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APPORTIONING DUE PROCESS: PRESERVING THE RIGHT TO AFFORDABLE JUSTICE

ELIZABETH J. CABRASER[†]

INTRODUCTION

This country was founded upon an ideal of due process accorded to everyone, in courts accessible to all, free of political and economic influence, and dispensing affordable justice with reasonable efficiency. Our nation's founders had the audacity to proclaim themselves possessors of inalienable rights, and founded their society upon a civil contract, enforceable in its courts. Access to justice was not a luxury to be enjoyed by a fortunate few; it was part and parcel of citizenship. The Declaration of Independence defines the essential terms of this contract:

We hold these Truths to be self-evident, that all Men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the Pursuit of Happiness—That to secure these Rights, Governments are instituted among Men, deriving their just Powers from the Consent of the Governed, that whenever any Form of Government becomes destructive of these Ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its Foundation on such Principles, and organizing its Powers in such Form, as to them shall seem most likely to effect their Safety and Happiness.¹

The language of the Declaration of Independence is not that of a mere political manifesto, and it is not unique to the Declaration itself. The notion that men form governments through a reciprocal and symbiotic system of rights and responsibilities, shared among equals, is, as the foundation of civil governance, mirrored in the earliest constitutions of the thirteen rebellious states. The profoundly self-conscious creation of these American States was expressly contractual, in nature, intent, and

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1. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

content. As the 1780 Constitution of Massachusetts states in its preamble:

The body-politic is formed by a voluntary association of individuals; it is a social compact, by which the whole people covenants with each citizen, and each citizen with the whole people, that all shall be governed by certain laws for the common good. It is the duty of the people, therefore, in framing a Constitution of Government, to provide for an equitable mode of making laws, as well as for an impartial interpretation and a faithful execution of them, that every man may, at all times, find his security in them.²

The people of the newly-minted Commonwealth of Massachusetts likewise, by a written compact, transformed a colonial enclave into a contract-based sovereign state. The Massachusetts creation-by-compact narrative is explicit: they “deliberately and peaceably, without fraud, violence, or surprise, [entered] into an original, explicit, and solemn compact with each other; [and formed] a new Constitution of Civil Government for [them]selves and posterity”³

The state-creating compacts enacted by the thirteen colonies were styled as contracts among persons with inherently equal bargaining power, and hence, equal rights. The state, through its institutions—notably the Courts—served the people as agents to enforce their civil contractual rights. The Virginia Declaration of Rights (1776) states it at the outset:

Section 1. That all men are by nature equally free and independent, and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety.

Sec[ti]on 2. That all power is vested in, and consequently derived from, the people; that magistrates are their trustees and servants, and at all times amenable to them.⁴

This nation was not, upon its founding, a paradise now lost. The social contract, and the due process at law that served as its enforcement mechanism, was formed among and existed for a small segment of socie-

2. MASS. CONST. of 1780, pmbl., reprinted in THE CONSTITUTIONS OF THE SEVERAL INDEPENDENT STATES OF AMERICA 36, 36–37 (William Jackson ed., 1783) [hereinafter CONSTITUTIONS]. My favorite tattered, well-thumbed old law book is this compendium of the thirteen original state constitutions, the Declaration of Independence, and the Articles of Confederation, published in London by J. Stockdale, Piccadilly, in 1783. These passages, and the passages of the other eighteenth century state constitutions quoted in this article, are from the original versions, as published in CONSTITUTIONS, *supra*.

3. *Id.*

4. THE VIRGINIA DECLARATION OF RIGHTS §§ 1–2 (Va. 1776), reprinted in KERMIT L. HALL ET AL., AMERICAN LEGAL HISTORY 92, 92 (3d ed. 2005).

ty, not its whole. The egalitarian concept of due process apportioned equitably among all is an ideal we have not yet reached; it is not simply an earlier state of social grace to be restored. Not everyone was acknowledged to be equal. Not everyone was included in the social contract.

For example, the above-quoted Virginia Declaration of Rights, which was drafted by George Mason and served as a prototype for many of the bills of rights sections in subsequently enacted state constitutions, illustrates the contradictions inherent in the contractual creation of a society of equals when many of its would-be citizens owned, and wished to keep, human slaves. The political solution was the insertion of the phrase “when they enter into a state of society,” which supposedly prevented the language of freedom and equality from being applied to slaves.⁵ The problem of women was resolved simply by limiting those who were “by nature equally free and independent” to those who were also “men.”⁶ It would take later amendments to the federal Constitution to admit women and former slaves, at least in theory, into the social contract. Yet progress toward inclusion has been made, and the courts have been the notable agents of this progression.

The landmark civil rights legislation of the 1960s was itself preceded by momentous judicial decisions at the federal appellate and Supreme Court levels, of which *Brown v. Board of Education* is the most famous illustration.⁷ The courts thus undertook the difficult, unpopular, and in retrospect heroic task of reminding society of the necessary inclusivity of the contract by which its constituents’ civil, legal, and procedural rights were protected and enforced.

It is a paradox—or at least a matter of irony—that as time has passed and as more categories of persons were admitted into the social contract, the price tag of due process in civil litigation has increased exponentially beyond the most extravagant imaginings of the founders. Civil litigation has been priced beyond the reach of most Americans, regardless of the ameliorating effects of the contingent fee system, and the presumed economies of scale of the class action mechanism. Due process has been priced as if it were a scarce resource, which in some respects it is, being limited by the number of judges and courtrooms available to hear disputes and the funds taxpayers (or their representatives) are willing to funnel into the judicial system. But due process itself is not inescapably expensive; it is, rather, the efforts of defendants in civil litigation to resist enforcement of the social contract, such as by deploying procedural devices as weapons in a war of attrition, that transforms procedural mechanisms, such as discovery, depositions, and pre-trial motions into anti-due process devices. The ability of a few citizens,

5. *Id.* § 1, reprinted in HALL ET AL., *supra* note 4, at 92.

6. *Id.*, reprinted in HALL ET AL., *supra* note 4, at 92.

7. See *Brown v. Bd. of Educ. of Topeka, Kan.*, 349 U.S. 294 (1955).

notably corporate citizens, to afford due process at any cost, and to insist upon all of the process they can afford, has so unbalanced the civil litigation process that, in the experience of many practitioners, meritorious claims with damages of less than \$1 million are economically unfeasible to prosecute.

The category of claims traditionally considered by courts to be too large or too dissimilar to be grouped in a class action, yet too small to merit individual litigation, is an expanding civil justice wasteland lacking due process. The price tag has simply become too high. Thus, many violations of the social contract go unredressed, and wrongdoers face no predictable penalties or consequences for their breaches of the social contract. In many such instances, paradoxically, it is those economically (and politically) powerful corporate citizens that can best afford the now-extravagant cost of due process that are least likely to need it, because due process prices have placed them above the law.

Reducing the cost of civil litigation is always desirable, if only to reduce the frustration and dissatisfaction that judges, lawyers, and sophisticated litigants experience when faced with litigation practices that are inefficient, obsolete, unnecessary, or protracted. Cost reduction has become not merely desirable, but necessary, because to many parties such experiences are beyond mere annoyance: they have driven them from the system completely. The litigation system was conceived as a crucible of direct democracy, in which citizens would bring their disputes before a judge, and a jury of their peers for adjudication in the context of community values. In the late eighteenth century, this was, in many respects, a true “do-it-yourself” system: credentialed lawyers were not necessary (and were frequently unavailable), and many lawsuits could be filed and tried within the same week—or even the same day. Change is inevitable, and that system likely could not exist today simply because most individuals do not possess the time or resources to maintain complex litigation at the trial and appellate levels against the large and well-capitalized corporate entities with which the vast majority of commercial, employment, and consumer transactions occur, and from which such litigation arises. Face-to-face transactions among members of the same community can feasibly be handled either informally, or in a small claims, non-lawyer assisted litigation system. The era when commercial and community life was characterized by such personal transactions has, however, long faded from the collective memory.

The restoration of due process as an affordable reality, rather than an unattainable luxury, should nonetheless be a goal toward which our judicial system continues to aspire. The more citizens are able to utilize an institution, and the more fairly and efficiently it is perceived to serve them, the higher repute it will enjoy. Legal professionals concerned about disrespect for the law, derision toward lawyers, and the alienation that pervades a society that believes wealth buys justice would do well to

make good on the promise of access by lowering the cost, and equalizing the distribution, of due process in civil litigation.

I. IN THE BEGINNING: DUE PROCESS AS A REVOLUTIONARY IDEAL

The United States' war for independence from Great Britain was motivated, or at least justified, by deep dissatisfaction with lack of access to a fair, affordable, and responsive justice system. The Americans of the late eighteenth century were separated by geography, lack of influence, and by relative lack of wealth, from the basic institutions of justice: courts, judges, and juries. Judges were perceived to owe their allegiance to the sovereign, not to justice itself. There were few local courts. The once venerable jury system had fallen into disrepute and disuse, and the sovereign was suspicious of juries.

Prominent among the complaints adduced against the King of Great Britain in the Declaration of Independence are "Injuries and Usurpations"⁸ relating to the justice system:

He has obstructed the Administration of Justice, by refusing his Assent to Laws for establishing Judiciary Powers.

He has made Judges dependent on his Will alone, for the Tenure of their Offices, and the Amount and Payment of their Salaries.

....

For depriving us, in many Cases, of the Benefits of Trial by Jury.⁹

As the War for Independence dragged on, the thirteen original American states declared a civil revolution as well: they each issued constitutions, forerunners of the federal constitution, which declared the terms of the social contract that bound each state's citizens together. In each, the ideals of access to justice, and the essential role of the jury trial in accomplishing justice, were explicit.¹⁰

The Delaware Constitution, for example, defines the social contract in article I in these terms: "That all government of right originates from the people, is founded in compact only, and instituted solely for the good of the whole."¹¹ Article XII of the Delaware Constitution implements this compact by declaring:

That every freeman, for every injury done him in his goods, lands, or person, by any other person, ought to have remedy by the course of

8. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

9. *Id.* paras. 10–11, 20.

10. See generally CONSTITUTIONS, *supra* note 2, at 30–344. A reading of these constitutions, in sequence, reveals recurring language, often uniform, reiterating these essential common points. See, e.g., *id.* at 215.

11. DEL. CONST. of 1776, art. I, reprinted in CONSTITUTIONS, *supra* note 2, at 212, 212.

the law of the land, and ought to have justice and right for the injury done to him, freely without sale, fully without any denial, and speedily without delay, according to the law of the land.¹²

This due process formula is echoed in the cornerstone of our operative Federal Rules of Civil Procedure, Rule 1, which declares that the federal rules "should be construed and administered to secure the just, speedy, and inexpensive determination of every action and proceeding."¹³ Article XIII defines the trial as the centerpiece of due process, as it declares "[t]hat trial by jury of facts where they arise, is one of the greatest securities of the lives, liberties, and estates of the people."¹⁴

As the Constitution of Massachusetts states in its article VII: "Government is instituted for the common good; for the protection, safety, prosperity, and happiness of the people; and not for the profit, honour, or private interest of any one man, family, or class of men"¹⁵ To enforce this system of reciprocal rights, article XI provides:

Every subject of the Commonwealth ought to find a certain remedy, by having recourse to the laws for all injuries or wrongs which he may receive in his person, property or character. He ought to obtain right and justice freely, and without being obliged to purchase it; compleatly [sic], and without any denial; promptly, and without delay; conformably to the laws.¹⁶

As article XXIX explicates the rationale for the primacy of the rights of recourse to the laws, and of access to justice:

It is essential to the preservation of the rights of every individual, his life, liberty, property, and character, that there be an impartial interpretation to the laws, and administration of justice. It is the right of every citizen to be tried by Judges as free, impartial, and independent, as the lot of humanity will admit. It is, therefore, not only the best policy, but for the security of the rights of the people, and of every citizen, that the Judges of the supreme judicial court should hold their offices as long as they behave themselves well; and that they should have honourable salaries, ascertained and established by standing laws.¹⁷

The New Jersey Constitution of 1776, in its preamble, likewise expresses the concept of sovereignty and the source of law, as "by compact derived from the people, and held of them for the common interest of the whole society, allegiance and protection are, in the nature of things, reci-

12. *Id.* art. XII, reprinted in CONSTITUTIONS, *supra* note 2, at 215.

