

**CLASS ACTIONS AND LIMITED VISION:
OPPORTUNITIES FOR IMPROVEMENT
THROUGH A MORE FUNCTIONAL APPROACH
TO CLASS TREATMENT
OF DISPUTES**

JEFFREY W. STEMPEL*

TABLE OF CONTENTS

INTRODUCTION.....	1128
I. THE MODERN CLASS ACTION AT FORTY: UNREALIZED PROMISE AND EXCESSIVE BACKLASH.....	1133
II. DIFFERENTIATING AMONG THE PURPORTED PROBLEMS OF THE CLASS ACTION: RECOGNIZING THE ADVANTAGES OF INVESTOR CLASS ACTIONS	1155
III. CONTINUING LOST OPPORTUNITIES TO EMPLOY CLASS TREATMENT: THREE ILLUSTRATIONS	1171
A. Rhone-Poulenc Rorer	1172
B. Newton v. Merrill Lynch.....	1176
C. Dura Pharmaceuticals.....	1184
IV. MAKING “GOOD” OUT OF A BEST/BAD SITUATION: AN ARGUMENT FOR GREATER USE OF CLASS TREATMENT OF MATTERS.....	1211
A. <i>Issue Class Actions as an Alternative to Refusing Certification</i>	1221
B. <i>More Functional and Flexible Approaches to Fact Development</i>	1233
1. <i>Presumptions</i>	1234
2. <i>Sampling and Test Cases</i>	1239
3. <i>Judicial Adjuncts and Initial Administrative Determinations</i>	1242
4. <i>Peeking at the Merits and Peeking at the Merits</i>	1256
5. <i>Process Concerns</i>	1258

* Doris S. and Theodore B. Lee Professor of Law, William S. Boyd School of Law, University of Nevada, Las Vegas. Special thanks to Jim Cox, Ed Labaton, and Joel Seligman for organizing the Symposium, and to Fran McGovern, Judge Gerard Lynch, and other panelists for helpful comments and ideas. Thanks also to Angela Dows, William S. Boyd School of Law, Class of 2005, for excellent research support on this and other projects.

CONCLUSION: AN EQUILIBRIUM OPPORTUNITY FOR A FUNCTIONAL
 APPROACH TO CLASS TREATMENT 1263

INTRODUCTION

Class actions, to borrow a phrase from the perhaps accidental legal commentators Mick Jagger and Keith Richards, have had more than their “fair share of abuse.”¹ All manner of social ills have been attributed to class actions—litigation blackmail, sweetheart settlements, excessive compensation, economic burden, obfuscation of serious legal and social issues—the veritable “works” of criticisms that can be leveled at a type of legal proceeding.² Much like bankruptcy, medical malpractice, jury trial,

1. For the benefit of those outside the boomer generation, the phrase is from THE ROLLING STONES, *You Can't Always Get What You Want*, on LET IT BLEED (ABKCO Records 1969). The full line from the song is “And I went down to the demonstration to get my fair share of abuse,” *id.*, an ironic parallel in that class action litigation has been something of the progressive outsider of civil litigation, consistently met with opposition, perhaps even repression, at the hands of the legal “establishment.” Like any classic of any genre, lyrics from once-popular songs appear to have some staying power, at least among law professors of the baby boom generation. *See, e.g.*, DAVID G. EPSTEIN, BRUCE A. MARKELL & LAWRENCE PONOROFF, *MAKING AND DOING DEALS: CONTRACTS IN CONTEXT* 830 (2002) (using chorus of the same song as introductory quote for section on specific performance).

2. *See, e.g.*, Louis W. Hensler III, *Class Counsel, Self-Interest and Other People's Money*, 35 U. MEM. L. REV. 53, 54 (2004) (“[U]proar over class actions has been building for years. . . . As the years passed . . . hostility toward the class action developed.”); James P. Feeney & Richard E. Gottlieb, *Taming Class Actions: Keeping Best Practices in Mind*, RISK MGMT. MAG., Feb. 2005, at 10 (“[T]he class action device is so overly used and abused that all business entities need to be prepared for a potentially crippling class action lawsuit.”); Eleanor Laise, *Picked Clean*, SMARTMONEY, May 2005, at 80 (describing class action suits as thriving but stating that the supposed plaintiff-beneficiaries often receive pennies on the dollar or small nonmonetary compensation, while lawyers have turned such lawsuits into an industry for collecting large fees). This gloomsday scenario is pretty typical of the perspective found in business, insurance, risk-management, and defense-counsel literature. It is undoubtedly shared by more than a few judges as well. *See, e.g.*, *In re Masonite Corp. Hardboard Siding Prod. Liab. Litig.*, 170 F.R.D. 417, 419 (E.D. La. 1997) (“Class certification exists today in an environment of diminished respect.”). For scholarly discussions of these concerns surrounding class actions, see DEBORAH R. HENSLER, NICHOLAS M. PACE, BONITA DOMBEY-MOORE, BETH GIDDENS, JENNIFER GROSS & ERIK K. MOLLER, *CLASS ACTION DILEMMAS: PURSUING PUBLIC GOALS FOR PRIVATE GAIN* (2000); John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343 (1995); Richard A. Epstein, *Class Actions: Aggregation, Amplification, and Distortion*, 2003 U. CHI. LEGAL F. 475; Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377 (2000); Susan P. Koniak & George M. Cohen, *In Hell There Will Be Lawyers Without Clients or Law*, 30 HOFSTRA L. REV. 129 (2001); Charles Silver, “We’re Scared to Death”: Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003). As one commentator put it, a “staple of class action literature is the recognition that class counsel might embrace a settlement inadequate for all, many, or some class members.” Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 163 (2003). The same can be said for issues of blackmail, conflict, self-dealing, or attorney opportunism. Professors Choi, Fisch, and Pritchard’s contribution to this

defendants' rights, broad civil discovery, and the tort system, class actions have become, to mix metaphors, a whipping boy and a political football upon which divergent elements of the legal and political community take out their aggressions. The Class Action Fairness Act of 2005 ("CAFA"),³ although it may accomplish some good, arguably provides another example of the trend. Not surprisingly, this type of atmosphere tends not to serve the public interest, as debate over the issues becomes long on rhetoric and short on analysis (and shorter still regarding empirical fact).

The class action "football," however, has been kicked both upfield and downfield over the years. Class actions have arguably been both overutilized in questionable circumstances (e.g., the 30-minute case from filing to settlement)⁴ and underutilized in cases where aggregation of claims or issues would provide an efficient means to address legitimate questions that might otherwise go unanswered.

Although a number of factors account for this seeming inconsistency, several seem particularly to blame. First is the traditional, almost nostalgic American preference for perfect individuated justice, a cultural norm so entrenched that it continues to rule us from an arguable "grave" in which it has been interred for decades (in view of the reality that nearly all civil disputes are resolved by settlement⁵ and most American law is not

Symposium captures a good deal of this criticism of class actions generally in its discussion of the factors leading to enactment of the Private Securities Litigation Reform Act of 1995 ("PSLRA"). See Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 WASH. U. L.Q. 869, 871–75 (2005). See *infra* text accompanying notes 341–51 for further discussion of the merits of the "blackmail" or "coercion" claim.

3. Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of 28 U.S.C.). See GEORGENE M. VAIRO, *THE CLASS ACTION FAIRNESS ACT OF 2005* (2005) (additional pamphlet/supplement/update to JAMES WM. MOORE ET AL., *MOORE'S FEDERAL PRACTICE* (3d ed. 2005)).

4. See, e.g., John T. Delacourt, *Protecting Competition by Narrowing Noerr: A Reply*, ANTITRUST, Fall 2003, at 77, 78 (stating that most antitrust class actions "will be on the fast track to settlement shortly after class certification, long before a summary judgment motion or merits adjudication of any kind").

5. See Judith Resnik, *Procedure as Contract*, 80 NOTRE DAME L. REV. 593, 609–25 (2005) (stating that modern civil litigation is geared to effecting settlement, a trend furthered by movement toward what Professor Resnik terms a "Contract Model of Procedure" due to use of arbitration clauses, other ADR agreements, and limitations on the default judicial range of remedies, jurisdiction, venue, choice of law, and discovery). See also Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459 (2004) (and other articles in this symposium issue on relative absence of full adjudication); Marc Galanter & Mia Cahill, "Most Cases Settle": *Judicial Promotion and Regulation of Settlements*, 46 STAN. L. REV. 1339 (1994); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000) (suggesting that in civil disputes, settlement is the norm and adjudication is often seen as a failure or aberration); Robert G. Bone, *From Judgment to Settlement: The Changing Character of American Courts*, Lecture at Boston University (Oct. 16, 2000) (transcript available in the Boston University Law Library).

adjudicative⁶). As a consequence, courts resist class treatment by insisting too greatly on both the “day in court” ideal and that class adjudication (if permitted) resolve the whole of a matter, overlooking the degree to which class resolution of selected issues or claims can provide significant social good and dispute-resolution efficiency.⁷

Second, critics of the class action tend to overlook or minimize the deterrent purposes of class actions in favor of focus on the compensatory aspects.⁸ When examining class action adjudication as compared to stand-

6. At least most American dispute resolution is not adjudicative in the formal sense of producing a judgment after full civil litigation, including trial. Many legally binding orders are administrative. See RONALD A. CASS, COLIN S. DIVER & JACK M. BEERMANN, *ADMINISTRATIVE LAW: CASES AND MATERIALS* 1 (3d ed. 1998) (stating “[w]e live in an administrative state” and quoting Supreme Court Justice Robert Jackson’s comment that “[t]he rise of administrative bodies probably has been the most significant legal trend of the last century” and that “[t]hey have become a veritable fourth branch of the Government, which has deranged our three-branch legal theories” (quoting *Fed. Trade Comm’n v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting))). Considering government regulation and enforcement such as fines and license revocation as well as benefits claims such as social security or workers compensation, in addition to the sheer number of administrative law judges and hearing officers, strong cases can be made that the clear majority of American law is administrative law rather than adjudicative law. Of course, administrative law is shaped by adjudication (as well as legislation) and is sometimes trumped by judicial review, so there has not necessarily been a coup of legal legitimacy. See also OWEN M. FISS & JUDITH RESNIK, *ADJUDICATION AND ITS ALTERNATIVES: AN INTRODUCTION TO PROCEDURE* (2003) (viewing procedure in broader sense than most scholars to combine consideration of criminal, civil, and administrative procedure).

Most obviously, at least since the rise of the alternative dispute resolution (ADR) movement in the 1970s, it has become clear that many disputes are resolved through processes other than adjudication or in supplementation of adjudication. Nonetheless, the traditional view of the legal profession has been to exalt the traditional model of adjudication over its alternatives. See Jean R. Sternlight, *Separate and Not Equal: Integrating Civil Procedure and ADR in Legal Academia*, 80 NOTRE DAME L. REV. 681 (2005) (focusing on law school curriculum but making convincing case that legal profession in general gives ADR secondary status relative to traditional civil litigation). My extension of Prof. Sternlight’s analysis posits that as between different modes of civil adjudication, the legal profession traditionally and currently privileges individualized adjudication too greatly in relation to aggregate adjudication.

7. See Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. REV. 193, 196–97 (1992) (noting that American jurisprudence is so dominated by the notion of each litigant being fully heard on its claims as to create a quite restrictive notion of the preclusive effects of prior litigation). See also Lawrence B. Solum, *Procedural Justice*, 78 S. CAL. L. REV. 181, 244–47 (2004) (describing the “Accuracy Model” of procedural justice, one version of which is “The Utopian Ideal of Perfect Procedural Justice”). Professor Solum, while making litigant participation, autonomy, and dignity major components of his preferred form of procedural justice, the “Participation Model,” *id.* at 259–73, nonetheless eschews an unrealistically utopian vision and in the case of class actions and aggregated disputes argues for a modified application of these concepts where necessary to avoid unduly limiting substantive rights. *Id.* at 313–20. See also *infra* text accompanying notes 302–21 (noting that the individual-based concerns of Professor Solum can be accommodated by the class treatment advocated in this article).

8. See, e.g., John C. Coffee, Jr., *Causation by Presumption? Why the Supreme Court Should Reject Phantom Losses and Reverse Broudo*, 60 BUS. LAW. 533 (2005) (arguing for rejection of a theory of loss causation under the Private Securities Litigation Reform Act of 1995 (“PSLRA”) then

alone, full-dress individualized litigation, the class device is seen as wanting because it cannot provide the type of tailored justice or precision at least purportedly achieved through individualized adjudication. The class device is also seen as inferior because of its purportedly greater opportunities for self-dealing by lawyers less tethered to traditional client controls and economic incentives. What these critics overlook is that class actions were designed in large part to give voice to claims that would otherwise not be brought at all and thereby provide deterrence of wrongful defendant behavior. Measured against this goal, class actions can fall short of the individualized adjudicative ideal and nonetheless provide considerable social value.

Third, both critics and defenders of the class action have, in my view, tended to overlook the degree to which different types of actions present different problems—and different opportunities—for use of the class action device. For example, critics of the class action have effectively conflated the perceived problems of mass torts, consumer claims, and investor actions into a hybrid sense that class actions are not only broken but also highly problematic in general.⁹ In reality, different types of lawsuits present different dangers but also present varying prospects for useful application of Rule 23.¹⁰

pending before the Supreme Court in *Dura Pharmaceuticals, Inc. v. Broudo*, 544 U.S. 336 (2005), that presumed prior inaccurate announcements of good news increased share prices before a price decline that was not directly linked to misleading statements and later corrective disclosures). Professor Coffee also presented this paper at the Institute for Law and Economic Policy Conference on Mutual Funds, Hedge Funds and Institutional Investors on April 8, 2005, and the Supreme Court opinion did in fact reject this theory of causation two weeks after Professor Coffee spoke at the ILEP Symposium.

His paper, although well-reasoned, gives comparatively little weight to the deterrence question presented by the case and also argues that affirming the Ninth Circuit's approach to loss causation would create excessive deterrence and inefficiency by making suit too easy whenever a stock declined in price. *See* Coffee, *supra*, at 535, 537–38, 542–43. In my view, Professor Coffee gives too little attention to the issue of deterrence of securities fraud and the likely impact on deterrence that may result from given resolutions of the loss causation problem. *See infra* text accompanying note 265. The Supreme Court's subsequent decision, which embraced Professor Coffee's conclusion and much of his analysis, soft-pedals the deterrent function of securities law while focusing on the compensatory function, leavened with a strong dose of worry that businesses will be unfairly punished for merely being wrong or that undeserving plaintiffs may reap windfalls. *See Broudo*, 125 S. Ct. at 1633. As discussed *infra* in text accompanying notes 205–300, I regard *Dura Pharmaceuticals* as problematic and arguably erroneous, even though defenders of the decision can argue that Congress, through the PSLRA, directed this result.

9. *See, e.g.*, John C. Coffee, Jr., Summary, *The Corruption of the Class Action: The New Technology of Collusion*, 80 CORNELL L. REV. 851 (1995) (criticizing contemporary class action practices of settlement class actions, resolution of future claims, and burdening of opt-out choice of class members); Epstein, *supra* note 2; Feeney & Gottlieb, *supra* note 2; Judith Resnik, *Aggregation, Settlement, and Dismay*, 80 CORNELL L. REV. 918 (1995) (noting movement of class actions toward settlement and away from adjudication of individual rights).

10. *See infra* text accompanying notes 99–160.

Fourth, the tendency of American courts to overlook or undervalue the utility of court-connected judicial adjunct proceedings further contributes to the problem of failure to further address large or complex matters in the most efficient manner.¹¹ Much of this stems from an overly restrictive reading of Rule 23, a very traditional concept of “fact finding,” an implicit belief that Article III judges must be engaged at all stages of a dispute resolution process, and a view that the Seventh Amendment permits little experimentation.¹²

The Class Action Fairness Act, if it functions as intended, will deposit a greater proportion of the problem in federal courts. This expansion of authority, combined with a recognition that class actions have been beaten down a bit by the body politic, gives federal courts an opportunity to improve the situation by taking a less formal and more functional¹³ approach to class actions and rebalancing the pro- and anti-class-action forces into a new equilibrium, one that would enhance the utility of the class action while simultaneously reining in the perceived excesses that have fueled the attack on class actions.¹⁴

Part I of this Article describes the evolution of the perception of the modern class action from populist darling to greedy lawyer pariah, including recent passage of CAFA.¹⁵ Part II examines the degree to which different types of cases present different potential benefits and detriments of class action treatment and explains why investor class actions, including those brought by institutional investors, are particularly likely to benefit

11. For discussion of judicial resistance to use of Special Masters and other judicial adjuncts, see *infra* text accompanying note 425. See also *N. Pipeline Constr. Co. v. Marathon Pipe Line Co.*, 458 U.S. 50, 71 (1982) (holding provisions of 1978 Bankruptcy Act unconstitutional for permitting Article I bankruptcy judges to hear and decide matters based on state law that are not part of “core” bankruptcy proceedings).

12. For discussion of caselaw taking a strong view of the jury trial guarantee set forth in Seventh Amendment, see *infra* text accompanying note 359.

13. This Article will use the term “formal” to describe judicial decisions based largely on a strict or even narrow reading of text, doctrine, and case precedent that does not give significant examination to the history, background, goals, and purpose of Fed. R. Civ. P. 23 and the substantive law (e.g., securities law, tort law) that is the subject of class claims. The term “functional” will be used to describe decisions taking a broader approach to text, doctrine, and precedent coupled with substantial emphasis on the “contextual” factors of the history, background, public policy, and purpose of Rule 23 and substantive legal claims at issue in class action cases. See *infra* text accompanying notes 441–52, discussing the formalist-functionalist divide at greater length. See also Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 393–94 (2004) (distinguishing formalism and functionalism).

14. See *infra* text accompanying notes 61–82 (discussing concept of the judiciary seeking equilibrium in the law, and the greater role to be played by federal courts in class actions because of the tendency of CAFA to direct more class action litigation to the federal courts and to permit fewer state court class actions).

15. See *infra* text accompanying notes 21–106.

from class treatment, are resistant to many of the perceived problems of class actions in other contexts, and should receive a warmer welcome from courts, both in absolute terms and relative to other types of class actions.¹⁶ Part III discusses the continuing underutilization of the class action and the degree to which potential benefits of class treatment are lost due to an excessively formal application of Rule 23.¹⁷ Two significant problem areas are examined, including refusal to use partial class treatment in mass tort matters and reluctance to accord class treatment to Rule 10b-5¹⁸ damages claims. In addition, the Supreme Court's recent decision in *Dura Pharmaceuticals, Inc. v. Broudo*¹⁹ is discussed, as it represents an example of an overly grudging judicial approach to investor class actions (even though it is technically a case interpreting the loss causation and particularized pleading requirements of the PSLRA and not a class action opinion per se).²⁰ Part IV outlines and defends a flexible approach to class treatment that can be applied in a case-specific fashion to enable more effective use of class actions for vindicating civil wrongs as well as protecting non-culpable defendants.

I. THE MODERN CLASS ACTION AT FORTY: UNREALIZED PROMISE AND EXCESSIVE BACKLASH

Group litigation has existed for centuries.²¹ Class actions were sufficiently established to be part of the pre-1938 Equity Rules and to be

16. See *infra* text accompanying notes 107–60.

17. See *infra* text accompanying notes 164–301.

18. See *infra* text accompanying notes 332–40.

19. *Dura Pharmaceuticals, Inc. v. Broudo*, 125 S. Ct. 1627 (2005).

20. See *infra* text accompanying notes 205–16.

21. See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE § 10.20, at 641 (5th ed. 2001) (“The antecedents of the class action date back through the equity procedure of the eighteenth and nineteenth centuries to the middle ages. The modern class suit evolved in the civil rights cases of the 1950s and 1960s and in the consumer movement of the 1960s and 1970s.”). The definitive historical account is generally seen as STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987), which builds on several significant historical articles about group litigation. See Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866 (1977); Stephen C. Yeazell, *From Group Litigation to Class Action Part I: the Industrialization of Group Litigation*, 27 UCLA L. REV. 514 (1980); Stephen C. Yeazell, *From Group Litigation to Class Action Part II: Interest, Class, and Representation*, 27 UCLA L. REV. 1067 (1980). See also Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990) (reviewing STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987) and commenting at length); Raymond B. Marcin, *Searching for the Origin of the Class Action*, 23 CATH. U. L. REV. 515 (1974); William Weiner & Delphine Szyndrowski, *The Class Action, from the English Bill of Peace to Federal Rule of Civil Procedure 23: Is There a Common Thread?*, 8 WHITTIER L. REV. 935 (1987).

formally codified in the 1938 Federal Rules of Civil Procedure.²² But it was not until the 1966 Amendments to the Federal Civil Rules that the modern class action emerged.²³ The 1966 Amendments effected a considerable expansion and liberalization of Rule 23, ushering in a new era of expanded class action use. The primary rationale for expansion of the class action was concern about the existence of injuries unremedied by the regulatory action of government. As the Supreme Court has said, “[w]here it is not economically feasible to obtain relief within the traditional framework of a multiplicity of small individual suits for damages, aggrieved persons may be without any effective redress unless they employ the class action device.”²⁴ As further elaborated by a leading treatise:

Class action suits serve several basic purposes. One primary purpose is to promote judicial economy and efficiency by avoiding multiple adjudications of the same issues. From the plaintiffs’ perspective, class actions afford aggrieved persons a remedy when it is not economically feasible to obtain relief through the traditional framework of multiple individual damage actions as, for example, when each claim involves only a small dollar amount. Thus, the class action device enhances access to the courts by spreading litigation costs among numerous litigants with similar claims. From the defendants’ perspective, a class action provides a single proceeding in which to determine the merits of the plaintiffs’ claims and, therefore, may protect defendants from repeated and potentially inconsistent adjudications.²⁵

22. See 5 MOORE ET AL., *supra* note 3, § 23App.100. See also Fed. R. Civ. P. 23 advisory committee’s note, reprinted in 2 Moore et al., *supra*, § 23App.01[2] (“This is a substantial restatement of Equity Rule 38 . . .”).

23. See 5 MOORE ET AL., *supra* note 3, § 23App.01[3] (“Rule 23 stood as promulgated in 1937 until it was completely revised in 1966.”); JAMES, HAZARD & LEUBSDORF, *supra* note 21, § 10.20 at 641 (“The key legal development in [expansion and] evolution [of the class action] was the 1966 revision to Federal Rule 23, which eliminated several technical constraints on the class action.”).

24. *Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980). Accord *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997) (“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 A class action solves this problem”).

25. 5 MOORE ET AL., *supra* note 3, § 23.02 at 23–37 to 23–38 (citations omitted). Accord JAMES, HAZARD & LEUBSDORF, *supra* note 21, § 10.20 at 641–44 (also emphasizing deterrent role of class actions in “enforcing the law” as well as providing means of avoiding constraints of requirement that “necessary parties” be joined to proceed with action and facilitating suits by organizations). Further, as Professors Hay and Rosenberg point out, the attractiveness of the class action is not simply that it makes aggregation of uneconomically small claims feasible but also “that it prevents the defendant from using the plaintiffs’ numerosity against them” by allowing plaintiffs to

But, the treatise continues, “[c]oncerns of judicial efficiency may not overrule all other concerns, however. Fairness and due process concerns make litigation by and against named parties the normal rule and litigation by or against a class the exception to the normal rule.”²⁶

This tension between a strong public policy purpose in giving voice to claims that might not be brought but for the benefits of Rule 23’s aggregation and concern that the class device not overly supplant the norm of individualized adjudication has been apparent throughout the forty years of the modern class action. Amended Rule 23 was initially met with a good deal of optimism. Many judicial opinions praised its rationale and stated that Rule 23 should be liberally construed to effect its purposes.²⁷ Within a few years, however, the class action was subject to critical commentary and judicial decisions restricting its use.²⁸

exploit the same scale economies [in a class action case] as the defendant when investing in the case. Because the plaintiffs’ lawyers can spread their investment over all the claims—just as the defendant does—it becomes possible to make investments in the litigation that the plaintiffs could not make if the claims were prosecuted separately.

Hay & Rosenberg, *supra* note 2, at 1380–81.

26. See 5 MOORE ET AL., *supra* note 3, § 23.03 at 23–38.

27. See, e.g., *Esplin v. Hirschi*, 402 F.2d 94, 99 (10th Cir. 1968), *cert. denied*, 394 U.S. 928 (1969); *Green v. Wolf Corp.*, 406 F.2d 291, 301 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969); *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 563 (2d Cir. 1968), *rev’d on other grounds*, 417 U.S. 156 (1974). As discussed *infra* in text accompanying note 37, the Supreme Court’s reversal of the Second Circuit’s *Eisen* decision, although officially classified as reversal based on a differing view of Rule 23(b)(3)’s notice requirement, can also be regarded as reversal based on a substantially less liberal construction of Rule 23 and substantially less regard for the deterrence and claim-viability-through-aggregation rationales underlying Rule 23. Instead, the Supreme Court placed considerably more emphasis on the individualized justice, procedural safeguards, and the aspects of Rule 23 that protect against weak claims that nonetheless pose serious financial risk when aggregated. See Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem,”* 92 HARV. L. REV. 664 (1979) (suggesting that the Court’s excessive fear of large class actions led it to take an unreasonably stringent view of notification requirements).

28. In addition, this tension was apparent in other decisions that, in arguable counterpoint to cases urging liberal construction of Rule 23, stated that Rule 23 should be strictly construed. See, e.g., *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 468 (9th Cir. 1973) (holding that Rule 23’s broad, flexible language must be narrowed through judicial construction, particularly where proposed class would present manageability problems). This is a candid and overt embrace of what might be deemed judicial activism in the service of narrowing the reach of legislation. Under the Rules Enabling Act, 28 U.S.C. §§ 2072, 2074 (2000) the Federal Rules of Civil Procedure are at least tacitly approved by Congress after promulgation by the Supreme Court since Congress has the power to act within six months to alter, amend, or eliminate a proposed Rule or Amendment. See also *In re A.H. Robins Co.*, 880 F.2d 694, 729–38 (4th Cir. 1989) (criticizing *La Mar* Court’s analysis as excessively resistant to text, purpose, history, and rationale of Rule 23). However, the *La Mar* sentiment—a broadly interpreted Rule 23 is not wise—crops up frequently in case decisions, usually under the individualism principle, the manageability principle, or the fear of coercive litigation rather than in a frontal assault on Rule 23 itself or overt disagreement with the principle of liberal construction to serve the purposes of the Rule. See, e.g., *Andrews v. AT&T*, 95 F.3d 1014, 1025 (11th Cir. 1996) (construing manageability problems to preclude class treatment of claims); *Roby v. St. Louis Sw. Ry. Co.*, 775

For example, in *Snyder v. Harris*,²⁹ and *Zahn v. International Paper Co.*,³⁰ the Supreme Court held that the claims of class members could not be aggregated for purposes of satisfying the jurisdictional amount for federal jurisdiction. *Snyder* held that a class action may not be maintained when no member of the class has a claim in the requisite amount.³¹ In *Zahn*, the Court rejected class treatment in a matter even though the named plaintiffs had claims of more than \$10,000 because many of the class members had claims of less than that amount³² (the jurisdictional amount at the time, which was subsequently raised to \$75,000 in the current version of 28 U.S.C. § 1332). In other words, each member of the class needed to have a significant enough personal claim to satisfy the jurisdictional amount, a requirement that made it considerably more difficult to obtain diversity jurisdiction to support prosecution of a federal court class action (and was made more difficult over the years as the jurisdictional amount for diversity cases climbed from \$10,000 to \$75,000). The Court's *Snyder* and *Zahn* decisions, like other forms of judicial resistance to aggregation of claims to satisfy the jurisdictional amount, have been correctly criticized.³³ Nonetheless, the Court made no

F.2d 959, 961 (8th Cir. 1985) (holding that Rule 23 must be strictly construed).

To some extent, this inconsistency is one seemingly inherent in the complexity of law, the differences among judges and situations, and the inconsistency of the human intellect. For example, two old saws of statutory construction are (1) remedial statutes should be liberally construed and (2) statutes in derogation of the common law should be strictly construed. See J.G. SUTHERLAND, STATUTORY INTERPRETATION §§ 573–75, 582–85 (2d ed. 1904). These two rules of statutory construction are, of course, almost completely inconsistent in that by definition nearly every piece of remedial legislation will be in “derogation” of the common law. Were the common law otherwise, there would be no need for the remedial legislation. Karl Llewellyn made this point convincingly more than fifty years ago. Karl N. Llewellyn, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes Are to Be Construed*, 3 VAND. L. REV. 395, 401 (1950) (juxtaposing these and other accepted maxims of statutory construction and demonstrating inherent inconsistency in the legal system recognizing both as legitimate, mainstream rules of law). But despite the inconsistency, both rules continued to be cited as the law of statutory interpretation. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, LEGISLATION AND STATUTORY INTERPRETATION 331–32 (2000). Judicial and scholarly attitudes toward the class action display a similar inconsistency, but one that commentators appear to recognize more than courts. See *infra* text accompanying note 308 (discussing conflicted attitudes of legal scholars toward class treatment of claims).

29. *Snyder v. Harris*, 394 U.S. 332 (1969). See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 36 at 198 (4th ed. 1983).

30. *Zahn v. Int'l Paper Co.*, 414 U.S. 291 (1973).

31. *Snyder*, 394 U.S. at 338. See CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 36 at 212 (5th ed. 1994).

32. *Zahn*, 414 U.S. at 301. See WRIGHT, *supra* note 31, § 36 at 214–15.

33. See, e.g., WRIGHT, *supra* note 31, § 36 at 212, 214–15 (criticizing *Snyder* both for failing to articulate clear standard for assessing when claims of individual plaintiffs may be aggregated for purposes of satisfying jurisdictional amount for diversity jurisdiction and for implicitly taking overly restrictive view; criticizing *Zahn* as “a puzzling case, particularly because of its failure even to consider the argument of three dissenters that recent principles of ancillary jurisdiction, which have

movement to soften these barriers to class treatment of claims. Ironically, *Zahn* was ultimately legislatively overruled by the enactment of 28 U.S.C. § 1367,³⁴ the supplemental jurisdiction provisions of the 1990 Civil Justice Reform Act, although the Court did not reach this conclusion until fifteen years after passage of the Act.³⁵

In addition, the Supreme Court took the view that denials of class certification were not appealable final orders even under circumstances where denial of certification amounted to the “death knell” of the litigation.³⁶ Further, the Court took the view that in Rule 23(b)(3) class actions seeking money damages, members of the class were ordinarily entitled to mailed notice of the class and their rights to opt out, even if this imposed a substantial cost-fronting burden on the named plaintiffs and class counsel.³⁷ Although these 1970s decisions were setbacks of sorts,

been held to overcome the jurisdictional-amount requirement in other contexts, should do so also in connection with joinder of parties.”) (footnote omitted). *See also id.* at 211

The rule that if there are several parties their claims cannot be aggregated had its origin more than 160 years ago, at a time when joinder of parties was far less understood than it is today, and it was a construction of a statute regulating the appellate jurisdiction of the Supreme Court, rather than the original jurisdiction of the district courts.

34. Section 1367(a), passed as part of the Civil Justice Reform Act of 1990, provides that where a district court has original jurisdiction, it “shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.” 28 U.S.C. § 1367(a) (2000). The most natural reading of this statutory text suggests that a court facing a proper class in which at least one of the class members meets the jurisdictional amount may hear the entire class action and that each class member must satisfy the jurisdictional amount. More debatable is the question of whether a class of claimants where not even one class member has a claim of more than \$75,000 can be heard by aggregating the small claims. As discussed in note 35, *infra*, the Supreme Court accepted the former proposition but not the latter.

35. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 125 S. Ct. 2611 (2005) (holding that where other elements of jurisdiction are present and at least one named plaintiff satisfies the amount in controversy requirement, § 1367 authorizes supplemental jurisdiction over claims of other plaintiffs in the same case or controversy). Prior to the Court’s decision in *Allapattah*, courts had divided over the issue. *Compare Olden v. LaFarge Corp.*, 383 F.3d 495, 502 (6th Cir. 2004) (finding § 1367 to legislatively overrule *Zahn*) with *Trimble v. Asarco, Inc.*, 232 F.3d 946, 962 (8th Cir. 2000) (holding that *Zahn* continues as binding precedent notwithstanding that the text of § 1367 can be read to permit exercise of supplemental jurisdiction over claimants whose claims individually fall short of the requisite jurisdictional amount). The Court’s *Allapattah* decision seems indubitably correct as a matter of both statutory text and jurisprudential consistency, in that § 1367 was enacted to overrule cases restricting “pendent parties” federal jurisdiction and generally expands jurisdiction in the interests of seeking more efficient, omnibus resolution of cases. *See FLEMING JAMES, JR., GEOFFREY C. HAZARD, JR. & JOHN LEUBSDORF, CIVIL PROCEDURE* § 2.28 (5th ed. 2001). But it is not at all clear that Congress specifically intended this result or wished to strengthen class actions as a byproduct of enacting the Civil Justice Reform Act. Where Congress has expanded federal jurisdiction over class actions, as in the Class Action Fairness Act of 2005, *see infra* text accompanying notes 59–79, this has largely been done as a way of reining in class actions rather than expanding their use.

36. *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978).

37. *Eisen v. Carlin & Jacquelin*, 417 U.S. 156 (1974). *See JAMES, HAZARD & LEUBSDORF, supra*

inhibiting use of the class action, they proved not to be insurmountable stumbling blocks as class actions continued to flourish and be brought in large numbers.³⁸ In addition, class actions expanded beyond their historic base of securities litigation to other realms, most notably mass torts.³⁹

During the 1980s, however, class actions became subject to sustained criticism on the basis of their purported tendency to become lawyer-controlled litigation that lacked requisite client control and policing of attorney behavior. A common criticism was that class actions were fee-driven and designed more to generate counsel fees than obtain compensation for the claimants and purported class members.⁴⁰ Both the traditional bailiwick of class actions—securities fraud—and the emerging use of class actions for mass torts came under criticism.⁴¹

This trend continued into the 1990s. For example, *Central Bank of Denver v. First Interstate Bank of Denver*,⁴² decided in 1994, is, strictly speaking, an opinion about substantive securities law, but had a considerable dampening effect on securities-fraud class actions. The Supreme Court, in a five-to-four decision, abolished civil liability for “aiding and abetting” securities fraud, even though a majority of the

note 21, § 10.23 at 661–62 (criticizing *Eisen* in that the “practical effect of this ruling is to place a severe cost barrier before mass class actions for damages. It also encourages plaintiffs to delay any decision on class certification and notice until they can negotiate a settlement, which can then be used to fund the notice.”).

38. See, e.g., *In re Asbestos Sch. Litig.*, 104 F.R.D. 422 (E.D. Pa. 1984) (according class treatment in large mass tort matter). A search of the LexisNexis caselaw database suggests more than 3,000 class actions resulting in some sort of opinion during the 1975–1985 period.

39. See, e.g., *In re Agent Orange Prods. Liab. Litig.*, 818 F.2d 145, 166 (2d Cir. 1987) (finding certification apt due to important common defenses raised by defendants in product liability toxic tort where defenses were applicable to entire class); *In re Asbestos Sch. Litig.*, 104 F.R.D. at 429 (holding that common issues regarding knowledge of the health hazard posed by asbestos, failure to warn, and industry practices warranted class treatment). See also 5 MOORE ET AL., *supra* note 3, § 23.23[4][h] at 23–86 (stating “courts have become less reluctant to certify [mass tort] classes based on common . . . issues” and citing *Agent Orange* as a key early case in the trend). See generally PETER SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1986).

40. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 882–83 (1987); John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 680–81 (1986). See also Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92 (noting that even in individual cases, lay parties have relatively little control of the litigation in relation to attorneys).

41. See John C. Coffee, Jr., *The Unfaithful Champion: The Plaintiff as Monitor in Shareholder Litigation*, LAW & CONTEMP. PROBS. Summer 1985, at 5, 17–18, 20–23; Roger H. Transgrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 87–88. See also David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 914–16 n.2 (1998) (providing extensive listing of articles discussing class action practice).

42. 511 U.S. 164 (1994).

federal circuit courts had recognized this liability for some time.⁴³ Thereafter, lawyers, accountants, bankers, or others that indirectly helped perpetrators engage in direct violation of the securities laws could not be sued under the 1934 Act (although they might still have liability under relevant state statutes or common law, such as an action for professional negligence, and they might still be liable as principals). This change in substantive law had a corresponding contracting effect on the scope of securities class actions, as it eliminated a significant possible use of the class action for investors concerning a type of misbehavior that often would have common questions of fact and law.⁴⁴

Class actions or the types of suits spawning class claims then became a target in the legislative arena as well. Securities class actions were the first to feel the pinch of what can in retrospect be seen as ten years of developments restricting class treatment of litigation. First came the Private Securities Litigation Reform Act of 1995,⁴⁵ which had emerged as a top political priority for congressional Republicans under their “Contract with America” program. When swept into control of the House of Representatives on the heels of the 1994 mid-term elections, Speaker Newt Gingrich and his allies placed sufficient emphasis on securities litigation reform to achieve it within a matter of months.⁴⁶ Not even a presidential veto could stop the legislation.⁴⁷ Among other things, the PSLRA:

- adopted a heightened pleading requirement for antifraud claims under the 1934 Act;
- adopted a safe harbor for forward-looking company statements;

43. *Id.* at 169, 184–85

44. See John R. Kroger, *Enron, Fraud, and Securities Reform: An Enron Prosecutor’s Perspective*, 76 U. COLO. L. REV. 57, 92 (2005) (*Central Bank* “reversed twenty-five years of practice and precedent in eleven federal circuits”); David J. Baum, *The Aftermath of Central Bank of Denver: Private Aiding and Abetting Liability Under Section 10(b) and Rule 10b-5*, 44 AM. U. L. REV. 1817, 1839 (1995) (*Central Bank* “fundamentally alters” private securities litigation by elimination of aiding and abetting liability and consequent restriction of meritorious actions as well as nonmeritorious actions).

45. Pub.L. 104-67, 109 Stat. 737 (1995) (codified 15 U.S.C. § 77a *et seq.*).

46. Support for the PSLRA was hardly limited to Republicans. Prominent Democrats such as Senators Christopher Dodd (D-Conn.), Barbara Mikulski (D-Md.), and Carol Mosley-Braun (D-Ill.) were listed as co-authors on the initial bill. S. 240, 104th Cong. (1995). See S. REP. NO. 104-98 (1995).

