan Guttmacher Institute explains that "[a]lthough it is difficult to measure the impact of the accessibility of abortion services on abortion incidence, lack of access likely prevents some women from terminating unintended pregnancies." Finer & Henshaw, *supra* 159, at 16.

276. *See* Nat'l Abortion Fed'n v. Ashcroft, 330 F. Supp. 2d 436, 439, 492-93 (S.D.N.Y. 2004).

277. *See supra* notes 1-24 and accompanying text.

278. *See, e.g.*, Evelyn Nieves, *Abortion Rights Said To Be at a Crossroads*, WASH. POST, Nov. 19, 2004, at A27 (predicting an abortion rights "battle" over Supreme Court nominations).

279. *See Nat'l Abortion Fed'n*, 330 F. Supp. 2d at 492.

280. *See supra* note 25.