13. FED. R. CIV. P. 1.

14. DEL. CONST. of 1776, art. XIII, reprinted in CONSTITUTIONS, *supra* note 2, at 212, 215.

15. MASS. CONST. of 1780, art. VII, reprinted in CONSTITUTIONS, *supra* note 2, at 38, 41-42.

16. *Id.* art. XI, reprinted in CONSTITUTIONS, *supra* note 2, at 43.

17. *Id.* art. XXIX, reprinted in CONSTITUTIONS, *supra* note 2, at 48-49.

procal ties, each equally depending upon the other, and liable to be dissolved by the other's being refused or withdrawn."¹⁸ To enforce it, article XXII declares "that the inestimable right of trial by jury shall remain confirmed, as a part of the law of this colony, without repeal for ever"¹⁹ The Constitution of Pennsylvania, article XI, is in accord: "[I]n controversies respecting property, and in suits between man and man, the parties have a right to trial by jury, which ought to be held sacred."²⁰

As the North Carolina Constitution phrases it in article XIV of its Declaration of Rights: "[I]n all controversies at law respecting property, the ancient mode of trial by jury is one of the best securities of the rights of the people, and ought to remain sacred and inviolable."²¹

We know that the relationships of freedom and property these Constitutions declared, and strove to protect, were far from perfect: not every natural person was or could be a property holder, a citizen, or even a full human being. Yet in some respects, the potential participants in civil litigation, with its guarantee of jury trial, were more equally situated than the range of potential litigants today. They most likely belonged to the same community, as means of transportation and communication had not yet enabled what we are familiar with as interstate and international commerce; and it was to be several generations before the modern limited liability corporation, as we know it now, would evolve. Litigation was local, among members of the same community. The function of "lawyer" was not yet its own more-than-fulltime profession. A complete law library, anchored by the works of Sir William Blackstone and Lord Coke, Justinian's *Codex*, and the political documents of the new nation, were able to fit upon one shelf.²²

In a society without radio, television, institutionalized performing arts, or the Internet, the courtroom was a place of news and entertainment for the community. Trials were exercises in rhetoric, as much or more

18. N.J. CONST. of 1776, pmbl., reprinted in CONSTITUTIONS, *supra* note 2, at 166, 166.

19. *Id.* art. XXII, reprinted in CONSTITUTIONS, *supra* note 2, at 177.

20. PA. CONST. of 1776, art. XI, reprinted in CONSTITUTIONS, *supra* note 2, at 182, 186. In other respects, the Pennsylvania Constitution of 1776 was less than ideal. "The constitution acknowledged slavery and did nothing about it, and limited officeholding to men who acknowledged God and the 'scriptures of the Old and New Testament to be given by Divine inspiration.'" HALL ET AL., *supra* note 4, at 94. As commentators have noted, this last provision, if enforced, "would have prevented not only Jews but also deists, like Benjamin Franklin and Tom Paine, from holding office." *Id.* at 95. This Constitution, unlike those of the other states, which long endured, was annulled in 1790 in favor of one with a more secular orientation. *Id.*

21. N.C. CONST. of 1776, art. XIV, reprinted in CONSTITUTIONS, *supra* note 2, at 291, 293.

22. It is one of the many ironies of American law and legal history that Sir William Blackstone's *Commentaries on the Laws of England* served as the cornerstone of American law and American legal education for decades, although Blackstone was an avowed British Imperialist. See HALL ET AL., *supra* note 4, at 84. He looked down upon the American colonists as subjects, not citizens of the Empire, and believed that they had no right to enjoy the common law of England which "has no allowance or authority there." 1 WILLIAM BLACKSTONE, COMMENTARIES *108, reprinted in HALL ET AL., *supra* note 4, at 84. Rather, Blackstone considered that America was a "distinct (though dependent) dominion[]" subject to parliamentary control. *Id.*

than demonstrations of evidence. It is not overly romantic to imagine the civil litigation process of those times as readily accessible, relatively cheap, responsive, efficient, and even entertaining.²³

We cannot realistically return to—or realize—the ideal of the local trial. We no longer live, work, produce, and conduct commerce within geographically circumscribed boundaries. Goods and services are marketed and sold around the world. The divide between the average citizen and the modern multinational corporation is a nearly incalculable economic gulf, a disparity between “citizens” that would have been incomprehensible to our founders. Those who produce and those who consume goods are not known to, or neighbors of, each other. The idea that they are co-equal parties to a social contract of reciprocal rights and responsibilities might seem quaintly cute or cynically cruel, if brought to the attention of a modern individual consumer or corporate CEO. Yet that contract remains at the heart of our justice system, and civil litigation retains its enforcing role.

It is due process that assures that disputes can be brought to court at all, and that they will be resolved fairly on the merits, rather than upon the relative power or wealth of each side. Much of what we have come to accept as normal and appropriate in civil litigation works against due process, and interferes with its fair allocation among litigants. The strategic insistence by a corporate defendant upon a separate jury trial in each of several thousand cases involving the same product may invoke, as its justification, the Seventh Amendment (and the above-noted American reverence for the jury trial) but may in reality consign the majority of such claims to no trial at all, at least in the claimants’ lifetimes. The courts have long decried scenarios in which the plaintiffs’ insistence upon individualized adjudications of multitudinous claims might impoverish the defendant before all cases could be decided, thus relegating the litigation process to “an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest.”²⁴ As one district court noted, after doing the inexorable math in a relatively small mass tort class action involving 10,000 plaintiffs:

23. Litigation, by which the public understands “trials,” is still considered high entertainment today. Broadcasts of actual trials, and dramatized imaginary ones, are favorite television fare. Of course, the fictitious trials with which the public is most enthralled are conducted and concluded in the space of an hour, including commercial breaks: a level of concentrated efficiency to which even the most intense civil justice reform advocates do not aspire. Although, a more reasonable accommodation to the cost of modern trial time, and the abbreviation of modern attention spans, is the utilization of the limited-time trial in which each side is given a specified number of hours (e.g., twenty-four or forty-eight) to present its case. “The burdens of an unduly long trial on jurors and on the public’s access to the court may . . . require setting limits during trial.” *MANUAL FOR COMPLEX LITIGATION (FOURTH)* § 12.35 (2004); *see also* *Gen. Signal Corp. v. MCI Telecomm. Corp.*, 66 F.3d 1500, 1507–10 (9th Cir. 1995).

24. *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977).

Pragmatically, the jury could not hear testimony of nearly 10,000 plaintiffs in this action within any practicable and reasonable time, to do justice to the class members. . . . Here, individual trials for each of the 9,541 plaintiffs would take decades. Most of that time would be wasted since the nature of the injuries would be similar, if not identical, [and] the testimony would be largely duplicative.²⁵

It may seem crass to discuss due process in not only pragmatic, but specifically monetary terms, but if we are to be honest about barriers to the optional functioning of our civil justice system, and if we are to achieve any true civil justice reform, money must be mentioned. The essence of due process is proportionality: in the expenditure of time and money, the issues and amounts at stake in a particular controversy, as well as the amount of process each side—and the system itself—can afford to devote to the dispute.²⁶ Every procedure has a price tag, yet instead of paying the most attention to ameliorating that price—or allocating and amortizing it fairly among the litigants—we have instead come to accept all too often that due process is a commodity like any other. It is there for the buying, by anyone with the means to do so, and anyone who can afford it may have as much of it as desired. Those who cannot afford it must do without. Thus, the wealthy litigant may, and often does, purchase delay at the expense of, and ultimately prejudice to, a less wealthy opponent.

Courts do not often set limits on the amount each side may spend in the civil litigation process, presumably believing that such limitations offend due process. However, failure to do so may simply encourage a system in which the wealthiest party wins—via attrition or by default—while due process is both dishonored and denied.

II. DUE PROCESS STICKER SHOCK

The Seventh Amendment to our Constitution provides for jury trials “[i]n Suits at common law, where the value in controversy shall exceed twenty dollars.”²⁷ A twenty-dollar jury trial? The concept seems absurd, notwithstanding that when the Bill of Rights was signed, twenty dollars bought more than lunch. In 1791, the year that the ten Amendments constituting the Bill of Rights were ratified, twenty dollars represented the equivalent of \$473.19 (using the Consumer Price Index), \$454.69 (using the Gross Domestic Product (“GDP”) deflator), or, utilizing a more sophisticated relative value calculus, either \$7,958.14 (using the unskilled

25. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1462, 1467 (D. Haw. 1995), *aff'd sub nom.* *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996).

26. *See Mathews v. Eldridge*, 424 U.S. 319, 334–36 (1976); *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

27. U.S. CONST. amend. VII.

wage) or even \$18,849.64 (using the nominal GDP per capita).²⁸ Under any calculation, this is far under the operative \$75,000 jurisdictional threshold for entry into the federal courts under diversity jurisdiction.²⁹

Whether the \$20 claim that entitles the aggrieved plaintiff to a jury trial is actually a \$400 claim, \$7,000 claim, or \$19,000 claim, it is a claim that cannot affordably be litigated under current conditions. A right too expensive to exercise is no right at all. Due process has been priced beyond the means of most claims of most people. Civil litigation has become the province of the elite, and neither the legal profession nor the judiciary that polices it have done enough to concern themselves with, much less control, the due process sticker shock that confronts the average litigant.

Sometime in the early to mid-nineteenth century, virtually unnoticed judicially, corporations happened. The modern limited liability corporation was born and somehow became a full-fledged citizen, a legal (albeit non-human) person with full legal rights by the courts, as a matter beyond peradventure, long before slaves were freed or women achieved constitutional recognition.³⁰ The legal personhood of corporations has gone largely unquestioned for over 100 years. The limited liability corporation was an unsurpassed vehicle of capital accumulation, and the engine of our spectacular national economic growth. At the same time, however, the justice system, in according equal rights to entities which were, by definition, unequal in status (with far greater economic power and far more diffuse responsibility) than the human citizens who faced them in court, created a functional due process problem that recurs in virtually every modern civil damages case.

It has been so long since this startling disparity was considered remarkable (or indeed has even been remarked upon) that, when newly-appointed Justice Sotomayor commented in the course of a recent oral argument before the Supreme Court that while judges “created corpora-

28. These calculations were derived from MeasuringWorth—a service for calculating relative worth over time. See Samuel H. Williamson, MeasuringWorth, *Six Ways to Compute the Relative Value of a U.S. Dollar Amount, 1774 to Present* (2009), <http://www.measuringworth.com/uscompare> (providing a simple online calculator and a thorough explanation of the indicators used).