47. See Choi *et al.*, *supra* note 2, at 873 (reviewing background of PSLRA). See also Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465, 1468–78 (2004) (providing background on PSLRA and assessing empirical results of securities class actions);

- imposed a mandatory stay of discovery during the time a motion to dismiss a securities fraud suit is pending;
- established proportional liability rather than joint-and-several liability;
- limited damages available in fraud-on-the-market cases;
- restricted counsel fee awards to a reasonable percentage of damages actually paid to the plaintiff class; and
- added a provision requiring plaintiffs to prove a sufficient causal nexus between defendant misstatements and the loss claimed by plaintiff.⁴⁸

The PSLRA is not restricted to class actions per se but speaks to securities fraud claims generally. However, because class actions are a common vehicle for bringing investor claims and because so much of the expressed concern animating passage of the Act related to class actions, it is more than fair to see the PSLRA as a backlash-like reaction to perceived problems of the class action.⁴⁹ “When it was reported that lawyers were evading [the PSLRA] by filing actions in more permissive state courts, Congress preempted many state court securities fraud class actions with the Securities Litigation Uniform Standards Act of 1998”⁵⁰ (SLUSA).⁵¹ The congressional orientation toward securities claims continued to be more hostile than welcoming. During the late 1990s, a number of prominent court decisions also curtailed aspects of class action litigation. For example, class treatment was refused in mass tort cases⁵² and in a

48. 15 U.S.C. §§ 78u-4(a)(6), (b)(2), (b)(3)(B), (b)(4), (e), (f), 78u-5 (2000).

49. For example, in addition to generally constricting securities claims, Congress refused to overturn the *Central Bank* decision and restore aiding and abetting liability under the securities law. See Lewis D. Lowenfels & Alan R. Bromberg, *A New Standard for Aiders and Abettors Under the Private Securities Litigation Reform Act of 1995*, 52 BUS. LAW. 1 (1996) (but noting that SEC may bring actions against aiders and abettors of securities fraud even if individuals have no right of action under *Central Bank of Denver*); Glen Shu, Comment, *Take a Second Look: Central Bank After the Public Securities Litigation Reform Act of 1995*, 33 HOUS. L. REV. 539, 568–69 (1996) (same).

50. JAMES, HAZARD & LEUBSDORF, *supra* note 21, § 10.22 at 654.

51. 15 U.S.C. 77p, 78bb(f) (2000). See Richard W. Painter, *Responding to a False Alarm: Federal Preemption of State Securities Fraud Causes of Action*, 84 CORNELL L. REV. 1, 2–7 (1998).

52. See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995); *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). See also *In re Simon II Litig.*, 407 F.3d 125 (2d Cir. 2005) (vacating trial court’s certification of class on question of punitive damages claims against tobacco companies and rejecting limited-fund class-action status; also suggesting that constitutional limitations on punitive damages set forth in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), work against class treatment of punitive damages claims). See *infra* text accompanying notes 164–77 for further discussion of Rhone-Poulenc.

securities matter in which the plaintiffs clearly appeared to have established culpability of the defendants.⁵³ Most important, the U.S. Supreme Court twice supported limitations on the use of class actions in mass tort claims.

In *Amchem Products, Inc. v. Windsor*, the Supreme Court overturned settlement of a mass tort class action where the Court found insufficient predominance of common issues of fact and also found representation of the class members to be inadequate due to conflicts of interest among the class members, some of whom were currently displaying symptoms of asbestos-related injury and some of whom were asymptomatic and might never develop injuries.⁵⁴

Two years later, in *Ortiz v. Fibreboard Corp.*, the Supreme Court overturned a \$1.535 billion global settlement of 45,000 pending and all future claims on the ground that this was not a proper use of a limited funds class action under Federal Rule of Civil Procedure 23(b)(1)(B), the limited funds being the remaining assets of an asbestos manufacturer and its insurance coverage.⁵⁵ In addition, despite its limited funds rationale, the *Fibreboard* settlement would have permitted the company to retain “virtually its entire net worth,” the class definition was viewed as incomplete, and class representatives were seen as recovering disproportionately more than similarly afflicted class members.⁵⁶

Although the correctness of the *Amchem* and *Ortiz* rulings and the precise degree to which they limit future settlement of class actions can be debated, there is no debate that their net effect was to make class actions less attractive as a mass tort settlement tool. In the aftermath of these decisions, asbestos defendants and plaintiffs have shown considerably more interest in using bankruptcy proceedings, particularly the pre-packaged bankruptcies authorized by 11 U.S.C. § 524(g)⁵⁷ as a means of

53. *Newton v. Merrill Lynch*, 259 F.3d 154, 193 (3d Cir. 2001). See *infra* text accompanying notes 178–204 for further discussion of *Newton*.

54. 521 U.S. 591, 622–28 (1997).

55. 527 U.S. 815 (1999).

56. *Id.* at 854–58.

57. 11 U.S.C. § 524(g) (2000); see Susan Powers Johnston & Katherine Porter, *Extension of Section 524(g) of the Bankruptcy Code to Nondebtor Parents, Affiliates, and Transaction Parties*, 59 BUS. LAW. 503, 510–11 (2004) (“In 1994, Congress amended the Bankruptcy Code to provide a restructuring model for asbestos-related bankruptcies. Section 524(g) represents a congressional response to the need for an effective mechanism to facilitate reorganization of companies facing massive numbers of asbestos claims. A variety of efforts to achieve such relief outside Chapter 11 have not proven successful. Section 524(g) codifies the approach that Johns-Manville Corporation, a major asbestos producer, used in its bankruptcy in the mid-1980s to deal with the asbestos claims against it.”) (footnotes omitted).

achieving global peace.⁵⁸ Although *Amchem* and *Ortiz* have only a tangential impact on investor class actions and settlement, they are part of the restrictive trend of the past decade.

Most recently, Congress passed the Class Action Fairness Act of 2005,⁵⁹ in which class action critics continued in the vein of the PSLRA in attempting to rein in purported misuse of the class device. Certainly, the arguments in favor of CAFA have been made on the political circuit for years, at least since passage of the PSLRA and SLUSA. Intervening use of state-court class actions in mass tort and consumer matters (perhaps spurred by efforts to avoid the effect of the *Amchem* and *Ortiz* holdings) fueled the drive to reform. Many saw such class actions, particularly in mass tort matters, as a means of forum shopping in favor of highly plaintiff-friendly venues⁶⁰ (what the American Tort Reform Association has labeled “judicial hellholes”⁶¹). With the 2004 re-election of President Bush and stronger Republican majorities in the House and Senate, CAFA

58. See Georgene Vairo, *Mass Torts Bankruptcies: The Who, the Why and the How*, 78 AM. BANKR. L.J. 93, 106–07 (2004) (reporting more than seventy asbestos-related bankruptcies); see also Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045 (2000); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. CIN. L. REV. 1319 (2002). Of course, *Amchem* and *Ortiz* only restricted particular usage of the class action as a dispute resolution device. They did not eliminate the asbestos mass tort problem, which rages on. See Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002).

59. Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) (codified in scattered sections of § 28 U.S.C.).

60. See VAIRO, *supra* note 3, at 1 (stating that the purpose of the Act is “to prevent judge shopping to States and even counties where courts and judges have a prejudicial predisposition on cases”) (quoting 151 CONG. REC. S999 (daily ed. Feb. 7, 2005) (statement of Sen. Arlen Specter (R-Pa))).

61. AMERICAN TORT REFORM ASSOCIATION, JUDICIAL HELLHOLES 2004 (2004), <http://www.atra.org/reports/hellholes/report.pdf>. See VAIRO, *supra* note 3, at 3 (stating that under the pre-CAFA status quo, “corporate defendants complained of being sued in ‘judicial hellholes’”). Although the rather attention-getting term has its origin with avowedly partisan lobbyist groups such as the American Tort Reform Association, the term has also been employed by groups generally regarded as non-partisan. See, e.g., AMERICAN COLLEGE OF TRIAL LAWYERS, MASS TORT LITIGATION MANUAL 263–65 (forthcoming 2005) (describing certain jurisdictions as “judicial hellholes” sought by counsel for plaintiffs because of favorable judges and jurors in given area). However, I would argue that these groups can be partisan on certain issues. See Jeffrey W. Stempel, *Politics and Sociology in Federal Civil Rulemaking: Errors of Scope*, 52 ALA. L. REV. 529, 530, 629 (2001) (noting that American College of Trial Lawyers played active role in advocating narrowing of federal civil discovery through 2000 Amendment to Rule 26 and that College committee active on the issue was overwhelmingly composed of defense counsel, particularly product liability defense counsel).

According to Professor Vairo, the “political nature” of CAFA “cannot be disputed.” See VAIRO, *supra* note 3, at 1–2 (noting that House bill was co-sponsored by sixty Republicans and thirteen Democrats, a nearly five-to-one ratio, suggesting greater GOP support but with significant numbers of Democratic legislators supporting CAFA, and stating, “[e]ven though CAFA was politically motivated, many Democrats and some plaintiffs’ attorneys shared the notion that problems existed with class action litigation.”).

moved to the top of the legislative agenda.⁶² CAFA made several significant changes in class action law. Among other things, CAFA:

- Expanded federal jurisdiction so as to encompass most class actions, requiring only minimal diversity among plaintiffs and defendants to permit exercise of federal jurisdiction.⁶³ In addition, CAFA creates federal jurisdiction for a new category of “mass actions,” which are defined to include cases seeking monetary relief that have been joined for trial, involve 100 or more plaintiffs, and satisfy the other federal jurisdictional requirements set forth in 28 U.S.C. § 1332(d)(2)-(11).⁶⁴ Interestingly, Congress chose to reject aggregation of plaintiffs’ claims for purposes of determining whether the jurisdictional amount is met in mass actions.⁶⁵ The *Zahn* rule continues to govern in this area.⁶⁶
- Provided for more expanded removal of class actions from state courts and restricted remand, authorizing expedited appellate review of remand decisions.⁶⁷ The federal court is required to

62. See Correy E. Stephenson, *New Law Limits Class Actions*, LAW. WKLY. USA, Mar. 14, 2005, at 1 (“The new class action bill signed into law by President Bush on Feb. 18 has given the administration its first tort reform victory.”). The legislation passed with strong majorities of 279 to 149 in the House and 72 to 26 in the Senate. *Id.* at 1. To some extent, CAFA appears part of a broader trend toward restricting litigation and claims thought to be unreasonably favorable to plaintiffs. See Steven J. Mintz, ELECTIONS FAVOR TORT REFORM: STATE INITIATIVES LIMIT CONSUMER, MEDICAL MALPRACTICE SUITS, LITIG. NEWS, Mar. 2005, at 1.

63. CAFA creates a new provision, 28 U.S.C. § 1332(d), which provides for federal jurisdiction over any class action in which at least one plaintiff is a citizen of a state different than that of at least one defendant and where the matter in controversy exceeds the sum of \$5 million. 28 U.S.C.A. § 1332(d)(2) (2005). This section of CAFA specifically rejects the *Zahn* bar to aggregating plaintiffs’ claims to reach the jurisdictional amount, see *supra* text accompanying notes 30–32, providing that “[i]n any class action, the claims of the individual class members shall be aggregated to determine whether the matter in controversy exceeds the sum or value of \$ 5,000,000, exclusive of interest and costs.” 28 U.S.C.A. § 1332(d)(6) (2005).

64. “Mass action” is defined in 28 U.S.C.A. § 1332(d)(11).

65. 28 U.S.C.A. § 1332(d)(11)(B)(i) (2005).

66. See VAIRO, *supra* note 3, at 33–34; Gregory P. Joseph, *The Class Action Fairness Act of 2005: A Preliminary Analysis*, NAT’L L.J. (2005), http://www.law.com/pdf/nlj/cafa_joseph.pdf.

67. In particular, a federal court is required to exercise jurisdiction over a removed state court class action unless at least one-third of all class members are citizens of the forum state. 28 U.S.C.A. § 1332(d)(3)-(4) (2005). If the number of class members who are forum state residents is between one-third and two-thirds of all class members, the federal court is permitted to decline jurisdiction, provided that the “primary defendants” are also citizens of the forum state. *Id.* In guiding the exercise of its discretion, the court is to consider the following six factors:

(A) whether the claims asserted involve matters of national or interstate interest;

(B) whether the claims asserted will be governed by laws of the State in which the action was originally filed or by the laws of other States;

decline jurisdiction only where two-thirds or more of the class members are residents of the forum state and either the primary defendants are also forum state citizens⁶⁸ or the underlying facts of the dispute are closely linked to the forum state and other criteria are met.⁶⁹ In addition, the one-year time limit on removal generally applicable to civil actions does not apply to removal of state court class actions.⁷⁰ Removal is without regard to defendant's citizenship (not restricted to nonresident defendants as is the case with general removal) and does not require the consent of all defendants, as is normally the case.⁷¹ Expedited appellate review of remand orders is provided.⁷²

- Changed the settlement procedure for federal court class actions. Federal and state officials (in states where class members reside) must be notified of any pending class action settlement within ten days after filing of a proposed settlement with the trial court, which is barred from approving the settlement until at least ninety days after the last government official is served.⁷³ The notice must include a good deal of information designed to

(C) whether the class action has been pleaded in a manner that seeks to avoid Federal jurisdiction;

(D) whether the action was brought in a forum with a distinct nexus with the class members, the alleged harm, or the defendants;

(E) whether the number of citizens of the State in which the action was originally filed in all proposed plaintiff classes in the aggregate is substantially larger than the number of citizens from any other State, and the citizenship of the other members of the proposed class is dispersed among a substantial number of States; and

(F) whether, during the 3-year period preceding the filing of that class action, 1 or more other class actions asserting the same or similar claims on behalf of the same or other persons have been filed.

Id. § 1332(d)(3)(A)-(F).

68. *Id.* § 1332(d)(4).

69. *Id.* § 1332(d)(4)(A). This standard requires that: (i) more than two-thirds of the class members be forum state residents, (ii) at least one defendant from whom "significant relief is sought" and whose conduct is a "significant basis" of the claim is a citizen of the forum state, (iii) the "principal injuries" of the plaintiff class were suffered in the state, and (iv) no other class action asserting the same or similar claims against any of the defendants has been filed during the prior three years. *Id.* In other words, the large core of the dispute must be forum-state centered to avoid removal under CAFA.

70. *Id.* § 1453(b). Section 1446(b) of Title 28 establishes the general one-year limit on removal and was added to the removal provisions of the Judicial Code in 1988 in an effort to prevent stale removal that might cause delay or disruption of litigation. *See Caterpillar, Inc. v. Lewis*, 519 U.S. 61, 67-69 (1996).

71. 28 U.S.C.A. § 1453(b).

72. *Id.* § 1453(c).

73. *Id.* § 1715.

permit the government official to make an informed decision as to whether to further investigate and perhaps challenge the settlement.⁷⁴

- Regulated coupon settlements.⁷⁵
- Took a more stringent view of settlements in which class members must make an expenditure in order to enjoy the benefit of a settlement.⁷⁶
- Limited geographic variance in class member treatment.⁷⁷

In microcosm, CAFA exemplifies the up-and-down history of the class action in the legislative and political arena. The Act has its genesis in perceptions that class actions are being “abused” in significant fashion and that action must be taken to correct the problem. Certainly, groups that are not friendly to class actions regard the legislation as a victory, while class action proponents regard it as a defeat.⁷⁸ The Act does in fact restrict certain class action practices. However, CAFA also should bring an increase in federal class actions (by shifting cases from state court to federal court),⁷⁹ which is arguably a qualitative expansion of the genre in view of the relatively greater federal court expertise on this topic.

74. *Id.* § 1715(b). Among the items to be included with the notice are the complaint and appendices (although these may be sent electronically), notice of any scheduled judicial hearing, any proposed or final notice of settlement to be sent to the class, any settlement or contemporaneous agreement between class counsel and defense counsel, any final judgment or notice of dismissal, any judicial opinion relating to the settlement, and information as to the identities of class members residing in the official’s state. *Id.* § 1715(b)(1)-(8).

75. *Id.* § 1712. In particular, CAFA provides that the value of coupon settlements is to be calculated on the basis of coupons actually redeemed rather than upon the hypothetical total value of all coupons issues that could be redeemed. *Id.* § 1712(a). The purpose of the statute is to avoid cases in which large counsel fees are awarded on the basis of a seemingly valuable (at least in the aggregate) issuance of coupons by the defendant when in fact the plaintiff class members are uninterested in redeeming the coupons.

76. *Id.* § 1713 (requiring that the nonmonetary benefits of any settlement to class members “substantially outweigh” the monetary costs of partaking in the settlement).

77. *Id.* § 1714 (prohibiting judicial approval of settlements where compensation to class members is based “solely” on geographic proximity to situs of case).

78. See Stephenson, *supra* note 62, at 1, 24 (noting that American Tort Reform Association General Counsel Victor Schwartz praised passage of CAFA while Sally Greenberg of the Consumers Union criticized the Act); Matt Brady & Arthur D. Postal, *Insurers, Agents Bask in Class-Action Victory*, NAT’L UNDERWRITER, Feb. 28, 2005, at 6.

79. See VAIRO, *supra* note 3; Alison Frankel, *Magnet Courts Losing Their Pull*, LEGAL TIMES, April 11, 2005, at 3 (stating that plaintiffs’ counsel appears prepared to “simply switch to federal court” for prosecuting class claims); Gerald R. Maatman, Jr., *Class Action Reform May Hike Settlements*, NAT’L UNDERWRITER (PROP. & CASUALTY ED.), Mar. 7, 2005 at 30, 31 (stating CAFA is an “expansion of federal jurisdiction” over class actions and “makes it significantly easier for plaintiffs to file class actions in federal court” and predicting routine defendant removals to federal court).

Certainly, the Act is not a total disaster for class action proponents. One can make a strong argument that pruning back the arguably abusive practices that animated the Act will in general strengthen the class action.

But, on a political level, CAFA represents backlash against the class action and a tendency to blame class actions for other ills of the system. For example, one might ask why Congress has during the past twenty years been unable or unwilling to address the asbestos mass tort problem directly, since this is the primary impetus driving much of the criticized resort to state court class actions. Similarly, if the problem is the existence of kangaroo courts in certain localities, one might wonder why Congress does not attempt to legislate pursuant to the Due Process Clause to bring problematic venues (a/k/a the “judicial hellholes”) under federal supervision in the manner of federal policing of voting rights in affected jurisdictions. Of course, these paths are more logistically, legally, and politically challenging. By comparison, class actions are a “soft target” that can be more effectively attacked by policymakers.⁸⁰

In determining which direction to go with future class action practice, it remains useful to remember that although the class action device may exacerbate other problems in the system, the class action is probably not the root cause of many of the problems for which it is blamed. The trite but true adage about being careful not to discard the baby with the bathwater⁸¹ should serve as a reminder that class actions, despite being battered in recent years, retain a good deal of untapped utility. In the wake of CAFA’s most recent round of reform, the stage may be well set for courts to attempt to realize some of that utility by permitting more flexible and expanded use of class treatment in appropriate cases.

After the past decade’s efforts at recalibrating class actions, it is pretty clear that the American legal-political establishment has something of a love-hate relationship with the class action. Although class actions may become lightning rods for criticism and change, there appears not to be

80. Of course, “soft” does not mean squishy-soft. CAFA was opposed by organized plaintiffs’ counsel and consumer groups. Nonetheless, it was more prudent for business and defense-bar interests to attack class actions rather than to directly attack aspects of substantive law favorable to consumers. A congressional effort to abolish products liability actions would probably raise previously slumbering citizens and organizations in protest. In addition, examples of extreme forum shopping in mass tort cases with minimal contact with the target jurisdiction present useful anecdotes for use in the political arena.

81. See Richard L. Marcus, *Of Babies and Bathwater: The Prospects for Procedural Progress*, 59 BROOK. L. REV. 761 (1993) (urging caution for critics quick to reject all proposed changes and suggesting that such an attitude would lead to Rules becoming outmoded and problematic). Professor Marcus was the co-Reporter of the Federal Civil Rule Advisory Committee.

any significant support for eliminating class actions.⁸² In spite of criticisms, class action treatment is routinely sought by litigants.⁸³ And in spite of what I at least view as too resistant an attitude toward class treatment by many courts, class certification is frequently granted.⁸⁴ Certainly, the class device remains effective in bringing claims that might otherwise not be brought and that appear to be more efficiently resolved through class treatment.⁸⁵ Even in cases where individual litigants would appear well situated to bring an individual claim, the class action device presents attractive opportunities for economies of scale.⁸⁶

82. See, e.g., Leslie A. Brueckner, *Class Action Ethics Issues: Combating the Threat of Class Action Abuse*, 2000 PROF. LAW. 133 (arguing that the problem is not the class-action device itself but abuse of class action through the pre-CAFA no-opt-out provision and coupon settlements); Richard M. Phillips, *The Private Securities Litigation Reform Act of 1995: Rebalancing Litigation Risks and Rewards for Class Action Plaintiffs, Defendants and Lawyers*, 51 BUS. LAW. 1009, 1065 (1996) (arguing that PSLRA “achieves a reasonable balance” of interests in protecting investors and avoiding abusive litigation by allowing pursuit of meritorious claims and “detering speculative securities litigation”).

83. See THOMAS E. WILLGING & SHANNON R. WHEATMAN, FED. JUDICIAL CTR., ATTORNEY REPORTS ON THE IMPACT OF *AMCHEM* AND *ORTIZ* ON CHOICE OF A FEDERAL OR STATE FORUM IN CLASS ACTION LITIGATION: A REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES REGARDING A CASE-BASED SURVEY OF ATTORNEYS (Apr. 2004 with May 2004 Update), available at [http://www.fjc.gov/public/pdf.nsf/lookup/AmOn02.pdf/\\$file/AmOrt02.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/AmOn02.pdf/$file/AmOrt02.pdf); see also LAURA E. SIMMONS & ELLEN M. RYAN, CORNERSTONE RESEARCH POST-REFORM ACT SECURITIES LAWSUITS: SETTLEMENTS REPORTED THROUGH DECEMBER 2003 (2004), available at http://securities.stanford.edu/Settlements/REVIEW_1995-2003/2003_Settlements.pdf (noting continuing significant class action activity notwithstanding the PSLRA); Administrative Office of the United States Courts, Table C-2A: U.S. District Courts—Civil Cases Commenced, by Nature of Suit, During the 12-Month Periods Ending September 30, 1999 Through 2003, available at <http://www.uscourts.gov/judbus2003/appendices/c2a.pdf>.

84. See, e.g., Klay v. Humana, Inc, 382 F.3d 1241, 1257–59 (11th Cir. 2004) (certifying class of physicians in suit against health care company over claims pursuant to Racketeer Influenced and Corrupt Organizations Act (“RICO”)); Daffin v. Ford Motor Co., No. C-1-00-458 2004 U.S. Dist. LEXIS 18977 (S.D. Ohio July 15, 2004) (certifying class action against auto maker in claim alleging failure to honor warranties to purchasers of new cars); *In re Cardizem CD Antitrust Litig.*, 200 F.R.D. 326, 352 (E.D. Mich. 2001) (certifying class in antitrust action); Young v. Meyer & Njus, P.A., 183 F.R.D. 231, 235 (N.D. Ill. 1998) (certifying class in Fair Debt Collection Practices Act case); Enfield v. Old Line Life Ins. Co. of Am., 98 P.3d 1048 (N.M. Ct. App. 2004) (certifying class in action alleging failure to disclose fact resulting in higher future premiums for purchasers of insurance). For example, one study found that securities class action filings increased from 1996 to 1998 and remained at an average of 190 filings or more per year through 2004. CORNERSTONE RESEARCH, CAF INDEX—NUMBER OF CLASS ACTION FILINGS 1996–2004, available at <http://securities.cornerstone.com/Research/litigation.htm>. See also Lindsay Fortado, *Class Actions: Record Securities Settlements*, NAT’L L.J., Mar. 14, 2005, at 9 (noting total securities class action settlements valued at \$5.5 billion in 2004, \$2 billion higher than in 2003). See generally 3 ALBA CONTE & HERBERT R. NEWBERG, NEWBERG ON CLASS ACTIONS § 10:8 (4th ed. 2002).

85. See cases cited *supra* note 84. Although the amounts of damages claimed in these actions were by no means trivial, many of the class members were claiming damage amounts small enough to call into question the economic utility of litigation as a remedy.

86. See Hay & Rosenberg, *supra* note 2, at 1379–81 (demonstrating that even in cases where individual injury is large, defendant has advantage over multiple plaintiffs unless claims are

aggregated due to economies of scale for investing resources in litigation in pursuit of improved odds of success). For instance, in *In re WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 392 (S.D.N.Y. 2003), a class action was filed on behalf of investors in WorldCom, with many class members large individual or institutional investors. See *infra* text accompanying notes 150–51 for further discussion of *WorldCom* as indicative of utility of the class action even for institutional investors with large separate stakes in dispute.

In *In re Tri-state Crematory Litig.*, 215 F.R.D. 660 (N.D. Ga. 2003), relatives of decedents who were to be cremated but were instead left rotting on land adjacent to the crematory pursued a class action against funeral homes, the crematory, and the family that owned the property on which the crematory was located on the theory that there was damage to the families of the decedents because of their residual property-like interest in the physical remains of their loved ones and because the revelation of the horrid treatment of the bodies caused significant injury to the family members. The plaintiff class reached several substantial settlements with various funeral homes that had used the facility as well as a large (but confidential) settlement with the owners of the crematory. See *In re Tri-State Crematory Litig.* MDL No. 1467 (N.D. Ga. Mar. 11, 2004) (in camera proceedings placing settlement on sealed record). Individuals acting alone in the wake of the ghoulish revelations about the treatment of deceased family members would not likely have fared as well, if they had prosecuted their respective causes of action at all.

One could therefore argue that the individual plaintiffs would have had sufficient economic incentive to pursue the tort claims individually. Perhaps. But given the realities of litigation costs, risk, inconvenience, and delay, one can seriously question whether even a \$50,000 injury is worth suing over, particularly for middle- and upper-class persons who could, at least on an economic basis, merely “lump it.” See Richard E. Miller & Austin Sarat, *Grievances, Claims, and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC’Y REV. 525 (1981). More importantly, this is a case in which it appears that class treatment brought an efficient and relatively swift resolution to tort claims that would otherwise have presented a major problem of judicial administration. Although defendants may argue that this is another case of aggregation creating undue pressures to settle, one must ask: Would the defendants (and their liability insurers obligated to defend the claims) really have preferred to face 1,600 individual suits? Or even 400 suits, if I am right about the economics of claim-making?

In what is perhaps the most heavily studied tort litigation, the asbestos mass tort of the past thirty years, analysts have found that more than half and as much as two-thirds of all amounts expended have been for disputing costs, primarily counsel fees (roughly evenly distributed as between plaintiff counsel and defense counsel). See STEPHEN J. CARROLL, et al., *Asbestos Litigation Costs and Compensation: An Interim Report* v-vii, 40, 47 (2002), available at http://www.rand.org/pubs/documented_briefings/DB397/DB397.pdf; James S. Kakalik et al., *Variation in Asbestos Litigation Compensation and Expenses* (1984).

In the 1970s and 1980s, when asbestos claims were more fiercely and individually litigated, total disputing costs were roughly two-thirds of the amount spent on the claims. In other words, only one dollar in three actually went toward victim compensation. In the 1990s, the disputing costs were closer to one-quarter of the amounts expended, reflecting the degree to which asbestos claims were more frequently settled rather than litigated, particularly with the use of group settlements as asbestos defendants attempted to achieve global peace. Because it costs money to litigate, rational plaintiffs and defendants would rather settle so long as they can arrive at a rough evaluation of the case less the expected disputing expenditures. See Rick Vassar, *To Settle or Not to Settle*, RISK MGMT. MAG., Nov. 2005 at 64 (corporate risk manager advocates settlement and less aggressive litigation, stating that “an organization needs to understand that claims management is economic . . . and outside vendors [e.g., attorneys, insurers] have primary interests that may be secondary to the company.”); see also JAMES HAZARD & LEUBSDORF, *supra* note 21, §§ 6.3, 6.4.

Certainly, the judicial system would not be well-served by this alternative. More importantly, if the claims lacked merit, class treatment provided the defendants with a single forum and suit for defense. The uncontested facts of the matter and the size of the settlement certainly suggest that the case was meritorious. The amounts awarded, although large in the aggregate, hardly seem excessive in light of the injuries claimed and the conduct in question.

In many ways, attitudes toward the class action seem reminiscent of attitudes toward government. In the abstract, many people are critical of “big government.” But when asked to eliminate a concrete government program, many of these critics are usually unwilling to ax a program from which they benefit.⁸⁷ In similar fashion, the legal-business-political community may criticize class actions, but it continues to permit them and pursue them.

As discussed in the Introduction, the undue resistance to class actions seems to stem from a number of factors that are more broadly cultural than analytically focused on class actions themselves. Perhaps foremost is the traditional preference for individuated justice, which is somewhat romantically perceived to be better than it really is. Professor Bob Bone has referred to this as the “day in court ideal,” a sentiment that captures both the concept and its idealized notion.⁸⁸ As Professor Bone has observed, notwithstanding problematic aspects, American “commitment to litigant autonomy runs deep: a person must have her “day in court” before the state may bring its judicial power to bear upon her.”⁸⁹ In actual fact, most litigants do not ultimately obtain a day in court but instead participate in a dispute resolution system designed to effect negotiated resolution in accordance with overall legal-social norms.⁹⁰ Nonetheless, the romantic appeal of the day-in-court mythology is sufficiently strong that there is a subconscious tendency to view class actions or other omnibus modes of dispute resolution as a type of second-class justice.

For purposes of disclosure, litigation remains pending regarding insurance coverage in connection with policies issued to the owners of the property on which the crematory operated, who settled with the class in return for assignment of their rights to coverage under the policies and a covenant that the plaintiff class would not seek to satisfy the settlement from the personal assets of these defendants. I have been retained by the plaintiff class in connection with the insurance coverage litigation.

87. See Geoffrey Nunberg, *Thinking About the Government*, AMERICAN PROSPECT, May 1, 2005 at A8 (“people’s enthusiasm for smaller government is apt to wane on the first heavy snow day”).

88. Bone, *supra* note 7. Accord Solum, *supra* note 7, at 259–73 (describing importance traditionally placed in legal doctrine on litigant’s participation in process); Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Liability Crisis,” and Efficiency Cliches Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003). See also Marshall v. Jerrico, Inc., 446 U.S. 238, 242 (1980) (One “central concern” of the legal process is “the promotion of participation and dialogue by affected individuals in the decisionmaking process.”), *cited by* Solum, *supra* note 7, at 259–60.

89. See Bone, *supra* note 21, at 215 n.4 (citing *Martin v. Wilks*, 490 U.S. 755 (1989), which found absent parties not bound by prior consent judgment settling job discrimination claims).

90. See Bryant Garth, *From Civil Litigation to Private Justice: Legal Practice at War With the Profession and Its Values*, 59 BROOK. L. REV. 931, 952–53 (1993) (suggesting that civil litigation is a system of forced negotiation due to coercive default option of adjudication if negotiations fail); Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 TEX. L. REV. 77, 84 (1997) (“[M]ore than ninety percent of cases settle short of trial.”); *supra* note 5 (noting that most cases are resolved without full trial and entry of judgment).

Related to this is traditional reluctance to depart from the typical mode of adjudication as an “event,” in which the proceedings occur simultaneously with one trial determining all issues of liability and damages. Although bifurcation of liability and damages has been a fixture of litigation for some time, the focus of American litigation remains the arena-like event of trial, with the corresponding subconscious resistance to piecemeal adjudication.⁹¹ In actuality, incremental adjudication is much more dominant than is commonly acknowledged. Much adjudication, of course, takes place through pretrial proceedings that decide many of the issues initially presented by the case (through Rule 12⁹² and Rule 56⁹³ motions) as well as conducting the disclosure and discovery that serves as a basis for settlement.⁹⁴ In addition, various modes of ADR may be required of some issues in dispute.⁹⁵ Finally and most obviously,

91. This stands in contrast to the continental mode of trial, which frequently takes place in episodic, piecemeal fashion, a trait facilitated by the absence of the jury. *See* Mirjan Damaska, *Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973).

92. FED. R. CIV. P. 12(1)-(7) provides several grounds for dismissing claims or even entire actions on the basis of lack of subject matter, lack of subject matter jurisdiction, improper venue, defective service, failure to join a required party and, perhaps most important, for failure to state a claim (Rule 12(b)(6)). *See* ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* §§ 4.1, 4.2 (5th ed. 2001).

93. FED. R. CIV. P. 56 provides that summary judgment may be granted where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. At least in theory, if a party has inadequate factual support for an allegation or is basing its claim on an impermissible legal argument, the court can end the case without trial. Although summary judgment can be sought at the outset of litigation, it is more commonly not available until the close of discovery. *See* HAYDOCK, HERR & STEMPEL, *supra* note 92, § 12.3.

94. *See* ROGER S. HAYDOCK, DAVID F. HERR & JEFFREY W. STEMPEL, *FUNDAMENTALS OF PRETRIAL LITIGATION* v. 4 (4th ed. 2000) (Vast majority of civil dispute resolution activity is pretrial litigation rather than trial itself; trial itself occurs in only “a small percentage of disputes.”). The legal academy was arguably slow to recognize this now seemingly obvious fact. Prior to 1985, when the First Edition of *Fundamentals of Pretrial Litigation* was published, there were many trial practice and appellate advocacy texts for law students, but few books regarding pretrial. The past twenty years have seen a comparative explosion of books on pretrial litigation, including multiple editions, as law schools belatedly recognized this civil disputing reality (and market for books). *See, e.g.*, R. LAWRENCE DESSEM, *PRETRIAL LITIGATION: LAW, POLICY, AND PRACTICE* (3d ed. 2001) (first published in 1991). Although judges are undoubtedly aware of this same reality, it is not at all clear that the bench (at least certainly not the entire bench) appreciates the implications for determining when class treatment is or is not “superior” to other adjudicative methods; THOMAS A. MAUET, *PRETRIAL* (5th ed. 2002) (first published in 1988); J. ALEXANDER TANFORD, *PRETRIAL PROCESS* (2003).

95. As with the dominance of largely clientless pretrial proceedings over “day in court” adjudication and the predominance of settlement over trial, the bench, bar, and legal academy were also slow to recognize the presence and importance of ADR, a situation more than rectified by both the explosive growth of ADR activity (the ABA’s Dispute Resolution section is now its largest) and scholarly treatment of the field. *See, e.g.*, JAMES J. ALFINI, SHARON B. PRESS, JEAN R. STERNLIGHT & JOSEPH B. STULBERG, *MEDIATION THEORY AND PRACTICE* (2001); STEPHEN B. GOLDBERG, ERIC D. GREEN & FRANK E.A. SANDER & NANCY H. ROGERS, *DISPUTE RESOLUTION* (2d ed. 1992).

settlement rather than litigation to verdict and multiple appeals is the norm.⁹⁶ Nonetheless, tradition dies hard, and the judicial system appears resistant to any adjudication device that tends to segment the proceedings or provide alternative means of fact finding. The implicit preference is for Article III judges to be engaged at all stages of a dispute-resolution process that culminates in a trial event before a jury (at least in cases subject to the Seventh Amendment guarantee, which is viewed as permitting little experimentation with the basic model of a single jury hearing an entire case in one sitting).⁹⁷

Reservations about class actions, and even some of the more piercing attacks, are also fueled by essentially nonpartisan, but ideological differences over appropriate judicial policy. Professor Issacharoff has summarized the divide well:

On one side were the proceduralist critics of the use of class actions shorn of the protective representation of the absent class members. On the other side were the distributionalist critics of the haphazard and wasteful fashion in which the litigation system responded to the asbestos crisis. For the proceduralists, the critical issues were the process distortions that emerged from conflicted representation and the seemingly inescapable temptation to forego the interests of the victims of tomorrow in exchange for compensation for the claimants of today. On the other side were those whose interests

96. The legal profession was slower still to examine party-controlled negotiation to the extent that arbitration, mediation, and other forms of ADR involving third parties were studied. Scholarly examination of negotiation, first through articles applying game theory and then cognitive theory, and only recently through casebooks or textbooks, tended to follow recognition of the importance of ADR methods and pretrial proceedings. See, e.g., RUSSELL KOROBKIN, *NEGOTIATION THEORY AND STRATEGY* (2002); ROBERT H. MNOOKIN ET AL., *BEYOND WINNING: NEGOTIATING TO CREATE VALUE IN DEALS AND DISPUTES* (2000); Russell Korobkin, *A Positive Theory of Legal Negotiation*, 88 GEO. L.J. 1789 (2000).