29. 28 U.S.C. § 1332(a) (2006). In practical terms, § 1332 as amended by the Class Action Fairness Act of 2005 provides federal diversity jurisdiction in cases brought as class actions “in which the matter in controversy exceeds the sum or value of \$5,000,000, exclusive of interest and costs” enabling, through class action aggregation, many claims of small individual value to be combined into a single proceeding that is economically feasible to prosecute. *Id.* § 1332(d)(2). However, the process of class certification is itself an expensive and increasingly difficult process, and the costs of class certification and the requisite class notice alone frequently range in the millions of dollars. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.133 (2004).

30. See *Spear v. Grant*, 16 Mass. (16 Tyng) 9, 14–16 (1819); *Vose v. Grant*, 15 Mass. (15 Tyng) 505, 520–22 (1819). Among the earliest cases, *Vose v. Grant* and *Spear v. Grant* endorse the principle that stockholders are not personally liable for the actions of their company. *Spear*, 16 Mass. at 15; *Vose*, 15 Mass. at 523. Instead, the company was the responsible “individual”: “That individual is a corporation; a creature of the legislature. It may die, or become insolvent, like any other person.” *Vose*, 15 Mass. at 520.

tions as persons, gave birth to corporations as persons . . . [t]here could be an argument made that that was the court's error to start with . . . [im-buing] a creature of state law with human characteristics," a major furor ensued.³¹

Whenever, precisely, it first emerged, corporate personhood was well entrenched by 1886 when, in *Santa Clara County v. Southern Pacific Railroad Co.*,³² the Supreme Court reporter quoted Chief Justice Waite as telling the attorneys to skip their arguments over whether the Fourteenth Amendment's equal protection clause applied to corporations, because "[w]e are all of opinion that it does."³³ More explicitly, in 1928, the Supreme Court struck down a Pennsylvania tax on transportation corporations because individual taxi cab drivers were exempt.³⁴ The Court, through the words of Justice Butler, wrote that corporations are entitled to "the same protection of equal laws that natural persons" enjoy.³⁵

It is far too late, and likely far too unwise, to disenfranchise limited liability corporations. By the same token, it is late, but not too late, to consider the economic reality of disparity of wealth, power, and influence between corporate persons and natural persons, and determine whether ignoring that disparity in the civil litigation context violates due process. The framers of our original state and federal Constitutions might well have considered the courtroom the last place where wealth and power ought to be allowed to throw its weight around. The disparity of wealth has allowed, and the courts have passively-aggressively enabled, some litigants to improperly add the burden of cost and delay to the burden of proof that plaintiffs must carry to prevail in court. Civil litigation, as practiced today, cannot be obtained "freely, and without being obliged to purchase it; compleatly [sic], and without any denial; promptly, and without delay; conformably to the laws."³⁶

III. HYDRAULIC PRESSURES, ENTREPRENEURS, AND CLASS ACTION WARS: DUE PROCESS GETS POLITICAL (AGAIN)

There is a long-established due process solution for the smallest of claims, including those worth \$20 (or less) in 2010 dollars: the class ac-

31. Jess Bravin, *Sotomayor Issues Challenge to a Century of Corporate Law*, WALL ST. J., Sept. 17, 2009, at A19, available at <http://online.wsj.com/article/SB125314088285517643.html> (second and third alterations in original) (internal quotation marks omitted) (quoting Sotomayor, J.); see also John Byrne, *Quietly, Sotomayor Turns on Corporations*, RAW STORY, Sept. 18, 2009, <http://RawStory.com/08/news/2009/09/18/quietly-Sotomayor-turns-on-corporations>. The case in which this comment was made has now been decoded. See *Citizens United v. FEC*, 130 S. Ct. 876 (2010). Justice Sotomayor joined in Part IV of the majority opinion, and with Justices Ginsburg and Breyer, joined Justice Stevens's opinion concurring in part and dissenting in part.

32. 118 U.S. 394 (1886).

33. *Id.* at 396.

34. *Quaker City Cab Co. v. Pennsylvania*, 277 U.S. 389, 402 (1928).

35. *Id.* at 400.

36. MASS. CONST. of 1780, art. XI, reprinted in CONSTITUTIONS, *supra* note 2, at 38, 43.

tion. The class action has had a long, venerable, sometimes controversial, and recently high-profile history. It is extolled, or at least endured, when it is utilized in certain contexts, such as the enforcement of civil rights, but frequently maligned and attacked when its goal is compensatory (or to deter) and its targets are private corporations. The Class Action Fairness Act of 2005 (“CAFA”),³⁷ for example, which expanded federal diversity jurisdiction to include most class actions, was promoted by business and manufacturers’ groups in part to channel state court class action litigation into the federal courts where class certification standards were supposedly stricter, in order to reduce the number of class actions and to discourage their filing.³⁸

Despite the class action—and plaintiffs’ lawyer—bashing that attended the passage of CAFA, the Act itself, albeit plagued by internal inconsistencies and undefined terms, announced benign goals. As the CAFA preamble states, “Class action lawsuits are an important and valuable part of the legal system when they permit the fair and efficient resolution of legitimate claims of numerous parties”³⁹

CAFA’s paradoxes are legion. Economies of scale, efficiencies of process, and increased speed and reduced cost in bringing justice are among its explicit, and commendable, purposes. As Section 2(b) of CAFA states:

The purposes of this Act are to: (1) assure fair and prompt recoveries for class members with legitimate claims; (2) restore the intent of the framers of the United States Constitution by providing for Federal court consideration of interstate cases of national importance under diversity jurisdiction; and (3) benefit society by encouraging innovation and lowering consumer prices.⁴⁰

Yet the task of assuring such “fair and prompt recoveries” is directed by CAFA itself to a relatively small cadre of jurists, composed of fewer than 1,000 members of the federal judiciary, which is a far smaller population than the combined nationwide corps of state and federal judges that presided over class actions in the pre-CAFA era. In literally “making a federal case” out of the vast majority of class actions, Congress intentionally or otherwise complicated and marked up the price tag on the delivery of “fair and prompt recovery to class members with legitimate claims” by forcing class actions into competition for the scarce

37. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. 1711 *et seq.* (2006)).

38. See generally Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Richard L. Marcus, *Assessing CAFA’s Stated Jurisdictional Policy*, 156 U. PA. L. REV. 1765 (2008).

39. Class Action Fairness Act § 2(a)(1).

40. *Id.* § 2(b), quoted in *Morgan v. Gay*, 471 F.3d 469, 473 n.1 (3d Cir. 2006).

judicial resources of a well-respected, but under-populated, federal judicial community.

Whatever Congress has done, purposefully or inadvertently, to help or hinder the prosecution of class actions, class actions retain a profound legitimacy of societal purpose, at least as viewed by the nation's highest courts. Nearly forty years ago, in *Vasquez v. Superior Court of San Joaquin County*,⁴¹ the California Supreme Court recognized the need to extend the benefit of the class action—which had been successfully deployed on behalf of investors—to average consumers. The judicial purpose was not simply to enable compensation for such claims (which were far too small to be prosecuted singly) but to empower consumers to enforce the social contract against increasingly powerful sellers of mass-produced, mass-marketed consumer goods and services. The *Vasquez* court was explicit on this point. It reaffirmed the societal stake in collective prosecution of similar claims to preserve the civil litigation process as an effective social contract enforcement mechanism, and cautioned that insistence on one-on-one litigation could fail in this essential enforcement function:

If each is left to assert his rights alone if and when he can, there will at best be a random and fragmentary enforcement, if there is any at all. This result is not only unfortunate in the particular case, but it will operate seriously to impair the deterrent effect of the sanctions which underlie much contemporary law.⁴²

The United States Supreme Court has articulated a similar policy with respect to class actions brought under Federal Rule 23:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.⁴³

41. 484 P.2d 964 (Cal. 1971).

42. *Id.* at 968 (internal quotation marks omitted) (quoting Harry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. Chi. L. Rev. 684, 686 (1941)). The principles of *Vasquez* have, lately, enjoyed a renaissance in the California courts, which have invoked them in the context of employee rights class certification decisions. *See, e.g.*, *Gentry v. Superior Court of L.A. County*, 165 P.3d 556, 561 (Cal. 2007); *Bell v. Farmers Ins. Exchange*, 9 Cal. Rptr. 3d 544, 565–66 (Ct. App. 2004).

43. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (internal quotation marks omitted) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)); *accord Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 813 (1985) (stating that class actions facilitate “an aggregation of small individual claims, where a large number of claims are required to make it economical to bring suit. The plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he would not file suit individually” (citation omitted)).

Courts have sometimes viewed class actions as *too* powerful, aggregating claims to such an extent that the whole of the class is more threatening to the defendant than the sum of its parts, and potentially more threatening than the merits of the class members' claims may warrant. The idea is that a certified class may incite more fear in the heart of even the wealthiest and most powerful defendant than would the same claims, with the same merits, left uncertified. Rather than being seen simply as the consequence of an unaffordable civil justice system, in which small claims (good, bad, or indifferent) have been priced out of the system and can only be brought in the aggregate, this perspective suggests that such disenfranchisement is the desirable, or at least the natural state, and that class members ought to be returned to it through denial of class certification. Then, at least, they pose no threat to corporate conduct or the status quo.

The idea that class actions are undesirable because they are effective, and that they can and should be denied class certification to protect defendants, found its first important, and most elegant, expression in the opinion of Judge Richard Posner in the *Rhone-Poulenc* case.⁴⁴ Judge Posner originated the notion (defendant did not brief it) that class certification of the personal injury hemophiliac claims at issue would place the defendant "under intense pressure to settle" lest it be "hurl[ed] . . . into bankruptcy."⁴⁵ As an alternative, Judge Posner recommended "a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions" because "a sample of trials makes more sense than entrusting the fate of an industry to a single jury."⁴⁶ Whatever its provenance, the "intense pressure to settle" of class certification became accepted as fact among the federal judiciary, and went from "fact" to factor in determining whether to grant class certification: "One sound basis for granting jurisdiction under Rule 23(f) [to implement interlocutory appellate review of a district court class certification decision] is . . . the circumstance that the class certification places inordinate or hydraulic pressure on defendants to settle, avoiding the risk, however small, of potentially ruinous liability."⁴⁷

44. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995).

45. *Id.* at 1298, 1300.

46. *Id.* at 1299, 1304. As a result, in part, of the influence of *Rhone-Poulenc*, judges faced with the challenge of effective case management in subsequent mass torts have developed, and refined, the system of "bellwether trials" which, indeed, selects, on some systematic basis, a sample of cases for multiple trials, whose results are intended to inform the parties on issues of liability and damages, so as to facilitate an ultimate settlement (class or non-class) without the predicate of trial-purposes class certification. The most comprehensive discussion of the bellwether trial concept, in actual practice, is Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008). This article's lead author is Hon. Eldon E. Fallon, an experienced federal judge who presided over, *inter alia*, the *Propulsid* and *Vioux* multidistrict litigations which, as described in the article, successfully employed the bellwether technique. *Id.* at 2332.

47. *Hevesi v. Citigroup Inc.*, 366 F.3d 70, 80 (2d Cir. 2004) (second alteration in original) (internal quotation marks omitted) (quoting *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting)).

Other courts have pragmatically (or cynically) noted that “[t]he effect of certification on parties’ leverage in settlement negotiations is a fact of life for class action litigants . . . [and] cannot defeat an otherwise proper certification.”⁴⁸ Such courts seem to have accepted the validity of the *Rhone-Poulenc* premise, including the “hydraulic pressure to settle” anti-certification factor as one of the variables to be weighted in determining whether Rule 23 class certification criteria are met.

As had been judicially noted, however, hydraulic pressures work both ways: “while affirming certification may induce some defendants to settle, overturning certification may create similar ‘hydraulic’ pressures on the plaintiffs, causing them to either settle or—more likely—abandon their claims altogether.”⁴⁹ As the Eleventh Circuit noted in *Klay v. Humana*, “Mere pressure to settle is not a sufficient reason for a court to avoid certifying an otherwise meritorious class action suit. . . . [N]o matter how strong the economic pressure to settle, a Rule 23(f) application, in order to succeed, also must demonstrate some significant weakness in the class certification decision.”⁵⁰ The *Klay* court addressed, with skepticism as to its *bona fides*, the defendants’ plea for deliverance from the classed mass of enraged doctor-plaintiffs in these words:

We have nothing but the defendants’ conclusory, self-serving speculations to support their claim that this trial could devastate the managed care industry. . . . [I]f their fears are truly justified, the defendants can blame no one but themselves. It would be unjust to allow corporations to engage in rampant and systematic wrongdoing, and then allow them to avoid a class action because the consequences of being held accountable for their misdeeds would be financially ruinous.⁵¹

The *Klay* decision is impressive in its recognition that defendants’ resistance to an aggregate format for the adjudication of the claims against them, although couched in the language of due process protection, was in reality a plea for protection from due process. This was an arrogant exercise in special pleading which *Klay* rebuffed as follows: “We are courts of justice, and can give the defendants only that which they deserve; if they wish special favors such as protection from high-though deserved-verdicts, they must turn to Congress.”⁵²

Class actions have sometimes been conceptualized as quasi-corporations, albeit corporations created for the sole and finite purpose of prosecuting defined claims in a particular piece of litigation. Similarly,

48. *In re Visa Check/MasterMoney Antitrust Litig.*, 280 F.3d at 145 (majority opinion) (Sotomayor, J.); see also *Swack v. Credit Suisse First Boston*, 230 F.R.D. 250, 263 (D. Mass. 2005).

49. *Klay v. Humana, Inc.*, 382 F.3d 1241, 1275 (11th Cir. 2004) (citing *In re Diet Drugs Prods. Liab. Litig.*, 93 Fed. App’x. 345, 350 (3d Cir. 2004)).

50. *Id.* (quoting *Waste Mgmt. Holdings, Inc. v. Mowbray*, 208 F.3d 288, 295 (1st Cir. 2000)).

51. *Id.* at 1274.

52. *Id.*

the lawyers who bring class actions have been likened to corporate entrepreneurs, a conceit that, for better or worse, some such lawyers themselves have come to believe, and boast of. Our society admires entrepreneurs, and the notion of entrepreneurial lawyers counteracting the economic power of corporate wrongdoers by investing the capital of their time and money in the massive undertaking that is a modern major class action has resonated with the courts.⁵³

It has become a truism that “class certification is a pivotal moment” in every case brought as a class action, because “[a] certified class, which increases a defendant’s potential exposure exponentially, can be a catalyst for settlement.”⁵⁴ A superficial look at recent statistics tends to back that proposition. As recently reported in the legal press, “[a]mong 231 class actions tracked in a 2008 Federal Judicial Center report, there were 70 certification motions and 30 certified classes.”⁵⁵ Every single certified case resulted in settlement. The average settlement was \$9.5 million.⁵⁶ However, that is just a fraction of the damage class actions can do to a company’s bottom line. The largest award in a class-action case came in 2008, when Enron shareholders won a settlement of \$7.2 billion.⁵⁷

If every single certified case results in settlement, it is at least equally true that not every case brought as a class action achieves certification—far from it. As the above figures indicate, only three out of every seven class certification motions are won, and most class actions (nearly 70%) do not reach the class certification stage. It may thus be argued that those class actions that deserve to be certified are, and certified actions deserve to be settled. This may actually be the operative truth, as merits determinations and class certification have converged. It is an obsolete proposition that the merits are irrelevant, are not considered, or at least should not be considered, in the context of class certification.⁵⁸ The class

53. See *Ravens v. Iftikar*, 174 F.R.D. 651, 653 (N.D. Cal. 1997) (noting that, as to counsel for both plaintiffs seeking legal plaintiff status, “[t]he lawyers heading up both class actions are prominent ‘entrepreneurial’ lawyers that specialize in, and have long dominated, securities class action practice”)

54. Rebecca Beyer, *The Clash over Class Actions*, DAILY J., Oct. 13, 2009.

55. *Id.*

56. *Id.*

57. *Id.*

58. Class certification nowadays takes place after substantial document and deposition discovery, and after experts have been retained, deposed, and issued their reports. In some cases, not only does class certification occur virtually on the eve of trial, the evidentiary class certification hearing becomes a “mini trial.” Courts need facts to make class certification findings, and the facts implicate the merits. See *id.* Some courts have deferred class certification until *after* trials of test, or “bellwether” cases. See, e.g., *In re Pharm. Indus. Average Wholesale Price Litig.*, 252 F.R.D. 83, 87 (D. Mass. 2008). As the Court noted, conducting the bellwether trial gave the Court the opportunity to understand the “complex factual and legal disputes” in the “difficult area of drug pricing” implicated in the litigation. *Id.* This pre-class certification trial certainly had the benefit of informing the Court as to the significance of common versus individual issues, and other criteria relating to class certification under Rule 23. It also undoubtedly added to the cost, delay, and risk for plaintiffs and their counsel who were forced to endure years of intensive and expensive litigation, without knowing whether an ultimate grant of class certification would render their investment a rational one.

certification consideration has morphed from the issue of whether the class action presents claims or issues which are, structurally, susceptible to common proof at trial, to whether the plaintiffs can convince the court that they will prevail on that proof at trial.⁵⁹ As the merits continue to inform (or intrude) in the class certification context, at some point it can only be hoped that defendants will acknowledge, having “lost” in an ever-more-rigorous class certification exercise that essentially requires plaintiffs to pre-prove their claims, that a class deserving of certification is likewise deserving of serious settlement consideration, without the drama of the “hydraulic pressure to settle” refrain or harangues on the evils of class actions.⁶⁰

Meanwhile, much of the value of class actions, to the system itself as well as to the class members, is being lost as cost and delay in the class certification process accrete. No party should be allowed to engage in litigation busy work, or hysterical arguments, designed to place access to the courtroom out of the reach of the other side by subverting procedures intended to provide economies of scale to counteract past attrition tactics. The spiral of cost and delay must be halted, and it will take judicial will power to do so.

“The class action and the entrepreneurial layer may be the best possible solution to some legal problems”⁶¹ Lawyers on both sides of complex civil litigation may enjoy the image of themselves as entre-

59. It was accepted for years that class certification was decided on the pleadings, that the allegations of the complaint were accepted as true for certification purposes, and that the merits could not be considered in the class certification context. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974). The *Eisen* barrier between merits determination and class certification has been breached by subsequent decisions. See, e.g., *In re Initial Public Offering Sec. Litig.*, 471 F.3d 24 (2d Cir. 2006); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672 (7th Cir. 2001).

60. The courts have insisted on maintaining a razor-thin distinction between merits proof and proof that Rule 23’s class certification criteria are met, even as they have incrementally erased it. *Szabo* articulated the distinction as follows:

A court may not say something like “let’s resolve the merits first and worry about the class later” But nothing . . . prevents the district court from looking beneath the surface of a complaint to conduct the inquiries identified in [Rule 23] and exercise the discretion it confers. . . . “*Eisen* has not been interpreted so broadly . . . as to foreclose inquiry into whether plaintiff is asserting a claim which, assuming its merit, will satisfy the requirements of Rule 23 as distinguished from an inquiry into the merits of plaintiff’s particular individual claim.”

Szabo, 249 F.3d at 677 (fourth alteration in original) (quoting *Eggleston v. Chi. Journeyman Plumbers’ Local Union No. 130*, 657 F.2d 890, 895 (7th Cir. 1981)).

61. *County of Oakland v. City of Detroit*, 866 F.2d 839, 850 (6th Cir. 1989) (internal quotation marks omitted) (quoting *Carter v. Berger*, 777 F.2d 1173, 1176 (7th Cir. 1985)). “Moreover, the weight of independent analysis amply confirms the societal benefit derived from vigorous prosecution of class actions.” *McMorris v. TJX Cos.*, 493 F. Supp. 2d 158, 166 (D. Mass. 2007) (citing Myriam Ellis & Gary B. Friedman, *Exploding the Class Action Agency Cost Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 106–108 (2006); see also DEBORAH R. HENSLER ET AL., RAND CORP., CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN 472 (2000), http://www.rand.org/pubs/monograph_reports/MR969 (stating that whether the benefits of class actions outweigh their costs is “a deeply political question, implicating fundamental beliefs about the structure of the political system, the nature of society, and the roles of courts and law in society”).

preneurs, and certainly the spectacular growth of civil litigation defense firms during the 1990s was overtly entrepreneurial. Plaintiffs' lawyers followed this example, on a much smaller scale: the inexorable economics of a contingent fee-based practice set limits on the size to which a plaintiffs' firm can grow. Plaintiffs' firms tend to grow—and contract—much more rapidly, have far fewer partners, are often owned by a proprietary single partner, and frequently do not outlast the death or retirement of their founders.

There are notable exceptions, but they tend to prove the rule. The author is a founding partner in a firm that has grown, gradually, over the past 33 years, from a two-lawyer firm to one that employs approximately 60 attorneys and their support staff. Half of these lawyers are partners in the firm, and share in its risks and rewards. This broad partnership base lends a stability to the firm that the sole proprietorship model does not. However, this firm is still quite small when compared to the national law firms that represent defendants in modern complex litigation, which may boast hundreds of partners and over one thousand lawyers. Yet, the author's firm is considered a large one among the plaintiffs' bar, and often shares leadership roles with counsel whose firms number ten lawyers or fewer.