97. See, e.g., *Tull v. United States*, 481 U.S. 412, 417–18 (1987) (holding that in determining whether jury trial is required, courts should use a historical test based on whether the action would have been tried to jury in the late eighteenth century and then whether the remedy sought would be traditionally classed as legal or equitable); see also DAVID F. HERR, *ANNOTATED MANUAL FOR COMPLEX LITIGATION* § 22.93 (4th ed. 2005) (citing *Cimino v. Raymark Indus.*, 151 F.3d 297, 319–22 (5th Cir. 1998), which held that individual jury determinations of liability, injury, and damages are required by the Seventh Amendment in asbestos mass tort litigation); Miller, *supra* note 88, at 1087–89 (approving of Supreme Court’s functional approach to jury trial question in *Markman v. Westview Instruments, Inc.*, 517 U.S. 370 (1996), but urging more traditional approach based on history and custom for most Seventh Amendment questions); Margaret L. Moses, *What the Jury Must Hear: The Supreme Court’s Evolving Seventh Amendment Jurisprudence*, 68 GEO. WASH. L. REV. 183, 219 (2000) (stating that the “willingness to allow underlying factual issues to be decided by judge rather than jury is at odds with core Seventh Amendment purposes”); Richard A. Posner, *The Summary Jury Trial and Other Methods of Dispute Resolution—Some Cautionary Observations*, 53 U. CHI. L. REV. 366 (1986) (suggesting that the summary jury trial ADR device may violate the Seventh Amendment).

were primarily dictated by the compensatory and distributive concerns underlying the foundations of the tort system.⁹⁸

Although the proceduralist-distributionalist division was discussed above in the context of mass tort litigation, it serves as a general organizing principle for explaining a good deal of the philosophical divide between those favoring more aggressive versus cautious use of class treatment.⁹⁹ Without doubt, mass tort class action litigation brings the

98. Samuel Issacharoff, “*Shocked*”: *Mass Torts and Aggregate Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1925, 1926 (2002). Accord Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 752–54 (2002). Professor Nagareda’s analysis, as distilled by Professor Issacharoff, provides a rough alignment of the prominent commentators of both camps. Noted proceduralists include Issacharoff, John C. Coffee, George Cohen, Susan Koniak, and Judith Resnik. See, e.g., John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370 (2000) [hereinafter Coffee, *Class Action Accountability*]; Coffee, *supra* note 2; Susan Koniak, *Feasting While the Widow Weeps: Georgine v. Amchem Products, Inc.*, 80 CORNELL L. REV. 1045 (1995); Judith Resnik, *Trial as Error, Jurisdiction as Injury: Transforming the Meaning of Article III*, 113 HARV. L. REV. 924 (2000). Noted distributionists include Eric Green, George Priest, and David Rosenberg. See, e.g., Eric D. Green, *What Will We Do When Adjudication Ends? We’ll Settle in Bunches: Bringing Rule 23 Into the Twenty-First Century*, 44 UCLA L. REV. 1773 (1997); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997); David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U. L. REV. 210 (1996); Hay & Rosenberg, *supra* note 2. See also David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) (taking issue with Nagareda’s thesis endorsing non-coercive remedies in class actions).

99. Of course, a good organizing principle or useful heuristic is not the same as a perfect explanatory device or criterion. Knowing an observer’s relative valuation of procedural-vs.-distributional concerns has significant but not foolproof predictive value. In addition, there is the thorny operational problem of determining exactly who fits into which school of thought. By way of full disclosure, I should note that I was happy to join an amicus brief authored by Professor Issacharoff and Professor Charles Silver and submitted to the Court in the *Amchem* case. Motion for Leave to File Brief Amici Curiae and Brief Amici Curiae of Law Professors in Support of Respondents, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) (No. 96-270) (urging Court to affirm Third Circuit decision disapproving settlement in mass tort asbestos action and refusing to permit certification of class for settlement where class could not be maintained for adjudication, a position ultimately adopted by the Court, as I read its *Amchem* opinion). See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). Presumably, that makes me a proceduralist.

But on the proverbial other hand, as further described in this article, I support greater use of class actions, even in cases where traditional proceduralists would argue that I am insufficiently sensitive to the need for individual proof and targeted judicial inquiry. I also support a liberal attitude toward the use of the class-action device and bankruptcy proceedings as a means of resolving mass tort claims, particularly in the context of the seemingly unending asbestos litigation in which, as the Judicial Conference has noted, “transaction costs exceed the victims’ recovery by nearly two-to-one; exhaustion of assets threatens and distorts the process; and the future claimants may lose altogether” if the claims are not resolved through settlement but left instead to work through the adjudicatory system seriatim. See *id.* at 598 (quoting U.S. JUDICIAL CONFERENCE, AD HOC COMMITTEE ON ASBESTOS LITIGATION REPORT 2–3 (Mar. 1991)).

So perhaps I am a distributionalist after all—or a lapsed proceduralist. Similarly, one can question my classification of Professor Issacharoff as a proceduralist. See, e.g., Samuel Issacharoff & John

divide into starkest relief because of the purported greater variegation found among aggregated tort claimants as compared to other types of aggregate litigation (although the purported differences between tort and non-tort litigation tend to be overstated), particularly the difference between class members with clear symptoms of serious injury and class members that may or may not develop serious injury in the future.¹⁰⁰ But even in non-tort litigation, there is some inherent tension in choosing between aggregate class treatment of a matter and individual treatment of claims. Although less pronounced, the same divide affects thinking in the legal community over the wisdom of certifying a class in investor securities litigation as well as in mass tort litigation.

A variant of this divide is reflected in the “everyone-has-a-day-in-court” model of litigation versus a model of litigation that permits more aggregated and generalized adjudication, including use of “inventory” or packaged settlements.¹⁰¹ On one side of this divide is the received traditional wisdom and precedent of Anglo-American procedure, which has historically placed significant limits on issue and claim preclusion and has tended to insist on individualized proof of matters as a prerequisite to

Fabian Witt, *The Inevitability of Aggregate Settlement: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1571 (2004) (taking an arguably more distributionalist view of litigation). Perhaps the proceduralist-distributionalist continuum is not a perfect vehicle for explaining attitudes toward class actions and does not completely describe the differing major orientations toward the matter of class treatment of claims. Although a very useful concept, it should be supplemented by recognition of a third perspective: that of the public-policy purposivist or “policy-purposivist.” See *infra* note 106 and accompanying text.

100. Asbestos claims again provide perhaps the best example. Global asbestos settlements have tended to divide victim injuries into a handful of broad classes and to provide for set monetary awards according to the classification of the injury, without further delineation of the varying seriousness of particular plaintiff injuries within a class. This is such a well established approach to the problem of asbestos mass tort settlement that Fairness in Asbestos Injury Resolution Act of 2005, S. 852, 109th Cong. (2005) (“FAIR”), the principal proposed asbestos litigation being considered by Congress, uses the same approach. Under the FAIR Act’s schedule of compensation, all claimants with evidence of some asbestos-related impairment would receive \$25,000. Thus, a sedentary plaintiff with only lung scarring visible on X-rays gets the same amount as an avid sports enthusiast who now finds herself short of breath on a walk. Similarly, all asbestos victims with pleural plaque would get \$100,000 under the bill, although the amount of plaque will vary among this group. “Severe” asbestosis is to be compensated at \$400,000 while “disabling” asbestosis qualifies for an \$850,000 award.

Although these amounts all make sense when measured against historical litigation experience there is no denying that this approach of grouping claims into uniform compensation categories tends to paper over individual distinctions within each category. It also presents issues of classification in borderline cases that can have dramatic effect. For example, the determination of disability from asbestosis can mean a \$450,000 difference in compensation amount. See Editorial, *Asbestos Showdown*, WALL ST. J., Feb. 14, 2006 at A22 (opposing FAIR Act in part because of its broad brush approach to valuation of claims, many of which are suspected to be based on “bogus claims from people who aren’t even sick”).

101. See *supra* text accompanying note 98.

entry of judgment.¹⁰² On the other side are a number of academic commentators who have eloquently argued for use of more flexible, alternative means of proof in order to permit litigation of disputes that would be cumbersome, if not impossible, to litigate under the traditional model.¹⁰³ There is some tacit but little explicit support in the judiciary as it evolves toward relaxations of the traditional approach in some areas. For example, federal courts during the last few decades have taken a broader approach to issue preclusion by, for example, removing the mutuality requirement¹⁰⁴ and permitting use of offensive issue preclusion.¹⁰⁵ To a degree, this jurisprudential divide is but a cousin to the divide in non-legal society between those who prefer things customized and those who take comfort in the standardized or uniform, pitting those who desire hand-made goods in tension with those willing to trade romance for consistency with machine-made goods.

In addition to the proceduralist-distributionalist tension (perhaps at times a schism), there is an arguable, essentially unnamed, and not as well articulated third camp with far fewer self-identified adherents. For purposes of discussion, I call this the “policy-purposivist” perspective on class actions (indeed on civil disputing and the justice system in general).¹⁰⁶ Under the policy-purposive approach, a court or commentator is most concerned with having the Rules of Civil Procedure interpreted and applied in a manner that best advances the public policy goals and objectives underlying the Rule, at least if this can be done in a manner

102. See JAMES, HAZARD & LEUBSDORF, *supra* note 21, § 11.29 at 727 (“The courts are generally cautious in applying preclusion against individual claims on the basis of a prior class action of which the individual may not either have had full knowledge or have fully accepted the adequacy of its representation of his or her claims.”)

103. See, e.g., Hay & Rosenberg, *supra* note 2 (advocating use of multiple trials to develop average outcomes and awards); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 412–15 (2002) (urging “polyfurcation” and class treatment of one or more susceptible issues in a case); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251 (2002); Bone, *supra* note 7; Bone, *supra* note 21 (reviewing STEPHEN C. YEAZELL, *FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION* (1987));

104. *Blonder-Tongue Labs. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971).

105. *Parklane Hosiery, Co. v. Shore*, 439 U.S. 322 (1979).

106. At least I think this third camp exists. This policy-purposivist perspective has replaced the proceduralist perspective I tended to hold in the past. As noted above, I happily joined in an amicus brief arguing for reversal in *Amchem* and was in general agreement with both *Amchem* and *Ortiz* at the time they were rendered. See *supra* note 99. Today, I am less enthusiastic about the practical effect of both decisions, which was to discourage class treatment, particularly in mass torts. Although this may indicate only evolution toward the distributionalist perspective (or merely incoherent thinking), I now think the problem with restrictive attitudes toward class treatment is the tendency of such a jurisprudence to make it not only less likely that “little wrongs” will be vindicated but also far less likely that laws against fraud, anticompetitive conduct, tortious behavior, and similar bad acts will have their intended deterrent effect.

consistent with other goals of the legal system. The policy-purposivist is not unconcerned with the proceduralist worries about inaccuracy, conflict of interest, corruption, or reduced due process. Nor is the policy-purposivist willing to endorse a distributionalist solution in the face of serious countervailing procedural-cum-constitutional problems. However, a policy-purposivist places a high value on the deterrent function of law and the moral leadership provided by law. To the policy purposivist, it is as important that tortfeasors, fraudulent actors, criminals, and unscrupulous businesspersons be called to account as it is to respect the traditional deference for individualized adjudication and concerns over compensation. As discussed in the remainder of this article, a policy-purposivist perspective leads to a more charitable attitude toward class treatment, even at some risk to or erosion of proceduralist or distributionalist ideals, in order to serve the larger public-policy purposes underlying both Rule 23 and the laws creating the claims for relief made in class litigation.

II. DIFFERENTIATING AMONG THE PURPORTED PROBLEMS OF THE CLASS ACTION: RECOGNIZING THE ADVANTAGES OF INVESTOR CLASS ACTIONS

As discussed in Part I, the modern class action has been under attack during much of its life. But those attacks (e.g., alleging collusive, self-serving, or inadequate settlements; *in terrorem* effects; and conflicts of interest) on class actions have tended to have a one-dimensional quality. The criticisms tend to proceed as if there is a single “class action problem” and as if all class actions present essentially the same potential benefits, detriments, logistical difficulties, proof problems, and so on. In actuality, the class-action device faces different problems when deployed in different applications.

Critics have tended to see all class actions as equally problematic (with perhaps some greater calumny reserved for tort class actions). But mass tort class actions, consumer class actions, and investor class actions all present somewhat different benefits and risks. Investor class actions, notwithstanding political rhetoric about strike suits and the merits not mattering, are considerably less problematic than mass tort and other class actions, particularly in cases where the alleged wrongdoing merits punishment but the individual losses are not large. Congress appears to have recognized this to a degree when enacting CAFA, which specifically

carves out securities class actions from its provisions,¹⁰⁷ although this may also have merely been acknowledgment that two relatively recent statutes (the 1995 PSLRA and the 1998 SLUSA) were specifically directed at securities matters. CAFA's securities carve-out also solidifies the popular impression that CAFA was largely a response to perceived excessive forum-shopping by mass torts plaintiffs' counsel.¹⁰⁸

The mass tort class action has fueled much of the recent debate and backlash against class actions. Mass tort class actions were specifically mentioned with disfavor in the Advisory Committee Notes to the 1966 Amendment to Rule 23 (although the Committee Note did not take the position that tort actions could never be brought as class actions).¹⁰⁹ In keeping with the notion that every litigant was entitled to his or her day in court, coupled with the view that many elements of tort injury (such as pain and suffering, emotional distress, or loss of consortium) were personal and idiosyncratic to the claimants, class action treatment was not often sought for tort cases during the first two decades after the 1966 Amendment.¹¹⁰

The asbestos, pollution, and toxic tort claims of the 1980s gave rise to greater consideration of the class device, leading to a boom of sorts. Key was the 1984 *Agent Orange* litigation settlement brokered by Judge Weinstein.¹¹¹ Although the settlement was hailed in many quarters, it was

107. See 28 U.S.C.A. § 1332(d)(9)(A) (2005) (providing that the new jurisdictional grant of section 1332(d) does not include an action that involves only a claim concerning a "covered security" within the Securities Litigation Uniform Standards Act of 1998). CAFA also specifically carves out from its jurisdictional grant cases involving government defendants, internal corporate affairs, and fiduciary duties. See Joseph, *supra* note 66. In addition, these types of state class actions are not removable under CAFA § 1453(d).

108. See Linda Pissott Reig, Charles E. Erway III & Brian P. Sharkey, *The Class Action Fairness Act of 2005: Overview, Historical Perspective, and Settlement Requirements*, 40 TORT TRIAL & INS. PRAC. L.J. 1087, 1091 (2005) ("increase in state court mass tort class actions was one of the factors that prompted passage of CAFA"); see also *id.* at 1089 (emphasizing that securities carve-out applies only if action is one "solely" involving securities or corporate governance; presence of mass tort or consumer claims make carve-out inapplicable).

109. See FED. R. CIV. P. 23, advisory committee's note (1966), *reprinted in* 5 MOORE, *supra* note 3, § 23App.04[2] at 23App.-13.

110. See 5 MOORE, *supra* note 3, § 23.23[4][h] at 23-86 ("Historically, courts have been reluctant to certify classes in products liability and mass tort cases.") (citing *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1186 (9th Cir. 2001), which noted and adhered to traditional reluctance due to inherent difficulties with respect to commonality and management); *In re Tetracycline Cases*, 107 F.R.D. 719, 724 (W.D. Mo. 1984) (noting traditional opposition to class treatment of tort claims).

111. See *In re "Agent Orange" Prods. Liab. Litig.*, 100 F.R.D. 718 (E.D.N.Y. 1983) (certifying class in *Agent Orange* litigation), *aff'd*, 818 F.2d 145 (2d Cir. 1987); Ralph Blumenthal, *Veterans Speak Out on Agent Orange*, N.Y. TIMES, Aug. 9, 1984, at B1; William Glaberson, *Agent Orange, the Next Generation: In Vietnam and America, Some See a Wrong Still Not Righted*, N.Y. TIMES, Aug. 8, 2004, at 25.

also criticized both from the perspective of the “left” (that the settlement undercompensated and created pressure against recognizing some legitimately stronger opt-out claims)¹¹² and the “right” (that the settlement was essentially “Orangemail” in view of the weak causation evidence that could be mustered by the plaintiffs).¹¹³

Although the *Agent Orange* settlement may have had its enemies, its perceived success helped usher in the new era of mass tort class actions. However, because class action defendants wanted global peace in resolving such claims, pressure to reach settlement was arguably too heightened.¹¹⁴ In addition, many mass tort defendants were not in the financial position to provide full compensation to claimants.¹¹⁵ In some cases, the insurance policies of the defendants were essentially the only significant assets available for paying tort claims.¹¹⁶ Although these could be substantial, they were not infinite and they were not available unless the insurers also agreed to the settlement or were defeated in any ensuing coverage litigation.¹¹⁷ The 1990s thus brought the trend toward class

112. See Charles Nesson, *Agent Orange Meets the Blue Bus: Factfinding at the Frontier of Knowledge*, 66 B.U. L. REV. 521 (1986).

113. See *Civil Litigation in the Twenty-First Century: A Discussion*, 59 BROOK. L. REV. 1199, 1208–12, 1218 (1993) (remarks of Hon. Ralph Winter and response by Agent Orange Special Master Kenneth Feinberg) (referring to Editorial, *Orangemail*, N.Y. TIMES, Mar. 8, 1985, at A34).

114. See Hay & Rosenberg, *supra* note 2; Silver, *supra* note 2 (reviewing contention that class actions create undue pressure to settle); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (articulating argument that certification of mass tort class virtually mandates that defendant settle).

115. See, e.g., *In re Rhone-Poulenc Rorer*, 51 F.3d at 1298 (court notes that although company has substantial assets and sales, amount required for payment of tort damages sought by requested class of claimants would likely outstrip company assets); *In re N. Dist. of California Dalkon Shield Litig.*, 693 F.2d 847, 852 (9th Cir. 1982) (same); *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1177 (8th Cir. 1982) (same); *Pruitt v. Allied Chem Corp.*, 85 F.R.D. 100 (E.D. Va. 1980) (same); *In re Three Mile Island Litig.*, 87 F.R.D. 433 (M.D. Pa. 1980); see also Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. (1987) (both available insurance and defendant assets may be insufficient to satisfy mass tort claims).

116. See, e.g., *Nelson v. Bennett*, 662 F.Supp. 1324 (E.D. Cal. 1987) (insurance policies only assets available to pay claims); *In re Acands, Inc.*, 311 B.R. 36 (Bankr. Del. 2004) (same). Although the insurance may be all there is in individual cases as well, a longstanding compensation problem for victims, see, e.g., *Maryland Cas. Co. v. Beebe*, 54 F.2d 743 (10th Cir. 1931), the situation is perhaps more likely to occur in mass tort litigation because the same factors that gave rise to the avalanche of claims (e.g., unsafe product, bad publicity, adverse government action) may have driven the company out of business, leaving only available insurance to pay claims.

117. For example, the bankruptcies of several litigation defendants have spawned substantial insurance coverage litigation. See, e.g., *UNR Indus., Inc. v. Cont'l Cas. Co.*, 942 F.2d 1101, 1104–05 (7th Cir. 1991) (applying Illinois law to insurance coverage dispute); *Fuller-Austin Insulation Co. v. Fireman's Fund Ins. Co.*, 135 Cal. App. 4th 958 (Cal. Ct. App. 2006); see also Mark D. Plevin, Robert T. Ebert & Leslie A. Epley, *Pre-Packaged Asbestos Bankruptcies: A Flawed Solution*, 44 TEX. L. REV. 883, 889–906 (2003) (describing insurer objections to bankruptcy-related global settlements and insurer challenges to asbestos defendant claims of insurance coverage).

actions designed primarily as a mass tort settlement-facilitation device. The 1982 Johns-Manville reorganization bankruptcy and establishment of the Manville Trust had already ushered in the use of bankruptcy as a mass tort resolution device,¹¹⁸ but the late 1990s and early twenty-first century were to see a renewed round of bankruptcy activity by asbestos defendants.¹¹⁹

Concerns that the class action mass tort phenomenon might be getting out of hand provided the backdrop to the Supreme Court's *Amchem* and *Ortiz* decisions. Although the *Amchem* and *Ortiz* holdings are generally viewed as having drastically limited class treatment as a device for mass tort resolution, a Federal Judicial Center ("FJC") study suggested that class actions continued to be widely used for mass tort settlements, and not solely in state court.¹²⁰ The study obtained survey responses from more than 700 attorneys involved in more than 600 class actions. Based on the responses, the FJC Report concluded that:

- "neither *Amchem* and *Ortiz* nor federal class certification rules were reported to have directly affected the vast majority of plaintiff attorneys' choice of forum";
- defense counsel considered the arguably more restrictive federal procedure in determining whether to remove state class matters to federal court;
- "federal and state judges were almost equally likely to certify class actions and to certify those cases for litigation and trial or

Even the absence of bankruptcy, insurers and asbestos defendant policyholders have long been in dispute regarding the degree to which asbestos claims are covered under insurance policies and the amount of coverage available. *See, e.g.*, *In re Prudential Lines, Inc.*, 158 F.3d 65 (2d Cir. 1998) (resolving dispute between asbestos defendant policyholder and its insurer regarding the number of "occurrences" under the policy and hence the amount of insurance available to pay asbestos claims); *Keene Corp. v. Ins. of N. Am.*, 667 F.2d 1034 (D.C. Cir. 1981) (policyholder and insurers dispute standard for triggering coverage); *Ins. Co. of N. Am. v. Forty-Eight Insulations Co.*, 633 F.2d 1212 (6th Cir. 1980) (same); *see also* JEFFREY W. STEMPER, STEMPER ON INSURANCE CONTRACTS §§ 14.07, 14.09, 14.10 (3d ed. 2006) (describing years of insurer-policyholder litigation over classification of asbestos claims, trigger of insurance coverage by asbestos claims, and appointment of relative insurer and policyholder responsibility for claims).

To the extent insurers succeed in avoiding coverage, this obviously undermines global settlement efforts and may prevent aggregate settlement altogether as plaintiffs and counsel race to the courthouse in an attempt to obtain tort judgments that the company will be able to pay in the absence of insurance or will have higher payment priority in administration of any bankruptcy.

118. *See* Resnick, *supra* note 58; Vairo, *supra* note 58, at 105–08 (describing Manville bankruptcy and trust).

119. *See* Vairo, *supra* note 58, at 105–08.

120. WILLGING & WHEATMAN, *supra* note 83. *See also* SIMMONS & RYAN, *supra* note 83.

for settlement,” but “federal judges were more likely than state judges to deny class certification, while state judges were more likely than federal judges to not rule on certification”;

- “federal and state judges were equally likely to approve class settlements”;
- “the rate at which proposed class actions were reported to have been certified appears to have declined when compared to a Federal Judicial Center pre-*Amchem* and *Ortiz* study of class actions in four federal districts” (and in addition, there appears to have been an increase in class actions certified for settlement); and
- “the percentage of class recoveries reported to have been allocated to attorney fees appears to have been about the same as in the previous [FJC] study.”¹²¹

Notwithstanding these FJC findings, there appears to have been a perception that federal class actions had lost substantial utility as a mass tort settlement device in the wake of *Amchem* and *Ortiz*. For example, there appears to have been a pronounced shift to bankruptcy as the preferred means of attempting to achieve global peace for asbestos defendants, particularly in view of congressional facilitation through enactment of section 524(g) of the Bankruptcy Code, which permits use of a “pre-packaged” bankruptcy in which asbestos tort claimants-creditors and the asbestos defendant-debtor can agree prior to filing to a streamlined bankruptcy procedure and stipulated settlement of asbestos claims.

Notwithstanding that there appears to continue to be a good deal of omnibus settlement of asbestos and other claims, debate also continues regarding the aptness of aggregate treatment of such claims. Currently, for example, the American Law Institute has underway a project regarding aggregation of claims.¹²² Although the project is not limited to mass tort claims, these clearly helped drive the project into being. And, of course, as passage of CAFA demonstrates, after *Amchem* and *Ortiz* there remained considerable concern on the part of class action opponents that state court

121. See WILLGING & WHEATMAN, *supra* note 83, at 4 (Executive Summary). See also THOMAS E. WILLGING ET AL., FED. JUDICIAL CTR., EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICT COURTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES (1996).

122. See AMERICAN LAW INSTITUTE, PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, PRELIMINARY DRAFT NO. 2 (2005) (reviewed by ALI Members Consultative Group on May 15, 2005).

class actions were being used as a means of avoiding the more stringent standards prevailing under federal law.¹²³

The concern over class treatment of mass torts, although overdone (as discussed in Part IV, *infra*), is not without foundation. The notion of “inventory” or “warehouse” settlements cuts against the grain of American judicial ideology, with its individualistic emphasis on each claimant’s day in the crucible of the courtroom. Although the notion may be quaint, romantic, and unrealistic, it remains powerful and constraining, particularly for tort claims. For most individuals, a tort claim is not only unusual, it also grows out of a traumatic event that was a major part of the plaintiff’s life. Consider the “typical” auto accident, medical negligence, or fraud claim. Although there are notorious “professional” fender-bender plaintiffs occasionally reported in the popular press, for most plaintiffs, the events leading them to pursue tort litigation were a major life tragedy, often one involving serious injury or death. Of course, these claims are also highly individuated and thus highly unlikely to ever be eligible for even partial class action treatment.

When this baseline norm is transferred to the arena of mass torts, the system subconsciously resists group treatment of the claim, despite the obvious fact that there are more commonalities found among asbestos, prescription-drug, or defective-product claimants than among typical negligence plaintiffs. This resistance to mass tort class actions holds continued vitality despite another distinguishing feature of many mass torts—there may be many claimants with non-trivial but non-traumatic or non-acute injury. Thus, in a given clump of tort claims, few may be the stuff of trial drama. Most may be examples of only relatively modest injury that as a whole add up to a claim of substantial value. This type of mass tort claim is different from one brought by a class of the estates of victims of an air crash or of a cruise ship disaster. It ought to make class treatment easier to obtain in that the court is not being asked to blur individual differences in a high-damages trauma claim, but instead is only being asked to make general “ballpark” assessments of similar types of injuries suffered by a large group of similarly situated claimants. Nonetheless, resistance to tort class actions as a concept continues.

Compared to claims arising out of a fixed course of conduct that may give rise to an antitrust claim, a securities claim, or even a disparate-impact discrimination claim, the mass tort claim is thought to present more pronounced issues of differentiation among the claimants, each of whom is

123. See *supra* notes 59–60 and accompanying text.

thought to have absorbed the blow of tortious behavior in his or her own individual way. For the reasons set forth in Part IV, this view is overwrought and has fomented too much resistance to class action treatment of mass tort claims.¹²⁴

An additional and related point is that the more individuated nature of tort claims, particularly the extent of each claimant's damages, makes it less likely that the same attorney can represent a large group of claimants fairly, without favoring the interests of some at the expense of others. By contrast, non-tort claims are thought to present damage differences that are more readily capable of objective and verifiable calculation, reducing the risk that lawyers will unwittingly favor some clients over others and, perhaps more importantly, making any class action settlement more subject to meaningful judicial scrutiny.

In addition, tort claims are thought to give rise to more untested or novel claims as plaintiffs press to prove fault in areas where scientific evidence may only be emerging on the matter. By contrast, statutory claims are thought to benefit from the roadmap of a statutory scheme of definitions, jurisdiction, liability, damages, and perhaps even disputing procedure. Class commercial claims such as fraud or misrepresentation are also perceived as stable and not novel. According to conventional wisdom, the commercial or statutory claim can thus more safely be entrusted to class treatment without running any significant risk that the court will commit adjudicative error that affects a huge number of claims.

By contrast, there is concern that class treatment of a tort action is not appropriate if the liability and damages theories underlying the tort are not "mature," with parameters established by previous adjudication and settlement.¹²⁵ For emerging torts, the conventional wisdom posits that there should be some respectable period of case-by-case adjudication during which the assumptions underlying the claims and defenses are tested.¹²⁶ The immaturity problems posed by these emerging tort claims are also exacerbated in that most tort claims are based on state law, which

124. See *infra* text accompanying note 303.

125. The concept of a mature mass tort claim is taken from Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659 (1989).

126. See Stephen B. Burbank & Linda J. Silberman, *Civil Procedure Reform in Comparative Context: The United States of America*, 45 AM. J. COMP. L. 675, 704 n.55 (1997) (noting "apparent renaissance of mass tort class actions is associated primarily with litigation that is sufficiently mature either to threaten product manufacturers with bankruptcy or to have revealed enough damaging information to induce them to strive for global settlements or both."); McGovern, *Mature Mass Tort Litigation*, *supra* note 125, at 659; Stephen C. Yeazell, *The Past & Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 699 (1997).

may be relatively undeveloped in many states. In addition, states may differ significantly, making choice-of-law issues particularly important and making the different locations of plaintiffs or defendants an impediment to class treatment.¹²⁷

This relates to another traditional judicial concern about mass torts: their purported *in terrorem* effect on defendants if pursued as a class action. Although any class certification is thought to enhance the settlement value of the claims, the notion is that, at least for non-tort claims, the amount of recoverable damage is fairly readily ascertainable and cabined within some outer boundary of what a reasonable factfinder might find to be the amount necessary to compensate for a drop in share price, lost business opportunity, and so on. Unless there is a realistic risk of a punitive damages award, which is thought less likely in a statutory, contract, or commercial dispute,¹²⁸ the defendant's "worst case" scenario can be calculated with some confidence.

By contrast, tort claims often present large elements of damages that are non-economic (e.g., pain and suffering, loss of consortium) or otherwise less readily amenable to objective measurement (e.g., future lost income, future medical care). Thus, the range of case outcomes is thought to be greater in tort cases, raising more risk of a really large, even devastating judgment if many tort claims are added together, even if few of the tort claims involve severe injury. For this reason, concerns over the *in terrorem* effect of class certification and "blackmail" of defendants are heightened in the mass tort context as compared to commercial claims.¹²⁹

As discussed at greater length in Part III, most of these concerns fueling reluctance to accord class action treatment to mass torts are

127. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985) (holding that plaintiffs' due process rights may be violated if their claims are subjected to law of another state). As the *Shutts* decision demonstrates, the problem is not confined to tort law. *Shutts* involved largely contract-based claims for oil and gas royalties.

128. Punitive damages are generally not available in ordinary breach of contract litigation unless the contract breach is also accompanied by conduct that constitutes an independent tort such as fraud or conversion. See, e.g., *Wild v. Rarig*, 234 N.W. 2d 775, 789-90 (Minn. 1975). See Note, "Contort": *Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing in Noninsurance Commercial Contracts—Its Existence and Desirability*, 60 NOTRE DAME L. REV. 510 (1985). Breach of an insurer's duties under a policy, if sufficiently wrongful, can support an action for bad faith seeking punitive damages, but only in states that consider insurance bad faith to be a tort action rather than a breach of contract action. See JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES §§ 10.02, 10.06[C] (2d ed. 1999 & Supp. 2005). See also RICHARD L. BLATT, ROBERT W. HAMMESFAHR & LORI S. NUGENT, PUNITIVE DAMAGES: A STATE BY STATE GUIDE TO LAW AND PRACTICE § 1.4 (2003 ed.) (reviewing notable punitive damage awards, almost all of them being in tort matters rather than simple matter of commercial failure).

129. See, e.g., *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995).

overstated.¹³⁰ As discussed in Part IV, many of these mass tort claims can be accorded class treatment that facilitates prosecution of the claims—at least for significant aspects of the case—without incurring the purported deleterious effects of mass tort class actions.¹³¹ What is important for purposes of this Part, however, is that tort claims, even mass tort claims, have historically been thought to be different from the statutory or commercial claims in ways that make tort claims less amenable to class treatment. By contrast, statutory and commercial claims are thought to be more apt for class treatment. These types of class actions—particularly investor class actions—should be less problematic for a number of reasons:

- the body of law to be applied is often national (through a federal statute or federal common law) or uniform (involving basic principles of contract, fraud, fiduciary duty, or the like that are seen as less likely to vary from state to state when contrasted with tort law);
- the conduct in question is thought to more often involve a relatively small number of acts or decisions, as contrasted with the more variegated and dispersed conduct giving rise to tort claims;
- the degree of differentiation between claims is muted;¹³²
- Certain items of damage, such as punitive damages, are not realistically available outside the tort context. Where statutory or commercial matters permit exemplary damages, these are usually provided for by the statute. In addition, objective damages formulas are thought to be more readily available for non-tort claims.

Claims brought by investors under the federal securities laws would appear to be particularly amenable to class action treatment as contrasted with mass tort matters, a result consistent with case results and civil procedure commentary.¹³³ The applicable law is largely federal and is

130. *See infra* text accompanying notes 164–87.

131. *See infra* text accompanying note 308.

132. Contrast, for example, a securities claim in which the different plaintiffs all bought shares of Acme Company with the asbestos mass tort in which plaintiffs may allege injurious exposure to defendant's asbestos through exposure to pipe insulation, walking through a construction site, scrubbing tile, opening bags of the material, working on circuit boards, ripping up carpeting, and so on.

133. *See* 5 MOORE ET AL., *supra* note 3, § 23.23[4][b] (citing cases).

quite well established. Even to the extent that duties under the securities law have developed in an incremental fashion, such as through the evolution and refinement of § 10(b) of the 1934 Act,¹³⁴ the state of the law today is for the most part stable and well-known. In addition, securities-related actions by investors appear even more likely than other statutory or commercial claims to be based on common or similar conduct by the defendants. Consequently, adjudicating liability on a classwide basis seems far less likely to raise problems in securities-related actions than in the mass tort context.

Securities claims are frequently linked with common law contract or fraud claims or with breach-of-fiduciary-duty claims, areas of law that are also, for the most part, not emergent but established, creating relatively little uncertainty about how applicable law will be applied. Although punitive damages are available for fraudulent conduct or a sufficiently egregious breach of fiduciary duty, they are seen as more widely available or even wildly available in tort cases. If nothing else, for all manner of claims today, the Supreme Court's 2003 *State Farm Mutual Automobile Insurance Co. v. Campbell* decision provides a considerable measure of predictability as to "worst case" outcomes in that *Campbell* presumptively limits punitive damages to a nine-to-one ratio with compensatory damages, at least in cases where the compensatory award is substantial.¹³⁵

Similarly, damage calculation in securities-related investor claims is more likely to lend itself for mathematical formulas than is the case for mass torts or other claims that might require more individuated jury determination. In related fashion, a securities-related claim is less likely to imperil the continued existence of the defendant companies than might a tort class action. As discussed above, the range of damages recovery in tort is thought to be less predictable, in view of the importance of non-economic and future-prediction damages in tort law claims. By contrast, the damage formula of investor-related claims is often based on a subset of share price (rather than being unlinked to share price as a tort claim may

134. See *United States v. Chestman*, 947 F.2d 551, 564–67 (2d Cir. 1991) (en banc) (describing background and evolution of SEC Rule 10b-5, which forbids any scheme or artifice to defraud in connection with securities transaction, including development of private right of action for aggrieved investors); LOUIS LOSS & JOEL SELIGMAN, *FUNDAMENTALS OF SECURITIES REGULATION* 936–39 (5th ed. 2003).

135. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). *But see In re Simon II Litigation*, 407 F.3d 125, 128, 135, 138–39 (2d Cir. 2005) (suggesting that *Campbell* limitations on punitive damages may work against class certification of punitive damages claims).

be) or related to commissions overcharged or optimal prices not attained.¹³⁶

In addition, the amount of total injury that even a bad business can inflict on investors is probably limited by the value of the company's shares. Not even stupid, wicked management can very easily take from investors more than they have to give in legitimate investment in the company, setting an outer ceiling on awards. Realistically, of course, the ceiling is quite a bit lower in that even really bad business conduct seldom takes all wealth from shareholders. Even Enron and WorldCom stock had some value after the fall. By contrast, tortious acts by a company may inflict injury on third parties that far outstrips the value of the company. To take an example, a small chemical company can poison a city water supply, resulting in liability far beyond the company's assets and insurance, but the same chemical company can logically only bilk investors up to the amount of the investment.

For that reason, insurance or other resources available to a company facing investor lawsuits are usually sufficient to settle the dispute or pay a resulting judgment.¹³⁷ For mass tort claims, however, the amount necessary for settlement or satisfaction of claims may far outpace the available, unexhausted insurance purchased by even a diligent risk manager. Where insurance is generally available, this also enhances the prospect of case resolution, apart from the class-certification question.

In addition, investor plaintiffs arguably have a different motivational matrix than tort plaintiffs. For investor plaintiffs, litigation should be, as

136. See *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1344 (9th Cir. 1976) (Sneed, J., concurring) (damages in securities litigation largely linked to change in share price due to wrongful conduct); James D. Cox & Randall S. Thomas, *Public and Private Enforcement of the Securities Law: Have Things Changed Since Enron?*, 80 NOTRE DAME L. REV. 893, 96 (2005) (same); Merritt B. Fox, *Understanding Dura*, 60 BUS. LAW. 1547, 1548–50 (2005) (describing damages formula as generally being difference in share price but focusing on “fraud on the market” actions in which allegation is that defendant fraud caused plaintiff to pay artificially inflated price for stock).

137. See Silver, *supra* note 2, at 1414 (stating that more than ninety percent of large public companies have Directors and Officers liability insurance, insurance is present in eighty percent of shareholder litigation, and insurance provides fifty to eighty percent of settlement funds) (citing Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497, 550 (1991)). According to Professor Silver:

Because class action defendants often have insurance coverage—including comprehensive programs containing multiple primary and excess layers—the likelihood of their being forced into insolvency by plaintiff victories is reduced. The risk quantification needed to prevent defendants from feigning deathly fear of class actions must therefore take insurance into account. The well-known practice of settling at or within policy limits adds force to this imperative. Liability insurance both protects a defendant's assets and fosters a climate in which a defendant's uninsured assets are thought to be beyond claimants' reach.

Id. (footnotes omitted).

put so well by Marlon Brando's "Don Corleone" in *The Godfather*,¹³⁸ "business, not personal." Although fraud claims that destroy savings accounts can test this concept, for the most part investor claims are economic claims seeking economic recompense. They are not about having a tortfeasor "pay" for disfiguring the plaintiff or having a court vindicate an employee's job performance (e.g., determining that discrimination rather than incompetence explained a discharge) or a person's reputation. As a result, one would expect investor plaintiffs to take a more flinty-eyed approach to claims and dispute resolution than many of their tort or statutory brethren. Investor plaintiffs should have a wider constituency and a longer-term view, making them particularly "rational" about litigation matters.

Investors rationally pursuing recompense through a class action are still subject to a good deal of lawyer control or influence in that the attorney will generally be the person managing the litigation on a front-line, daily basis. However, investors—particularly institutional investors—are likely to have a good deal more control over class counsel than consumer, discrimination, or tort plaintiffs. Although Norman Poser wisely reminds us that institutional investors are not uniformly sophisticated or savvy,¹³⁹ it seems indisputable that the average institutional investor is relatively more sophisticated about litigation matters than the average former construction worker in a pack of pleural plaque asbestos claimants or the average consumer overcharged on credit-card interest. As compared to most litigants, institutional investors are relatively more likely to be "repeat players" that have been through litigation before and understand the practical potential and constraints of the process.¹⁴⁰

Perhaps more importantly, the average institutional investor likely has more economic and practical control over its participation in litigation and its relations with class counsel. Even in cases presenting "injury by a

138. See MARIO PUZO, *THE GODFATHER* (1969).

139. See Norman S. Poser, *Liability of Broker-Dealers for Unsuitable Recommendations to Institutional Investors*, 2001 BYU L. REV. 1493, 1499 ("While many institutional investment officers are highly experienced and capable, many others lack the ability or training to understand the nature and risks of the complex investments that many securities firms sell to their customers. . . . [Further, e]ven a sophisticated investment officer may not be able to resist selling pressure from a highly motivated and well-trained salesperson.").

140. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW. & SOC'Y. REV. 95 (1974). This is the seminal article articulating the distinction between "repeat" and "one-shot" litigation participants and the impact of this distinction on claim development, settlement, and adjudication. See also Joel B. Grossman, Herbert M. Kritzer & Stewart Macaulay, *Do the "Haves" Still Come out Ahead?*, 33 LAW. & SOC'Y REV. 803, 809 (1999) (stating that at the theoretical level the Galanter paradigm "continues to be important and provocative").

thousand cuts”¹⁴¹ and hence making class pursuit of claims clearly preferable to individual litigation, the institutional investor may have a sufficient critical mass of injury to present a credible threat of opting out of a class, insisting on subclass treatment by itself or with a few others; or may even have a statutory right to control proceedings through the lead plaintiff provisions of the PLSRA.¹⁴² Even if the institutional investor does not have the quantum of injury to make claim-by-claim proof economically attractive, the institutional investor is still likely to have a sufficient amount at stake to sharpen the organization’s interest and motivate it to provide continued scrutiny of the progress of the litigation and the performance of class counsel.

In addition, most institutional investors, even the relatively unsophisticated, are nonetheless more likely than the average consumer or tort claimant to seek a second or third legal opinion. To the extent an institutional investor has concerns over class counsel’s performance, the investor can consult other counsel or perhaps even employ monitoring counsel to assess class counsel’s performance, strategic decisions, or settlement advice. The institutional investor may even have regular corporate counsel (in-house or outside) available. Because investor class-action litigation is a specialized field of law, it is unlikely that the same law firm will be both regular counsel to an institutional investor and class counsel in a major matter involving the institutional investor. Institutional investors are in many ways the polar opposite of the seamstress plaintiff in *Surowitz v. Hilton Hotels Corp.*,¹⁴³ who had not read the complaint and at her deposition appeared to have little understanding of the case.¹⁴⁴

141. By evoking the metaphor of “death [injury] by a thousand cuts,” I am referring to the ability of singularly innocuous harm or liability to become severe if it occurs with sufficient frequency. See Saikrishna Prakash, *The Chief Prosecutor*, 73 GEO. WASH. L. REV. 521, 582 (2005) (using metaphor to describe gradual small encroachment on executive power and prerogatives resulting in significant curtailment of executive power). In ancient Chinese criminal law, death by a thousand cuts was a literal punishment used in the most serious crimes. See generally GEOFFREY MACCORMACK, *TRADITIONAL CHINESE PENAL LAW* (1991).

142. See Choi et al., *supra* note 2, at 871 (stating that the PSLRA lead plaintiff provision “establishes a rebuttable presumption” that the plaintiff with the largest financial interest is best suited to be lead plaintiff and “vests the lead plaintiff with authority to select and retain class counsel.”).

143. 383 U.S. 363, 368 (1966).

144. See Roberta S. Karmel, *Should a Duty to the Corporation Be Imposed on Institutional Shareholders?*, 60 BUS. LAW. 1 (2004) (noting power and leverage of institutional investors and suggesting it may be so strong, in light of dominance of the “shareholder primacy model” in “scholarship theories with regard to the firm,” that institutional shareholders should have management-like duties (and attendant legal responsibilities) toward corporation); Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Duties of Institutional Investors in Securities Litigation*, 56 BUS. LAW. 1381 (2001) (making similar point, particularly in light of prerogatives given to large, usually institutional, investors under PSLRA). See also Edward B. Rock, *Controlling the Dark Side of Relational Investing*,

Some institutional investors may even be proverbial “800-pound gorillas” who are in a position to “sit anywhere they want” and effectively run the show in an investor class action. Consider CalPERS, the California Public Employees’ Retirement System, which controls billions of dollars in investments and may be a major force in any class claim in which it is involved.¹⁴⁵ Although perhaps not frequently, institutional investors have certainly shown their ability to flex their muscles when so inclined. In one case, large institutional investors investigated a putative class action, concluded the claims were without merit, and urged dismissal of the case.¹⁴⁶ As relatively sophisticated, relatively well-heeled litigants or prospective litigants, institutional investors are in a position to exercise substantial control over a matter, including the selection and activities of counsel. Institutional investors may even hold “beauty contests” to select counsel from among attorney supplicants seeking class-counsel status from institutional investors.

This is not to suggest that investor litigation is a type of dispute-resolution Nirvana made all the more perfect by the presence of institutional investors in a putative class.¹⁴⁷ As noted above, not all institutional investors have the expertise, resources, or will to play the litigation monitoring and claim “purifying” role that they are at least capable of playing. For example, in the Choi-Fisch-Pritchard empirical examination in this Symposium, the authors found that there was only mixed evidence of increased institutional-investor participation despite the lead plaintiff provisions of the PSLRA.¹⁴⁸ It appears that private institutions have not increased in participation, although the authors did

15 CARDOZO L. REV. 987 (1994).

145. See Jill E. Fisch, *Class Action Reform: Lessons from Securities Litigation*, 39 ARIZ. L. REV. 533, 540–41 (1997). In *In re California Micro Devices Securities Litigation*, 168 F.R.D. 257 (N.D. Cal. 1996), CalPERS successfully intervened through its own monitoring counsel in a case involving allegations of breach of fiduciary duty:

When plaintiffs’ counsel proposed to settle the case on terms that did not involve any monetary payment to the company, CalPERS [which owned 1.3 million shares of defendant W.R. Grace] objected to the settlement. In addition to permitting CalPERS to intervene, the court appointed CalPERS’ counsel to serve as co-lead counsel for the plaintiffs, thereby allowing CalPERS full participation in the settlement negotiations.

Fisch, *supra* at 540–41.

146. See Joseph A. Grundfest & Michael A. Perino, *The Pentium Papers: A Case Study of Collective Institutional Investor Activism in Litigation*, 38 ARIZ. L. REV. 559 (1996).

147. But the most recent scholarly examination of the securities class actions suggests that this genre of lawsuit performs much better than the era’s critical rhetoric against the class action would suggest. See Stephen J. Choi, *The Evidence on Securities Class Actions*, 57 VAND. L. REV. 1465 (2004).

148. See Choi et al., *supra* note 2, at 877–78.

note a correlation between enactment of the PSLRA and a “substantial increase in involvement by public pension funds.”¹⁴⁹ However, the distinct possibility that the PSLRA lead plaintiff provisions and the presence of institutional investors does not rid class actions of problematic aspects hardly negates the advantages institutional investor litigation would appear to enjoy over other types of class action litigation.

On the whole, there is good reason to be more optimistic about investor class actions, even if one is something of a class-action skeptic in other areas, particularly where the matter involves the significant presence of institutional investors. Consider the recent seeming efficacy of the class action brought against WorldCom directors, bankers, and accountants for failure to stop the company’s massive fraud on investors.¹⁵⁰ Billions of dollars have been obtained in settlements.¹⁵¹ The lead plaintiff in the litigation is New York State Comptroller Alan Hevesi, representing the state’s public employees’ benefit fund, which undoubtedly has enough at stake to have justified individual litigation.¹⁵² But even for this type of litigant, in a case in which punitive-damages exposure was non-trivial, the economics of the case favored class-action treatment. The results appear to have been extremely successful. It is hard to attack class-action claims brought by investors, particularly institutional investors, that appear to bring compensation, vindication, and deterrence after a major financial scandal.

This prompts the question (at least for me): why does there continue to be considerable resistance to class treatment of investor claims, even those carried forward by the supposedly more responsible and politically favored institutional investors? Although investor class actions have not faced the hostility visited on mass tort class actions, there nonetheless remain a significant number of cases in which courts could accord greater class treatment to investor claims but refuse. In short, there should probably be more class treatment of investor claims than we currently see—why has this not occurred?

149. Choi et al., *supra* note 2, at 872.

150. See *In re WorldCom, Inc. Sec. Litig.*, 346 F. Supp. 2d 628 (S.D.N.Y. 2004).

151. See, e.g., Michael Bobelian, *WorldCom II: Some Class Action Defendants Settle; Others Prepare for Trial*, N.Y. L.J., Mar. 10, 2005 at 5 (“Citigroup . . . forked over \$2.57 billion to injured shareholders and bondholders.”); Gretchen Morgenson, *Bank of America Settles Lawsuit Over WorldCom*, N.Y. TIMES, Mar. 4, 2005 at C1 (reporting Bank’s agreement to pay \$460.5 million in settlement with WorldCom investors); Ben White, *J.P. Morgan Settles WorldCom Suit for \$2 Billion*, WASH. POST, Mar. 17, 2005 at E1.

152. See White, *supra* note 151, at E1; Morgenson, *supra* note 151, at C1.

One answer is the simple legal realism of contemporary politics and the power of the “cosmic anecdote.”¹⁵³ Powerful economic and political forces would prefer that class actions not be available at all, and perhaps that civil liability not exist at all. To the extent that class actions permit prosecution of claims that would otherwise not be brought, this class of potential defendants and their ideological sympathizers oppose class actions and will expend political capital in pursuit of curtailing, reducing, or eliminating class treatment of claims. As a practical matter, the class action cannot be eliminated. It enjoys too much intellectual support, its rationale being essentially unassailable, unless one is taking the position that small injuries should simply be “lumped” by victims. It also enjoys enough political and social support that killing the class action is not a realistic political option.

But the class action is subject to being wounded and constrained as a result of effective political assault. The 1995 PSLRA demonstrates one example of such curtailment.¹⁵⁴ The 2005 CAFA another.¹⁵⁵ Although critics cannot destroy the class action, they certainly have proven capable of weakening it or making it more difficult to deploy¹⁵⁶—a result preferred by corporate America—even if the legislation does not result in a net decrease in class action litigation.¹⁵⁷ A certain segment of the body politic simply does not like litigation, particularly plaintiff claims and recoveries.

153. A cosmic anecdote is a well-known, oft-repeated story that makes a rhetorical point about an issue and enjoys wide acceptance as an accurate portrayal but lacks empirical support. *See, e.g.*, Herbert Kritzer, Lawrence Marshall & Frances Kahn Zemans, *Rule 11: Moving Beyond the Cosmic Anecdote*, 75 JUDICATURE 269 (1992).

154. *See supra* text accompanying notes 45–51 (discussing PSLRA).

155. *See supra* text accompanying notes 62–81 (discussing CAFA).

156. *See* Stephen C. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?* (UC Berkeley Pub. Law Paper No. 558285; USC CLEO Paper No. C04-11; USC Law Sch., Olin Paper No. 04-16; NYU Law & Economics Paper No. 03-04, 2005), available at <http://papers.ssrn.com/abstract=558285> (concluding that additional restraints of PSLRA are deterring some meritorious claims where proof of fraud or damage is difficult to obtain).

See also Marilyn F. Johnson, Karen K. Nelson & Adam C. Pritchard, *Do the Merits Matter More? Class Actions Under the Private Securities Litigation Reform Act* (Mich. State Univ. Research Paper No. 02-011, Stanford Law and Econ. Olin Working Paper No. 249, 2002), available at <http://papers.ssrn.com/abstract=349500> (concluding that PSLRA has encouraged plaintiffs' counsel to focus on stronger investor claims). As noted in the Choi-Fisch-Pritchard paper, the two hypotheses are not inconsistent. Choi et al., *supra* note 2. Changes in the law may in fact encourage more attorney and claimant emphasis on stronger claims where proof of liability or damages is more readily apparent, but this does not mean that the de-emphasized or forgone claims were without merit. On the contrary, they may be the “innocent victims” of well-meaning reform or the casualties of politically motivated efforts to effectively immunize securities defendants from at least some category of claims for which the defendants should, at least in theory, be held to account for their wrongdoing.

157. *See, e.g.*, Michael A. Perino, *Did the Private Securities Litigation Reform Act Work?*, 2003 U. ILL. L. REV. 913, 936–37 (finding that enactment of PSLRA correlated with increased number of securities-fraud claims against issuers, a result the author suggests may stem from efforts of plaintiffs’

In addition, of course, investor class actions, like mass tort class actions, have presented some major public-relations opportunities for their adversaries. Despite all the evidence that can be marshaled in support of the social value of class actions, coupon settlements, settlements that pay lawyers more than class members, and defendant-packaged settlements can be made to look very bad in the theater of politics. In that atmosphere, even a small moment of levity mixed with candor can produce a sound bite that comes back to haunt. Consider William Lerach's now famous-cum-infamous comment that as a class action attorney, he has "the greatest practice in the world because [he has] no clients."¹⁵⁸ But although political exploitation is a given, it is also the case that many class action claims are problematic or were arguably handled in ways that enriched lawyers at the expense of parties. Certainly, the sudden pull of locales like rural Illinois or Mississippi for class action situs looks far more strategic than real to most observers.¹⁵⁹ (Recall, however, that most of this sort of drive to bring class actions in purported "judicial hellholes" involves mass tort litigation and not investor claims).¹⁶⁰

III. CONTINUING LOST OPPORTUNITIES TO EMPLOY CLASS TREATMENT: THREE ILLUSTRATIONS

The different intellectual approaches to aggregate litigation combine with different political perspectives to produce a good deal of division over the proper sphere of class treatment. My argument is that class treatment can be used even more than it has been and should continue to be widely used, particularly for investor claims. However, an analysis of a more flexible approach to class treatment also suggests that class actions

counsel to cast a wider net as a means of risk distribution and cost spreading, out of concern that victory in securities fraud matters was made more difficult by the PSLRA).

158. See *In re Network Assocs., Inc. Sec. Litig.*, 76 F. Supp. 2d 1017, 1032 (N.D. Cal. 1999) (quoting Lerach as further stating "I bring the case. I hire the plaintiff. I do not have some client telling me what to do. I decide what to do."); Craig C. Martin & Matthew H. Metcalf, *The Fiduciary Duties of Institutional Investors in Securities Litigation*, 56 BUS. LAW. 1381, 1381 (2001) (reiterating quote and noting that Lerach has been labeled the "King of Strike Suits"). The quotation originally appeared in William P. Barrett, *I Have No Clients*, FORBES, Oct. 11, 1993 at 52, and has been prominently repeated in subsequent attacks on class actions. See, e.g., Neil Weinberg & Daniel Fisher, *The Class Action Industrial Complex*, FORBES, Sept. 20, 2004, at 150.

159. See John H. Beisner & Jessica Davidson Miller, *They're Making a Federal Case Out of It . . . In State Court*, 25 HARV. J.L. & PUB. POL'Y 143, 169–85 (2001) (describing thousand-fold increase in class action filings in Madison County, Illinois in late 1990s as plaintiff counsel sought favorable venue; describing cases with only minor connections to the county); Kimberly Jade Norwood, *Shopping for a Venue: The Need for More Limits on Choice*, 50 U. MIAMI L. REV. 267, 278–79 (1996) (noting plaintiff counsel preference for Madison County and other favorable jurisdictions).

160. See *supra* text accompanying notes 60–61.

have significant potential for expanded use in mass tort matters. The remainder of this Part addresses two instances where class-action treatment was refused, one in a mass tort context¹⁶¹ and the other in an investor's securities action.¹⁶² Also addressed is the U.S. Supreme Court's recently imposed hurdle for pleading and proving securities-fraud damages, a substantive rule that discourages and limits the availability of class treatment for such cases.¹⁶³ These illustrations show instances in which a more flexible approach attempting to utilize class treatment, rather than erring against use of class treatment, would better serve the justice system and society.

A. Rhone-Poulenc Rorer

In the now well-known *In re Rhone-Poulenc Rorer Inc.* case, the Seventh Circuit felt sufficiently upset about a trial judge's certification of a class as to issues of negligence that it granted mandamus to overturn the certification.¹⁶⁴ Although the panel split two-to-one on the issue, the majority opinion by Judge Richard Posner was influential in discouraging use of issue class actions.¹⁶⁵ The putative plaintiff class in *Rhone-Poulenc* alleged that Rhone-Poulenc and other defendants had been negligent in failing to heat-treat blood supplies used to make blood solids administered as part of the treatment of hemophiliacs. As a consequence, thousands of hemophiliacs became HIV-positive.¹⁶⁶

Because of the problems of individualized injury, the trial court was unwilling to certify the matter as a class action but did invoke Rule 23(c)(4)(A) to certify a class on the issue of whether defendants were negligent in either (a) failing to adopt heat treatment as a preventative of Hepatitis B (which was a known danger prior to HIV and where the Hepatitis heat treatment would have also eradicated the HIV in the blood stocks) and (b) failing to implement heat treatment or other preventatives of HIV prior to 1985.¹⁶⁷ The district court's plan was to try the issue of negligence standing alone. A defense verdict would end the litigation on a classwide basis. A plaintiff class verdict would establish a preclusive

161. See *infra* text accompanying notes 164–77.

162. See *infra* text accompanying notes 178–97.

163. See *infra* text accompanying notes 205–16.

164. 51 F.3d 1293 (7th Cir. 1995).

165. A LexisNexis search indicates that *Rhone-Poulenc* has been cited 133 times by courts and a quite amazing 355 times by commentators, attesting to its impact.

166. *Id.* at 1296.

167. *Id.* at 1295–97.

finding of negligence that could be employed by class members in subsequent litigation in which they sought to prove liability on the part of defendants and injury due to defendant's negligence.¹⁶⁸

The Seventh Circuit panel majority took the view that the question of negligence could not be divorced from the issues of causation and comparative negligence that would be necessary to decide in resolving the remainder of the claims.¹⁶⁹ In addition, and perhaps somewhat more famously, the court stressed the coercive power of class certification regarding settlement,¹⁷⁰ even though the majority simultaneously indicated that it was not really basing its decision on public-policy concerns about settlement dynamics.¹⁷¹ Neither of the majority's assessments is very persuasive.

First, consider the question of whether negligence determinations are inextricably intertwined with issues of causation and comparative negligence. On one level, it is hard to take the Seventh Circuit's seeming contention about comparative negligence seriously. What did the hemophiliacs do that can be considered comparatively negligent? Should they have conducted their own blood-stock screening as a check on the expertise of Rhone-Poulenc and others? That seems absurd. If by comparative negligence the court meant other sources of HIV infection,

168. *Id.* at 1296–97.

169. *Id.* at 1303.

170. *Id.* at 1298.

171. *Id.* at 1299. The court stated as follows:

[D]efendants did not mention their concern about settlement pressures until the oral argument of this appeal [but this is not waiver]. For obvious reasons, they did not point out . . . that if mandamus is denied they will be forced to settle—for such an acknowledgment would greatly weaken them in any settlement negotiations. We should be realistic about what is feasible to put in a public brief.

We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts. We have yet to consider the balance.

Id. Although the majority's refusal to find waiver by the defendants in failing to make the coercion argument can perhaps be justified on public policy grounds (a court should be able to make a sound decision and should not be led to an unsound decision because of the mistakes of the litigants), its commentary on the realpolitik of the adversary system seems unrealistic. Is Judge Posner really suggesting that plaintiffs and counsel will only know that a finding of defendant negligence gives them settlement leverage if Rhone-Poulenc and the other defendants concede this in a brief? Before making this assessment, Judge Posner spent the preceding paragraphs regaling the reader with the many sources of authority in the public domain that make the case for the coercive power of class certification, including Judge Friendly's famous 1973 comment to that effect. *Id.* at 1298–99 (citing HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973), seven other sources from secondary legal literature, and three circuit court cases). The argument that class certification unfairly coerces defendants to settle was by 1995 a fixture of law and litigation. Rhone-Poulenc was perfectly capable of making the argument in a brief if it so chose.

this seems to be either (a) a separate part of the causation inquiry or (b) the type of fact-finding that is not dependent on the fact-finding addressing the question of the vendor's due care or lack thereof.

As to causation, this seems a clearly separable matter and not a blended question as to "whether the harm to the plaintiff followed in some sense naturally, uninterruptedly, and with reasonable probability from the negligent act of the defendant."¹⁷² One can assume a fact of blood-supplier negligence and then conduct a separate inquiry as to whether a plaintiff's HIV was brought about through tainted blood or some other cause. The court's view is particularly odd in view of its statements earlier in the opinion that hemophiliacs, needing chronic infusion of blood solids, are almost sure to develop HIV and AIDS from tainted blood solids.¹⁷³

On the question of class certification and pressure to settle, the court is perhaps even less persuasive. According to the court, class certification on the negligence issue gave unreasonable leverage to the plaintiffs because the defendants had prevailed in twelve of thirteen individual trials on the matter but had not enjoyed the benefit of preclusion. By contrast, a plaintiff class victory on the issue of negligence would put defendants in a position where the best they could do in subsequent litigation was hope for some limitations on causation and damages, but where defendants were sure to be held liable for at least some large damage awards. According to the court, the trial judge's issue certification would tear asunder defendants' previously tenable defense strategy.

All of a sudden they will face thousands of plaintiffs. Many may already be barred by the statute of limitations, as we have suggested, though its further running was tolled by the filing of [the] class action.

Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. And suppose the named plaintiffs in [the case] win the class portion of this case to the extent of establishing the defendants' liability under either of the two negligence theories. It is true that this would only be prima facie liability, that the defendants would have various defenses. But they could not be confident that the defenses would prevail. They might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to

172. *Id.* at 1303.

173. *Id.* at 1295.

roll these dice. That is putting it mildly. They will be under intense pressure to settle.¹⁷⁴

As discussed in greater detail in Part IV, this is simply too excessively bleak a picture of the realities of the situation.¹⁷⁵ Even after an adverse class finding on the issue of negligence, Rhone-Poulenc and similarly situated defendants could continue to interpose several substantial legal, economic, and practical barriers to liability, retaining the option of settlement if this was rationally seen as the best option. In addition, it is a bit hard to weep for a defendant if the court tries the matter and finds the defendant to have been negligent in a manner that exposes tens of thousands of innocents to a deadly virus, received in connection with use of a product for which the defendant was well compensated. Also, most rational commercial actors in the position of Rhone-Poulenc have substantial liability insurance in place—or at least had the opportunity to put such insurance in place as part of a sound risk-management strategy.¹⁷⁶ In general, as Judge Rovner’s dissent put it:

[E]ven if the possibility of a settlement were relevant to the first mandamus requirement, and even if it had been asserted by defendants in support of their petition, I still cannot agree with the majority’s premise that [the trial court’s] order in fact will prompt a settlement. Contrary to the clear implication of the majority’s opinion . . . the class portion of the anticipated trial in this case would not go so far as to establish defendants’ liability to a class of plaintiffs; it would instead resolve only the question of whether defendants were negligent in distributing tainted clotting factor at any particular point in time. Even if defendants were faced with an adverse class verdict, then, a plaintiff still would be required to clear a number of hurdles before he would be entitled to a judgment. . . .

174. *Id.* at 1298 (citations omitted).

175. In particular, the argument that settlement pressure is too “intense” to withstand has been, in my view, quite thoroughly discredited in Silver, *supra* note 2. See *supra* text accompanying notes 341–51 for further discussion of weaknesses in the “blackmail” thesis of class actions, which takes several forms including that expressed in *Rhone-Poulenc*. See Silver, *supra* note 2, at 1360 (stating that the blackmail charge has been made in four distinct versions, none of which is persuasive).

176. Whether the insurers will pay when they should and as promptly as they should (or whether the insurer has a valid defense to coverage) can be quite another matter. See generally JEFFREY W. STEMPEL, LAW OF INSURANCE CONTRACT DISPUTES, *supra* note 128, Ch. 2 (2d ed. 1999 & Supp. 2005) (providing an overview of insurance coverage litigation). But the question of insurance coverage and collection is a separate matter that should not be invoked by the defendant as a basis for avoiding adjudicated liability.

The defendants will thus have ample opportunity to settle should they lose the class trial.¹⁷⁷

As discussed in Part IV, I not only see *Rhone-Poulenc* as a failed opportunity to utilize Rule 23(c)(4)(A) certification of a common issue but also as a lost opportunity to employ flexible means of proof and case processing that can reach questions of damages more efficiently and effectively than individual trials on causation and damage.

B. *Newton v. Merrill Lynch*

In cases where a denial of class treatment really does appear to change the settlement and resolution dynamic, one can make a strong argument that courts should be looking less at resisting litigation and more at maximizing the possibility of fair compensation to the claimant and holding true to the deterrence rationale of the law in question. A strong example is *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*,¹⁷⁸ In *Newton*, the Third Circuit upheld the trial court's decision to refuse to certify a class in a 10b-5 securities claim on the ground that the investors' claims, alleging injury by the defendants' misconduct in failing to obtain the "best execution" feasible for the share trades of class members, failed to meet the predominance and superiority requirements of Rule 23(b)(3).¹⁷⁹

Earlier in the litigation, the circuit court had reversed the trial court's rejection of plaintiffs' theory of liability, ruling that a "duty of best execution" existed and applied to the defendants.¹⁸⁰ The Third Circuit reversed the trial court's summary judgment in favor of defendants and remanded for further proceedings, stating:

[W]e believe that a reasonable trier of fact could conclude that the defendants misrepresented that they would execute the plaintiffs' orders so as to maximize the plaintiffs' economic benefit, and that this misrepresentation was intentional or reckless because, at the

177. *Rhone-Polenc*, 51 F.3d at 1307 (Rovner, J., dissenting).

178. 259 F.3d 154 (3d Cir. 2001).

179. *Id.* at 186–93; See Brian J. Wanamaker, Note, *Class Actions and Rule 10b-5: A Critique of Newton v. Merrill Lynch*, 80 WASH. U. L.Q. 997 (2002). See also Poser, *supra* note 139 (reviewing broker liability under Rule 10b-5 generally).

180. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266 (3d Cir. 1998) (en banc), *cert. denied* 525 U.S. 811 (1998). The *Newton* litigation had an extensive litigation history, "travell[ing] up and down the Third Circuit over several years." Wanamaker, *supra* note 179, at 998 n.5 (reviewing case history).

time it was made, the defendants knew that they intended to execute the plaintiffs' orders at the NBBO [National Best Bid and Offer, a posted price used by the National Association of Securities Dealers] price even if better prices were reasonably available. A reasonable trier of fact could thus find scienter with respect to a material misrepresentation, as well as the other elements essential to a Section 10(b) fraud claim.¹⁸¹

In *Newton*, a class of plaintiff investors argued that they were injured when defendant broker-dealers failed to disclose that the brokers were failing to give the best execution to their transactions. Plaintiffs styled this as a violation of section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 on the part of lead defendant Merrill Lynch and other large brokers PaineWebber, Inc. and Dean Witter Reynolds, Inc.

In essence, the plaintiffs' theory of the case was that commercial brokers owe customers (both institutions and individuals) a duty to take advantage of readily available technology when conducting trades so as to attain the best possible price that day for the investor. The plaintiffs (who numbered in the thousands) argued that the defendant brokers made no effort to attain best prices and best trade execution. Instead, without disclosing their conduct to the investors, the brokers automatically used the price provided by NBBO system for companies listed on NASDAQ (the National Association of the Securities Dealers Automated Quotation System). Plaintiffs argued that use of the NBBO price for all trades frequently resulted in increased costs to the investors. According to plaintiffs, this behavior by defendants constituted a material misrepresentation under Rule 10b-5 because the brokers failed to inform the investors of this problem before accepting the investors' business.¹⁸²

One need not read too much into the uncontested facts of *Newton* to conclude that there was no real factual question as to the defendants' conduct. They appear to have used the NBBO price, period. Consequently, even though adjudication of *Newton* as a class action would have required some fact-finding in this regard, the matter was essentially subject to stipulation. Where the broker-defendants argued vociferously, however, was on the question of plaintiff reliance and injury. According to the defendants, plaintiffs could not prevail unless reliance was proven—as to

181. *Newton*, 135 F. 3d at 274–75.

182. *In re Merrill Lynch*, 911 F. Supp. 754 (D.N.J. 1995). See also Wanamaker, *supra* note 179, at 998–99, 1001–06.

each transaction—because reliance is an essential element of a Rule 10b-5 action.¹⁸³

The Third Circuit, in addition to being hospitable enough to the merits of the claim to impose a duty of best execution upon the defendants, was willing to apply a presumption of reliance¹⁸⁴ but was unwilling to presume injury from the practice, even as a rebuttable matter, in part because of the “loss causation” language of the PSLRA.¹⁸⁵

In this case, defendants allegedly executed trades solely at the NBBO price. Depending on the facts of each trade, the NBBO listed price may or may not have provided a class member with the best price. Therefore, economic loss to the plaintiffs cannot be presumed by the purchase or sale of a security at the NBBO price, and we will not presume it across the class.¹⁸⁶

As a result, the court of appeals was unwilling to permit class certification on the grounds that common issues did not predominate and that the class action approach was not a superior means of managing the litigation.¹⁸⁷

Because plaintiffs sought not only declaratory and injunctive relief but also damages, certification of the damages claim would need to satisfy both Federal Rules of Civil Procedure 23(a) and 23(b)(3).¹⁸⁸ Although the court found that the proffered *Newton* class satisfied the Rule 23(a) requisites of numerosity, commonality, typicality, and adequacy,¹⁸⁹ the

183. 259 F.3d at 174.

184. *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 259 F.3d 154, 177 (3d Cir. 2001).

[T]he investors have alleged that the broker-dealers failed to disclose their policy of executing NASDAQ trades at the NBBO price. Like a securities dealer’s failure to disclose its policy of overcharging investors, defendants’ execution of investors’ trades at the NBBO price, when better prices may have been available from alternative services, constitutes a potentially fraudulent common course of conduct from which reliance can be presumed. We will not require each plaintiff to prove he relied on a practice which defendants did not affirmatively disclose. . . . [T]he burden of rebutting a presumption of reliance is properly placed on defendants here.

Id. (citations omitted).

185. *Id.* at 177 (stating that the PSLRA provides that “[i]n any private action arising under this chapter, the plaintiff shall have the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages.”) (quoting 15 U.S.C. § 78u-4(b)(4) (2000) (alteration in original)).

186. *Id.* at 180–81. The court further stated: “In sum, we conclude that the putative class would be entitled to a rebuttable presumption of reliance but not of economic loss. Therefore, their claims do not warrant a rebuttable presumption of class-wide injury.” *Id.* at 181.

187. *Id.* at 186–91 (“Because economic loss cannot be presumed, ascertaining which class members have sustained injury means individual issues predominate over common ones.”).

188. *Id.* at 181.

189. *Id.* at 181–86.

attempt to attain class status foundered when the appellate court found that the common questions of the defendants' legal duties and conduct did not "predominate" over what the court saw as individual issues regarding whether class member investors in fact suffered economic injury.¹⁹⁰ Consequently, the court found the *Newton* class inapt for certification pursuant to Rule 23(b)(3).

As the court noted, reliance is an essential element of a successful 10b-5 claim. While the court was willing to make a rebuttable presumption of reliance, the consequences of reliance for each class member were seen as an "uncommon" question of fact precluding class certification.

To state a claim for securities fraud under § 10 of the Securities [Exchange] Act of 1934 and Rule 10b-5, plaintiffs must demonstrate: (1) a misrepresentation or omission of a material fact in connection with the purchase or sale of a security; (2) scienter on the part of the defendant; (3) reliance on the misrepresentation; and (4) damage resulting from the misrepresentation.¹⁹¹

The court described the third and fourth requirements as follows:

Under Rule 10b-5 causation is two-pronged. Reliance, or transaction causation, establishes that but for the fraudulent misrepresentation, the investor would not have purchased or sold the security. Loss causation demonstrates that the fraudulent misrepresentation actually caused the loss suffered.¹⁹²

The court declined to treat the question of injury from a failure of disclosure regarding defendant sales practices as the equivalent of "fraud on the market," a type of 10b-5 action in which courts have permitted a rebuttable presumption that all buyers and sellers during the time of the market fraud were affected by the fraud. The court reasoned that although investors may

be entitled to a rebuttable presumption of reliance under the "fraud-on-the-market theory," this is because "in an efficient market the misinformation directly affects the stock prices at which the investor trades and thus, through the inflated or deflated price, causes injury even in the absence of direct reliance." Reliance may

190. *Id.* at 187–90.

191. *Id.* at 173 (quoting earlier *Newton* opinion, *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 269 (3d Cir. 1998)).

192. *Id.* at 172–73 (citations omitted).

be presumed when a fraudulent misrepresentation or omission impairs the value of a security traded in an efficient market. [But here plaintiffs' claims do not involve an omission or misrepresentation that affected the value of a security in an efficient market. Therefore, a presumption of reliance [causing injury] based on this theory would be inappropriate [for the *Newton* claims].¹⁹³

In addition, the *Newton* court stated:

It is important to recognize that the facts of this case do not resonate with those typical of securities violations under Rule 10b-5. Customarily those claims involve a fraudulent material misrepresentation or omission that affects a security's value.

The alleged material nondisclosure here consisted of a broker-dealer accepting an investor's order under the implied representation of the duty of best execution.¹⁹⁴

So defined, the question before the court was thus a more individualized inquiry into what each investor may or may not have thought the brokers would do and the degree to which the share-purchasing decisions of the investors were premised upon reliance, if any, upon broker efforts to close requested transactions at the best feasible price through diligence in the duty of best execution. The court was unwilling to treat the broker-defendants' seemingly apparent acknowledgment of failure to seek best execution and failure to inform investors as the factual equivalent of a misleading company press release or conference-call statement.

In the Third Circuit's view, the type of wrong alleged by the plaintiff investors was simply not broad enough or uniform enough to justify invocation of the type of rebuttable presumption available for fraud-on-the-market cases in which class certification is sought. Indeed, the court seemed to view the case as fairly individualized notwithstanding that there seems to have been a company policy (at all three of the major brokerage-house defendants) of using the NBBO price because it was less work than scrounging around for better prices in order to save a few bucks for the company's customers. The court stated that a rebuttable presumption of reliance might be available in this case:

193. *Id.* at 175–76 (citations omitted) (quoting *In re Burlington Coat Factory*, 114 F.3d 1410, 1419 n.8 (3d Cir. 1997)).

194. *Id.* at 173 (citations omitted).

While it seems apparent that some class members likely knew of defendants' practice, this knowledge does not necessarily invalidate the presumption. When defendants fail to disclose material information about a uniform practice involving the purchase or sale of securities, plaintiffs may be entitled to a presumption of reliance which defendants may rebut. Presuming reliance class-wide is proper when the material nondisclosure is part of a common course of conduct.¹⁹⁵

However, while the court found sufficient evidence of the required common course of conduct to support application of a rebuttable presumption of reliance, it would not make a presumption of economic loss, reasoning that the broker-defendants use of NBBO share prices as their yardstick would in alternating and episodic fashion sometimes benefit investors (when it was the best price available, thus satisfying the duty of best execution) and sometimes harm investors (when better prices were available outside the NBBO system).¹⁹⁶

The alleged injuries in *Newton* arise out of the execution of hundreds of millions of trades, not a single act of fraudulent conduct. The distinct facts among the hundreds of thousands of plaintiffs involving hundreds of millions of trades will determine whether securities violations occurred. Because plaintiffs' claims will require an economic injury determination for each trade, we hold the putative class fails to satisfy the predominance requirement.¹⁹⁷

The court also shut the door to the putative class by taking the position that plaintiffs' proffered expert evidence on class member damages did not suffice because it constituted a damages-calculation formula rather than a means for permitting aggregate proof of injury to class members.¹⁹⁸

In an effort to gloss over this requirement [of proving injury], plaintiffs suggest their expert could calculate the amount of

195. *Id.* at 176 (citations omitted).

196. *Id.* at 180–81. The court stated:

In this case, defendants allegedly executed trades solely at the NBBO price. Depending on the facts of each trade, the NBBO listed price may or may not have provided a class member with the best price. Therefore, economic loss to the plaintiffs cannot be presumed by the purchase or sale of a security at the NBBO price, and we will not presume it across the class.

Id.

197. *Id.* at 190.

198. *Id.* at 187–88.

damages each class member sustained thereby removing proof of injury as an obstacle to certification. In a sworn declaration, plaintiffs' expert, provided no model formula, but instead projected that he could devise a formula that would measure damages among the class and serve as a plan for allocation. We are not convinced. But even if plaintiffs could present a viable formula for calculating damages (which they have not), defendants could still require individualized proof of economic loss.¹⁹⁹

The *Newton* court's analysis resisting class certification has a certain formalist appeal and persuasiveness, but it functionally reflects an undue limitation on class treatment in exactly the type of case that the drafters of Rule 23 (at least the 1966 Amendment) had in mind. A number of large vendor defendants with considerable control over a business transaction fail to advise the customer of an important fact that results in loss to the customer but savings to the vendor (which saves the resources it would otherwise expend seeking the best available price). The amounts in question may vary and are not, in general, large in each instance. However, the cumulative effect is to permit the vendors to enjoy a substantial benefit at the expense of uninformed customers to whom they supposedly owe a fiduciary duty. Consequently, although the entirety of the economic harm and the shift in wealth from customers to vendors is quite large, individual customers (even institutional investors) will probably find it uneconomic to prosecute a civil claim.

This sounds like a classic case for use of a class action, but class treatment is deemed unavailable. One can thus add the *Newton* case to the list of situations in which judicial reluctance to utilize the class action device (in whole or in part) redounds, as a practical matter, to the benefit of the well-heeled, allegedly defrauding party, which escapes being called to account for its misdeeds. Another example includes tortious conduct that results only in relatively small injury in a situation where individual litigation will not be inexpensive.²⁰⁰ Another occurs when claimants are adversely affected as a group, in connection with a type of claim that may require substantial proof at trial, perhaps even the development of fresh facts and making of new law, where the costs of civil prosecution are disproportionate to the amount of injury to particular class members.²⁰¹

199. *Id.* (footnote omitted).

200. See JAMES, HAZARD & LEUBSDORF, *supra* note 35, § 10.20 at 642 (class actions "are often brought in situations in which each class member's claim is too small to support litigation by itself").