The reality that most plaintiffs' counsel are solo or small-firm practitioners, are thinly-capitalized, and often have no backup, hourly-fee generating bread-and-butter practice to subsidize their contingent fee work, has not prevented courts from overestimating the economic resources of plaintiffs' firms, and indeed the constant concern that plaintiffs' firms might be overpaid for their successes is a factor that has constrained the attorneys' fees subject to judicial scrutiny and approval in class actions.⁶²

The prevailing methodology in calculating a reasonable percentage of the recovery obtained for the class as an appropriate class counsel fee thus counteracts the perceived entrepreneurial motivations of class counsel by decreasing, rather than increasing, the percentage of the recovery awarded as fees as that recovery scales upward. This anti-bonus system reduces the percentage on very large recoveries—so-called “mega” cases—such that “the percentage of recovery is generally far less than the typical range and may be as low as 4%. Generally, as the total recovery

62. See, e.g., BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., *MANAGING CLASS ACTION LITIGATION: A POCKET GUIDE FOR JUDGES* 22–25 (2005), [http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/\\$file/ClassGde.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/ClassGde.pdf/$file/ClassGde.pdf). Judges presiding over class actions are, understandably, concerned about preventing “unnecessary litigation and over-staffing” but focus on the organization of plaintiffs' counsel (who have little economic incentive to over-litigate or over-staff), rather than the defendants' counsel, who are paid by the hour, regularly and regardless of outcome, and who may thus face incentives to do so. See *id.* at 4–5.

increases[,] the percentage allocated to fees decreases.”⁶³ The legitimate rationale for this approach is that “the district judge must protect the class’s interest by acting as a fiduciary for the class.”⁶⁴

IV. RESTORING PROPORTIONALITY BY “FIXING” FEES

The role of traditional hourly attorneys’ fees in expanding the cost and delay of civil litigation cannot be understated. Attorneys billing by the hour will tend, intentionally or not, to maximize the time spent on completing assigned tasks, and to invent or elaborate tasks for which time can be billed. The inverse relationship between hourly billing and due process is so imbedded that it has literally become a joke. As a cartoon lawyer informed his judge in the caption of an October 5, 2009 *New Yorker* cartoon, “The way I see it, justice delayed is that many more billable hours.”⁶⁵

Much of the inefficiency in modern complex civil litigation has its roots in the hourly billing system. The “makework” produced by time-billing attorneys generates additional work for litigation participants who do not bill by the hour: judges and plaintiffs’ lawyers. Plaintiffs’ lawyers typically work on contingency, which means they are not paid unless and until a monetary recovery is produced for their clients. In the meantime, they also typically advance the out-of-pocket costs of the litigation, which may also be magnified by the industry of their time-billing opposing counsel; and, in current complex civil litigation, such contingency fees are usually subject to court approval, court scrutiny, and court reduction. Judges, of course, are on fixed salaries (set at the whim of Congress or state legislatures) and do not get bonuses for efficiency or productivity.

Thus, as a matter of pragmatism and necessity, if not morality, plaintiffs’ lawyers and judges tend to see efficiencies and economies in litigation, while outside counsel representing defendants may not. There is no reciprocal or mutual pressure to reduce the cost of litigation, or at least there has not been, until lately. The recent economic near-catastrophe has hit major law firms hard, as well as their corporate clients. Lawyers and staff have been laid off, major firms have dissolved or merged, and major corporate clients are, suddenly or not, articulating a commitment to controlling litigation costs. We may be beginning to see

63. *Id.* at 22 (citation omitted) (citing MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.121 (2004)).

64. *In re Rite Aid Corp. Sec. Litig.*, 396 F.3d 294, 307 (3d Cir. 2005). *But see Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1048, 1050 (9th Cir. 2002) (finding that class counsel may properly be awarded fees that fall outside a benchmark or historical range where counsel achieved “exceptional results” and undertook an “extremely risky” case in representing the class, and upholding a 28%-of-recovery fee award, approximately \$27 million, in a case prosecuted over an 11-year period).

65. P.C. Vey, *NEW YORKER*, Oct. 5, 2009, at 72.

the necessary convergence of attitude toward litigation cost and delay as detrimental to due process.

While it may seem that focusing on fees to reduce cost and delay, and hence promote due process, “fixes” the problem at the expense of its advocates, such is not necessarily the case. When courts exercise their inherent authority to scrutinize the fees being charged and paid to the counsel who appear before them, such scrutiny must be directed even-handedly, on defendants’ and plaintiffs’ counsel alike.

Courts, in both class actions and non-class action mass torts cases, have long considered it a function of their inherent authority and case management jurisdiction to keep track of lawyers’ time and costs, on an ongoing basis, and to set limits, not only on court-awarded class counsel fees, but on private contingency fees as well. This trend has recently accelerated. The express authority provided by Federal Rule 23(g) and (h) to appoint class counsel and award class counsel fees and costs has been augmented by a series of recent decisions in which federal judges presiding over non-class mass tort multidistrict litigation have set “caps” on the fees individual plaintiffs’ attorneys may collect under their contingent fee contracts with their clients.⁶⁶

The *Manual for Complex Litigation* devotes an entire chapter to attorney fees, providing practical suggestions for judges presiding over complex cases, including but not limited to class actions and mass torts, to scrutinize, award, and control attorney fees and costs.⁶⁷ The *Manual* provides access, in turn, to other authorities, such as the *Third Circuit 1985 Task Force Report*,⁶⁸ which articulated a judicial preference for percentage-of-recovery fee awards over the time-based “lodestar” method,⁶⁹ and influential decisions that have set benchmarks and guidelines for prevailing ranges of percentage fees in major cases, including mass torts⁷⁰ and class actions.⁷¹ The Federal Judicial Center has provided re-

66. See, e.g., *In re Vioxx Prods. Liab. Litig.*, ___ F. Supp. 2d ___, MDL No. 1657, 2009 WL 2408884, at *7–11, 13 (E.D. La. Aug. 3, 2009) (affirming 32% contingent fee cap imposed on recoveries in the non-class settlement multidistrict product liability suit based upon the court’s inherent and implied authority from the settlement to limit the fees, and to promote the just and efficient conduct of the suit under 28 U.S.C. § 1407(a) (2006) [the multidistrict litigation authorizing statute]); *In re Guidant Corp. Implantable Defibrillators Prods. Liab. Litig.*, MDL No. 05-1708 (DWF/AJB), 2008 WL 682174, at *18–19 (D. Minn. Mar. 7, 2008) (“[T]his Court has the inherent right and responsibility to supervise the members of its bar in both individual and mass actions, including the right to review contingency fee contracts for fairness.”) (capping contingent fees at 20% subject to appeal to a special master for upward departures based upon specific factors); *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491 (E.D.N.Y. 2006) (exercising the court’s inherent power to impose “fiduciary standards to ensure fair treatment to all parties and counsel regarding fees and expenses,” capping fees at 35%, but allowing for departure, downward or upward, based upon the unique facts of the given case).

67. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14 (2004).

68. Third Circuit Task Force, *Court Awarded Attorney Fees*, 108 F.R.D. 237 (1985).

69. *Id.* at 258.

70. See, e.g., *In re Nineteen Appeals Arising out of the San Juan DuPont Plaza Hotel Fire Litig.*, 982 F.2d 603 (1st Cir. 1992).

source materials for federal judges that include detailed attorneys' fees guidance.⁷²

The inherent authority of courts presiding over complex litigation to enhance due process and manage litigation costs by controlling fees is neither fairly nor logically limited to the control of plaintiffs' counsel fees. Indeed, plaintiffs' counsel can often do little or nothing to control their out-of-pocket advances (which someone must ultimately pay, whether the clients directly or the defendants funding the judgment or settlement indirectly) because they are frequently responding to the fee-generating work product of the other side. Until very recently, defense counsel have had little incentive to suggest innovations, limitations, or efficiencies in discovery and other pretrial proceedings. Indeed, maximizing the cost and time consumed by such proceedings not only boost the law firm's bottom line, but may also be a weapon intentionally selected by the corporate client in a defense strategy of litigation by attrition.

Courts, in their frustration at such tactics have often reacted, understandably but inappropriately, by reducing plaintiffs' fees. The more equitable—and effective—approach would be to also reduce or “cap” the fees to be charged, or at least the hours spent, by defendants' counsel. Indeed, the *Manual* suggests—at least as a technique for judicial use in evaluating the plaintiffs' fee request—“[h]aving defendants submit billing records” because “[r]ecords showing defendants' attorney fees may provide a reference for determining the reasonableness of fees where defendants oppose plaintiff's counsel's fee request.”⁷³ The Hirsch & Sheehey *Attorney Fees* benchbook makes the same suggestion, and quotes several federal judges who have utilized this approach.⁷⁴ However, this suggestion is made in the context of reviewing plaintiffs' fees, not directly setting limits on defendants' fees, although the anticipation of judicial review of billing records may itself serve to moderate such fees.

The courts have long been aware, and have long noted, that lawyers' time is not a fungible commodity, that every hour spent does not generate an equal value to the client, and that time-based billing is deeply and fundamentally flawed. Oft-cited is this venerable and pithy encapsulation of the maxim, “One thousand plodding hours may be far less productive than one imaginative, brilliant hour.”⁷⁵ Even more to the point is

71. See, e.g., *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001); *In re Vitamins Antitrust Litig.*, 398 F. Supp. 2d 209 (D.D.C. 2005).

72. See, e.g., ALAN HIRSCH & DIANE SHEEHEY, FED. JUDICIAL CTR., AWARDING ATTORNEYS' FEES AND MANAGING FEE LITIGATION (1994), [http://www.fjc.gov/public/pdf.nsf/lookup/attyfees.pdf/\\$File/attyfees.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/attyfees.pdf/$File/attyfees.pdf); ROTHSTEIN & WILLGING, *supra* note 62, at 22–24.

73. MANUAL FOR COMPLEX LITIGATION (FOURTH) § 14.231 (2004).

74. HIRSCH & SHEEHEY, *supra* note 72, at 105–106.

75. George D. Hornstein, *Legal Therapeutics: The “Salvage” Factor in Counsel Fee Awards*, 69 Harv. L. Rev. 658, 660 (1956), quoted in *Prandini v. Nat'l Tea Co.*, 557 F.2d 1015, 1019 n.5 (3d

the next sentence by the same commentator, which reflects the primary societal value of results obtained, rather than time spent: “A surgeon who skillfully performs an appendectomy in seven minutes is entitled to no smaller fee than one who takes an hour; many a patient would think he is entitled to more.”⁷⁶

The courts that cite these insights do so in the context of scrutinizing, reviewing, and awarding plaintiffs’ attorneys’ fees. In these cases, courts discern a conflict, or at least a divergence, of interests between class counsel and class clients, seeking to protect the class members from overpayment of the class fund to their counsel. Although the courts’ inherent authority also extends to defendants’ counsel, as noted above, such counsel largely escapes such scrutiny because their clients are considered sufficiently sophisticated and economically powerful to fend for themselves in fee contract negotiations. In practice, however, this discrepancy devolves into a costly situation in which, in the same litigation, “skilled surgeons” are paid less than plodding ones.

One thin silver lining of the 2008–2009 economic recession has been a new (or at least renewed) corporate urgency to control litigation costs, coupled with the efforts of fiercely competing major defense firms to offer greater value to their hoped-for and current corporate clients. The defense analog to the contingent fee—the “fixed fee”—has thus generated recent interest and enthusiasm, with prominent corporate counsel and senior litigation firm partners calling for its adoption. The appeal for the “fixed fee” was made in a recent *American Lawyer* article co-authored by prominent in-house corporate and outside litigation counsel:

In these troubled economic times, fixed fees for particular legal matters have appeal both for law firms and their corporate clients. As a former general counsel of a major company and as current co-managing partner of an Am Law 100 firm, we strongly believe that this is an idea whose time has come.⁷⁷

The “fixed fee” proponents primarily see this system’s value through the lens of law-firm and corporate-client interests:

For in-house counsel facing tremendous budgetary pressures, the fixed fee addresses the problems caused by the hourly rate, such as unpredictability, high costs divorced from actual value and, most importantly, the maddening law firm definition of “productivity”—defined as more lawyers and more hours per matter.

Cir. 1977), *Mashburn v. Nat’l Healthcare, Inc.*, 684 F. Supp. 679, 689 (M.D. Ala. 1988); see also *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 394 n.18 (1970) (citing the article).

76. Hornstein, *supra* note 75, at 660.

77. Ben W. Heineman, Jr. & William F. Lee, *The Time Has Come: Two Veteran Lawyers Say that Clients and Firms Should Consider Fixed Fees*, AM. LAW., Oct. 2009, at 59, 59.