201. See *id.* § 10.20 at 640-44. See *id.* at 642 (class actions enable plaintiffs to "pool their resources to litigate on a more equal footing with institutional litigants such as corporations and

In these and other cases, it seems unquestionable that class-action treatment would be appropriate on a practical level and socially valuable. However, because of the strictures imposed on its application, Rule 23 too often seems unavailable, even in small part, to address these claims. Some of this may be the inexorable result of the Rule's text. For example, Rule 23(b)(3) states that a damages class action must be "superior to other available methods for the fair and efficient adjudication of the controversy."²⁰² The *Newton* court read the Rule as requiring that a class action "must represent the best" available method of fairly and efficiently resolving the controversy.²⁰³

One hates to quibble or engage in excessive semantic debate, but rephrasing the already perhaps overly daunting "superiority" inquiry as a requirement that class-action treatment be the "best" way of resolving a matter seems, at a connotative level, to raise the stakes in a manner making it less likely that a purported class action will satisfy the criteria. Although to say that something is "superior to" the alternatives is essentially to characterize it as the best alternative, there is something a little more daunting at the margin of insisting that class treatment be the best treatment of the case.²⁰⁴ The *Newton* court's choice of words betrays the degree to which it was perhaps insisting on too much from the class-action device as well as erroneously taking an implicit all-or-nothing approach to class treatment. Part IV of this Article presents suggestions for permitting more common use of the class action device, occasionally using *Newton* and other cases of failed opportunity to illustrate how these more flexible approaches to Rule 23 might permit greater prudent use of class treatment without offending other systemic norms.

government agencies" although this also leads to allegations that class treatment is too coercive as respects institutional litigants).

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

203. *Id.* at 191.

204. It is worth noting that the ALI is at least experimenting with different terminology that will lessen focus on concepts like "predominance" and "superiority" of class treatment, in part out of concerns similar to those expressed in this Article.

In casting the aggregate treatment of common issues in terms of fidelity to substantive law, finality in adjudication, and feasibility in judicial administration, this Section draws on a similar typology developed in Allan H. Erbsen, *From "Predominance" to "Resolvability": A New Theoretical and Practical Approach to Regulating Class Actions*, 58 VAND. L. REV. [995] (2005). In so doing, this Section consciously breaks from much of the terminology and organization of existing law with regard to aggregation through class actions.

AMERICAN LAW INSTITUTE, *supra* note 122, § 2.03 cmt. b.

C. Dura Pharmaceuticals

Less than two weeks after this Symposium, which featured spirited debate over the case,²⁰⁵ the Supreme Court decided *Dura Pharmaceuticals, Inc. v. Broudo*,²⁰⁶ unanimously adopting a quite strict view of the “loss causation” section of the PSLRA and refusing to consider proof of a misleading positive disclosure as establishing a presumption of injury from securities fraud. Although the Court’s decision in *Dura Pharmaceuticals* (which demonstrated hostility toward securities fraud claims generally and to class claims by implication) was not an encouraging development for the functional, policy-purposivist approach to class treatment proposed in Part IV, it is not in direct opposition to these proposals. The loss-causation provisions of the PSLRA require that a securities plaintiff prove that his or her loss was caused by securities violations, particularly violation of Rule 10b-5 of the 1934 Act.²⁰⁷ However, the PSLRA requires only that there be proof of loss—it does not specify the acceptable methodologies for demonstrating such proof.²⁰⁸

205. Compare Coffee, *supra* note 8 (presented at the Eleventh Annual ILEP Conference April 8, 2005) (arguing in favor of a restrictive view of loss causation and for reversal of the Ninth Circuit’s *Dura Pharmaceuticals v. Broudo* decision that permitted presumption of causality when misrepresentations were made by a company) with Patrick J. Coughlin, Eric Alan Isaacson & Joseph Daley, Eleventh Annual ILEP Conference: What’s Brewing in *Dura v. Broudo*? A Response to Professor Coffee (Apr. 8, 2005), <http://law.wustl.edu/wulq/conference/2005response-dwa-rev.pdf> (defending the Ninth Circuit result and arguing that corporate misrepresentations that inflate price inevitably “cause” subsequent losses when the share price drops). Professor Coffee’s analysis is not part of this Symposium Issue but is published at 60 BUS. LAW. 533 (2005) in juxtaposition with Merritt B. Fox, *Demystifying Causation in Fraud-on-the-Market Actions*, 60 BUS. LAW. 507 (2005) (taking the opposing view for reasons largely in accord with the analysis of Coughlin et al., *supra*).

206. 125 S. Ct. 1627 (2005)

207. See 15 U.S.C. § 78u-4(b)(4) (2000). As Professor Coffee correctly notes, different portions of the securities laws may be treated differently for purposes of assigning the burden of proof to litigants. See Coffee, *supra* note 8, at 544–46 (noting that in sections 11 and 12 of the 1933 Act, “Congress placed the burden of disproving loss causation on the defendant,” but in PSLRA and sections 9 and 18 of the 1934 Act, burden is on plaintiff).

208. The relevant text of the PSLRA simply states that the plaintiff has “the burden of proving that the act or omission of the defendant alleged to violate this chapter caused the loss for which the plaintiff seeks to recover damages” and does not discuss acceptable methodologies for proving loss causation. § 78u-4(b)(4). The legislative history is similarly open-ended on the issue of the nature of acceptable proof. For example, the Conference Committee Report stated:

The Conference Committee also requires the plaintiff to plead and then to prove that the misstatement or omission alleged in the complaint actually caused the loss incurred by the plaintiff in new Section 21D(b)(4) of the 1934 Act [§ 78u-4(b)(4)]. For example, the plaintiff would have to prove that the price at which the plaintiff bought the stock was artificially inflated as the result of the misstatement or omission.

H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep.).

Nonetheless, the Court's restrictive and formal approach to the issues before it does suggest undue continuing hostility toward such claims, albeit hostility arguably derived from Congress's expression of concerns about abuses of securities class actions as reflected in the PSLRA. This is in unfortunate contrast to some of the Court's other opinions of Spring 2005, which tended toward a more functional approach, with better analysis and decision-making.²⁰⁹ It is, however, consistent with another strand of the current Court's jurisprudence: protection of corporate interests out of concern that claims based on relatively "little" wrongs may have outsized economic consequences by excessively punishing the business entity, thereby unnecessarily hurting its constituents. For example, news accounts of the oral argument before the Court in *Arthur Andersen LLP v. United States*,²¹⁰ uniformly reported that the Justices' questioning of the government was sharp and even hostile, reflecting the view that taking down a then Big-Six accounting firm was simply punishment disproportionate to the pseudo-"crime" or semi-crime of shredding documents.²¹¹ Not surprisingly, the Court subsequently reversed

209. See, e.g., *Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding Individual Retirement Account (IRA) exempt from bankruptcy estate despite IRA funds being technically subject to immediate withdrawal on demand but practically not so because of substantial penalties for early withdrawal and because IRAs were functionally similar to other pension plans with age-based right to proceeds); *Smith v. City of Jackson, Miss.*, 544 U.S. 228 (2005) (holding that plaintiffs alleging age discrimination may proceed under "disparate-impact" theory and are not confined to proving "disparate treatment" in order to prevail in view of similarity of Age Discrimination in Employment Act (ADEA) to Title VII, which has long recognized disparate-impact cause of action; however, ADEA disparate-impact action is narrower than that of Title VII); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (permitting private right of action under Title IX of Education Amendments of 1972, 20 U.S.C. § 1681 (2000), by teacher claiming retaliation for standing up for rights of women's sports team because permitting action served functional purpose of enforcing Title IX and effecting statutory goals); *Roper v. Simmons*, 543 U.S. 551 (2005) (stating that application of death penalty to juveniles violates Eighth and Fourteenth Amendments in view of lack of national consensus on the issue, worldwide consensus that executing children is morally wrong, and substantial evidence that children's reasoning and emotions differ substantially from those of adults, making juveniles less culpable for even heinous crimes). See also *infra* text accompanying notes 451–52 (suggesting that the 2005 Supreme Court decisions reflect a more expansive functional analysis rather than restrained formalist approach, but noting that the Court continues to frequently resort to more formalist methodology, as reflected in *Dura Pharmaceuticals*).

210. 544 U.S. 696 (2005) (requiring proof of consciousness of wrongdoing, intent and a nexus between the corrupt persuasion and a particular federal proceeding for federal obstruction of justice and thus holding that the jury instructions were erroneous, requiring reversal), *rev'g* 374 F.3d 281 (5th Cir. 2004). The circuit court opinion had rejected a challenge to the federal government's theory of the case in prosecuting the now-defunct accounting firm for obstruction of justice.

211. See, e.g., Jess Bravin, *Supreme Court Hints at Curbing Strategy on White-Collar Crime*, WALL ST. J., Apr. 28, 2005, at C3 ("[S]everal justices expressed open disdain during oral arguments for the sweeping theory the Justice Department used to secure the criminal conviction of Enron Corp.'s accounting firm, Arthur Andersen LLP."). For example, Justice Anthony Kennedy characterized the government's notion of criminal activity as a "sweeping position that will cause

the conviction in a unanimous opinion, but one softpedaling the costs of erroneous prosecution and emphasizing violation of due process where the jury instructions failed to convey the mens rea requirement for conviction.²¹² Although the result may be perfectly justified on doctrinal grounds, it undoubtedly stemmed as well from a more problematic view that law enforcement should tread carefully and not unduly threaten private economic interests, a result quite consistent with the Court's resistance to securities fraud claims as reflected in the *Dura Pharmaceuticals* opinion.²¹³

The current Court, although not uniformly formalist or textualist, seems to have a soft spot in its jurisprudential heart for business entities²¹⁴

problems for every corporation or small business in this country." *Id.* at C3. See also Tony Mauro, *Andersen's Paper Jam: Did Arthur Andersen Take A Bad Rap for Tossing Documents, or Is It Exhibit A for Corporate Corruption?*, LEGAL TIMES, Apr. 18, 2005, at 1.

212. Arthur Andersen v. United States, 544 U.S. 696 (2005).

213. One can also seriously question whether the Court's protectiveness of business entities is appropriate in light of the conduct in question and whether the Court's implicit calculus is correct (that the end of a business is a social harm that outweighs permitting the business to "get away" with that to which the government objects). See generally BARBARA LEY TOFFLER WITH JENNIFER REINGOLD, FINAL ACCOUNTING: AMBITION, GREED, AND THE FALL OF ARTHUR ANDERSEN (2003) (describing an Andersen of institutionalized bad behavior that arguably was more of a harm to its clients, securities markets, and society than a valuable employer and generator of wealth); Richard A. Oppel, Jr., *Enron Traders on Grandma Millie And Making Out Like Bandits*, N.Y. TIMES, June 13, 2004, § 4, at 7 (reproducing communications between Enron employees in which they mocked consumers and congratulated themselves on gouging the public on energy sales, including statement that "we need a blackout" to facilitate reduced government regulation of energy industry). Put more simply, perhaps some businesses, even big, formerly respected ones, deserve the legal death penalty as a fair punishment for their own wrongs and to provide a deterrent to similar behavior by other such businesses. See also Gretchen Morgenson, *All That Missing E-Mail . . . It's Baaack*, N.Y. TIMES, May 8, 2005, § 3, at 1 (noting that emails claimed to have been lost by Morgan Stanley as a result of September 11 terrorist attack and that were consequently not available to plaintiffs remained in existence and have surfaced in suit against Morgan brought by wealthy financier Ronald Perelman; re-discovery of the e-mails "may force Morgan Stanley to defend itself against countless investor cases it had previously won."). The implication of the article is that Morgan did not try very hard to locate this information in response to prior discovery requests.

In addition, the Court's implicit economic calculus seems empirically incorrect. Although there is certainly a large, uncomfortable dislocation of the workforce when a business entity closes its doors, the workers, particularly skilled workers, do not stand in soup lines forever. They take jobs at other firms doing similar work. One should seriously question the "killing the golden goose" rationale and "Chicken Little" fears that underlie much of the case for leniency against commercial wrongdoing. If the same rationale were applied to criminal activity or civil wrongs by individuals, the justice system would act with leniency in order to keep the defendant engaged in economic activity, for the good of his employer, his family, etc. Although these pleas sometimes are persuasive at sentencing, this is disfavored in cases of serious wrongdoing. In civil actions, these factors are irrelevant and juries are precluded from considering them. Why should the standard be relaxed for business entities and white collar crime?

214. To the extent that the Court has sympathies for what it perceives as a downtrodden commercial community, this may be in part simple reflection of contemporary socio-political and socio-legal attitudes. See John Gibeaut, *Back in Business: After Enron and Sarbanes-Oxley*, an

and a concern that thin claims may nonetheless have excessively coercive impact when aggregated. In that sense, *Rhone-Poulenc* and *Newton* are arguably in accord with *Dura Pharmaceuticals*. But the Court has by no means foreclosed functional approaches to expanded class treatment in appropriate cases, *Amchem* and *Ortiz* notwithstanding. To a large degree, the Court's recent jurisprudence is primarily limited in scope, with opinions that do not go much beyond what is necessary to decide the instant case.²¹⁵ Consequently, *Dura Pharmaceuticals* is not definitive bad news for securities plaintiffs and supporters of class treatment, although it obviously is not good news, either. *Dura Pharmaceuticals* is, however, a problematic opinion reflecting the type of analysis that unnecessarily holds back both the securities laws and Rule 23 from achieving optimal effect.

The *Dura Pharmaceuticals* case arose out of the purchase of shares in the company by Michael Broudo and others during the time period of April 15, 1997 through February 24, 1998. The Broudo plaintiffs contended that shares purchased during this period had been pumped up in price by "several press releases indicating satisfactory development and testing of the Albuterol Spiros Device and claiming rising sales of Ceclor CD, both of which [Plaintiffs] allege were known to Dura and the individual defendants to be untrue."²¹⁶ Plaintiffs pointed to six separate press releases they alleged contained misrepresentations. Some parts of the statements seemed relatively innocuous and could arguably be seen as mere public-relations speak.²¹⁷ Others contained more factually declarative statements that, if untrue or misleading, would constitute material misrepresentations.²¹⁸ During the class period, company stock reached a high of \$53 per share. At the close of the class period (February 24, 1998),

Aggressive SEC Cracked Down. But a Favorable Political Environment Finds Corporations Battling Back, A.B.A. J., May 2005, at 40.

215. See CASS SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT (1999).

216. *Broudo v. Dura Pharms., Inc.*, 339 F.3d 933, 935 (9th Cir. 2003) (footnote omitted).

217. See *id.* at 935–36. The June 5, 1997 press release stated, for example, that the company was "pleased with the results to date" of the Albuterol Spiros product and that the company was "preparing the NDA [New Drug Application] for filing in the latter half of this year." *Id.* The June 15, 1997 press release stated the company was "pleased with Dura's performance in the second quarter of 1997." *Id.* at 936. Similar low-key but boosterish language is found in parts of all the six challenged releases. *Id.* at 935–36.

218. See *id.* The April 15, 1997 release stated that "Patient dosing was completed for clinical trials needed for NDA (new drug application) submission of Spiros albuterol . . ." *Id.* at 935 (alteration in original). The June 5, 1997 release stated that the company had completed "clinical trials necessary" for submitting a NDA for the Albuterol Spiros product. *Id.* The July 15, 1997 release stated that the company had "completed clinical trials necessary for NDA (new drug application) submission and [was] on track to file the Albuterol Spiros NDA on behalf of Spiros Corp. in the second half of 1997." *Id.* at 936. The November 10, 1997 release stated that the company had in fact submitted a NDA "with

Dura revealed that it expected lower[-]than-forecast 1998 revenues and 1998 earnings per share (“EPS”) due to, *inter alia*, slower-than-expected sales of Ceclor CD. Dura’s stock then dropped from \$39 1/8 on February 24, 1998 to \$20 3/4 on February 25, 1998, a 47% one-day loss. Throughout the remainder of 1998, Dura’s business declined. In an April 16, 1998 conference call with stock analysts, Dura revealed that as early as December 1997, wholesale channels had been clogged with many months of excess inventory and that actual sales of several products, including Ceclor CD, had in fact been declining. Later, in November 1998, Dura also revealed that the FDA found the Albuterol Spiros device not approvable due to electro-mechanical reliability issues and chemistry, manufacturing, and control concerns.²¹⁹

The Broudo plaintiffs contended that they had purchased inflated drug-company stock on the basis of misstatements by the company and were injured when the share price came crashing back to earth as the truth about the company’s situation gradually came out.²²⁰ On its face, this does not seem a far-fetched theory of loss. If a vendor lies about the rosy prospects for two of its key prospects, this logically increases the value of the company and hence the cost of purchasing a portion of the company. If these lies are later exposed, the value of part ownership (i.e., the value of a share of stock) logically goes down. Those who bought at the fib-inflated price and were still holding shares when the price became truth-adjusted suffered a loss. This seems inarguable.

However, as the *Dura Pharmaceuticals* defendants pointed out, the price of a stock can decline for many reasons unrelated to specific misrepresentations. In the *Dura Pharmaceuticals* case in particular, the chronology of descent in company share prices was not particularly good for the plaintiffs because there was not one “big bang” company announcement of past misrepresentation, stripped of other bad news, followed by an immediate drop in share price. The linkage asserted by the Broudo plaintiffs was more attenuated. Consequently, the defendants contended that the loss asserted by the plaintiff class was insufficiently

the FDA [Food and Drug Administration] for Albuterol Spiros.” *Id.* The January 20, 1998 release claimed that market share of Ceclor CD had grown “from 8% at the beginning of 1997 to 25% by year-end.”

219. *Id.*

220. *Id.* at 936–39.

direct to qualify as an acceptable theory of loss causation under the PSLRA.²²¹

The trial court accepted the defense's contentions and granted a motion to dismiss the complaint without prejudice, giving plaintiffs leave to amend. The plaintiffs submitted a second amended complaint that was dismissed with prejudice, the trial court holding that the plaintiffs had failed to adequately allege "any relationship" between the FDA's non-approval of the Albuterol Spiros device and the "February price drop."²²² The trial court took a similar view of the allegations of misrepresentation regarding Ceclor CD and the drop in share price.²²³

The Ninth Circuit reversed, holding that an allegation of directly or closely linked causality between defendant misrepresentation and loss of share value was not necessary. "In this circuit, loss causation is satisfied where 'the plaintiff shows that 'the misrepresentation touches upon the reasons for the investment's decline in value.'"²²⁴ According to the Court of Appeals:

[I]t is necessary in the [securities fraud] pleading to allege 1) that the stock's price at the time of purchase was overstated and 2) sufficient identification of the cause for this overvaluation. Appellants have pled that the price of the stock was overvalued in part due to the misrepresentations by Dura and the individual defendants that the development and testing of the Albuterol Spiros device were proceeding satisfactorily and that FDA approval of the device was imminent. Accordingly, the district court erred by finding that appellants failed to plead loss causation sufficient to survive a motion to dismiss with regard to statements concerning the Albuterol Spiros device.²²⁵

In addition, the Court of Appeals reversed the trial court's determination that the allegations of plaintiffs' second amended complaint did not adequately allege scienter, which is also required for a successful Rule 10b-5 "scheme or artifice to defraud" claim,²²⁶ and could not be

221. *Id.* at 936.

222. *See id.* at 936-37.

223. *See id.* at 937.

224. *Id.* at 937-38 (citing and quoting *Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999) and *McGonigle v. Combs*, 968 F.2d 810, 820 (9th Cir. 1992) and citing *Provenze v. Miller*, 102 F.3d 1478, 1492 (9th Cir. 1996)).

225. *Id.* at 939.

226. *See Santa Fe Indus., Inc. v. Green*, 430 U.S. 462 (1977); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723 (1975); JOHN C. COFFEE, JR. & JOEL SELIGMAN, *SECURITIES REGULATION: CASES AND MATERIALS* 1126 (9th ed. 2003).

cured through further amendment. The Ninth Circuit noted the governing law of liberal attitude toward amending pleadings pursuant to Federal Rule of Civil Procedure 15 and concluded that “[b]ecause it appears that [plaintiffs] had a reasonable chance of successfully stating a claim if given another opportunity, the district court abused its discretion in denying leave to amend the [second amended complaint].”²²⁷

The Supreme Court granted certiorari²²⁸ and reversed.²²⁹ The Court’s unspoken rationale for granting review was the importance of the loss-causation question, which had not been addressed in any detail by the Court in light of the relatively recent passage of the PSLRA. The express reason for granting review was “[b]ecause the Ninth Circuit’s views about loss causation differ from those of other Circuits that have considered this issue.”²³⁰ The division of the circuits appears to have existed for several years in view of earlier Ninth Circuit precedent consistent with the *Broudo v. Dura Pharmaceuticals, Inc.* opinion of the Court of Appeals.²³¹ Apparently, the hydraulic pressure of disuniformity finally became too much for the Court to ignore. Or, perhaps the Broudo claims struck the Court as particularly fuzzy, too indefinite to permit deployment of the coercive power of a class action.

Dura Pharmaceuticals is both a loss-causation case and a particularity-of-pleading case, which may have been a combination that made it particularly vulnerable to a decision restricting class plaintiff claims. In light of the six (count ‘em, six) allegedly fraudulent press releases,²³² it seems odd that the Broudo plaintiffs did not simply add a few sentences in their amended complaint alleging greater linkage between their purchase of misrepresentation-inflated shares and their losses when corrective

227. *Broudo v. Dura Pharms, Inc.*, 339 F.3d at 941.

228. *Dura Pharms., Inc. v. Broudo*, 124 S. Ct. 2904 (2004).

229. *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005).

230. *Id.* at 1630 (citing Ninth Circuit opinion as inconsistent with *Emergent Capital Inv. Mgmt., LLC v. Stonerpath Group, Inc.*, 343 F.3d 189, 198 (2d Cir. 2003); *Semerenko v. Cendant Corp.*, 223 F.3d 165, 185 (3d Cir. 2000); and *Robbins v. Koger Props., Inc.*, 116 F.3d 1441, 1447–48 (11th Cir. 1997) and also citing a pre-PSLRA loss-causation case, *Bastian v. Petren Res. Corp.*, 892 F.2d 680, 685 (7th Cir. 1990)).

231. *See* 339 F.3d at 938 (citing to Ninth Circuit precedent from 1996 and 1999 permitting a showing of loss causation where alleged fraud “touches upon the reasons for the investment’s decline in value” as well as pre-PSLRA precedent to same effect) (quoting *Binder v. Gillespie*, 184 F.3d 1059, 1066 (9th Cir. 1999)).

232. If the facts stated in the six challenged company press releases were incorrect, they almost certainly were the result of fraud. A reasonably competent company knows whether it has actually completed clinical trials or submitted an NDA and what its sales figures are for a given time period. It is not very likely that any of the misstatements challenged by the Broudo plaintiffs was the result of mistake or inadvertence, suggesting that the plaintiffs would have relatively little difficulty proving the scienter necessary to satisfy Rule 10b-5.

information reduced the value of those shares. Even in the absence of a single pivotal corrective announcement and immediate decline in share price (a “dream scenario” of sorts for a securities plaintiff wishing to have no problem satisfying the loss-causation requirement), one would expect that the Broudo plaintiffs could have alleged a lot more connection between Dura’s purported misrepresentations and their losses and remained comfortably within the boundaries of Federal Rule of Civil Procedure 11 and 28 U.S.C. § 1927.²³³

Presumably, the Broudo plaintiffs made a conscious decision to allege less rather than more on this point in hopes of attaining a favorable ruling from the Ninth Circuit that could be used as future precedent in favor of a presumption of loss causation and which would generally make loss causation a reduced obstacle to successfully surviving a motion to dismiss. Such a ruling, if allowed to stand by the Supreme Court, would make it easier for securities plaintiffs to reach a more advanced stage of the proceeding, to obtain discovery, and perhaps to attain class certification—all of which would give the plaintiff class significant settlement leverage. In addition, a presumption of loss causation that is inadequately rebutted could be an important procedural and evidentiary tiebreaker for securities plaintiffs in cases actually reaching trial. Consequently, there appears to have been some considerable method to the strategy of the Broudo plaintiffs. But the Supreme Court treats this strategic course more as madness or evidence of a weak claim that is unworthy of the legal rule sought by plaintiffs.²³⁴ In addition, the Court trotted out the now familiar cudgel of the purported “*in terrorem*” effect of class certification.²³⁵

233. Rule 11 of the Federal Rules of Civil Procedure requires that a claim have “evidentiary support” or that party and counsel making the claim reasonably believe it will have evidentiary support after adequate discovery. FED. R. CIV. P. 11(b)(3). Violation of Rule 11 is subject to sanction. FED. R. CIV. P. 11(c). Section 1927 permits the court to impose sanctions on parties that unnecessarily multiply or elongate civil actions. 28 U.S.C. § 1927 (2000). Both provisions are, like ABA Model Rule of Professional Conduct 3.1, rules forbidding attorneys (and their clients) from commencing frivolous litigation (or frivolously defending or conducting litigation). *See* MODEL RULES OF PROF’L CONDUCT R. 301 (2004). In the absence of contrary evidence, it seems unassailable to argue that misrepresentation-inflated share prices have a ripple effect that causes harm to shareholders unfortunate enough to still be holding their shares when more accurate information forces a market correction and downturn in price, regardless of whether the downturn is abrupt or gradual.

234. The Court stated:

[P]laintiffs’ lengthy complaint contains only one statement that we can fairly read as describing the loss caused by the defendants’ “spray device” misrepresentations. That statement says that the plaintiffs “paid artificially inflated prices for Dura’s securities” and suffered “damages[.]” The statement implies that the plaintiffs’ loss consisted of “artificially inflated” purchase “prices.” The complaint’s failure to claim that Dura’s share price fell significantly after the truth became known suggests that the plaintiffs considered the

If, contrary to the Court's implicit assessment of the strength of the Broudo claims and the design of Broudo counsel, the case is viewed as an attempt to seek a liberalized standard of proof that would permit more liberalized pleading (notwithstanding the requirements of Federal Rule of Civil Procedure 9(b) and PSLRA that fraud be pleaded with particularity), the proceedings below and the case itself make considerably more sense. As a result of the Court's opinion, the particularized pleading requirements of the PSLRA have effectively been strengthened in that securities complaints must now allege loss causation with more specificity and less attenuation if the claims are to survive a motion to dismiss. Unfortunately, the Court's decision operates as a "judicially activist" expansion of the pleading requirements beyond the text of the statute and the apparent intent of Congress. The text of section 21(D)(b) of the PSLRA (15 U.S.C. 78u-4(b)) "imposes particularized pleading requirements for falsity and scienter allegations, but imposes no burden of pleading loss causation at the lawsuit's earliest stages."²³⁶

The Court's holding regarding pleading requirements under the PSLRA is obviously a setback for the Broudo plaintiffs,²³⁷ at least in terms of legal

allegation of purchase price inflation alone sufficient. The complaint contains nothing that suggests otherwise.

Dura Pharms., 125 S. Ct. at 1634 (alteration in original) (citation omitted).

235. According to the Court, allowing the Broudo plaintiffs to proceed based on their thin contentions as to the linkage between misrepresentation and damages would allow plaintiffs to abuse the situation:

It would permit a plaintiff "with a largely groundless claim to simply take up the time of a number of other people, with the right to do so representing an *in terrorem* increment of the settlement value, rather than a reasonably founded hope that the [discovery] process will reveal relevant evidence." Such a rule would tend to transform a private securities action into a partial downside insurance policy.

Id. (alteration in original) (quoting *Blue Chip Stamps v. Manor Drug*, 421 U.S. 723, 741 (1975) and citing H.R. Rep. No. 104-369, at 31, and the partial dissent of Justices White and O'Connor in *Basic, Inc. v. Levinson*, 485 U.S. 224, the 1988 case in which the Court officially recognized and accepted the "fraud-on-the-market" claims, which had been recognized for some time in the lower courts).

236. Coughlin, Isaacson & Daley, *supra* note 205, at 24 (italics omitted).

237. And without doubt, lawyer observers see *Dura Pharms. v. Broudo* as a loss for securities plaintiffs and a win for securities defendants. See Peter Geier, 'Loss Causation' Becomes Reality, NAT'L L.J., May 9, 2005, at 13 (noting influence of *Dura Pharmaceuticals* for ongoing securities litigation, including criminal sentencing for securities fraud, in news story reporting case where convicted defendant received lighter sentence on theory that there must be sufficient causal connection between defendant fraud and injury to company to merit stiffer criminal punishment); *The Supreme Court Raises the Bar for Shareholder Class Actions*, WEST CLEALERT (email advertisement of April 27, 2005, EDT) (on file with author) (advertising panel discussion CLE on *Dura Pharmaceuticals*, emphasizing the decision as one restricting class treatment of securities claims as well as one adopting heightened standard of proof of loss causation, and stating that "the Supreme Court reined in suits by shareholder" and "ruled that shareholder must allege and prove a clear connection between a company's misrepresentations and subsequent loss in stock value before they can recover damages in

doctrine. But it may not be utter and complete defeat for the plaintiffs. Presumably, now that the Court has set national standards on loss causation, the Broudo plaintiffs should be permitted to amend their complaint notwithstanding the trial court's earlier dismissal, which took place when the trial court adopted a standard of loss causation that was legitimately open to challenge by the plaintiffs and on which plaintiffs prevailed before the Court of Appeals. There conceivably could be a third or even fourth amended complaint in *Broudo v. Dura Pharmaceuticals* that cures the purported deficiencies of the first and second amended complaints.

As to the question of the substantive legal standard of proof for loss causation, which is technically a different (but related) question from aptness for class treatment, the Supreme Court's analysis seems almost breezily superficial. For example, the Court took issue with the "basic" understanding of the Ninth Circuit that purchase of a misrepresentation-inflated security is a sufficient allegation of loss.²³⁸ The Court found this view "wrong" because normally "an inflated purchase price will not itself constitute or proximately cause the relevant economic loss."²³⁹

Part of the Court's attack on the Ninth Circuit was empirical. The Court decreed that

the logical link between the inflated share purchase price and any later economic loss is not invariably strong. Shares are normally purchased with an eye toward a later sale. But if, say, the purchaser

fraud-on-the-market litigation"). See also Kathy D. Patrick, *Ease Burden on Plaintiffs*, NAT'L L.J., June 20, 2005, at 26 (shareholders' counsel criticizes heightened pleading standard of PSLRA). But see Merritt B. Fox, *Understanding Dura*, 60 BUS. LAWYER 1547 (2005) (viewing *Dura Pharmaceuticals* as narrow decision leaving several open questions that could (and in his view should) be resolved in favor of fraud-on-the-market plaintiffs in securities litigation).

238. *Dura Pharms.*, 125 S. Ct. at 1631. It is important to remember that the Ninth Circuit opinion on loss causation adopted a liberal standard of proof. It did not embrace a socialist standard of proof or strict liability for misrepresenting corporations. Rather, the Ninth Circuit opinion merely permitted the case to go forward if the plaintiffs alleged that the claimed fraud "touched upon" their losses and held that this created a presumption of loss that was also presumably rebuttable (the Court of Appeals opinion did not expressly address the strength of the presumption of the procedural and evidentiary implications at trial). The Ninth Circuit opinion did not say that the Broudo plaintiffs won merely because they survived a motion to dismiss. In fact, had *certiorari* not been granted, the case was to have been remanded in any event and the plaintiffs would have been required to cure pleading deficiencies if they expected to continue with the case, a result that is not all that far from what I argue should happen in the aftermath of the Court's decision. See *Broudo v. Dura Pharms., Inc.*, 339 F.3d 933, 940-41 (9th Cir. 2003). Seen in this light, the Ninth Circuit decision is more of a pleading opinion and less an opinion on the substantive law of the PSLRA.

239. 125 S. Ct. at 1631.

sells the shares quickly before the relevant truth begins to leak out, the misrepresentation will not have led to any loss.²⁴⁰

Although the Court's statement is true in the narrow sense, it gives a misleading picture of investing and implicitly holds out what should be a disfavored type of "investor"—the quickie day trader—as the norm, rather than the patient "buy-and-hold" investor. Empirically, the Court simply seems mistaken. For respectable investors and institutional investors of the type to whom one would think the securities laws would provide most protection, the buy-and-hold strategy seems far more in vogue than quick in-and-out trading. Witness the near-icon status (despite problems of General Reinsurance and its dealings with AIG) of Berkshire-Hathaway Chairman Warren Buffet, who clearly preaches and practices a long-term investment philosophy.²⁴¹ Many Berkshire-Hathaway shareholders probably have no plans to sell, unless necessary for living expenses but will make the holdings part of their respective estates (especially if the estate tax is eliminated). Certainly, most investors are likely to hold even a mediocre stock for ten months, the length of the class period in *Dura Pharmaceuticals*.

Whether the Court is empirically correct about investor behavior or I am correct about investment behavior is perhaps not important. But it certainly seems important that the Court is indulging in the empirical assumption that much investment is not even long-term enough to permit a presumption that investors duped into paying a price of ten times the true value of a stock because of false statements about its impending product breakthroughs probably lose money as a result of those false statements when they sell the stock for a reduced price after the truth trickles out. At the very least, one would expect the Court to provide some empirical support for its sweeping view that so much investing is jackrabbit investing as to preclude this seemingly reasonable presumption.

Perhaps more important, the Court's armchair empiricism leads it to render an opinion that may foreclose investor plaintiffs from having a chance to prove that (a) they indeed held their fraud-inflated shares for months rather than days and (b) that when they ultimately sold, the shares were worth less because the falsity of the earlier claims had become

240. *Id.*

241. See Karen Richardson, *Questions Follow Buffett to the Mike This Year*, WALL ST. J., Apr. 28, 2005, at C1 (noting Buffett's popularity and hero-status as the "Oracle of Omaha" largely because of his investment strategy of taking the long view and stating that his popularity appears intact despite recent bad publicity resulting from reinsurance subsidiary's involvement in sales of insurance product to American International Group (AIG) that are viewed as suspect by some regulators).

apparent. Notwithstanding the intent of the PSLRA to require pleading particularity commensurate with or somewhat greater than Federal Rule of Civil Procedure 9(b), it seems a little harsh to require precise allegations of loss in complex cases, prior to discovery and the opportunity for expert forensic or economic analysis of the manner in which the market ultimately discovered prior misstatements and reacted to them.

A major part of the Court's analysis was not empirical but formalist. The Court stated that "as a matter of pure logic, at the moment the transaction takes place, the plaintiff has suffered no loss; the inflated purchase payment is offset by ownership of a share that *at that instant* possesses equivalent value."²⁴² This quite astounding contention by the Court has the sort of "pure logic" one sees in sophomoric philosophical questions on the order of "If a tree falls in the forest and no one hears it, does it make a sound?"²⁴³ It is hair-splitting "logic" rather than an honest attempt to assess the reality of a situation.

If I pay platinum prices for gravel based on misrepresentations of the seller, I am uninjured in only the most hyper-technical sense. I have parted with a platinum-sized amount of money that could have been deployed in a host of investments or in enjoyable consumptive expenditures. In return, I received gravel; I just have yet to discover it is gravel and not platinum. Although I may have been sufficiently deceived that I will not discover the loss for some time, it seems undeniable that I have indeed suffered loss. If nothing else, I could have used the money to buy bronze or copper, or perhaps even silver or gold, rather than the gravel I now have on my hands. Only if I am fortunate enough to pass this hot potato on to another fool who pays platinum prices will I avoid loss. This may happen in a minority of cases in which duped investors purchase inflated shares—but it cannot "logically" be the dominant scenario as the Court suggests. Most investors are likely too slow to realize that they bought hype-inflated gravel rather than true platinum and there probably is not a large enough

242. 125 S. Ct. at 1631.

243. See GEORGE BERKELEY, A TREATISE CONCERNING THE PRINCIPLES OF HUMAN KNOWLEDGE/THREE DIALOGUES BETWEEN HYLAS AND PHILONOUS (G.F. Warnock ed., Open Court Publ'g Co. 1986) (1710/1713). This caricature of a deep philosophical inquiry has made the rounds of popular culture for decades. I first heard it on television's *All in the Family* as character Michael Stivic, Archie Bunker's leftist son-in-law played by Rob Reiner, employed the analogy to express the emptiness of experiences if not shared with his wife (Archie's daughter, played by Sally Struthers), as part of Michael's attempt to make amends for a previous slight. Although one can of course argue that things do not "exist" unless perceived, this is a rather homocentric view of the world. Of course the tree makes a crashing sound when it falls, regardless of whether any human being is in the vicinity.

supply of additional fools to permit the first wave of defrauded investors to sell out on good terms before the music stops.

The *Dura Pharmaceuticals* Court attempted to justify its crabbed interpretation of loss causation on the basis of a very strained, brittle formalism that crosses into the realm of the unrealistic and unhelpful. The Court's syllogism seems to be: if the fraudulently misinformed market says you have a \$100 stock, then you by definition have a \$100 stock, even if the truth will inevitably make it a \$10 stock, until the exact date that particular revelations of truth bring particular changes in price. Although this may be "correct" in a narrow sense, it does not mean that Congress adopted this view or that the Court should adopt this view in the absence of clear congressional command.

Applied to actual share purchases, the Court's analysis becomes even weaker. Assume, for example, that I buy Enron stock at \$90.75 a share, its high (at least according to the class complaint filed in the Southern District of Texas²⁴⁴). Enamored of the new energy trading skills of the "smartest guys in the room,"²⁴⁵ I hold these shares for months, thinking they will make a strong cornerstone for my retirement. What I do not yet know, but what will soon be known to the world, is that Enron is a house of cards. Within weeks or months, my investment will be essentially worthless, Enron employees will be out on the street, and the Houston Astros will play in a renamed ballpark. But until that day of reckoning, according to a unanimous U.S. Supreme Court, I am rich, rich, rich. This contention is not "pure logic" so much as pure poppycock.

More defensible portions of the *Dura Pharmaceuticals* opinion analogize the 10b-5 securities claim to common-law fraud and hold 10b-5 claims to the stringent standards that have historically been applied to fraud claims, thereby making it inappropriate in the Court's view to permit a plaintiff to survive a motion to dismiss unless the complaint alleges some rather strong and specific wrongdoing linked to an actual loss.²⁴⁶ Finding the Broudo complaint wanting in this regard, the Court reversed the Ninth Circuit and found that the alleged misrepresentations must be asserted to cause the alleged losses in a causal chain that is not too attenuated. If this had been all the Court said, fans of strong securities laws might be disappointed at the Court's view of the shortness of the permissible causal chain, but they would at least not be dismayed by the

244. Complaint at 12, *Newby v. Enron Corp.*, 188 F. Supp. 2d 684 (S.D. Tex.) (No. H-01-4198).

245. See BETHANY MCLEAN & PETER ELKIND, *THE SMARTEST GUYS IN THE ROOM* (2003) (describing massive, ongoing fraud that led to collapse of Enron).

246. 125 S. Ct. at 1632–33.

Court's strained "logic" and odd perception that the Congresses of 1934 and 1995 saw securities markets as mostly day traders rather than buy-and-hold investors.

Further undermining the persuasiveness of the Court's decision, however, is that the Court took a more restrictive view of the PSLRA loss requirement than did the Solicitor General, who argued that the PSLRA does not require dismissal of claims such as Broudo's but only that plaintiffs like Broudo demonstrate that "the inflation in the price of the security attributable to the misrepresentation" be eliminated or reduced in order to claim damages for the purported fraud.²⁴⁷ Professor Coffee considered this an excessively modest position, which he presumably is happy that the Court rejected in favor of a more extensive narrowing of the criteria for pleading and proof of loss causation.²⁴⁸ I disagree and find it troubling when the Supreme Court takes a more restrictive approach towards securities fraud claims than the Bush Administration, which prides itself on being pro-business regarding such matters.²⁴⁹

The Court acknowledged that "[t]he securities statutes seek to maintain public confidence in the marketplace" and acknowledged the deterrent function of these laws. "But," continued the Court, the statutes "make [private rights of action] available, not to provide investors with broad insurance against market losses, but to protect them against those economic losses that misrepresentations actually cause."²⁵⁰ There are two problems with this passage of the *Dura Pharmaceuticals* opinion. First, it is the Court's only mention of the deterrent purpose of the securities law, and it is only a passing mention. Even in a brief opinion, this suggests that the Court is giving short shrift to this important part of the law and policy of securities regulation, particularly in light of its precedents recognizing the fraud-on-the-market theory²⁵¹ and the liability of third parties (in

247. Brief of the United States as Amicus Curiae Supporting Petitioners at 16, *Dura Pharms., Inc. v. Broudo*, 125 S. Ct. 1627 (2005) (No. 03-932).

248. See Coffee, *supra* note 8, at 547.

249. Anne E. Kornblut, *Bush Wants a Cap on Malpractice Awards; Partisan Issue Touches '04 Presidential Race*, BOSTON GLOBE, Jan. 16, 2003 at A3; Dana Milbank, *The Political Mind Behind Tort Reform*, WASH POST, Feb. 25, 2003 at A21 (describing top presidential advisor Karl Rove's significant involvement in Bush Administration support of tort reform).

250. 125 S. Ct. at 1633.

251. Fraud-on-the-market theory, which was approved by the Court in *Basic v. Levinson*, 485 U.S. 224 (1988) is a broader, more policy-centered securities fraud cause of action than individual claims, which tend to focus of course on what was said or done to a particular claimant, whether and how much the particular claimant lost, and what he or she requires to be made whole. By contrast, fraud-on-the-market theory seeks to make for "clean" securities markets and a level playing field between investors and issuers and sellers. Consequently, the public policy of deterring fraud and the focus is on the impact of misrepresentation or nondisclosure on the market as a whole more than the individual

addition to the share issuer) to investors²⁵² and refusing to permit securities-fraud damage awards to be reduced by purported tax savings.²⁵³

Second, the Court is engaging in sloganeering rather than analysis. Although it may sound good at a Chamber of Commerce meeting to decry use of securities laws as de facto “insurance against market losses,” the real legal question before the Court is considerably less political and the consequences of giving an answer favorable to securities plaintiffs are considerably less apocalyptic than the Court’s prophecy of an inefficient, government-enforced de facto insurance program for incompetent or unlucky investors who can enlist an attorney in their cause.²⁵⁴ The

and his or her losses. This suggests a more charitable and expansive view as regarding proof of loss in fraud-on-the-market cases. See LOUIS LOSS & JOEL SELIGMAN, FUNDAMENTALS OF SECURITIES REGULATION 1274–94 (5th ed. 2003 & Supp. 2006) (also regarding *Dura Pharmaceuticals* holding as not drastically altering this approach); Merritt B. Fox, *Understanding Dura*, 60 BUS. LAW. 1547, 1547–1551 (2005).

252. See *United States v. O’Hagan*, 521 U.S. 642 (1997) (holding that attorney could be guilty of securities fraud on the basis of purchasing and trading stock in company based on inside information acquired from representing company’s purchaser prior to public disclosure and sale). Ironically, the Court cited *O’Hagan* in its brief nod to the deterrence rationale underlying the securities laws. Although the Court had not forgotten its existence, perhaps it had forgotten its implications.

253. See *Randall v. Loftsgaarden*, 478 U.S. 647 (1986) (holding that party adjudicated to have committed securities fraud and caused damages cannot have damages award reduced by the “tax shelter” benefits the defrauded investor enjoyed from purchasing the shares at issue). Again, apparently oblivious to the irony, the *Dura Pharmaceuticals* case cited *Loftsgaarden* as it had cited *O’Hagan* a sentence earlier. *O’Hagan* and *Loftsgaarden* are so different in approach as to make one wonder whether the same Court was involved (although, of course, it wasn’t precisely the “same” Court because of personnel changes). *O’Hagan* and *Loftsgaarden* are both relatively expansive in their applications of the securities laws. *Dura Pharmaceuticals* is not. More important, *O’Hagan* and *Loftsgaarden* are functionalist analyses of the legal issues before the Court rather than formalist opinions. *O’Hagan* and *Loftsgaarden*, as the Court perhaps implicitly acknowledges, are opinions that treated the underlying deterrent purpose of the securities laws as important. They are opinions influenced by public policy as well as text and doctrinal analysis (e.g., the “elements of fraud” discussion employed in *Dura Pharmaceuticals*, 125 S. Ct. at 1631–33) and represent very good, even outstanding examples of the Court taking a policy-purposivist approach to the controversy as well as a functional approach to legal analysis.

254. With this rhetorical move (saying that the securities laws are not intended to be an insurance policy against market decline), the Court too credulously follows the political-public-relations gambit of industry defendants at the expense of closer legal and public-policy analysis. The discussion in these parts of *Dura Pharmaceuticals* (the Court used the market-insurance analogy twice, 125 S. Ct. at 1631–32, 1634) is reminiscent of a similarly overly credulous embrace lower courts often give to insurer arguments that a general liability policy is “not a performance bond,” thus wrongfully refusing coverage when a policyholder is sued for the alleged property damage inflicted by construction defects. See, e.g., *Farmington Cas. Co. v. Duggan*, 417 F.3d 1141 (10th Cir. 2005). The “not a performance bond” slogan is smart public-relations rhetoric by liability insurers, in part because it is true at a general level. However, when one actually looks closely at the relevant liability insurance policy language and the allegations of the third party’s claim, it becomes clear in many cases that the claim is covered and that the insurer’s rhetoric, although initially persuasive, does not withstand case-specific scrutiny. See generally STEMPPEL, *supra* note 176, at ch. 14A (discussing general liability insurance and construction defect litigation). Compare *American Family Ins. v. American Girl, Inc.*, 673 N.W.2d 65 (Wis. 2004) (majority correctly assessing the insurance-coverage issue before the

question before the Court in *Dura Pharmaceuticals* was simply whether a case could proceed and whether plaintiffs could perhaps recover if they proved violations of Rule 10b-5 and provided sufficient evidence, after discovery, to demonstrate losses occasioned by the fraud-pumped purchase price and the subsequent sale after corrective information had resulted in a decline in share price.

This is not really a sweeping standard of “causation by presumption” as decried by Professor Coffee.²⁵⁵ Rather, it is a modest recognition of the seemingly unassailable reality that positive misrepresentations increase share prices and that prices usually come back to earth when the misrepresentations become known. To be sure, other factors may also depress share price during the same time period. It would be too pro-plaintiff a rule to fix a set damages formula based on share-price inflation at the time of purchase. But is it too pro-plaintiff to require the corporate defendant, which has access to quite a lot of information, to carry the burden of proving that something other than correction of the previous fraud accounted for the lower price paid to plaintiffs that sold their shares?

Professor Coffee’s argument against the Ninth Circuit approach is considerably better than the Court’s. Although he, like the Court, succumbs to the overwrought contention that anything beyond a narrow approach to loss causation turns securities litigation into market-decline insurance,²⁵⁶ Professor Coffee addresses more forcefully the policy questions underlying securities claims. He argues that permitting plaintiffs like Broudo to bring cases without a sufficiently direct link between material misstatement and financial loss will result in some investors being compensated for a “phantom loss” at the expense of other investors, who will at least indirectly pay the purportedly injured investors when the business entities found liable pass the cost on to shareholders generally, including those that are not part of the plaintiff class.²⁵⁷ Even if a settlement or judgment is funded by insurance, the company will usually be responsible for a significant retention and such settlements are likely to increase future premiums, resulting in increased costs borne by all future shareholders.²⁵⁸

court) *with id.* at 86 (Crooks, J., dissenting) and *id.* at 89 (Roggensack, J., dissenting) (both dissents embracing too uncritically the “not a performance bond” argument).

255. *See* Coffee, *supra* note 8.

256. *Id.* at 535.

257. *Id.* at 534, 538.

258. *Id.* at 534–35, 542. At least this is what underwriting and insurance theory would predict. However, as commentator Thomas Dubbs observed at the ILEP Conference, the market for Directors & Officers (“D & O”) liability insurance, including insurance covering corporate-entity liability,

Professor Coffee describes these types of claims as “essentially pit[ting] one class of shareholders (those who traded within the class period) against all other shareholders” and concludes that “[i]nherently, in the secondary market context, such actions generate wealth transfers from the latter class of generally non-culpable shareholders to the former class.”²⁵⁹ He also argues that it is bad social policy to “maximize the number and amount of these intra-shareholder wealth transfers” because of the “considerable transactions costs extracted by the legal profession,” which means that permitting recovery to plaintiffs like the Broudo class will “produce net losses in the real world.”²⁶⁰

In addition, maintains Professor Coffee, class actions like the Broudo claim direct their fire at the wrong target:

[S]ecurities litigation in this context inherently results in a wealth transfer between two classes of public shareholders, neither of whom is necessarily culpable. Worse still, even if we assume that fraud was present, the beneficiaries of the fraud are the persons who sold at inflated prices—the selling shareholders—and they escape without incurring any cost when liability is later imposed on their former corporation.²⁶¹

In addition, one might add that there is no guarantee that even a successful securities-fraud claim will result in payment by the persons often most responsible for the fraud: constituents of the corporation that approved misleading press releases, cooked the corporate books, or otherwise misled investors to the detriment of both investor and corporation.²⁶²

Professor Coffee’s legal-doctrinal analysis is similar to the Court’s, but more sustained and sophisticated in its assessment of congressional intent.

appears to move as much or more in relation to factors such as the cost of capital, interest rates, and the overall economic climate as in response to a particular policyholder’s claims experience. Thomas Dubbs, Esq., Panel III. Class Actions and Institutional Investors, Remarks of ILEP Conference (Apr. 8, 2005). Mr. Dubbs currently is a lawyer primarily representing securities plaintiffs, but he previously was counsel to Kidder, Peabody & Co. and is quite familiar with the purchase of D & O policies. His comments are in accord with many assessments found in insurance trade literature and with anecdotal information I have heard from brokers and counsel. To the extent this disjunction between insurance pricing and claims experience is the rule rather than the exception, it weakens the argument that successful securities claims inevitably raise costs for shareholders outside the plaintiff class, at least in cases where insurance covers most of a settlement, which appears to be the norm in securities class action litigation.

259. Coffee, *supra* note 8, at 534.

260. *Id.* at 534.

261. *Id.* at 541–42.

262. *See id.* at 542–43.

He argues that the PSLRA loss-causation provisions, however broad or narrow they may be, clearly put the burden of persuasion upon the plaintiff. Consequently, he further argues, any sort of presumptive causation shifts the burden of persuasion to the defendant in an impermissible manner at odds with the positive law of the PSLRA and the intent of Congress.²⁶³ Professor Coffee's analysis is provocative and undoubtedly will be persuasive to many readers. More important, perhaps, it captures the essence of a unanimous Supreme Court's view, even if the Court's analysis was less comprehensive. But the Coffee assessment also overstates the purported problems with the Ninth Circuit's more liberalized approach to loss causation and understates the deleterious effects of requiring something too close to direct causation at the pleading stage of the case. Although I realize that criticizing Coffee on corporate law matters is a bit like criticizing Warren Buffet's investment decisions, Professor Coffee's attack on the Ninth Circuit's approach to loss causation and his implicit endorsement of the Supreme Court's approach (which he accurately predicted, at least as to basic outcome) has several flaws. In addition, Professor Merritt Fox, a similarly eminent authority on securities law, also takes issues with the Coffee assessment.²⁶⁴

First, calling the Ninth Circuit approach "causation by presumption" is a bit of rhetorical excess. Although if *Dura Pharmaceuticals* had progressed to trial and plaintiffs had been accorded a presumption of loss, this hardly would have guaranteed victory for the class plaintiffs. Before they could enjoy the presumption, they would need to (a) amend their complaint on remand before the trial court to correct shortcomings noted by the Ninth Circuit; (b) develop sufficient information through discovery and investigation to withstand expected defense summary-judgment motions in which (i) the defendants' fact witnesses would deny scienter or perhaps even the inaccuracy of the statements at issue and (ii) the defendants' expert witnesses would contend that loss of share value resulted from factors other than the market becoming aware of the inaccuracy of prior statements about Spiros Albuterol and Ceclor CD; (c) prove that the fact statements of the press releases were materially inaccurate and that the defendants possessed scienter; (d) establish that the class plaintiffs bought stock at a fraud-inflated price and sold at a truth-deflated price; and (e) defeat the defendants' expected evidence suggesting that other factors accounted for the market decline. Professor Coffee's

263. *Id.* at 535, 544–47.

264. *See* Fox, *supra* note 205.

assessment glosses over litigation realities by suggesting that the Broudo plaintiffs are on easy street after the Ninth Circuit decision.²⁶⁵ In my view, they are only being given entrance to a potentially long and winding road.

Second, and relatedly, Professor Coffee assesses the purportedly dire effects of the Ninth Circuit approach as if the Court of Appeals had created an irrebuttable presumption of causation when investors purchase fraud-inflated shares. Although the Ninth Circuit does not belabor this point, it is apparent that the Court of Appeals was at most giving the Broudo plaintiffs the benefit of a rebuttable presumption of loss causation sufficient to withstand a motion to dismiss if the claim was properly pled.

Third, although Professor Coffee gives better consideration to the deterrence rationale of the securities laws and the Ninth Circuit's approach than does the Supreme Court,²⁶⁶ he nonetheless understates the case for deterrence and undermines its application. According to Professor Coffee:

[F]or deterrence to work, the costs must fall either on the culpable or at least on those who are the best cost avoiders—that is, those who can take effective precautions to minimize the risks. As a practical matter, this means that actions directed against corporate managers, controlling shareholders, auditors, underwriters or other gatekeepers should have some desirable deterrent effect, but when the liability simply falls on the corporation, as the residual risk bearer, the deterrent effect is dissipated.²⁶⁷

The point is well-taken and one wishes the Court had leavened its holding with some indication that it supported apt securities class-action claims against the type of potential rogues' gallery sketched by Professor Coffee. Unfortunately, the Court threw away this important tool for

265. See Coffee, *supra* note 8, at 537. Contrary to my view and that of Professor Fox, *supra* note 205, at 525, Professor Coffee asserts that he is the academic commentator who truly appreciates the importance of procedure and of litigation realities that Professor Fox (and, by my implication, me as well) overlooked. See Coffee, *supra* note 8, at 539. For the reasons set forth above and in the text accompanying this footnote, I disagree. See *infra* text accompanying notes 266–74 (acknowledging and disputing Professor Coffee's settlement coercion argument). Professor Coffee is overemphasizing the defendants' difficulties and plaintiffs' advantages under the Ninth Circuit approach. To be sure, he does a good job of showing that application of the court's standard can lead to litigation and damage-calculation complexities, see Coffee, *supra* note 8, at 537–39, and by implication establishes that the Supreme Court decision makes things simpler. But, of course, if the U.S. legal system really wanted to make life simpler for corporations, officers, and directors, it could simply abolish securities-fraud liability altogether. The fact that permitting recovery for misrepresentation leads to occasionally difficult questions of proof and extensive litigation simply establishes that permitting recovery to injured plaintiffs is not cost-free. It hardly follows that permitting recovery is not worth the cost.

266. See Coffee, *supra* note 8, at 542–43.

267. *Id.*

policing the securities markets when it extinguished aiding-and-abetting liability in its 1994 *Central Bank of Denver* decision.²⁶⁸ Congress compounded the error by not reinstating aiding-and-abetting liability and overturning *Central Bank of Denver* when enacting the PSLRA in 1995.²⁶⁹ By criticizing the Ninth Circuit approach to loss causation because it fails to go after the real villains of corporate fraud (the agents) and instead seeks recompense from the corporation itself, Professor Coffee is allowing the “best” (a world with aiding and abetting liability) to be the enemy of the “good” (a world where a reasonably broad approach to loss causation brings more deterrence than exists under a narrow regime of loss causation).²⁷⁰ He appears to take the position that no deterrence is better than some deterrence, in that he advocates precluding claims like those in *Dura Pharmaceuticals* in part because they do not pursue the appropriate targets of wrongdoing. More likely, he means that the costs of *Dura*-like actions outweigh the benefits, but this is both unclear in his article and far from clear as a matter of empirical fact.

In addition, Professor Coffee appears to overlook the degree to which liability suffered by the corporate entity should encourage a rational corporation (through better controls, supervision, etc.) to take steps that will reduce the chances of future claims and enable it to ultimately force errant constituents to pick up the tab. For example, a corporation can require officers and directors to indemnify it for intentional liability-creating behavior or can withhold portions of a salary or bonus as a hedge against such liability. Although this is not feasible for middle and lower-level employees, it probably is worth pursuing for high-ranking, highly paid officers.²⁷¹ Unfortunately, corporate boards appear to have irrationally gone in the other direction in recent years, perhaps the most notorious example being Tyco’s agreement to compensate former CEO and current criminal defendant Dennis Kozlowski should he be convicted of a crime (any crime, not just some regulatory problem attendant to his duties for the company).²⁷²

268. *Cent. Bank of Denver v. First Interstate Bank of Denver*, 511 U.S. 164 (1994).

269. *See supra* text accompanying notes 47–51.

270. *See supra* text accompanying note 304 (criticizing restrictions on class treatment as example of allowing an ideal of the “best” to thwart the “good” of positive if imperfect use of class treatment).

271. Directors may present a different situation because of the difficulty in obtaining qualified directors, particularly after passage of the Sarbanes-Oxley Act, 15 U.S.C.A. § 7201 (2005). In today’s market, the Directors appear to have the leverage to request insurance coverage, indemnity agreements, and other protections. In contrast, officers seeking to attain or retain corporate employment at six- and seven-figure compensation are likely to bend to reasonable corporate requests.

272. *See* Roger Lowenstein, *A Boss for the Boss*, N.Y. TIMES, Dec. 14, 2003 § 6, at 42 (“In 2001, shortly before his supposed crimes [Kozlowski was subsequently convicted] came to light, Kozlowski

These sorts of examples of government attacks on corporate misfeasance perhaps strengthen Professor Coffee's case. However, there is no guarantee that the government will always be diligent in pursuing such actions. In fact, one can of course argue that today's relative upsurge in criminal prosecutions of white collar crime is merely the result of under-regulation and inadequate supervision of these individuals and entities during the 1990s. Also, many of today's administrative or prosecutorial initiatives against corporate wrongdoing could easily have never occurred or could have been reversed or nullified. For example, if a prosecutor declines to pursue action against the Enrons or Koslowskis of the world, that may end the enforcement effort as a practical matter. Although notorious company chieftains such as John Rigas (Adelphi) and Bernard Ebbers (WorldCom) were convicted and received stiff sentences, Richard Scrushy (HealthSouth), was acquitted despite the testimony of several former employees implicating him in fraud of similar magnitude.²⁷³

As to SEC regulation, it currently appears to hang by a thread. In April 2005, the Commission adopted a regulation that accomplished much of what was sought by the *Newton* plaintiffs: a requirement that brokers exercise a duty of best execution in conducting stock trades.²⁷⁴ However, the commission vote on the matter was three to two, and many in the Republican party criticized Chairman William Donaldson, a Bush appointee, for being insufficiently sensitive to industry concerns by siding with the majority.²⁷⁵ Because administrative enforcement, even in the most

demand a contract that guaranteed his severance [with pay], even if he committed a felony. The directors might have reasonably asked if Kozlowski were plotting a little arson or, perhaps, a discreet murder. Instead, they met his terms." See also *In Brief*, EVENING STANDARD (London), Mar. 31, 2004, at 32 (reporting \$72 million in bonuses given to Kozlowski alone); Lawrence K. Cagney & Catherine Marten, *Executive Compensation Litigation: Lessons to be Learned, Landmines to be Avoided*, 576 PRACTICING L. INST. TAX L. & PRAC. 779, 793 (2003) (reporting that Kozlowski and Tyco CFO Swartz were accused of fraud totalling more than \$600 million through unauthorized compensation and stock sales).

273. See Kim Clark, *For Whom Enron Tolls*, U.S. NEWS & WORLD REP., Feb. 13, 2006 at 46 (noting convictions of John Rigas (former CEO of Adelphi Communications), Bernard Ebbers (former CEO of WorldCom), Dennis Kozlowski (Former TYCO CEO) and others as well as acquittal of HealthSouth CEO Richard Scrushy); Stephen Labaton, *Four Years Later, Enron's Shadow Lingers as Change Comes Slowly*, N.Y. TIMES, Jan. 5, 2006 at C1 (same).

274. See *SEC Adopts Regulation NMS and Provision Regarding Investment Advisers Act of 1940*, SEC NEWS DIGEST, Apr. 7, 2005 at 1.

275. Floyd Norris, *Split SEC Approves Rule Requiring Best Price in Stock Trades*, INT'L HERALD TRIB., Apr. 7, 2005, at 13. See Greg Farrell, *Donaldson Steps Down as Head of Divided SEC*, USA TODAY, June 2, 2005 at 1B; Ken Herman, *Chairman of SEC to Depart; Critics Say Donaldson Too Fond of Regulation*, ATLANTA J.-CONST., June 2, 2005 at E1. Subsequently, Donaldson resigned, and he is to be replaced by Congressman Christopher Cox (R-Calif.), who almost certainly would not support the regulation, although "sources familiar with his thinking" stated he would not work to repeal it. See Stephanie Kirchaessner & Andrew Parker, *Nominated SEC Chief "Will Not Seek To*

non-partisan of agencies, is subject to practical political constraints, courts must shoulder a significant role in efforts to deter bad securities practices.

Most important, however, the Coffee argument is insufficiently supportive of the deterrent rationale of securities law because he refuses to hold a fraudfeasor liable unless there is nearly direct and irrefutable evidence that disclosure of the fraud caused an immediate and finely calculable reduction in share price. Although I acknowledge that he (and the Supreme Court) can argue that this was the will of Congress, it ought to give all of us pause to think that this construction of the PSLRA means that American law is unwilling to impose civil liability against a fraudulent actor absent a smoking gun. Logically, the practical effect of this protective “no harm, no foul” defense must be to make actors more willing to engage in fraud. They have whatever incentives might exist to prompt fraud (e.g., pumping up the share price; getting a bonus; helping a merger go through, etc.), while after *Dura Pharmaceuticals*, the disincentives for fraud are substantially reduced: you will only be punished for fraud you commit if it happens to inflict injury in a manner that can be demonstrated under the Court’s narrow view of the PSLRA.

Similar criticisms of Professor Coffee’s analysis have been put forth by Professor Fox²⁷⁶ and Messrs. Coughlin, Isaacson, and Daley.²⁷⁷ The latter note that corrective disclosure of corporate fraud sometimes comes so late in the day that the corporation has been liquidated or reorganized in bankruptcy and argue (persuasively, in my view) that applying the Court’s notion of adequate loss causation leaves investors in such companies uncompensated or undercompensated. By definition it is then too late to recover, but only then has sufficient loss linked to fraud been shown under the *Dura* test.²⁷⁸

They also note that as a practical matter, the efficient markets posited by economists and case law often reflect a decline in share price due to

Undo” Donaldson Reforms If Confirmed, FIN. TIMES (London), June 29, 2005 at 1. I remain skeptical. See also Symposium, *The SEC at 70*, 80 NOTRE DAME L. REV. 825–1186 (2005), which contains several valuable articles presenting variant views of the SEC’s effectiveness and future. Although the Symposium contributors represented a wide range of views, all appear to agree that the SEC and corporate regulation in general, change over time. See, e.g., A.C. Pritchard, *The SEC at 70: Time for Retirement?*, 80 NOTRE DAME L. REV. 1073 (2005); Harvey J. Goldschmid, *The SEC at 70: Let’s Celebrate Its Reinvigorated Golden Years*, 80 NOTRE DAME L. REV. 825 (2005) (taking quite opposing views of the best future course of securities regulation infrastructure, but both seeing SEC as agency going through historical phases).

276. Fox, *supra* note 205.

277. Coughlin, Isaacson & Daley, *supra* note 205.

278. *Id.* at 12 (“[R]ecover should not be denied merely because the defendants manage to conceal their fraud until after the company failed and its stock was worthless.” (citing RESTATEMENT (SECOND) OF TORTS § 548A (1977)).

prior misrepresentations before those misrepresentations formally come to light.²⁷⁹ In the world of efficient markets, observers often smell smoke before the fire can be spotted, and certainly before the fire is officially acknowledged by any corporate pyromaniacs. Further, Coughlin et al. note that many wrongdoers will be adept at covering the tracks of prior misstatements, making it difficult as a practical matter to prove all damages resulting from fraud if restricted to the Supreme Court's narrow concept.²⁸⁰ To the extent that they are correct, the *Dura Pharmaceuticals* holding chooses to give greater protection to the rights of a perhaps unjustly accused corporate defendant than to a perhaps excessively litigious former shareholder.

Although the Court's position can perhaps be justified by the congressional intent underlying the PSLRA or a more general notion of protecting the rights of the accused, it cannot be justified by a damages theory generally. There is no evidence that application of the Ninth Circuit's approach to loss causation would result in more wrongful inculcation of innocent defendants than that the Court's approach will result in wrongful exculpation of culpable defendants.²⁸¹

Professor Fox puts the loss-causation debate in its historical context, which suggests that Congress intended to codify case law on the subject rather than to impose a substantially higher burden on securities-fraud plaintiffs.²⁸² The term originated in the Second Circuit, where the Court of Appeals historically took a more stringent view of pleading under Federal Rule of Civil Procedure 9(b) and was considered by many to be protective

279. *Id.* at 13 (citing various sources, including BURTON G. MALKIEL, *A RANDOM WALK DOWN WALL STREET* 185 (6th ed. 1996) ("Research indicates that, on average, stock prices react well in advance of unexpectedly good or unexpectedly bad earnings reports.")). *But see* Lynn A. Stout, *Takeovers in the Ivory Tower: How Academics Are Learning Martin Lipton May Be Right*, 60 *BUS. LAW.* 1435, 1436 (2005) ("During the 1970s, 1980s, and early 1990s, efficient market theory and the principal-agent model wielded tremendous influence over academic thinking about corporate takeovers. More recently, however, corporate scholars have begun to look at each of these ideas more carefully. Neither is holding up especially well to closer scrutiny.") Even if Professor Stout is correct as to efficient market theory as respects hostile takeovers, this does not appear to me to undermine the validity of fraud-on-the-market actions by securities purchasers, which does not presume much about the behavior of corporate leaders but instead makes the reasonable assumption that share prices reflect information about the company, both good and bad. Consequently, the spreading of good but false information logically defrauds the market of purchasers.

280. Coughlin, Isaacson & Daley, *supra* note 205, at 14.

281. *See* Lynn A. Stout, *Type I Error, Type II Error, and the Private Securities Litigation Reform Act*, 38 *ARIZ. L. REV.* 711 (1996) (noting that choice of rule or approach will have differential effects on whether defendants are held culpable and hence will also affect degree of deterrence of securities fraud).

282. Fox, *supra* note 205, at 508–11. *See, e.g.*, *Schlick v. Penn-Dixie Cement Corp.*, 507 F.2d 374 (2d Cir. 1974); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969).

of corporate defendants, at least as compared to other courts. But the Second Circuit did not require smoking-gun proof of loss, only a reasonable linkage, and found that loss causation was “rather easily [shown] by proof of some form of economic damage.”²⁸³ A prominent Fifth Circuit decision stated that loss causation was shown if the alleged misrepresentation “touches upon the reasons for the investment’s decline in value”²⁸⁴—a verbal test not far different from the Ninth Circuit articulation that was struck down by the Court in *Dura Pharmaceuticals*.

Professor Fox notes that the traditional measure of damages in a Rule 10b-5 action has always been the plaintiff’s “out-of-pocket” losses, and he argues persuasively that a purchaser of a fraud-inflated security does indeed suffer an actual loss on the day of purchase when she buys a stock that would sell for half that amount in the absence of the material misstatements.²⁸⁵ “Price inflation [from misrepresentation] is the type of loss that most closely corresponds with this measure of damages.”²⁸⁶ Perhaps most important, Professor Fox reads the legislative history of the PSLRA to require only this showing of loss causation, thus eliminating congressional intent as a justification for the Court’s intellectually unsatisfying *Dura Pharmaceuticals* opinion.²⁸⁷ Equally important, Professor Fox appears to place more importance on the deterrent function of the securities laws than does Professor Coffee.²⁸⁸

Professor Fox also argues convincingly that the very nature of a fraud-on-the-market claim requires an application of the traditional rule, similar to the Ninth Circuit’s approach, rather than the Supreme Court’s approach and that in these types of cases, the traditional dichotomy between transaction causation and loss causation is not helpful.²⁸⁹ He also levels significant criticism at two of the appellate court decisions embraced by the Supreme Court in its *Dura* opinion, finding that each has “serious problems.”²⁹⁰ Concludes Professor Fox:

283. *Schlick*, 507 F.2d at 380. See Fox, *supra* note 205, at 508–11.

284. *Huddleston v. Herman & MacLean*, 640 F.2d 534, 549 (5th Cir. 1981), *aff’d in part, rev’d in part*, 459 U.S. 375 (1983).

285. Fox, *supra* note 205, at 515–19.

286. *Id.* at 528.

287. See *id.* at 528 n.71 (citing H.R. REP. NO. 104-369, at 41 (1995) (Conf. Rep)).

288. See *id.* at 529–30 (noting his agreement with Coffee that the compensatory rationale for suits such as the *Dura* claim is not strong, but arguing that such claims are supportable under a theory of deterrence).

289. *Id.* at 513–15.

290. *Id.* at 518–19 (criticizing *Robbins v. Koger Properties, Inc.*, 116 F.3d 1441 (11th Cir. 1997) and *Semerenco v. Cendant Corp.*, 223 F.3d 165 (3d Cir. 2000)).

[A] plaintiff who sells before full market realization of the truth should have his damages reduced or eliminated by the extent to which the price continues to be inflated by the misstatement. But full elimination of this price inflation . . . does not require that price at time of plaintiff's sale be below the price he paid. . . . Other factors may have increased share price by more than the full deflation reduced it. . . . [T]he problem of sales prior to full deflation is, for a number of reasons, better considered in terms of the determination of individual damages rather than causation.²⁹¹

Professor Coffee would undoubtedly respond to my criticisms that he understates the “hurdles of litigation” faced by plaintiffs by noting that most cases settle and that once the Broudo amended complaint survives a Rule 12 motion to dismiss as a class action (or an action likely to receive class certification), it has substantial settlement value that will prompt the Dura defendants to reach for their checkbooks (or at least the insurers’ checkbooks) rather than continue to test the bona fides of the Broudo claims through protracted, expensive, adverse-publicity-generating litigation.²⁹² Although this alternative view of “litigation reality” cannot be blithely dismissed, it must be recognized for what it is: the by-now-familiar-to-the-point-of-being-hackneyed “litigation blackmail” argument of class-action coercion. As discussed previously and subsequently, this argument is overstated in the abstract and in application, particularly if the case is problematic.²⁹³ For example, in the Ninth Circuit’s *Broudo v. Dura* decision, there does appear to be substantial ground for arguing a “no harm, no foul” defense to a finding of misleading corporate press releases. Under these circumstances, the Dura defendants would seem well positioned to fight on (or have their insurers fight on their behalf). At best, they may win total victory after trial and appeal. The realistic worst-case assumption is that their efforts will drive down the cost of settlement, probably to something within the limits of their insurance coverage.

Even assuming that *Broudo v. Dura* was inevitably destined for a substantial settlement payment to plaintiffs (and counsel, of course) had the Supreme Court affirmed the Ninth Circuit, the public-policy question remains: is that so bad? Professor Coffee and other critics of the Ninth Circuit approach (including, I think, the justices of the Court) too quickly

291. *Id.* at 519.

292. See Coffee, *supra* note 8, at 540.

293. See Silver, *supra* note 2; Hay & Rosenberg, *supra* note 2; *supra* text accompanying notes 137–39.

take the position that the litigation reality of settlement pressure in a class action results in inappropriate payments by defendants and excessive pressure on corporations, over-deterrence if you will.²⁹⁴ Persuasive scholarly analysis has convincingly refuted the all-too-commonly held notion that class certification unfairly leverages innocent defendants into unreasonable settlement of meritless claims.²⁹⁵ Courts and commentators should simply stop continuing to invoke this canard as a rationale against class treatment, at least until such time as the case for the idea of the poor, downtrodden, lawyer-abused corporate defendant is given at least some convincing empirical support. At this juncture, there is of course some evidence of substantial settlement payments in particular class action cases. There is also evidence of what appear to be occasions of abuse (“quickie” settlements; coupon settlements, etc.). But this hardly suggests that securities-fraud defendants are in general overpaying for the consequences of their misconduct. At this juncture, an equally convincing case can be made that these defendants are seldom forced to fully internalize the cost of the wrongdoing they inflict on securities buyers and the market.

To a large degree, this divide over whether securities class actions over-punish or under-enforce mirrors the debate surrounding the PSLRA, in which proponents of the law argued, largely on the strength of one study of a small cluster of cases, that the merits did not matter to settlement, while others argued that settlement outcomes were related to the strength of plaintiffs’ claims.²⁹⁶ Congress, rightly or wrongly, adopted the former view in promulgating a law that was designed to make it harder to successfully sue under the securities laws and to use procedural barriers (e.g., the requirement of pleading with particularity) as a proxy for more searching judicial inquiry into the quality of claims.²⁹⁷ On that basis, a reasonable court might determine that a narrow view of loss causation and an expansive view of the particularized pleading requirement is congressionally commanded.

If the Supreme Court had adhered more to this type of analysis in *Dura Pharmaceuticals*, the decision would be less subject to criticism but still incorrect, at least in my view. Courts interpreting statutes need to be mindful that legislation is not only positive law but that it varies in the degree to which it is truly “public-spirited” legislation rather than mere

294. See *supra* text accompanying notes 137–39.

295. See Hay & Rosenberg, *supra* note 2; Silver, *supra* note 2.

296. See *supra* text accompanying note 156.

297. See *supra* text accompanying notes 47–51 (discussing enactment of PSLRA).

interest-group legislation.²⁹⁸ Although one can argue that the PSLRA was the former (and particular parts of the law such as the “Lead Plaintiff” provisions appear to have genuinely been added to the Act in the spirit of public interest),²⁹⁹ the claim-reducing, defendant-protection aspects of the PSLRA are more in the nature of interest-group legislation designed more to protect corporate securities defendants than to limit abuses of the securities laws. Under these circumstances, the better course for courts is to interpret the law in a way that minimizes its interest-group characteristics and maximizes its public-regarding aspects.³⁰⁰

Applied to *Dura Pharmaceuticals*, this suggests at a minimum that a more functional and less formal approach is in order. In addition, it suggests that the public is better served by adopting, at least in the early stages of litigation, a liberal approach to pleading loss causation rather than a more restrictive approach. A more functional approach to pleading loss causation will not unduly burden defendants, while the more restrictive approach may well eliminate claims in which contentions of defendant fraud have merit. Although the more liberal approach imposes some costs on defendants from increased litigation, these costs are worth bearing in order to reduce the likelihood that fraud will go unpunished because of the defendants’ good fortune to have complex economic factors surrounding post-fraud decline in share price.

Dura Pharmaceuticals thus stands as an example of Supreme Court jurisprudence that is not encouraging, but that does not directly foreclose a more functional approach to class treatment of securities claims, one that will give some renewed impetus to such claims in the service of deterring fraud. After a decade of class actions under attack, the time is now ripe for considering such approaches, particularly now that more class actions will

298. See JERRY L. MASHAW, *GREED, CHAOS AND GOVERNANCE: USING PUBLIC CHOICE TO IMPROVE PUBLIC LAW* (1997) (making distinction between public-regarding and private-regarding legislation).

299. See Choi, Fisch & Pritchard, *supra* note 2, at 876 (noting that lead plaintiff provision of PSLRA resulted rather directly from suggestion made in Elliot J. Weiss & John S. Beckerman, *Let the Money do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions*, 104 YALE L.J. 2053 (1995)). See also S. REP. NO. 104-98 at 11 n.32 (1995) (acknowledging influence of Weiss & Beckerman article on the legislation).

300. See Jonathan R. Macey, *Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model*, 86 COLUM. L. REV. 223 (1986). Of course, even if everyone would agree that public-regarding legislation should receive more expansive, charitable interpretation than private-regarding statutes, there would remain substantial differences of opinion as to classification and notions of the public interest generally. Professor Macey, for example, may favor purpose-oriented statutory construction but is quite opposed to regulation. See Jonathan R. Macey, *Administrative Agency Obsolescence and Interest Group Formation: A Case Study of the SEC at Sixty*, 15 CARDOZO L. REV. 909 (1994).

be in federal court, subject to a more unified body of substantive and procedural law.³⁰¹

IV. MAKING “GOOD” OUT OF A BEST/BAD SITUATION: AN ARGUMENT FOR GREATER USE OF CLASS TREATMENT OF MATTERS

The history of the modern class action is a classic case of making the “best” (individuated, detailed, full-scale Article III jury-trial adjudication) the enemy of the “good” (fair, reasonably just, efficient resolution of disputes involving rights that might otherwise lack vindication in a completely individuated justice system).³⁰² To the extent the judicial system (including legislators and executives as well as the judiciary) insists on permitting class treatment of claims only in cases where class adjudication is a near-perfect method of resolution and ignores the practical consequences of failing to permit class treatment, the system permits an idealized norm (the purportedly perfect individualized justice of a full-dress individual trial) to unnecessarily impede benefits that may accrue from utilizing partial class treatment or applying pragmatic (rather than perfect) adjudicative tools.