For law firms facing reduced demand and cash flow problems (if not crises), the fixed fee addresses the issues of increasing overhead devoted to the billing process, clients flyspecking bills and demanding after-the-fact discounts, and delays in payments and falling realization rates.⁷⁸

The foregoing defense firm perspective on fixed fees, which focuses on predictability, administrative practicality, and client relations, understates the power of the fixed fee to promote pragmatic due process by reducing overall legal costs at the same time it protects, or perhaps increases, law firm profitability. After all, plaintiffs' firms practice the fixed fee system exclusively, with one crucial exception: the fixed fees they charge their clients are prospective. They are contingent upon success, and expressed as a fixed percentage of recovery, rather than a fixed dollar amount. A supposedly healthy contingent fee percentage rate of 30%, or one-third of a recovery (which often, in contingent fee contracts, increases to 40% if the case is tried or defended upon appeal), can wither in protracted litigation—thus the inescapable incentive of plaintiffs' lawyers to conserve on costs and to save time. Experience has shown, however, that one side's devotion to efficiency and economy cannot accomplish the goals of cost-effective litigation and proportional due process if the other side is striving to implement contrary objectives. The adoption by defense litigators of a fixed fee system would more closely approximate the plaintiff lawyer's contingent fee in terms of implementing a cost-reducing and time-saving imperative.

The idea of the fixed fee—that is, a total fee for a specific service, representation, or litigation (refined, perhaps, by bonuses and penalties for spectacular or less-than-satisfactory performance)—has been around for some time, but has not truly caught on. However, “[t]he credit meltdown and the deep global recession may provide the impetus for real change in this corner of the economy, as in so many others.”⁷⁹ Hourly fees have not led to efficiencies or economies in legal services, particularly in the litigation context—but the fixed fee just might. A law firm that knows it will be receiving a set amount of money for a service rendered has a real incentive to seek economies and efficiencies in performing that service. One suspects that fewer and shorter, rather than more and longer, depositions, interrogatories, motions, and hearings might occur in complex cases in which the litigation defense firms are serving on a fixed fee, as opposed to an hourly fee, basis. Such economies create a reasonable profit for defense firms under a fixed fee regime, and, as a by-product, produce economies for plaintiffs and courts as well.

There are major challenges in the design of a successful fixed fee system, but its key objective “to set price with quality and achieve cost

78. *Id.*

79. *Id.*

and value alignment” has demonstrably not been reached under the hourly billing system.⁸⁰ What is interesting is that these newly urgent calls for implementation of a fixed fee system have come at a juncture where, admittedly, corporations can no longer afford process for its own sake, or simply as a strategy to exhaust opponents. Plaintiffs’ counsel may no longer be alone in their complaints that hourly-billing wastes the private time and money of plaintiffs and their counsel, and the public time and money invested by taxpayers in the judicial system: they may be joined by those who send, and those who pay, such bills. These proponents of the “fixed fee” system predict enhanced productivity and morale because attorneys “will be paid for doing quality work within the fixed-fee budgets on more matters in smaller teams, rather than billing endless busy-work hours on overstuffed megamatters.”⁸¹ As the *American Lawyer* article concludes:

The fixed fee is not an easy answer to the economic conflicts between firms and corporate clients. But the current financial crisis makes it imperative to have greater predictability and regularity on billing and payment for both law firms and corporate clients. This closer alignment between matters and money, between in-house and outside lawyers, can serve a broader societal goal in this time when trust in boards of directors and CEOs has been shredded and wise counseling is so critical.⁸²

V. DUE PROCESS AS A CASUALTY OF LITIGATION BY ATTRITION

The waves of individual and class action litigation against tobacco companies over the past forty years illustrate many of the points discussed earlier. A comprehensive survey of tobacco litigation is far beyond the scope of this article, and indeed cannot yet be written because tobacco litigation is still unfolding. To date, however, the broad array of federal and state cases spanning the past four decades has seen both the worst and the best of litigation tactics and strategies, and, most recently, has generated several examples of pragmatic due process that may serve as exemplars in the quest to bring true due process back into complex civil litigation.

Early tobacco litigation saw the perfection, if not the invention, of the strategy of litigation by attrition: the simple expedient of making litigation so expensive for the opposing side that it could not afford to win. A company, or an industry, willing and able to spend unstintingly on defense in order to avoid paying anything in compensation can successfully deploy this strategy, unless judges proactively and courageously enforce the proportionality and limiting principles inherent, and ex-

80. *Id.*

81. *Id.*

82. *Id.*

pressed, in the Federal Rules. Litigation by attrition is expensive, exhausting, and demoralizing, but it can work. The tobacco litigation defendants made it work to their benefit for many years, even as the courts charged with supervising the tobacco litigation decried the tactic.

Tobacco counsel knew how to make even nominally valuable wrongful death claims, in which a jury finding for the plaintiff might be persuaded to award \$1 million or more, too expensive to pursue. As R. J. Reynolds's counsel put it:

[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [RJR]'s money, but by making that other son of a bitch spend all of his.⁸³

In the *Haines v. Liggett Group, Inc.* case in which the above boast was quoted, there were over 100 motions, four interlocutory appeals, one final appeal, and two petitions for certiorari.⁸⁴ Defendants deposed one of plaintiffs' experts, a doctor, for 22 days.⁸⁵ The verdict for plaintiffs was \$400,000.⁸⁶ Plaintiffs expended over \$500,000 in out-of-pocket costs and \$2 million in lawyer and paralegal time.⁸⁷ The defendant tobacco companies had spent an estimated \$50 million in defense.⁸⁸ Their attorneys were quoted in the press as stating, "This verdict sends a message to all plaintiff attorneys that these cases are not worth pursuing."⁸⁹ The verdict was followed by appeals to the Third Circuit Court of Appeal; from there, it journeyed to the Supreme Court, which affirmed and reversed in part.⁹⁰

Of course, the tobacco companies could have settled these individual smokers' cases for a small fraction of what they spent in each case on defense costs. The industry feared that if any cases were settled, the news of settlement would generate an endless stream of "thousands of potential claimants to whom payment—no matter how small—would be [cumulatively] prohibitive."⁹¹ The industry therefore demanded that its law-

83. *Haines v. Liggett Group, Inc.*, 814 F. Supp. 414, 421 (alterations in original) (internal quotation marks omitted) (D.N.J. 1993) (quoting Memorandum from J. Michael Jordan to unspecified Smoking and Health Attorneys (Apr. 29, 1988)).

84. *Id.* at 418 n.7, 421.

85. *Id.* at 421.

86. *Id.* at 419.

87. *Id.* at 418.

88. Andrew Blum, *Will Next Round of Smoking Challenges Be Worth Pursuing?*, NAT'L L.J., June 27, 1988, at 3, 3.

89. *Id.* (internal quotation marks omitted).

90. See *Cippollone v. Liggett Group, Inc.*, 893 F.2d 541 (3d Cir. 1990), *aff'd in part, rev'd in part*, 505 U.S. 504 (1992). The *Haines* case was argued under the name *Cippollone* on appeal.

91. E.J. JACOB & JACOB MEDINGER, REPORT PREPARED BY RJR OUTSIDE LEGAL COUNSEL TRANSMITTED TO RJR EXECUTIVES FOR THE PURPOSE OF RENDERING LEGAL ADVICE CONCERNING

yers “[v]igorously defend any case; look upon each as being capable of establishing dangerous precedent and refuse to settle any case for any amount.”⁹² This strategy was far from secret; its very efficacy depended on the fact that it was widely publicized in the media and well-known in the popular culture, and also on its consistent deployment to exhaust plaintiffs before the point of trial.⁹³

The strategy of attrition surfaced early in tobacco litigation in the context of superior resources deployed to multiply litigation proceedings, which prevented plaintiffs from obtaining in discovery the information they needed to win. For example, the 1970 *Thayer* case, brought by an individual smoker, ended in a jury verdict for defendant Liggett & Myers.⁹⁴ Afterward, the trial court—disturbed by the defendant’s “overwhelming superiority in resources” and “insatiable appetite for procedural advantage”—detailed abuses that, in its view, rendered the trial a mockery.⁹⁵ Among other things, the court noted that the defendant was evasive in discovery, “confidently risk[ed] tactics” knowing that the plaintiff “could not afford the luxury of a mistrial,”⁹⁶ and obtained a sweeping protective order “on grounds which later proved largely illusory” to isolate plaintiff’s counsel.⁹⁷ Meanwhile, the defense counsel freely engaged in extensive cooperation with other industry attorneys.⁹⁸

The *Thayer* decision is an extraordinary chronicle of judicial frustration and dismay with the ability of one litigant to exploit the procedural rules ostensibly equally available to both sides, in order to thwart the ability of plaintiff to prosecute effectively a potentially meritorious case. Rather than illuminating the merits, the Federal Rules became offensive weapons in the defendant’s hands—weapons that succeeded in concealing and obscuring the facts, in secreting key documents, and, in the *Thayer* court’s own words, “mock[ing] the mandatory jury instruc-

SMOKING AND HEALTH ISSUES AND LITIGATION 7 (1980), available at http://tobaccodocuments.org/bliley_rjr/504681987-2023.html.

92. J.F. HIND, REPORT CONCERNING SMOKING AND HEALTH PREPARED BY RJR EMPLOYEE PROVIDING CONFIDENTIAL INFORMATION TO RJR IN-HOUSE LEGAL COUNSEL, TO ASSIST IN THE RENDERING OF LEGAL ADVICE, AND TRANSMITTED TO RJR MANAGERIAL EMPLOYEE 12 (1977), available at http://tobaccodocuments.org/bliley_rjr/505574976-4977.html.

93. Patricia Bellew Gray, *Legal Warfare: Tobacco Firms Defend Smoker Liability Suits With Heavy Artillery*, WALL ST. J., Apr. 29, 1987; see also BERT C. GOSS, BACKGROUND MATERIAL ON THE CIGARETTE INDUSTRY CLIENT 2 (1953), available at <http://legacy.library.ucsf.edu/tid/wvc34c00>. A central strategy for the cigarette industry’s approach to litigation “is a lavishly financed and brutally aggressive defense that scares off or exhausts many plaintiffs long before their cases get to trial.” Gray, *supra*. Those plaintiffs who proceed with their cases “are vastly outgunned,” encountering the tobacco industry’s “overwhelming strength and prowess at every turn.” *Id.*

94. *Thayer v. Liggett & Myers Tobacco Co.*, No. 5314, 1970 U.S. Dist. LEXIS 12796, at *1 (W.D. Mich. Feb. 19, 1970).

95. *Id.* at *18–19.

96. *Id.* at *18.

97. *Id.* at *16; see also *id.* at 10–14.

98. See *id. passim*.

tion that individuals and corporate institutions are always equal before the law.”⁹⁹

To the *Thayer* court, the case that unfolded before it—with its protected and multiple trials, petitions for writs of mandamus and prohibition, and multiple appeals—demonstrated that civil justice, at least in the context of the tobacco litigation which played out before it, was simply beyond the ability of “a single individual human being” to afford.¹⁰⁰ Looking beyond the particulars of the individual case before it, the *Thayer* court voiced its concern for the peril such practices imposed on the ability of plaintiffs to obtain, and the courts to deliver, due process in other cases in which defendants, emboldened by the tobacco company’s success, would adopt in a widening array of cases.