Although the “best should not be the enemy of the good” maxim is a cliché, perhaps even a trite one, it has achieved cliché status for a reason: it well captures the tendency of human beings to compare an option not with its realistic alternatives but with some hypothetical, idealized alternative.

An evaluation of class-action treatment of disputes requires that the class action be compared to individual litigation as it actually takes place, rather than to idealized individual litigation. Making the best the enemy of the good occurs when courts and policymakers reject class treatment of a matter merely because class treatment will not be completely equivalent to the romanticized concept of individual litigation or because the posited class members may in theory have some divergence of interest.

More commonly (no pun intended), courts unnecessarily resist class actions in situations where the damages of each class member require

301. See *supra* note 79 and accompanying text.

302. In commentary at the Symposium Conference, Professor Francis McGovern preferred to use the terminology of not “making the perfect the enemy of the good.” Although I am forever hidebound from having first heard the expression using “best” rather than “perfect,” Professor McGovern’s word choice may better capture my point in that I am to a degree accusing class action opponents of not only an unrealistic insistence that class treatment be better than the idealized baseline of individual litigation, but also that a class treatment solution be “perfect” or nearly so because of the purported perfection of the individual case treatment it displaces.

some arguably individuated proof.³⁰³ Where this occurs in situations of highly common questions of defendant conduct, defendant liability, or important elements of a claim, denying class treatment seems to elevate unnecessarily the question of damages. Although common questions must predominate and the matter must be triable, at least in part as a class action, this hardly means that intra-class uniformity on damages should be a complete bar to class certification.

To the extent the judicial system has allowed the nostalgic vision of individuated justice to prevent fully optimal use of class treatment, this mythical “best” has indeed become the enemy of a more utilitarian but attainable “good”—the resolution of legitimate claims in the most cost-effective manner likely to achieve the social goals of compensation to the injured and deterrence of disfavored behavior. Arguing against class treatment based on an implicit view that individualized adjudication is a pearl beyond price seems particularly hypocritical in an era when courts have increased their use of summary judgment substantially, giving rise to serious concern that individual judges have rushed to prejudgment of the facts (or the conclusion that there are no genuinely disputed facts) in order to prevent trial of claims.³⁰⁴ Although this concern seems most serious in discrimination litigation (where white male judges seem astonishingly willing to label problematic behavior beyond Title VII liability as a matter of law),³⁰⁵ more aggressive summary judgment, which began in earnest in 1986 with the Supreme Court’s blessing,³⁰⁶ undoubtedly affects all claims

303. See, e.g., *E. Tex. Motor Freight Syst., Inc. v. Rodriguez*, 431 U.S. 395, 403 (1977) (Named plaintiffs “were not members of the class of discriminatees they purported to represent.”); *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 220–21 (1974) (holding that plaintiffs challenging armed forces reserve membership of members of Congress did not have standing to sue since the interest alleged was “held in common by all members of the public”).

304. See Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73 (1990); Jeffrey W. Stempel, *A Distorted Mirror: The Supreme Court’s Shimmering View of Summary Judgment, Directed Verdict, and the Adjudication Process*, 49 OHIO ST. L.J. 95 (1988).

305. See Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71 (1999) (arguing that summary judgment is granted frequently for defendants in sexual harassment Title VII claims where there is substantial evidence of outrageous treatment that reasonable jurors (or open-minded judges) could regard as making the workplace “hostile”); Catherine J. Lancot, *The Defendant Lies and the Plaintiff Loses: The Fallacy of the “Pretext-Plus” Rule in Employment Discrimination Cases*, 43 HASTINGS L.J. 57 (1991) (noting same problem at Fed. R. Civ. P. 50 stages of sex discrimination trials); Ann C. McGinley, *Credulous Courts and the Tortured Trilogy: The Improper Use of Summary Judgment in Title VII and ADEA Cases*, 34 B.C. L. REV. 203 (1993) (stating that summary judgment is inordinately granted in error in Title VII cases).

306. In the now-famous trilogy of 1986 cases, *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp. v. Catrett*, 477 U.S. 317 (1986), and *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574 (1986), the Court strengthened the defendant’s procedural hand regarding

and works against the very day-in-court ideal that these same summary-judgment-granting judges then invoke to deny class treatment.

Rather than clinging to as much of the nostalgic vision as remains embraced by courts, a better approach would begin by accepting that there is an inherent tradeoff in this realm of jurisprudence, and thus an inherent tradeoff facing courts deciding whether to permit class treatment of a matter. On at least a rough theoretical level, for many cases the tradeoff is fairly straightforward. On one hand, permitting aggregation will often permit recovery that would otherwise never come (to even a meritorious claimant) because the economics of individual litigation are too discouraging. On the other hand, permitting aggregation may often give a nonfrivolous but relatively weak claim³⁰⁷ greater leverage, and class

application of Fed. R. Civ. P. 56. Prior to these 1986 Supreme Court decisions, the prevailing law and practice under Fed. R. Civ. P. 56 was regarded by many as making summary judgment too hard to obtain even where the plaintiff's claims were weak. See JAMES, HAZARD & LEUBSDORF, *supra* note 35, § 4.10, at 258 ("For many years [prior to 1986], the motion was rarely used to terminate litigation because, as administered, the party against whom the motion is made was not rigorously required to meet the evidence offered by the moving party, and a genuine issue of fact was regarded as presented if there was the 'slightest doubt' as to what the fact were."). See, e.g., *Poller v. Columbia Broad. Sys., Inc.*, 368 U.S. 464 (1962) (Court supports denial of summary judgment motion in antitrust case on basis that jury might disbelieve only witness offering evidence on point because witness was identified with defendant).

Recall that Rule 56(c) provides that the party seeking summary judgment must demonstrate that there is "no genuine issue as to any material fact." Prior to this trilogy, parties opposing summary judgment (usually plaintiffs) tended to be able to defeat the motion by showing that there were contested facts as between the litigants. In its 1986 decisions, the Supreme Court shifted both the law and the practicalities of summary judgment by requiring that a "genuine" issue be one in which the nonmoving party had substantial evidence in its favor, a quantum akin to what is required in order to survive a motion for judgment as a matter of law pursuant to Fed. R. Civ. P. 50 (then known as a "directed verdict"). *Liberty Lobby, Inc.*, 477 U.S. at 255. In addition, the Court emphasized that any factual dispute must relate to a "material" fact defined as one necessary to sustain an essential element of the claim in question. *Celotex*, 477 U.S. at 322–23.

In both *Liberty Lobby* and *Celotex*, the Court also emphasized that if the movant had satisfied its initial burden of demonstrating no genuine issue of material fact, Rule 56(e) imposed significant burdens on the nonmovant to come forth with "specific facts" supported by affidavit or other reasonably reliable material to demonstrate that trial of the case was necessary (or trial of a particular claim regarding motions for partial summary judgment). In the third case of the trilogy, *Matsushita*, the Court demonstrated the degree to which it was willing to support grants of summary judgment even in large or complex cases when it supported summary judgment in a complex antitrust case alleging price fixing, with the Court further tending to dismiss the plaintiffs' proffered factual evidence because it was inconsistent with prevailing economic theory.

The net effect of the 1986 summary judgment trilogy, as it came to be called, was to encourage Rule 56 motions and increase their chances of success. See JAMES, HAZARD & LEUBSDORF, *supra* note 35, § 4.10, at 258–59 (describing *Celotex* as revealing a Supreme Court "stance much more supportive of summary judgment"). See Stempel, *supra* note 304, at 100–08 (noting degree to which 1986 trilogy altered federal summary-judgment practice); Steven Alan Childress, *A New Era for Summary Judgments: Recent Shifts at the Supreme Court*, 116 F.R.D. 183 (1987) (same).

307. Prospective class-action defendants consistently complain that aggregation gives even frivolous claims coercive power over them and forces unnecessary defense and settlement. This

adjudication may be cumbersome or may risk error that could in theory be avoided if the matter were individually litigated.

Class treatment thus may permit life to a claim that would otherwise die, but does so at the cost of the traditional day-in-court ideal and at the potential cost of giving claimants an advantage disproportionate to the merits of the claim. In addition, settlement of such matters accorded class treatment may be unduly generous to counsel, relative to class members, and may create problems of conflict of interest that would not arise for individual cases.

In conducting this hypothetical balancing of interests, it seems unquestionable that the factors favoring class treatment are real and substantial. For many claims, even claims of some magnitude, individuated litigation is not a realistic option, even for institutional investors or well-heeled claimants willing to invest litigation resources to prove a point.

This traditional notion underlying the need for the availability of the class-action device had as its archetype the sort of modest chiseling (of investors, consumers, tenants) that, although quite real, could not conceivably justify individual litigation for even the most rabid moralist wanting to right even the smallest of wrongs. Examples justifying class treatment would include overcharges of only a few dollars, or perhaps even a few cents, on a transaction.³⁰⁸

argument is unpersuasive for two reasons. First, the judicial system has ample means of screening meritless claims. At worst, defendants may be required to expend non-trivial litigation resources establishing the frivolousness of a claim. But if the claim really is frivolous, this should not be a major problem. See Jeffrey W. Stempel, *Sanctions, Symmetry, and Safe Harbors: Limiting Misapplication of Rule 11 by Harmonizing It with Pre-Verdict Dismissal Devices*, 60 *FORDHAM L. REV.* 257 (1991). In addition, for commercial defendants facing class actions or other complaints, reasonable expenditures made in defeating a claim are generally tax deductible while a natural person's litigation costs are not deductible. See I.R.C. § 162a.; Edward L. Rubin, *The Code, The Consumer and the Institutional Structure of the Common Law*, 75 *WASH. U. L.Q.* 11, 27 (1997) (noting substantial impact this may have on balance of economic coercive power when individuals and businesses are involved in litigation).

308. In this sense, the traditional reluctance of courts to support class treatment of a case strikes me as a bit odd in that our legal system permits a goodly number of claims where there is arguably little real injury to the claimant. Consider, for example, what can happen in a Truth-in-Lending Act, 15 U.S.C. §§ 1601–1667 (2000), claim in which there is some technical deficiency that supports liability. Something as trivial as a failure to use the appropriately large font type may constitute a violation of the Act but may have (by everyone's admission) not caused any actual harm to the borrower receiving the undersized disclosure materials. (The theory underlying the Act is that harm from violation of the Act is presumed because it frustrates the purpose of comparison-shopping by consumers). For most truth-in-lending violations, the amount of provable out-of-pocket injury is small. A typical violation is not the type of situation that would itself engender a claim, absent special statutory incentives such as fixed penalties or attorney fee-shifting. To be viable, this type of claim had to be created by the legal body politic, with new grounds for liability (e.g., small font type is a ground for liability even if not

In the modern world of litigation, the economics of disputing are sufficiently daunting that even some pretty large claims are probably not worth suing over—even where the wrong is clear—unless the amount of individual injury is in the tens of thousands of dollars. Unless an attorney fee-shifting or recovery provision is in effect, even winning claimants will lose when any gross recovery is netted out by payment to counsel (under either an hourly-fee or contingent-fee arrangement). Add to this the problem that the entire gross recovery will probably be taxable to the claimant, even though the net to plaintiff will often be a third (or more) less because of counsel fees and costs.³⁰⁹ Although recovery of pre- or post-judgment interest will help, the availability of punitive damages is severely curtailed after the U.S. Supreme Court's 2003 ruling establishing stricter limits on punitive damages, including a (rebuttable) presumption that a punitive-to-compensatory ratio greater than nine to one is unconstitutional.³¹⁰

fraudulent or misleading), minimum penalties, and a change in the American rule requiring each party to bear its own fees and costs. The statutory penalties for impermissible electronic surveillance provide another example. Even if the only statement wrongfully overheard is “No, I don’t want to subscribe to any more magazines,” the penalty is the same. *See* 18 U.S.C.A. § 2510 (2005). Both the wiretapping and truth-in-lending penalties are designed more for deterrence than compensation linked to injury. This seems not to bother the body politic. Why, then, should class treatment of securities, consumer, and tort claims be treated differently, since they also foster greater deterrence of disfavored behavior?

In contrast to wiretapping and truth-in-lending cases, in every damages class-action situation the class members will at least purportedly have actually lost something of value. To be sure, the value might be small. But it cannot be said that class treatment permits creation of a cause of action and compensation that would not otherwise exist. It takes legislation or common law precedent to do this. Class actions merely permit aggregation of claims that otherwise already exist (at least in theory) under the law but that are unattainable because of the small amounts of individual injury involved. Yet courts and Congress resist class treatment while simultaneously being willing to create new causes of action. To me, this is inconsistent.

309. *See* Comm’r of Internal Revenue v. Banks, 543 U.S. 426 (2005) (holding that, as a “general rule,” where award to individual litigant constitutes income, the amount of income to be reported to the IRS must also include portion of recovery that will never actually be enjoyed by plaintiff, but will instead be paid to attorney as contingent fee). However, as the *Banks* Court points out, the American Jobs Creation Act of 2004, 26 U.S.C.A. § 62(a)(19) (2005), essentially defangs the *Banks* holding in that, under the Act, taxpayers may deduct counsel fees and court costs paid in connection with a claim of unlawful discrimination) (i.e., the type of actions pursued by Banks and consolidated plaintiff Banaitis). The *Banks* Court’s relatively short opinion does not address possible consequences of the holding for other types of plaintiffs’ claims. *See* Steve R. Johnson, *Major Changes to Taxation of Tort Damages*, NEV. LAW, April 2005 at 12 (commenting on *Banks* decision).

310. *See* State Farm Auto. Mut. Ins. Co. v. Campbell, 538 U.S. 408 (2003) (striking down \$145 million punitive-damages award in connection with \$1 million compensatory-damages verdict in case involving jury findings of egregious and sustained bad faith by insurer). On remand, State Farm’s position before the Utah Supreme Court was that any award in excess of the one to one ratio suggested by the U.S. Supreme Court’s opinion was per se unconstitutional. Although the Utah high court rejected this position, *see* Campbell v. State Farm Mut. Auto. Ins. Co., 98 P.3d 409, 411–12 (Utah 2004), it illustrates the degree to which *Campbell* gives powerful new leverage to defendants.

In short, the traditional assumption that without class-action availability many worthy but relatively modest claims will wither seems sound. In addition, even a plaintiff with these admittedly non-trivial amounts at stake must endure the many uncompensated costs of litigation (e.g., stress, inconvenience, public or personal opprobrium) as well as delay and risk of loss. Where the liability issues presented by the claim are closer, the amount at stake must be higher, or simple cost-benefit analysis makes individual disputing unlikely. Most important, courts should not lose sight of the deterrence rationale underlying law, particularly the securities laws that are designed to foster sound markets.³¹¹

The arguments used on the other arm of the scale balancing class-action benefits and detriments seem less solid. This part of the balancing equation posits that although class treatment of claims may give life to otherwise moribund small claims this gain comes at the cost of (a) “averaging” or “bureaucratizing” justice rather than making a finely-tuned individual determination; (b) enhancing the value of the claim because of the force of aggregation, even to the point of creating an *in terrorem* effect that may permit defendants to be “blackmailed” into settlement of weak or even highly-suspect claims; or (c) creating a system in which defendants

In other cases since *Campbell*, a norm appears to be evolving, consistent with dicta in *Campbell*, that a double-digit multiple of punitive damages may be appropriate in situations where there is sufficiently reprehensible behavior by a defendant, but only small amounts of injury to the plaintiff. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676–78 (7th Cir. 2003) (ratio of more than thirty-seven to one permitted in case involving injury to hotel guests from bedbugs where compensatory award was only \$5,000). See also *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (affirming punitive damages award of \$150,000 in case involving \$2,000 contract claim, based on holding that attorneys fees and costs could be included, due to defendant’s bad faith, within “compensatory damages” for purposes of calculating the punitive damages ratio).

Even with this sort of potential “escape hatch” from *Campbell*’s presumptive nine to one ratio, this hardly changes the economics of individual versus class pursuit of small claims. Relatively few cases are strong punitive-damages cases.

311. See James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3 (1999); Jill E. Fisch, *Class Action Reform, Qui Tam, and the Role of the Plaintiff*, 60 LAW. & CONTEMP. PROBS. 167, 175 (1997). Professor Fisch stated as follows:

The deterrence rationale provides powerful support for lawyer-driven litigation. To the extent that class suits provide a financial incentive for lawyers to search out and redress corporate wrongdoing, the fees awarded to class counsel are justified by the social utility of the suits. Corporate decisionmakers are encouraged by the possibility of class litigation to comply with the law instead of taking the risk that wrongdoing will be undetected or will produce harms too small to warrant litigation. Moreover, if deterrence rather than compensation is the primary objective of class litigation, it becomes less important to justify departures from the traditional litigation structure.

Id.

may most effectively purchase peace by overcompensating class counsel relative to class members.³¹²

Although these concerns are more than legitimate, they are also more than a bit overdone and, in some cases, directly at odds with what appears to be the greater empirical reality. Perhaps most egregious in overstatement is the notion that the American judicial system produces perfect justice in individually litigated cases. The arguments on this arm of the class-action balancing scale appear dramatically incorrect.

First, it tends to overlook the almost immutable fact that if the claims are not accorded class treatment, they will not be brought at all. Thus, the question is not: “How would class treatment look as compared to individual adjudication?” Rather, the actual question is: “How does class treatment compare with having the claims eliminated entirely, without regard to their merit?” Phrased in this second, more realistic sense, it seems to me unassailable that the correct answer is that class treatment is a far better alternative to allowing claims to die an early death unlinked to their merits—so long as the claim is not permitted to proceed without some vetting by the judicial system. If in fact the claims are baseless, this can be tested through Rule 11 motions, Rule 12(b)(6) motions, or other procedural devices to ensure that the claims kept alive through class treatment are not worthless, useful only for aggregated extortion.

Second, the traditional assumption about the goodness of individual litigation is seriously flawed. Individual litigation is often a messy endeavor. Sometimes it reaches sound results. Sometimes it reaches results that most onlookers would regard as bizarre, incorrect, or simply absurd. Some of this is of course the fault of another American institution that, like the individual day in court, has mythic, iconic status out of proportion to reality—the civil jury. At the risk of sounding like a tort reformer even to the right of Victor Schwartz,³¹³ juries are simply not what they are

312. This phenomenon can take the form of settling as a means of paying purported extortion in the form of legal fees to class counsel, who in theory control the litigation because of their relatively greater power over the named plaintiffs and class members in contrast to the typical individual lawsuit. Or it can take the form of paying settlement dollars to resolve a meritorious claim, but doing so in a manner in which a disproportionate share of the settlement funds are paid to class counsel rather than to the class members themselves.

313. Schwartz is former law professor and Dean of the University of Cincinnati College of Law who in private practice has been among the most prominent proponents of tort reform and vocal critics of perceived excesses of American litigation. He has served as general counsel for the American Tort Reform Association and published extensively. See Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 AM. U.L. REV. 1573, 1610 (1997) (referring to Schwartz testimony before Congress as general counsel of ATRA); Victor E. Schwartz, Mark A. Behrens & Joseph P. Mastrisomone, *Reining in Punitive Damages “Run Wild”*: *Proposals for Reform by Courts and Legislatures*, 65 BROOK. L. REV. 1003 (1999); Victor E. Schwartz & Mark A. Behrens,

cracked up to be in the litigation folklore of America. One can even make a case that the Seventh Amendment itself is in need of reconsideration.³¹⁴ But I am not attempting to write a brief for repeal. I am simply arguing that the jury-driven individual trial is not the ideal resolution it is held out to be by the traditional American folklore of litigation.

In addition, it seems undeniable that both juries and judges can reach inconsistent assessments of what is essentially the same conduct by litigants. The same case that results in a defense verdict in Colorado may bring a plaintiff's verdict in Iowa. This is hardly an inspiring portrait of individualized litigation. Although state law and jury pool differences may explain some of the inconsistency, it is just as likely that the people in general are simply inconsistent much of the time.³¹⁵ Similarly, different judges often reach different determinations regarding contested facts or competing legal analyses.³¹⁶ In essence, this means that there is no "one"

Federal Product Liability Reform in 1997: History and Public Policy Support Its Enactment Now, 64 TENN. L. REV. 95 (1997).

314. Although civil juries may at times be a reflective oracle of the community and can avoid the occasionally jaded attitudes of the judge, they can also completely misunderstand legal, scientific, or business concepts. They may be swept with emotion that overcomes or even supplants reason, in their determinations of who did what to whom and why. They may also be inclined to rule based on the race, ethnicity, gender, status, attractiveness, fame, or occupation of the litigants or lawyers. They may reach results as a matter of compromise, rather than sound analysis. They may resent being pulled from regular life, and this resentment, or simply fatigue from being required to deliberate at length, may adversely affect their decisions. In some cases, jurors may even be more interested in writing a book about the experience rather than faithfully discharging their duties. Of course, one can make similar criticisms of judges or administrative adjudicators who, like jurors, are human beings capable of emotional and heuristic error. But at least judges are professionally trained to avoid these pitfalls and are subject to the further discipline of the requirement that they provide a written analysis of their factfinding that is subject to appellate scrutiny and legal commentary.

315. Recently, for example, criminal prosecutors purport to have noted a "C.S.I. Effect," named for the popular television program about police forensic investigations, in which jurors are disinclined to convict criminal defendants in the absence of forensic, laboratory-like evidence of the type the jurors are used to seeing each week on the show. Several seemingly strong cases, based on seemingly credible eyewitness testimony and non-forensic circumstantial evidence, resulted in acquittals that surprised observers. See, e.g., Jane Ann Morrison, "*CSI Effect*" May Have Led Binion Jurors to Demand Harder Evidence, LAS VEGAS REV.-J., Dec. 2, 2004 at 1B; Richard Willing, "*CSI Effect*" Has Juries Wanting More Evidence, U.S.A. TODAY, Aug. 5, 2004, at 1A. But see Mark Hansen, *The Uncertain Science of Evidence*, A.B.A. J., July 2005, at 48 (noting that some evidence experts are skeptical about existence of purported C.S.I. Effect).

316. A particularly vexing example of this takes place in the field of insurance, which is largely governed by state law and hence is less subject to doctrinal unification through the pronouncements of the U.S. Supreme Court or overarching federal legislation. To the contrary, the primary federal legislation in this area, the McCarran-Ferguson Act, 15 U.S.C. § 1011 (originally enacted in 1945), cedes most insurance lawmaking authority to the states. As a result, one can see for insurance cases that consistency is hard to come by, even from judges, without a final authority. In many areas of insurance-policy construction involving identical policy language and essentially identical background facts, decisions by judges (that's right, judges merely conducting contract interpretation and "applying the law," not some erratic lay jurors) divide roughly in half, and often by 180 degrees, over questions

individual adjudicative alternative to class treatment of a matter. There instead is a range of individual adjudicative outcomes that must be compared to the likely more cohesive class result that will come, warts and all, from class treatment of the matter.

Another fallacy tending to overweight the arm of the scale resistant to class actions is the notion that choosing class treatment creates dramatically higher pressure on defendants to settle claims, in the interests of avoiding a loss on a “bet the company” case. Although this may be true for the truly classic small-value case (e.g., a pattern of eighty-seven-cent overcharges), in which denial of class certification essentially strips the case of settlement value as well as continued viability, it is probably not true for many securities, commercial, or tort claims. Although many of these claims will be less attractive to litigate individually, they will not necessarily screech to a halt upon denial of class treatment. In a significant subset of the claims, plaintiffs can still credibly threaten to press on individually, especially with the most compelling cases, the largest instances of injury, or the most pro-plaintiff settings for trial.

And, as what might be termed the “second wave” of asbestos litigation demonstrates, a multitude of smallish claims, even many of suspicious strength, presents significant concern to defendants if adopted by lawyers willing to invest institutional resources in prosecuting the matters.³¹⁷ Even when a defendant has ample unexhausted insurance in place and insurers willing to engage in protracted defense litigation, a swarm of such cases

such as the meaning of the pollution exclusion, whether land cleanup costs come within liability coverage, whether a government action is a “suit” requiring a defense, whether an insurance policy may be assigned, what constitutes “use” of an automobile, whether punitive damages may be recovered for bad faith, whether an insurer may recoup litigation defense costs from a policyholder, allocation of policy proceeds, application of value policy statutes, and other matters of significant importance. See EMERIC FISCHER, PETER NASH SWISHER & JEFFREY W. STEMPEL, *PRINCIPLES OF INSURANCE LAW* 676–792 (3d ed. 2004) (reproducing and discussing cases from different states in which state high courts took diametrically opposed views of legal issues); STEMPEL, *supra* note 128, §§ 14.03–14.14 (discussing divergence of state supreme courts when interpreting identical language of insurance policies).

317. See Randy J. Maniloff, *Asbestos: Insurance Coverage Issues On a Changing Landscape*, MEALEY’S LITIG. REP.: INS., July 9, 2002, at 1 (noting trend of asbestos litigation in which “[t]he [p]eripheral [a]sbestos [d]efendant [b]ecomes [a] [t]arget,” a phenomenon that has come to be called the “second wave” of asbestos litigation, as distinguished from the first wave, which was largely directed toward asbestos manufacturers as target defendants). Many of the claims in this second wave are for relatively minor injuries (e.g., plaque in the lungs) as opposed to major asbestos-related disease such as mesothelioma. Many of the claimants are physically asymptomatic, but fear or expect that they will develop asbestos-related health problems in the future. See also Alison Frankel, *A Well-Oiled Machine*, AM. LAW., (LITIG. 2004), available at <http://www.americanlawyer.com/litigation2004/weitz.html> (describing Weitz & Luxenberg, a very successful plaintiffs’ firm with an infrastructure specializing in asbestos claims, both serious injury claims and minor injury or fear-of-injury claims, and the degree to which the firm has been able to keep asbestos litigation from fading away).

poses a serious distraction for company personnel and presents an adverse picture to the financial community. If it can be done for the right price, settlement will be preferable for the defendant, particularly if insurance dollars will pay a substantial portion of the settlement.³¹⁸

And, not surprisingly, such settlements do not involve the highly individuated bargaining and assessment typically presented by the traditional legal folklore. Instead, they tend to be mass inventory settlements rendered according to a few key criteria on which the adversaries agree.³¹⁹ This is not at all bad. It arguably provides compensation to claimants/victims (albeit with counsel and transaction costs consuming a significant share) roughly equivalent to what would, on average, result from the far less efficient, higher transaction-cost route of individuated disputing and settlement *seriatim*.

But for now, my concern is not so much whether such results are good or bad in a cosmic sense. Rather, my point is that this result—*en masse*, formulaic, inventory settlement—obtains under either the class or non-class option. Most mass-tort inventory settlements found in cases like asbestos claims, other toxic torts, or prescription drug claims take place without any help from class certification.³²⁰ For many cases, refusing class treatment does not materially change the likely outcome. Under such circumstances, is there any reason for much continued judicial reluctance to accord class treatment for these cases? At least in the class-action mode, the court will retain considerable authority over the final shape of settlement, rather than leaving the matter entirely to the less guided market forces affecting plaintiffs, defendants, and counsel.

This reality is hammered home by the apparent aftermath of *Amchem* and *Ortiz*. Although these cases placed significant limits on use of the class-action device for settlement only, limiting class treatment in cases of class conflicts or divergence of member interests, *Amchem* and *Ortiz* hardly brought mass settlements to a screeching halt. To the extent that settlement class-action treatment was unavailable, particularly for mass asbestos claims, litigants discovered that bankruptcy (including the pre-

318. See STEPHEN J. CARROLL ET AL., RAND, ASBESTOS LITIGATION COSTS AND COMPENSATION: AN INTERIM REPORT (2002) (summarizing history of asbestos litigation, emphasizing magnitude, and estimating that transaction costs such as counsel fees consume two-thirds of funds spent on asbestos claims); White, *supra* note 58, at 1319 (noting that an estimated 100 million people have been exposed to asbestos).

319. See Charles W. Schwartz & Lewis C. Sutherland, *Class Certification for Environmental and Toxic Tort Claims*, 10 TUL. ENVTL. L.J. 187 (1997); Ronald W. Davis, *Amchem and Antitrust: Have the Ground Rules for Antitrust Class Actions Changed?*, ANTITRUST, Fall 1997, at 39.

320. See Issacharoff & Witt, *supra* note 99; Coffee, *supra* note 2.

packaged bankruptcy device authorized by Congress in 1994) might suffice quite well for permitting resolution on terms similar to what might result from settlement in the class-action context.³²¹

Rather than continuing to fight the inevitable drive toward settlement, the judicial system should relax its concern that “too much” class treatment may yield “too much” settlement. First, it is a bit hard to say what constitutes excessive settlement in a world where disputants want to settle. Second, it is not at all clear that a more relaxed judicial attitude toward class treatment will lead to any significantly greater settlement activity than already found outside the class context. As previously discussed, permitting more class-action activity with less formalist resistance to class treatment may even result in sounder settlements that are judicially supervised in at least a modest way.

To the extent that settlement results in the absence of class certification, it is also far from clear that this is a good development. In theory, settlements without certification should be lower, at least if the critics of class actions alleging *in terrorem* effects are correct. But this hardly answers the question of whether the settlement is a good, fair, or optimal resolution. One can as easily make a case that class treatment improves settlement results by providing settlements more commensurate with harm inflicted by the defendant. To the extent that class claims are weak on the merits, this arguably supports class treatment as well. A successful defense motion against a weak class claim can do more to eliminate or reduce defense payments, on a practical level, than can a series of many such defense motions in a multitude of individual cases. Successful defense efforts in a class action can also provide preclusion protection for a defendant.

A. Issue Class Actions as an Alternative to Refusing Certification

One clear improvement to contemporary class-action practice would be greater use of Rule 23(c)(4), which provides: “When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each

321. See Resnick, *supra* note 58, at 2046 (noting bankruptcies of asbestos makers and installers Celotex Corp., Eagle-Picher Industries, Inc., Keene Corp., and “at least a dozen other asbestos manufacturers deluged with thousands of personal injury claims”); Vairo, *supra* note 58, at 106–07 (noting that more than seventy asbestos companies are in bankruptcy proceedings).

subclass treated as a class, and the provisions of this rule shall then be construed and applied accordingly.³²²

While use of subclasses has been discussed with some frequency, the use of Rule 23 to provide class treatment of particular issues in litigation has been relatively overlooked, at least during the past decade. According to one commentator,

[U]ntil the mid-1990s, courts used Rule 23(c)(4)(A) to certify issue classes presenting a common core of issues concerning the defendant's conduct or product notwithstanding downstream variability for individual class members as to damages, and as to some aspects of liability, such as proximate causation and reliance.

In the late 1990s, the salutary trend toward issue litigation stopped short, following a prominent pair of court of appeals decisions, *In re Rhone-Poulenc Rorer Inc.* and *Castano v. American Tobacco Co.* Since then, courts have become wary of certifying class actions requesting monetary damages that involve any appreciable downstream variability. Notwithstanding the underlying common core of the harmfulness or wrongfulness of the defendant's conduct or product, courts have focused on the varying consequences to individual class members. In so doing, courts have repeatedly rejected class certification when cases have required resolution of individual issues of any significance.³²³

One need not completely agree with Professor Romberg's empirical assertion that issue certification is in decline to support greater use of Rule 23(c)(4)(A) class treatment as a way to streamline resolution of issues, in hopes of facilitating settlement on matters that may not be fully amenable

322. FED. R. CIV. P. 23(c)(4).

323. Jon Romberg, *Half a Loaf Is Predominant and Superior to None: Class Certification of Particular Issues Under Rule 23(c)(4)(A)*, 2002 UTAH L. REV. 249, 252 (footnotes omitted). Professor Romberg also states that, as of the time he wrote, "no scholarly commentator has addressed issue certification under Rule 23(c)(4)(A) in any depth whatsoever." *Id.* at 253–54. This statement is not merely rhetorical flourish designed to present his own very fine article as particularly novel. There simply is, other than the Romberg article, no very extensive discussion of Rule 23(c)(4)(A) issue certification in the legal literature. Even stalwart treatises such as *Moore's Federal Practice*, Wright & Miller, and *Newberg on Class Actions* (which seems to say something about nearly every class-action decision ever written) do not engage in any serious, sustained discussion of issue certification. *But see* Susan E. Abitanta, *Bifurcation of Liability and Damages in Rule 23(b)(3) Class Actions: History, Policy, Problems, and a Solution*, 36 SW. L.J. 743, 747–57 (1982) (discussing issue certification to some degree). *See also* Laura J. Hines, *Challenging the Issue Class Action End-Run*, 52 EMORY L.J. 709 (2003) (criticizing use of class treatment of issues and arguing contra Romberg).

to class treatment.³²⁴ Certainly, prior to *Rhone-Poulenc*, *Castano v. American Tobacco Co.*,³²⁵ and the most recent assault on class actions, courts appeared more receptive to class treatment of issues. For example, the famous Agent Orange settlement resulted in part because of the commonality of the military-contractor defense issue raised by defendant dioxin makers.³²⁶ The equally famous Dalkon Shield litigation involved certification of an issue class.³²⁷ Certification of only liability issues has occurred in other mass tort matters.³²⁸

Professor Romberg is correct in seeing *Rhone-Poulenc* and *Castano* as influential cases setting back use of class treatment in situations where it might be quite beneficial. The *Rhone-Poulenc* and *Castano* decisions had an impact favoring restriction on class treatment of mass tort matters. As described in Part III, *Rhone-Poulenc* refused to certify, even on an issue basis, a putative class of plaintiffs injured by HIV-tainted blood as a result of Rhone-Poulenc's failure to implement reasonable screening procedures for donated blood.³²⁹ *Castano* refused to certify, even on an issue basis, a putative class of plaintiffs injured by use of tobacco products.³³⁰ *Rhone-Poulenc* has been cited more than 500 times, more than 300 times in secondary legal literature alone (and, as the math would suggest, has been cited in nearly 200 court decisions).³³¹ *Castano* has been cited more than 800 times—more than 300 times in legal periodicals and more than 400 times in judicial decisions.³³² *Rhone-Poulenc* and *Castano* are prominent opinions because they involved newsworthy products and claims, were decided by prominent federal appeals courts, and provided strong (albeit, in my view, incorrect) argumentation against even partial class certification in mass tort matters involving any significant divergence of individual class-member damages. In addition, *Rhone-Poulenc* was

324. There are, of course, those who oppose Professor Romberg's proposal (and mine) for increased use of issue class treatment. See, e.g., Hines, *supra* note 323 (criticizing the use of issue classes as undermining the class-certification requirements of Fed. R. Civ. P. 23(b)(3)). For the reasons set forth in this article, I find the case against issue class treatment unpersuasive.

325. 84 F.3d 734 (5th Cir. 1996).

326. See *In re* "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 166–67 (2d Cir. 1987).

327. See *In re* A.H. Robins Co., 880 F.2d 709, 740 (4th Cir. 1989).

328. See Coffee, *supra* note 2, at 1439 n.389.

329. *In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995). See *supra* notes 164–77 and accompanying text.

330. *Castano v. Am. Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). See *supra* text accompanying notes 323–24.

331. "Shepardization" of *Rhone-Poulenc* using LexisNexis (May 5, 2005).

332. "Shepardization" of *Castano* using LexisNexis (May 5, 2005).

authored by prominent Circuit Judge Richard Posner, a magnet for both academic praise and criticism.³³³

Even if *Rhone-Poulenc* and *Castano* were correctly decided, Rule 23(c)(4)(A) remains both a viable part of Rule 23 and a good idea in many cases. Ordinary civil litigation frequently is bifurcated on questions of liability and damages. At a minimum, this suggests that issue certification could frequently be granted in class actions, which often involve a rather small core of allegedly improper conduct even if they also involve a multitude of plaintiffs incurring arguably dissimilar consequences from this core of alleged defendant misconduct.

Further, Rule 23(c)(4)(A) permits certification of issues smaller than the question of liability. For example, in a tort claim the court could certify a class as to a common element of the claim (e.g., existence of a duty or breach of a statutory duty). Outside the mass tort context, one could easily envision an issue class certified on the question of whether a particular proxy statement was false or misleading—or whether a particular entity was aware that it was omitting material facts from press releases. There is no requirement that issue certification resolve any particular proportion of the case. Resolution of a single issue common to the class is sufficient, so long as the result does not waste judicial resources.³³⁴

To the extent a Rule 23(c)(4)(A) certification of an issue permits resolution of a contested matter in class litigation, it holds substantial possibility for providing some significant economies of scale, even if the class action as a whole is never certified. A decision on a key element of liability, the liability question itself, or key damages questions can lay out for the disputants a puzzle square that makes the remainder of the board relatively easy to navigate for purposes of determining the settlement value of the case.

333. Like the other moths attracted to the flame of the Posnerian pen, I confess to having engaged in both. See, e.g., Jeffrey W. Stempel, *An Inconsistently Sensitive Mind: Richard Posner's Cerebration of Insurance Law and Continuing Blind Spots of Economicalism*, 7 CONN. INS. L.J. 7 (2000) (generally praising Posner's insurance coverage opinions but criticizing opinion holding that Americans with Disabilities Act does not apply to policy terms and coverage); Ann C. McGinley & Jeffrey W. Stempel, *Condescending Contradictions: Richard Posner's Pragmatism and Pregnancy Discrimination*, 46 FLA. L. REV. 193 (1994) (criticizing Posner's Title VII analysis in opinion dismissing pregnancy discrimination claim).

334. See *Hydrite Chem. Co. v. Calumet Lubricants Co.*, 47 F.3d 887, 891 (7th Cir. 1995); Romberg, *supra* note 323, at 265; William W. Schwarzer, *Structuring Multiclaimit Litigation: Should Rule 23 Be Revised?*, 94 MICH. L. REV. 1250, 1265 (1996). See, e.g., *In re Copley Pharm., Inc.*, 158 F.R.D. 485, 488 (D. Wyo. 1994) (certifying class as to some common issues); *Wadleigh v. Rhone-Poulenc Rorer, Inc.*, 157 F.R.D. 410, 423 (N.D. Ill. 1994) (certifying common negligence and breach-of-fiduciary-duty issues).