The *Thayer* court did possess, but did not exercise, the power to sanction, punish, and deter such procedural abuse. It could, for example, have granted plaintiffs the remedy of a new trial, one in which the plaintiffs had the necessary documents and information they had sought in discovery, and could present their case on its merits. Plaintiffs could thus achieve the *sine qua non* of the American concept of due process: a jury trial by fact finders empowered to enforce the social contract and restore balance and reciprocity to the rights and responsibilities of the parties before them.

Unfortunately, as the *Thayer* court concluded, defendants’ success in deploying their strategy of attrition deprived plaintiff of obtaining any meaningful benefit from the grant of such a remedy: the remedy itself had become unaffordable. While the court stated its conviction that the impact of the disparity in resources between the parties had approached a denial of due process which would compel the granting of a new trial, “[t]his question, unfortunately, is now moot because plaintiff cannot afford further proceedings. Therefore, if a denial of due process has in fact occurred, it has at this point slipped past the safeguards existing within the system and cannot be corrected.”¹⁰¹

VI. THE LONG CLIMB: COURTS RESUME THE ASCENT TO PRINCIPLED AND PROPORTIONAL DUE PROCESS

In early 1994, worn out by *Thayer* and the *Haines–Cippollone* saga and emboldened by the sudden exposure of tobacco industry documents revealing the industry’s active role in misrepresenting and suppressing information regarding the health hazards of smoking and the addictive nature of nicotine, plaintiffs’ lawyers began to file class actions. This effort included the nationwide *Castano v. American Tobacco Co.*¹⁰² class

99. *Id.* at *59.

100. *Id.* at *58.

101. *Id.* at *59.

102. 160 F.R.D. 544 (E.D. La. 1995).

action, which was certified by the district court, only to be reversed by the Fifth Circuit.¹⁰³ Efforts to certify nationwide or statewide classes for injured or addicted smokers were largely unsuccessful; however, there were some procedural victories for plaintiffs, and some judicial recognition that the cumulative damage of litigation by attrition to the system and its reputation, as well as to plaintiffs, deserved to be counteracted. For example, in *Simon v. Phillip Morris, Inc. (Simon II)*,¹⁰⁴ Judge Weinstein looked beyond discovery to its historical goal—trial—to determine whether and how to determine important issues without the cost, delay, and inconsistency of multiple repetitive trials of the same conduct of the same actors, with respect to the determination of a permissible level of punitive damages liability, in the challenging context of the tobacco “mass tort.”¹⁰⁵ The *Simon II* court found that Rule 1 supported a conclusion that severance of issues and trials before the same (or separate) juries was appropriate.¹⁰⁶ In this class action seeking class-wide determination of punitive damages for the conduct of the tobacco industry, the court considered whether the class certification and severance of the punitive damages issues from underlying individual compensatory damages claims would violate the Seventh Amendment right to jury trial.¹⁰⁷ Judge Weinstein began by discussing trial judges’ broad discretion to sever issues for trial, observing that “[t]he language and spirit of the Federal Rules of Civil Procedure provide trial judges with the authority to structure trials efficiently and fairly.”¹⁰⁸ The *Simon II* court concluded that “[s]everance of issues is one of the trial judge’s most useful trial management devices to ensure the just and efficient determination of civil actions as required by Rule 1.”¹⁰⁹

The district court in *Simon II* reasoned that severance was supported by the “public policy favoring the efficient and fair determination of mass torts on the merits, utilizing flexible class actions where they are appropriate.”¹¹⁰ The court explained that modern adjudicatory tools such as severance “must be adopted to achieve the original framers’ goal of ‘securing the just, speedy, and inexpensive determination of every action.’”¹¹¹ After surveying authorities that encourage adjudicatory innovation, the court stated that “[a]djudicating mass torts as class actions instead of on a case-by-case basis helps fulfill the dictates of Rule 1.”¹¹² In turn, the court reasoned, mass tort class actions lend themselves to sever-

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

104. 200 F.R.D. 21 (E.D.N.Y. 2001).

105. *Id.* at 24.

106. *Id.* at 26–27.

107. *Id.* at 24.

108. *Id.* at 26 (citing FED. R. CIV. P. 1).

109. *Id.* at 27.

110. *Id.* at 24.

111. *Id.* at 44 (quoting FED. R. CIV. P. 1).

112. *Id.* (citing Mary J. Davis, *Toward the Proper Role for Mass Tort Class Actions*, 77 OR. L. REV. 157, 168 (1998)).

ance because “[t]he very nature of injuries arising from mass production and mass marketing efforts makes trial judges’ discretion to sever issues for trial one of the most necessary and natural” tools for efficient adjudication.¹¹³ After examining the Seventh Amendment’s history and case law, the court held that it did not substantially inhibit severance of these issues and trials because the amendment “is only implicated where a severed issue is presented to a subsequent jury in a confusing or uncertain manner.”¹¹⁴ Despite this analysis, the Second Circuit reversed the *Simon II* class certification decision without much explanation or analysis of the issues and policies explored by Judge Weinstein.¹¹⁵

Simon II was a counterpoint to another smokers’ class action: the Florida state court *Engle v. Liggett Group, Inc.*¹¹⁶ litigation. The *Engle* jury verdict of \$146 billion in punitive damages was widely viewed as excessive under U.S. Supreme Court standards, was beyond even the tobacco industry’s ability to pay, and would have benefited the citizens of only a single state. The *Simon II* action thus sought a nationwide class to determine the maximum punitive damages award (if any) that could constitutionally be imposed against the industry for its conduct. Injured smokers within the *Simon II* class definition would have shared equitably in any such award, if and when they proved their own actual damages.

The *Engle* punitive damages verdict was likewise reversed, as was the class certification, but with a pragmatic difference which at least partially erased the attrition advantage of the tobacco defendants: In *Engle*, the Florida Supreme Court granted *res judicata* to eight key liability findings of the trial jury, enabling members of the defined class who timely filed individual suits to carry these findings with them, and proceed to proof of individual medical causation and damages, without re-trying (or re-discovering) these class-wide findings.¹¹⁷ Approximately 7,000 Floridians within the *Engle* class definition thereafter filed individual damage suits, which, as of early 2010, were pending in Florida state and federal courts. A handful have already gone to trial, with victories for both smokers and tobacco companies.¹¹⁸

In *Engle*, the Florida Supreme Court achieved, via its declaration of the common liability facts determined by the jury in the class action trial as *res judicata*, the type of severance of common and individual issues that *Simon II* had attempted—albeit via a roundabout route. The decision approved the intermediate appellate holding vacating the \$145 billion

113. *Id.*

114. *Id.* at 24.

115. *See In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005).

116. 945 So. 2d 1246 (Fla. 2006).

117. *Id.* at 1257 n.4, 1276–77.

118. One federal district court rejected the *Engle res judicata* ruling. *See Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1347–48 (M.D. Fla. 2008). The *Brown* decision is on appeal to the Eleventh Circuit.

award of punitive damages; it upheld the award for compensatory damages for two of the class representative plaintiffs and expressly approved the class trial Phase I findings for the class as to eight key questions (Questions 1 through 8 on the jury verdict form), which included findings that smoking cigarettes causes a specified list of diseases; that the defendants concealed or omitted material information regarding the health effects and addictive nature of smoking cigarettes; that the information was concealed or omitted with the intention that smokers and the public would rely on it to their detriment; that all of the defendants sold or supplied cigarettes that were defective; that they all sold or supplied cigarettes that did not conform to their representations of fact; and that all of the defendants were negligent.¹¹⁹

After surveying federal decisions discussing the class certification/common treatment of specified claims or issues within a case under Rule 23(c)(4)(A), the *Engle* court found procedural and constitutional support for its desire to conserve the considerable judicial effort and resources that had been invested in the *Engle* pretrial, trial, and appellate proceedings. Accordingly, it acted to preclude the endlessly duplicative re-adjudication of specific issues of fact that it determined the Phase I class jury had properly heard and decided. The *Engle* court held:

In this case, the Phase I trial has been completed. The pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those on the fraud and intentional infliction of emotion distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature. Class members can choose to initiate individual damages actions and the Phase I common core findings we approved above will have *res judicata* effect in those trials. . . .

. . . .

119. *Engle*, 945 So. 2d at 1276-77. The decision specifies:

We approve the Phase I findings for the class as to Questions 1 (that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma, large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer), 2 (that nicotine in cigarettes is addictive), 3 (that the defendants placed cigarettes on the market that were defective and unreasonably dangerous), 4(a) (that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both), 5(a) (that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment), 6 (that all of the defendants sold or supplied cigarettes that were defective), (7) (that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants), and 8 (that all of the defendants were negligent). Therefore, these findings in favor of the *Engle* Class can stand.

Id.

. . . Individual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given *res judicata* effect in any subsequent trial between individual class members and the defendants, provided such action is filed within one year of the mandate in this case.¹²⁰

The *Engle* Phase I class-wide jury trial had consumed more than one year. Understandably, the Florida Supreme Court sought, and found, a way to avoid consigning thousands of Florida smokers to the impossibility of replicating this trial in each of their individual cases. Because the class jury's product- and conduct-related findings were given *res judicata* effect, individual smokers within the class definition could now go to trial, in a reasonable period of time, to prove medical causation and damages, in trials spanning days instead of months or years. A number of these cases have now gone to trial, with predictably mixed results. Of the five Florida cases that went to trial in 2009, for example, only one case resulted in an award of punitive damages. In the cases that plaintiffs have won, juries have tended to apportion fault between the tobacco company defendant and the plaintiff, thereby reducing compensatory damages.¹²¹ The cost and duration of the trials was thus proportionate to the amounts in controversy, both plaintiffs and defendants are able to win, depending upon the individual merits of the cases, and punitive damages, when awarded, will not cripple the industry.

Another state's high court likewise approved the due process propriety of severing individual and common issues for phased trials, to prevent the excesses of attrition strategy by avoiding the duplicative adjudication of the same issue across multiple cases. The *In re Tobacco Litigation (Personal Injury Cases)*¹²² decision by the Supreme Court of Appeals of West Virginia answered a certified question arising from the trial court's case management order, which provided for bifurcation of the trial of a group of consolidated personal injury tobacco cases. Under the bifurcation order, punitive damages were to be determined in the first phase, along with liability issues. This is a structure similar, though not identical, to that utilized by the trial court in *Engle*. The *Tobacco Litigation* court answered the following certified question:

Does the Due Process Clause of the Fourteenth Amendment to the Federal Constitution, as interpreted by *State Farm v. Campbell*, preclude a bifurcated trial plan in a consolidated action consisting of per-

120. *Id.* at 1269, 1277.

121. See Amanda Bronstad, *The Bloom is off the Rose for Tobacco Claims: As Memories Dim of Industry Wrongdoing, a New Generation of Jurors is Proving Less Sympathetic to Smokers*, NAT'L L.J., Sept. 21, 2009, at 10, 10; Jim Loney, *Smokers, Tobacco Both Winners in Early Engle Cases*, REUTERS, Aug. 20, 2009, available at <http://www.reuters.com/article/idUSTRE57J52Y20090820> ("The scorecard: seven judgments for smokers and their families, ranging from \$600,000 to \$30 million; two wins for tobacco firms.") (reporting nine verdicts to date in cases brought by former *Engle* class members).

122. 624 S.E.2d 738 (W. Va. 2005).

sonal injury claims of approximately 1,000 individual smokers, wherein Phase I of the trial would decide certain elements of liability and a punitive damages multiplier and Phase II of the trial would decide for each plaintiff compensatory damages and punitive damages based upon the punitive damages multiplier determined in Phase I?¹²³

The West Virginia high court answered the certified question in the negative; that is, it determined that the bifurcated trial plan was consistent with due process and the Fourteenth Amendment.¹²⁴ As the court noted, "trial courts have significant leeway in implementing a mass trial format."¹²⁵ Thus:

A creative, innovative trial management plan developed by a trial court which is designed to achieve an orderly, reasonably swift and efficient disposition of mass liability cases will be approved so long as the plan does not trespass upon the procedural due process rights of the parties.¹²⁶

As the certified question indicates, defendants' due process arguments against the bifurcated trial plan were based on the premise that the United States Supreme Court's decision in *State Farm v. Campbell*.¹²⁷ In *State Farm*, the Court recognized a due process right on the part of defendants to protection from excessive punitive damages awards based on wrongdoing directed to non-parties,¹²⁸ requiring all plaintiffs to prove compensatory damages before proceeding to the punitive damages phase.¹²⁹ As the West Virginia court pointed out, however, *State Farm* was not a mass tort case, and held that *State Farm*, which did not involve mass tort litigation, did not per se preclude the circuit court's original trial plan. Limiting its analysis to the issue of whether *State Farm* precludes a bifurcated trial plan like the one designed in the trial court, the West Virginia Supreme Court found nothing in *State Farm* that would "mandate[] a reexamination of our existing system of mass tort litigation."¹³⁰ And nothing in *State Farm* "that per se precludes a bifurcated trial plan in which a punitive damages multiplier is established prior to the determination of individual compensatory damages."¹³¹

As Justice Starcher of the West Virginia Supreme Court noted in his concurring opinion applying his state's version of Federal Rule 1 to confirm as constitutional a bifurcated trial process that included a single,

123. *Id.* at 739.

124. *Id.*

125. *Id.* at 740 n.1.

126. *Id.* (quoting *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 300 (W. Va. 1996) (syllabus)).

127. 538 U.S. 408 (2003).

128. *Id.* at 422-23.

129. *See id.* at 425-426.

130. *In re Tobacco Litig.*, 624 S.E.2d at 741.

131. *Id.*

aggregate determination of punitive damages liability, no court is “constitutionally mandated to deny the plaintiffs a just, speedy and inexpensive resolution of their claims in order that the defendants’ property rights may be fully protected.”¹³² In a judicial system of finite resources, the due process rights of any litigant cannot be absolute, lest opponents or others be shortchanged of *their* due process. Like it or not, due process is allocated on a “sliding scale.” Each side must get its due, each is due something, and what process is due must be carefully decided under the circumstances and nature of each case.¹³³

Justice Starcher’s concurring opinion contains a more detailed explanation of the West Virginia “mass litigation” system and a reasoned statement as to “why such a system is necessary.”¹³⁴ As Justice Starcher acknowledges, “[t]he defendants are certainly entitled to due process,” but it is “the trial judge’s duty to afford *all* parties due process.”¹³⁵ As Justice Starcher explained the context:

In the current age, a single mistake by a product manufacturer can injure dozens, hundreds, or even thousands upon thousands of individuals. A few manufacturers take a callous, deliberate, and knowing approach and choose to ignore the injuries caused by their products, or conspire to conceal the problems with their products. Sometimes, the injuries caused by the product cover the nation and span many decades.¹³⁶

Justice Starcher went on to describe the evolution of asbestos mass tort litigation in the West Virginia courts, and the trial-and-error process by which various forms of consolidation and bifurcation were employed.¹³⁷ These included utilizing various forms of consolidation under Rule 42 of West Virginia’s Rules of Civil Procedure, the state analogue to the Federal Rules. As other states have done, West Virginia formalized its “mass litigation” system by creating a “Mass Litigation Panel” consisting of six “specially trained judges who are ready and willing to take on cases with common questions of law or fact where large numbers of individuals have potentially been harmed, physically or economically, as a result of a catastrophe or as a result of a defective product.”¹³⁸ The experience gained by such specializing judges or specialized courts may render them more sophisticated and efficient as they gain familiarity with recurring issues, similar products, and repeat players, such as the New Jersey-headquartered pharmaceutical companies who are frequently be-

132. *Id.* at 744 (Starcher, J., concurring).

133. *Id.* at 748.

134. *Id.* at 744.

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 747–48 (describing Trial Court Rule 26.01 and the West Virginia “mass litigation” system).

fore the New Jersey state courts. New Jersey has, in fact, enacted a “mass tort court” system under which cases are transferred and centralized for coordinated proceedings managed by specialized “mass tort” judges.¹³⁹

Our mass litigation system enables expert and experienced judges to employ procedures—including consolidation, bifurcation, and/or class action treatment—to fashion litigation structures that accord due process to each side, without exhausting either, and that are within the available resources of the system. The crucial question is whether our judiciary, aided by counsel of integrity, will test the limits of its independence by deploying its Constitutional powers to adopt such innovative (or under-utilized) procedures notwithstanding the protestations of those who had come to expect—and to profit from—“litigation as usual.” Justice Starcher, in the West Virginia *Tobacco* litigation, summarized the defendants’ argument of entitlement, pursuant to the due process clauses of the State and federal Constitutions, to try the question of punitive damages one case at a time so that the jury would assess each defendant’s culpability to each plaintiff individually rather than collectively. He noted the defendants’ insistence that the only way punitive damages may be reasonably related to the potential harm caused to an individual plaintiff is by a jury hearing evidence about both a defendant’s conduct and the actual or potential harm to the plaintiff at the same time. In sum, Justice Starcher acknowledged the defendants’ recurring assertion in large mass litigation, that the issue of punitive damages can never be assessed under Rule 42(a), “or for that matter in a class action under Rule 23.”¹⁴⁰

Justice Starcher exposed the pivotal defect with this argument: its inherent flaw is “the assumption that due process, particularly to protect property rights, is a concrete concept. Instead, what process is due under the due process clause is determined under a sliding scale, and changes with the facts of each case.”¹⁴¹ Once it is determined that due process applies, the question to be answered is “What process is due?”¹⁴²

The due process analysis explicated by Justice Starcher proceeds from an analogy to criminal litigation, in which the concept of due process is sacred. Nonetheless, as he notes, the courtroom process due to someone who has several parking tickets is different from the procedural

139. For a description of the New Jersey system, see New Jersey Courts Online, Mass Tort Information Center, <http://www.judiciary.state.nj.us/mass-tort/index.htm>.

140. *Id.* at 748.

141. *Id.* Other cases have employed similar reasoning:

When due process applies, it must be determined what process is due and consideration of what procedures due process may require under a given set of circumstances must begin with a determination of the precise nature of the government function involved as well as the private interest that has been impaired by government action.

Bone v. W. Va. Dep’t of Corr., 255 S.E.2d 919, 919 (W. Va. 1979). “[D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972), *quoted in Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

142. *Tobacco Litig.*, 624 S.E.2d at 748 (Starcher, J., concurring).

protections afforded a shoplifter, and “vastly different from the process to be accorded someone who is accused of murder.”¹⁴³ If these real and practical gradations in due process are permissible—indeed necessary—in the criminal realm, they can hardly be withheld from the arena of civil litigation. While the interests at stake in civil cases are different in kind than the life and liberty interests at risk in criminal prosecutions, the stakes in modern complex litigation nonetheless can be very high.

Comparing the criminal and civil litigation systems is, from many perspectives, problematic: the two fulfill different crucial functions in our society. The first imposes penalties upon individuals who breach the social contract by harming or imperiling others, through violence or fraud. The second enforces the social contract against those who breach the integrity of the commercial life of the community, although the harms attending such breaches may likewise involve death or injury to the victims. We accord the utmost due process to those accused of criminal wrongdoing, precisely because their lives and liberties, which the social contract was designed to protect, are in jeopardy. In civil litigation, it is the plaintiffs whose lives or property has already been taken, damaged, or imperiled. It should be a matter of equal concern to deliver the due process these litigants deserve by refusing to consign them to an endless wait for a trial which can never come because their opponent insists on a complete, costly, time consuming trial in each of a multitude of cases, rather than the group, aggregate, class action, test case, or consolidation alternatives the Federal Rules provide.

Our society need not tolerate undue expense and delay in civil litigation simply because some defendants are willing to endure it, and can afford to impose it upon their opponents. The limited resources of our court system must be apportioned fairly among all of the litigants who need them, and, in our era of mass production, mass marketing, and nationwide consumer markets bombarded with myriad standardized products, those who need to avail themselves of the system when products kill, injure, fail to perform as represented. The demand on scarce judicial resources is greater than ever, and the need to apportion them fairly is now critical.

We are far indeed, both in time and in economic reality, from the beginnings of our nation, when the judicial system could, and was expected to, enforce the social contract effectively by dispensing one trial per customer. Literally applying that notion of due process to the contemporary context negates due process itself. As Justice Starcher put it, if due process were reduced to the literal concept of a defendant’s right to one jury trial per claim, in litigation involving thousands injured or damaged in similar ways by the same product or practice, “we would essen-

143. *Id.*

tially be saying that the more people a defendant injures with its defective product, the less likely the defendant is ever going to have to pay compensatory or punitive damages to the people injured by the product.¹⁴⁴ This “right” to jury trials in a magnitude the system cannot administer within any reasonable time span is a “right” which trumps and obliterates the corresponding due process rights of opposing litigants. And, as we know from the social contract which animates and justifies our legal system and which endows it with its operative mission, rights are reciprocal; they must be maintained in balance. As Justice Starcher characterized the “rights” that the *Tobacco* defendants were insisting:

[The defendants] would therefore be accorded a right to thousands upon thousands of individual trials that would cause the legal system to grind to a halt. At the same time, we would be telling the individual plaintiffs that they have no rights to any process—because of administrative gridlock, the individual plaintiffs would *de facto* be denied their day in court.¹⁴⁵

CONCLUSION: DUE PROCESS FOR “BOTH SIDES NOW”

If our civil litigation system is to maintain—or recapture—its integrity, its efficiency, and the confidence of the public whose health, safety, and financial security depends upon it, pragmatic due process, in which necessity is the mother of procedural innovation, must be practiced. The term “pragmatic” may be disfavored, because it may, to some, connote a disregard or discount of principle. In the case of due process, however, principle and pragmatism are allies. Pragmatic due process is no less pure than that which ignores the devastating realities of cost and delay upon the administration of justice. Pragmatic due process is proportional, and is most faithful to the underlying principles of due process in its recognition that perfect due process, from the standpoint of one side, may work as a denial of process upon the other. Due process does not tolerate the stark disparities all too often observed, but uncorrected, in complex litigation. Advocates and adjudicators who fall into the trap of seeing due process from one perspective risk distorted decisions that prejudice one side while seeking to protect the other. Due process demands a recognition and protection of the rights of “both sides now.”¹⁴⁶ Due process does not exist if it is not shared among adversaries. It must be apportioned. Each side may feel affronted, or deprived, of perfect due process if it does not receive all of the process that it wishes in a given case. But if there is a shortage of judicial resources, as indeed there is, and if the time and money of each side is finite, which it is, then due process must be allocated so that all have some, lest many have none.

144. *Id.* at 749.

145. *Id.*

146. Apologies to Joni Mitchell, composer of *Both Sides Now*, and to everyone who will now be unable to get that song out their heads.