In the case of a “bifurcated” class action, it is envisioned that after determination of the certified issue as to the named plaintiffs, remaining issues will be resolved in later stages of the same lawsuit with the intent of binding all class members to the result. In contrast, a “partial” class action involves issue certification and determination of the certified issue, after which time individual class-member damages claims will be prosecuted in subsequent individual lawsuits—but with the class members who bring individual damages or enforcement actions enjoying the benefit of preclusive effect as to the issue(s), including any liability determination or binding finding of fact, made in the issues-class adjudication. To obtain relief, absent class members must “file a separate lawsuit—one in which the common issues already resolved will have preclusive effect.”³³⁵ Conversely, a defendant victory on the certified issue(s) would give the defendant the benefit of preclusive effect in fending off later litigation.³³⁶

Even where the class action involves so-called “negative value” claims and “substantial individual issues of damages, counterclaims, or individual defenses,” issue class treatment can deliver significant economies of scale to a matter, lowering transaction costs at least for the portions of the case subject to issue class treatment and probably for later contested matters as well, in view of the tendency of resolution of one issue to limit the range of outcomes on other issues. The “lowered transaction costs of a collective trial on common issues will allow for societally desirable compensation and optimal deterrence of wrongful conduct.”³³⁷

In addition to being more efficient than individualized litigation, the issue class-certification process is likely to attract the attention of the litigants and other interested parties and to sharpen their focus regarding the stakes of the case. Put in attorney vernacular, both plaintiffs and defendants are likely to bring their respective “A Teams” to the task of litigating the issue or issues under dispute. By contrast, individual litigation has chronically presented difficult problems of issue preclusion. Even in cases where it would appear that an issue was unavoidably presented and apparently decided during earlier proceedings, courts have been reluctant to grant broad issue preclusion. Some of this is undoubtedly because of a relatively formal approach to the doctrinal requirements of issue preclusion, but some of this is also likely to have been the result of courts’ more functional concerns that earlier litigation outcomes should

335. Romberg, *supra* note 323, at 254.

336. *Id.* at 255.

337. *Id.* at 264.

not bind forever unless it is clear that both sides put forth their best efforts on the matter.

Issue certification would also seem to present less “unfair” pressure on defendants to settle. Aggregation of entire claims, at least in theory, always increases pressure on the defendants by raising the stakes and potential damages amount. Aggregation of the liability component of a case through a bifurcated action arguably has similar effect. But any hydraulic pressure to settle due to issue certification must logically be correspondingly smaller in an issue class than for an entire case because the amount of aggregation is smaller. In addition, the consequences of a class-wide decision on an issue, although of moment, are not by any means conclusive. Consider an issue class pertaining to a single element of a Rule 10b-5 claim or product liability claim. A defendant may lose the issue certified, and this may certainly amount to handwriting on the wall—but only to a degree. The defendant may still defend as to whether other elements of the liability aspect of the claim are satisfied, including questions of causation (a particularly strong defense in light of *Dura Pharmaceuticals*). The defendant may, of course, continue to defend as to whether damages were suffered and in what amount.

In the ongoing debate over class actions, class-action critics have not been appropriately called out regarding their excessive doomsday scenario for class defendants. According to the conventional wisdom of the critics, a defendant faced with a certified class—or even partial class treatment of an aspect of the case—is at such grave risk that it cannot afford to contest the matter vigorously. Perhaps this is true in some cases, but there is a substantial argument to the contrary.³³⁸ Where the merits of a class claim are truly weak, class counsel would appear to be taking the greater risks. Without significant results, class attorneys are unpaid (or at least not as well paid as they could have been pursuing other cases). If defendants are disinclined to offer anything more than nuisance-value settlements and have correctly identified the claim as weak, it would seem to be class counsel that is at risk. After years of litigation, thousands of hours in lost counsel time and probably six figures of out-of-pocket expense, class counsel may find that the case ends in a defense verdict.

Even if the plaintiff class succeeds at trial, defendants continue to have at their disposal an array of procedural and substantive defenses, most obviously including post-trial motions and appeal, with the occasional shot at en banc consideration or Supreme Court review. And all along this way,

338. See, e.g., Hay & Rosenberg, *supra* note 2; Silver, *supra* note 2.

each defendant retains the option of offering to settle, an offer that most rational class members and counsel will consider if the offer is reasonable.³³⁹ Although there are similar plaintiff options after a defense verdict, plaintiffs generally have far less leverage in these matters. By contrast, defendants normally have both their own money and substantial insurance that can be called upon to attempt resolution if the defendant has miscalculated the strength of the class claim at trial. In short, it is generally easier to play defense than offense in litigation, and loss on a class issue matter is not fatal for defendants.³⁴⁰

In defending class treatment against the allegation that it results in litigation blackmail, I am for argument's sake giving some credence to the contention. However, as Professor Silver has powerfully demonstrated, there is no solid ground for believing that class treatment leads to any litigation blackmail.³⁴¹ He assessed the blackmail argument at length and found that the contention takes at least four separate forms, none of which withstands scrutiny.

In its original form, raised shortly after the 1966 Amendment to Rule 23, observers contended that class actions created inordinate pressure to settle because they were not triable.³⁴² Time has shown this contention to be incorrect, but it persists nonetheless as class-action opponents frequently cite the two most prominent, prestigious (but erroneous) purveyors of this view, Henry Friendly and Milton Handler.³⁴³

339. This is a point succinctly put in Judge Rovner's dissent in *Rhone-Poulenc. In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1307 (Rovner, J., dissenting) (stating that "defendants will thus have ample opportunity to settle should they lose the class trial" and fare poorly in subsequent proceedings).

340. See Jeffrey W. Stempel, *Cultural Literacy and the Adversary System: The Enduring Problems of Distrust, Misunderstanding and Narrow Perspective*, 27 VAL. U. L. REV. 313 (1993) (arguing that dynamics of litigation make defense considerably easier than prosecution as a practical matter).

341. Silver, *supra* note 2. In addition, Professor Silver notes something that in retrospect seems almost obvious but that has largely escaped the legal profession and the public in the throes of anti-class action rhetoric and sentiment: the very term "blackmail" is completely inappropriate to the situation. By definition, blackmail occurs when one threatens to take action permitted by law (e.g., to report an incident to police, to inform a cuckolded spouse, to sue) unless paid. Class-action plaintiffs have already taken legal action (by suing) and will continue to engage in this very public prosecution of their contentions unless paid. Thus, the "problem" of which class defendants complain is the very opposite of blackmail. *Id.* at 1388–89.

342. See HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 118–20 (1973); Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9 (1971).

343. See Silver, *supra* note 2, at 1361–69. In particular, Silver notes a key, but often overlooked, fact that tends to undercut not only this but essentially all of the anti-class action "blackmail" arguments.

Consent provides the standard normative foundation for settlements, including class action settlements on the defense side. . . . Friendly shows only that defendants settle because they

Another version of the blackmail argument contends that blackmail occurs when claims are small because defendant resources will be drained in defending these claims, while such defense could be avoided in the absence of aggregation. Of course, this criticism is one that wishes Rule 23 did not exist. The policy in favor of vindicating small wrongs through class treatment clearly trumps any sympathy one might engender for defendants that would have otherwise been able to “get away with” inflicting small wrongs on a large number of people. Still another variant of the blackmail argument claims that settlement pressure is too overwhelming when large claims are aggregated. This is the thesis of *Rhone-Poulenc* and, to a lesser extent, cases like *Castano* (and, more recently, the *In re Simon II Litigation* tobacco class action)³⁴⁴ that deny class treatment out of a fear that certification forces defendant companies to choose between settlement and an unacceptable risk of bankruptcy. Yet another variant finds claim size irrelevant.³⁴⁵

After assessing in depth the arguments that class treatment induces undue settlement pressure, Professor Silver finds them all lacking logical and empirical support.³⁴⁶ In particular, he debunks much of the *Rhone-Poulenc* opinion’s resistance to class treatment for fear of excessively coercing the “poor” blood products manufacturer.³⁴⁷ Professors Hay and

fear losing at trial. Ordinarily, this fear poses no challenge to consent. It is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced.

This point is fundamental. All American civil justice systems generate settlement pressure by forcing parties to risk losing at trial. Few judges complain about this, even though fear of losing at trial typically generates cheap settlements because plaintiffs and their lawyers are more risk averse than defendants. Many advocates of tort reform want to turn up the pressure to settle by making trials even riskier and more expensive than they already are.

Ordinarily, then, the fear of losing at trial (whether coupled with risk aversion or not) does not justify a blackmail claim. . . .

....

. . . When the threat [of aggregation] is absent . . . the pressure on the defendant is unacceptably low and absent plaintiffs receive inadequate representation. In class actions, then, deficient settlement pressure raises due process concerns. Maximum pressure does not.

Id. at 1366–68 (footnotes omitted).

344. 407 F.3d 125 (2d Cir. 2005).

345. *See id.* at 1361.

346. *Id.* at 1369–96

347. *Id.* at 1376–79. In addition Professor Silver notes, drawing on the work of Professor Tidmarsh, that the HIV claims treated by the *Rhone-Poulenc* majority as too weak to stand without the pressure of class certification presumably did have some merit and “legitimate” settlement value, in that they were resolved for \$100,000 per case without the benefit of class treatment. *Id.* at 1380 (“A year and a half after Posner decertified the *Rhone-Poulenc* class and seemingly in deliberate defiance of his opinion, the parties negotiated a class-based settlement that paid \$100,000 per ‘case’ of HIV infection, exclusive of attorneys’ fees and costs, which were provided for separately.”) (citing JAY

Rosenberg, in a shorter but equally persuasive analysis, reach largely the same conclusion.³⁴⁸ None of the sources asserting an extortionate impact of class treatment come close to the sophistication of these analyses. Rather, they are long on rhetoric and the “cosmic anecdote” (e.g., a businessperson or defense lawyer “tells” the author that beleaguered defendants overpay to avoid *in terrorem* class litigation). As Professor Silver suggests, until there is a more persuasive normative or empirical case for the “litigation blackmail” argument, the term should be shelved.³⁴⁹ At some point, the legal profession must resist the anti-litigation, anti-lawyer, pro-business political rhetoric of the time and face facts. The “litigation blackmail” argument against class treatment is essentially a Potemkin village.³⁵⁰ It has an initial superficial persuasiveness but upon closer inspection appears to be an illusion.

In addition, certification of issues permits the matter to proceed piecemeal. Parties declining to settle and electing trial are engaged in a process of rolling, iterated feedback. As more information becomes available through the resolution of class-certified issues, the defendant is able to reassess its settlement posture and make more informed decisions than it could in the absence of Rule 23 (c)(4)(A) certification and adjudication of the issues.³⁵¹ Issue certification can thus provide useful

TIDMARSH, FED. JUDICIAL CTR. MASS TORT SETTLEMENT CLASS ACTIONS: FIVE CASE STUDIES 92–93 (1998).

348. See Hay & Rosenberg, *supra* note 2, at 1392–94.

349. See Silver, *supra* note 2, at 1430 (“Given the sad state of the duress theory, judges hardly are justified in using it at all, let alone in employing incendiary phrases like legalized blackmail. The hard work of thinking the theory through has not been done. Judges should focus on this aspect of the project and leave the task of demonizing plaintiffs, trial lawyers, and trial judges to others.”).

350. A “Potemkin Village” is something that has an external or superficial look of size or substance but is in fact a shell. The term is taken from efforts of Grigori Potemkin, an 18th Century minister to Russia’s Catherine the Great. He arranged to have entire facades of towns built without building actual and functional facilities or populating the phony villages. The false front Potemkin Villages were designed to reassure the Empress as she toured the countryside. See generally JOAN HASLIP, CATHERINE THE GREAT (1977).

351. Certainly, this sort of iterated feedback appears to be present in non-class litigation, which suggests that decisions on issue class matters will provide a similar impact on approaches to aggregate settlement. As Professor Silver stated:

Settlement negotiations have a sorting effect, as parties resolve those cases upon which they agree and jockey over the order in which the remainder will be adjudicated. . . . By settling good cases for large amounts and defending bad ones aggressively, defendants can manipulate the trial record to their advantage and drive down settlement values in pending cases.

Id. at 1378. Accord TIDMARSH, *supra* note 347; Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92 (1997); Joseph Sanders, *The Benedictin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 HASTINGS L.J. 301 (1992).

guidance for dispute resolution with much less of the coercive-cum-extortionate element thought to flow from class treatment.

As applied to the problems presented in mass torts and securities claims, issue class actions continue to hold promise. Most obviously, a more liberal attitude toward use of issue classes would bring a different result in the *Rhone-Poulenc* litigation. Prior to the Seventh Circuit's reversal, the trial judge had authorized a partial class action.³⁵² Similarly, in *Castano*, the Fifth Circuit reversed a trial court's issue certification on the question of whether tobacco companies "fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature."³⁵³ Both cases were wrongly decided; the courts of appeals should have permitted the issue classes approved by the trial courts.

Castano is particularly incorrect in that it committed what seems to be a clear error of rule interpretation doctrine by reading into Rule 23(c)(4)(A) the requirement that the issue certified under this portion of Rule 23 be also subject to the requirement of Rule 23(b)(3) that common questions "predominate," if the matter as a whole is to be certified as a class action. The Fifth Circuit appears to have simply fabricated this requirement in order to deal a setback to a type of litigation it disliked. There is nowhere in the legislative history of Rule 23 any suggestion that Rule 23(c)(4)(A) should not be accorded its plain meaning.³⁵⁴ Rule 23(c)(4)(A) clearly states that a matter may be brought as a class action "with respect to particular issues." The text of Rule 23(c)(4)(A) does not state that class treatment can only be given regarding particular issues that predominate in the litigation. The Fifth Circuit's holding thus runs rather dramatically contrary to the text and legislative history of Rule 23.

Castano also runs counter to what seems to have been the intent of the drafters and what surely is the purpose of the Rule. If the Rule 23(b)(3) predominance requirement is added to Rule 23(c)(4)(A), this essentially reads the latter provision completely out of the Rule. A portion of the rule permitting issue classes loses almost all utility if it is subject to the same criteria required for certification of an entire action. According to the *Castano* approach, any case that qualifies for Rule 23(c)(4)(A) issue class treatment will also always qualify for certification of the entire matter pursuant to Rule 23(b)(3). But if Rule 23(c)(4)(A) and Rule 23(b)(3) are

352. *Wadleigh v. Rhone-Poulenc-Rorer, Inc.*, 157 F.R.D. 410 (N.D. Ill. 1994). See *supra* notes 323–24 and accompanying text.

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

354. See 5 MOORE ET AL., *supra* note 3, §§ 23.App.01–23.App.200 (Historical Appendix).

congruent or co-dependent as contended the Fifth Circuit, why have Rule 23(c)(4)(A) at all?³⁵⁵ The seemingly obvious answer (to one not blinded by anti-tobacco litigation zeal) is that the two provisions were not meant to be read in tandem and the issue class action was not intended to be subject to the predominance requirement imposed upon class certification decisions affecting the entire lawsuit.

In addition, *Castano* appears to have proceeded on the basis of what we now know to be a view of the “facts” slanted in favor of the defendants. The Fifth Circuit described plaintiffs’ theory of the case as “novel and wholly untested,” implying that the plaintiff class was perhaps in the grip of some wild conspiracy theory about the evils of the tobacco industry.³⁵⁶ Not long after *Castano* was decertified, documents unearthed in discovery pursuant to the litigation brought by state attorneys general seeking Medicare and Medicaid reimbursement from tobacco companies tended to strongly substantiate plaintiffs’ hypotheses. It appears that the tobacco industry (or at least substantial elements of it) was indeed trying to get people hooked on cigarettes, concealing clearly relevant information about the dangers of smoking, and even attempting to mislead the public about those dangers.³⁵⁷

Rhone-Poulenc is perhaps less clearly incorrect but on balance also demonstrates too crabbed a view of the scope of Rule 23(c)(4)(A). In its intense focus on the purported *in terrorem* effect of certifying even an issues class, the Seventh Circuit substituted ideologically based, empirically unsupported policy arguments in lieu of a more focused and careful reading of Rule 23 in the context of the case. In addition, the

355. *Castano* thus also appears to violate another central tenant of sound interpretation of statutes, rules, and contracts: give effect to all sections of the document if this can be done without contradicting other maxims of construction and does not produce an absurd result. See WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 267–76 (2d ed. 2006); E. ALLAN FARNSWORTH, *CONTRACTS* § 7.11 at 457–59 (4th ed. 2004). Treating Rule 23(c)(4)(A) as a “stand-alone” portion of Rule 23 (subject, like all of Rule 23(b) to the class prerequisites of numerosity, commonality, typicality, and adequacy set forth in Rule 23(a) and specifically referenced in the text of the Rule) does not produce an absurd result but instead permits perfectly rational “miniature” class action treatment for some aspect(s) of a case. On the contrary, interpreting Rule 23 so as to read Rule 23(c)(4)(a) effectively out of the Rule seems much closer to an absurd result.

356. 84 F.3d at 737.

357. See *The Florida Tobacco Litigation Symposium—Fact, Law, Policy, and Significance*, 25 FLA. ST. U. L. REV. 737 (1998). Florida and other states sought payment from the tobacco companies on the basis of allegedly increased costs of providing health services due to the deleterious effects of smoking. The tobacco industry paid hundreds of billions of dollars in settlement. Not bad for a novel and untested theory. See also Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 VAND. L. REV. 2177 (2004) (taking a quite different view of the tobacco litigation but concluding that it ultimately worked reasonably well as a form of de facto public regulation).

Seventh Circuit's corresponding concern that a plaintiffs' victory could be unfair because defendants had previously prevailed in twelve of thirteen litigated cases is touching but not particularly important. As discussed above, defendants have a host of imbedded advantages in the litigation process that do not disappear and are at best only reduced by class treatment of matters.³⁵⁸ In addition, the mere twelve-out-of-thirteen statistic does not say anything about the quality of the underlying litigation, available discovery, or other factors bearing on outcome. Although it is of course possible that Rhone-Poulenc was not negligent and that tainted blood was not its "fault" (or did not emanate from its inventory), it is equally plausible that in early, individualized litigation, plaintiffs and counsel were simply outgunned by Rhone-Poulenc and its resources. Further, if the case on the merits so clearly exonerates the defendant, a rational defendant would presumably relish class treatment in anticipation of obtaining a decision that it could use as a preclusive shield against such future litigation. If the poor track record of prior tainted-blood plaintiffs is an accurate reflection of the "real" merits of the negligence claims, this argues in favor of certifying the class in anticipation of a defense victory that will bring adjudicative closure to the dispute once and for all.

The Seventh Circuit's Seventh Amendment concerns about issue certification—that use of multiple juries would violate the constitutional guarantee—is not persuasive.³⁵⁹ Similarly, the appellate court's resistance to issue certification due to choice-of-law issues also seems overdone. The nub of the plaintiffs' claim in *Rhone-Poulenc* was simple negligence. This

358. See text accompanying notes 341–51; Silver, *supra* note 2; Hay & Rosenberg, *supra* note 2.

359. See Martin H. Redish, *Seventh Amendment Right to Jury Trial: A Study in the Irrationality of Rational Decision Making*, 70 NW. U. L. REV. 486 (1975); Charles W. Wolfram, *The Constitutional History of the Seventh Amendment*, 57 MINN. L. REV. 639, 744–47 (1973) (arguing that application of the Seventh Amendment should not be rigidly frozen in historical custom and that the term "common law" in the Amendment was probably intended by the drafters to allow the evolutionary effect of changed circumstances and new procedural devices); *Developments in the Law—The Civil Jury*, 110 HARV. L. REV. 1408 (1997) (arguing that decisions of different juries in connection with related claims, even if inconsistent, do not violate the Seventh Amendment). See also JOHN E. NOWAK & RONALD D. ROTUNDA, *CONSTITUTIONAL LAW* 586 (6th ed. 2000) ("Nothing in the Constitution, or its amendments, guarantees that an individual will have a process that is most likely to result in a favorable ruling for that individual."). The basic test to determine applicability of Seventh Amendment is historical, with the court asking: what was the situation in 1789 when the Amendment was enacted? See WRIGHT, *supra* note 29, § 92. In 1789, an era of fragmented communication, slow travel, and lack of centralized sources of law and judicial decisions (the West Publishing Regional Reporter system would not exist for another seventy years), it is hard to seriously argue that there were no arguably inconsistent jury determinations of essentially the same allegedly wrongful conduct. See also Prentice H. Marshall, *Jury Trial of Right*, in 8 MOORE ET AL., *supra* note 3, § 38.13 (stating that use of collateral estoppel, even where prior action was bench trial, does not violate Seventh Amendment).

is not a body of law that varies drastically from state to state or that is likely to hinge on subtle nuances lodged in the interstices of state supreme court precedents. *Rhone-Poulenc* thus reads more like an opinion on a public policy agenda of curtailing mass tort class actions than one articulating any strong, lasting argument against issue certification. Consequently, the case should not (as it apparently has) discourage use of issue class actions in mass tort matters.

Applied to non-tort matters such as investor class actions, the reasons given in *Castano* and *Rhone-Poulenc* and other arguments raised against issue class certification seem unpersuasive for the reasons noted in Part II. The law to be applied in investor securities claims is largely federal or uniform, eliminating one of the Seventh Circuit's concerns.³⁶⁰ In addition, as also discussed in Part II, the potential risk to a defendant company in securities litigation is more predictable and cabined than is the case with mass tort matters.³⁶¹

In the *Newton v. Merrill Lynch* matter, for example, the Third Circuit might have been able to satisfy its concerns regarding proof of damages and vindicate the purpose and spirit of Rule 23 by certifying a class (or subclasses) on the issue of the financial impact to investors of having their share purchases conducted at the NBBO posted price rather than alternatives.³⁶² However, to make this determination, something more than mere certification under Rule 23(c)(4)(A) would probably be required for the inquiry to be manageable. Courts such as the *Newton* Court need to expand their notions of acceptable fact-finding and determination.

B. More Functional and Flexible Approaches to Fact Development

As discussed above, excessive formalism tends to have a constraining effect on use of class treatment. Although formalism has its importance in a stable legal system, it is not the talisman its defenders purport it to be. To achieve correct and full application of a rule, statute, or legal concept, a certain functional flexibility is required. Use of the class action is no different in this regard than other aspects of law such as statutory interpretation or contract interpretation.

360. See *supra* text accompanying notes 106–60.

361. See *supra* text accompanying notes 106–60.

362. See *supra* text accompanying notes 178–204.

1. Presumptions

One area in which courts could open the door, ever so slightly, to expanded use of class treatment of issues is through the use of rebuttable presumptions. Such presumptions have been well-established in some aspects of securities law for some time. For example, the “fraud on the market” theory of a Rule 10b-5 violation presumes that the entire market for a given security was affected by false or misleading public statements surrounding the security.³⁶³ Indeed, the presumption of this market-wide reliance on a misstatement in fraud-on-the-market cases is so strong as to essentially amount to a conclusive or irrebuttable presumption of reliance.³⁶⁴

However, as evidenced by the Supreme Court’s recent *Dura Pharmaceuticals, Inc.*,³⁶⁵ there is resistance to adopting such presumptions, although the Court has not completely foreclosed such approaches.³⁶⁶ *Newton v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*³⁶⁷ stands as an example of this sort of limitation on class treatment and *Broudo v. Dura Pharmaceuticals*³⁶⁸ is in the same vein. In similar fashion, the Ninth Circuit has refused to presume reliance of class members asserting a RICO claim based on an alleged

course of fraudulent and misleading acts and omissions intended to induce people to play [the defendants’] video poker and electronic slot machines based on a false belief concerning how those machines actually operate, as well as the extent to which there is actually an opportunity to win on any given play.³⁶⁹

363. See *Basic, Inc. v. Levinson*, 485 U.S. 224 (1988).

364. See *id.* at 241–47.

365. 125 S. Ct. 1627 (2005).

366. See *supra* text accompanying notes 206–300 (discussing *Dura Pharmaceuticals* and its implications).

367. 259 F.3d 154 (3d. Cir. 2001).

368. 339 F.3d 933 (9th Cir. 2003).

369. *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 659 (9th Cir. 2004). The outcome in *Poulos*, denial of class certification and effective ending of the case, appears to me perfectly correct because plaintiffs’ theory of the case on the merits is weak and counterintuitive. Some disclosure is in order: I have provided consulting services to some of the defendants and their counsel. Managing what neutrality I can, however, it seems the idea that gamblers who chose this form of gaming recreation might have a cause of action because odds favor the house is a touch bizarre. Plaintiffs asserted that the actionable misconduct of gaming defendants was failing to disclose that video poker has an allegedly different payout matrix than playing with real cards and that electronic slot machines work on a slightly different random-response mechanism than does a traditional mechanical slot machine.

At the risk of being unempathetic to the recreational patrons of my home state: so what? The average gambler probably approaches all game machines on his or her own terms, without any

In addition to the question of reliance, the issue of causation may be one in which a substantial relaxation in the traditional approach is warranted. Regarding toxic torts, for example, Margaret Berger has persuasively argued that the traditional approach of requiring claimant-victims to carry the burden of persuasion as to causation is no longer apt.³⁷⁰ Under the traditional approach to a toxic tort, like the approach to most any claim, the burden of persuasion is on the plaintiff to prove a link between defendants' purported wrongful conduct and plaintiff's injury, usually according to the "preponderance" standard.³⁷¹ This makes perfect

expectation as to the degree to which the machine may or may not diverge from more traditional games in terms of the odds. Odds will eventually become known as casinos and others publish information about the relative payout ratios, house earnings, and so on. See BEN MEZRICH, BRINGING DOWN THE HOUSE: THE INSIDE STORY OF SIX MIT STUDENTS WHO TOOK VEGAS FOR MILLIONS (2003) (detailing successful efforts of MIT students to "beat the system" in Las Vegas). For example, I am not even an occasional gambler, but I know that my odds against the house are better off playing craps or blackjack as opposed to the slot machines. Under these circumstances, where plaintiffs have voluntarily chosen to pursue an activity that on average is guaranteed to be perhaps the biggest money loser on the floor, courts should have little sympathy. For example, electronic slots resulted in reported seven-figure loss for former Secretary of Education and *Book of Virtues* author William Bennett, a well-educated man who arguably should have known better. See Joshua Green, *The Bookie of Virtue*, WASH. MONTH., Vol. 35, No. 6, June 1, 2003, at 8 (estimating that Bennett lost as much as \$8 million gambling, particularly playing high-limit \$500-a-pull slot machines); Rod Smith, *Gaming Foe Characterized as High Roller*, LAS VEGAS REV.-J., May 3, 2003, at 1A; David Von Drehle, *Gambling Days Are Over, Says Bennett*, WASH POST, May 6, 2003, A12 (Bennett admits to unspecified large gambling losses but asserts that he will cease habit many view as inconsistent with his promotion of virtue). See generally WILLIAM J. BENNETT, THE BOOK OF VIRTUES (1993) (arguing for continued fidelity to traditional virtues and morals). But such cases should not be too surprising. Casinos are profit-making enterprises. The same argument, of course can and has been made on behalf of securities claims, and it may be particularly well taken if limited to the argument that civil remedies and government regulation should not necessarily compensate disappointed investors who pursued high risk investments. See Pritchard, *supra* note 275, at 1085 (criticizing SEC for focusing on "stereotypical 'widows and orphans' in crafting [regulatory] protections," using "[t]he SEC's recent initiative to regulate hedge funds—the investment haven of the ultra-rich" as an example).

But determination of whether the nature of an investment or activity itself adequately warns a participant of danger is a merits-based substantive assessment. On the question of reliance, pragmatism could support class treatment—even of claims involving willing participation in risky activity—if plaintiffs first prevail on the questions of defendant duties, assumption of risk, comparative fault generally, and plaintiffs' actual expectations and understanding and if there is some reasonable sampling method that demonstrates general reliance throughout the plaintiff class. Issue class action treatment under Rule 23(c)(4)(A) and flexible factfinding could potentially be used in even a "long shot" case like the *Poulos* video poker claims. Whether it should is a serious question best left to the discretion of the trial court. Similarly, gaming plaintiffs may be entitled to an issue class action regarding the addictive properties of such machines. At risk of being seen to endorse litigation in lieu of personal responsibility, I would prefer to address these types of cases more forthrightly on the merits rather than preventing their airing through a formalist application of Rule 23. Of course, nothing is preventing an individual test case by a gambler who has substantial losses that make such a claim economically feasible (e.g., Secretary Bennett).

370. Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117 (1997).

371. See WILLIAM L. PROSSER, LAW OF TORTS § 41 (4th ed. 1971).

sense if one does not know much about the next incoming tort claim and request for compensation. It stands to reason that the system historically has required plaintiffs to “prove up” their cases, including the causal link between “bad” defendant behavior and injury to the plaintiff.

However, the traditional model—or at least insistence on formal adherence to the traditional model—becomes less compelling when we do know something about the case in question and it involves claims of fairly clearly established defendant wrongdoing or liability coupled with difficult matters of proof. For example, in the toxic tort context, Professor Berger argues that the traditional causal model does not adequately account for the practical limits of scientific uncertainty as to what causes illness or disease when defendant’s toxins, environmental factors, and plaintiff’s heredity are combined.³⁷² Similarly, she argues, insisting on the type of causal proof expected for an automobile accident simply provides excessive insulation from liability for commercial wrongdoers that knowingly discharged hazardous substances or used them in connection with their operations or products.³⁷³

Professor Berger proposes that where the defendant’s culpability in the handling of dangerous materials and injury to claimants have both been established, the usual doctrine of general causation should yield to a presumption that the defendant-related toxic material was a proximate cause of plaintiffs’ injury.³⁷⁴ Describing a concrete operationalization of her thesis, Professor Berger writes:

How would the asbestos litigation have played out under this Essay’s proposal to relieve plaintiffs of the burden of proving general causation? According to this model, once plaintiffs proved the manufacturers’ negligence in failing to reveal substantial information highly relevant to assessing the potential risks of asbestos exposure, a prima facie case of liability would be made out for those able to substantiate exposure and ill health. Defendants should, however, be entitled to two special defenses, both as a matter of fairness and as an inducement to conduct future research. Society still needs to know whether defendant’s product poses such an unreasonable risk that it should be removed from the market, or whether special safety measures are needed. Consequently,

372. Berger, *supra* note 370, at 2129–32, 2135–40.

373. *Id.* at 2120–29.

374. See Margaret A. Berger, *Eliminating General Causation: Notes Towards a New Theory of Justice and Toxic Torts*, 97 COLUM. L. REV. 2117, 2118–20, 2143–44 (1997).

defendants should be entitled (1) to prove in general that certain adverse health reactions could not plausibly arise from exposure to defendant's product, or (2) to reduce damages by proof that a particular plaintiff's injury is attributable or partly attributable to another cause, such as smoking. Defendant should bear the burden of persuasion on these issues.³⁷⁵

In essence, Professor Berger is arguing for a rebuttable presumption of causation and damage in toxic torts cases, subject to the prerequisite that plaintiffs first carry the traditional burden of proof on questions of the liability-related elements of the claim such as dangerousness, defendant control, defendant behavior, failure to warn, and like issues. Plaintiffs would also have to prove injury that is consistent with injurious exposure to the toxic substance. Once this burden is satisfied, the plaintiffs (including, presumably, a plaintiff class in a toxic tort class action) would be entitled to the rebuttable presumption of proximate cause and damages that defendants may counterattack.

The Berger approach to causation or variants of it would appear to have significant potential utility in class action mass torts, of which the asbestos toxic tort dominates the landscape. For example, the approach would seem readily applicable to a case like *Rhone-Poulenc*. First, plaintiffs would have to prove defendant negligence and claimant exposure, which could be facilitated by Rule 23(c)(4)(A) issue class certification. If plaintiffs met these initial burdens, the rebuttable presumption of causal injury would be applied. In addition, the amount of damages could be preliminarily assessed through a formula or use of judicial adjunct or administrative fact-finders (as further discussed below).³⁷⁶ Such a system would not be unfair to defendants such as Rhone-Poulenc because they would still have the opportunity to prove that the type of injury claimed by certain class members was not a tainted blood HIV injury (either because the nature of the injury was inconsistent or because the source likely was something other than the defendants' tainted blood).

This rebuttable presumption as to causal injury could also be applied to investor class actions. In order to gain the benefit of the presumption, the plaintiff class would be required to prove other elements of liability and prima facie damage to the group in general. Certification of these issues for discovery and adjudication could proceed pursuant to Rule 23(c)(4)(A). Thereafter, the court could apply a rebuttable presumption as

375. *Id.* at 2144–45 (footnotes omitted).

376. *See infra* text accompanying notes 392–431.

to the causation-related aspects of the claim such as reliance, detriment as to defendant's practices, and so on. This type of approach would rather clearly solve the problems that were seen as preventing class certification in *Newton v. Merrill Lynch, Pierce, Fenner & Smith*.³⁷⁷ Defendants such as Merrill Lynch, Dean Witter, and PaineWebber would then have the opportunity to rebut the presumption by evidence of non-reliance or evidence that for given class members, the NBBO price was actually advantageous.

As a practical matter, of course, none of the broker-defendants in *Newton* would be likely to expend resources attempting to rebut the presumption I am advocating. Nor would they be likely to insist on a full-blown trial (or trials) of damages issues. More likely, they would settle. This is hardly a bad outcome, much less an unfair outcome, for the defendants. By the stage of the proceedings where defendants find the suggested rebuttable presumption imposed upon them, it will be because the plaintiffs have established that the defendants violated the securities laws or the common law requirements of fiduciary duty and that this generally caused injury to the plaintiff class. At this juncture, defendants are not in a very sympathetic position for arguing that the judicial system should nonetheless give these culpable defendants practical leverage against the plaintiff class by insisting on traditional causal proof. To do so is to undercut the rationale of the class action and to permit culpable defendants to escape liability merely because of the economics of litigation. Defendants will have been permitted to commit "little wrongs" or "hard/expensive-to-trace wrongs" with impunity. The class-action scenario that clings to a traditional formal requirement of causal proof thus reduces the deterrent effect of the securities laws and similar bodies of law designed to elicit better business behavior.³⁷⁸

Like many good functionalist ideas, the rebuttable presumption of causal injury may be unable to surmount certain formalist barriers. For example, the PSLRA requires that an investor plaintiff prove loss causation.³⁷⁹ "Loss causation is an element of securities fraud, borrowed . . . from negligence law, that requires plaintiff to establish a sufficient causal nexus between defendant's misrepresentations and the plaintiff's loss."³⁸⁰ One reluctant to lower the barriers to successful investor class

377. 259 F.3d 154 (3d Cir. 2001).

378. See James D. Cox, *The Social Meaning of Shareholder Suits*, 65 BROOK. L. REV. 3 (1999).

379. 15 U.S.C. § 78u-4(b)(4) (2000).

380. Choi et al., *supra* note 2. Because my suggestion that courts take a charitable view of proof of loss causation first requires that the plaintiffs demonstrate (through adjudication of an issue class or

actions can certainly read the loss causation requirement as mandating traditional proof of causation as in an automobile accident case or other tort of negligence. However, one can also engage in a functionalist reading of the PSLRA loss causation language as permitting non-traditional approaches to determining causation so long as they are consistent with the Act's purpose of deterring frivolous litigation or so-called strike suits. If, as a prerequisite to enjoying the benefit of the rebuttable presumption of causation, the plaintiff class must first prove other elements of liability and a general case for general damages among the class, the case would appear by definition not to be frivolous. At this juncture, judicial insistence on traditional, formal proof of causal loss does not serve the congressional purpose of the PSLRA but instead only deprives a class of investors of compensation and immunizes defendants for a particular sort of blameworthy conduct that is hard to litigate on an individual basis.

2. *Sampling and Test Cases*

Another overlooked option for addressing large cases is the use of statistical sampling and analysis through examination of representative test cases or sample cases. Although this technique has been intermittently used for many years by many courts,³⁸¹ it appears not to have achieved general acceptance as a means of addressing class-action issues.

Under any number of variants of the statistics/sampling/test-case approach, a court may conduct adjudicative proceedings and fact-finding regarding a particular case or issue in a matter to reach a determination. In cases of class disputes, the court may do this across a representative sample of cases that reflect both the range of situations presented by the class claims and the types of typical claim scenarios at the core of the class's complaints against the defendant. Once this information is

other means) that defendants violated the law, I regard it as presenting a much more attractive case for a liberal attitude toward loss causation than was presented in *Dura Pharmaceuticals v. Broudo*, 125 S. Ct. 1627 (2005). There, plaintiffs sought class certification without first addressing the questions of defendant wrongdoing (i.e., were the statements at issue materially misleading and did defendants act with scienter) and in which the Supreme Court took a narrow attitude toward proof of loss causation. See *supra* text accompanying notes 206–300 (discussing *Dura Pharmaceuticals*). In addition, *Dura Pharmaceuticals* only decided one type of loss causation question as a matter of the substantive law of the PSLRA. The Court did not set forth a template governing future procedural management of loss causation cases.

381. See, e.g., *United States v. Krizek*, 111 F.3d 934, 939–40 (D.C. Cir. 1997) (approving statistical sampling use); *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649 (E.D. Tex. 1990) (statistical sampling used to determine amount of damages in large asbestos case). See also Gregory Todd Jones & Reidar Hagtreid, *Sample Data as Evidence: Meeting the Requisites of Daubert and the Recently Amended Federal Rules of Evidence*, 18 GA. ST. U.L. REV. 721, 746–48 (2002).

determined, liability may be determined, presumptions established, and presumptive damages calculated for the variously situated class members. This permits a determination as to the amount of damages owed the class and provides a formula for distribution of any award. The case for sampling and statistical analysis has, in my view, been well made for a decade, perhaps two. In making this claim, I am thinking most prominently of two persuasive articles by Professor Bone³⁸² and Professors Saks and Blanck³⁸³ advocating greater use of statistical sampling to adjudicate large or complex cases. In a similar vein is Professor Walker's suggestion for use of sampling.³⁸⁴ Also supporting this approach is the substantial literature that emerged in the mid-to-late 1980s regarding probability and proof, particularly the use of Bayesian theory to prove circumstantial claims.³⁸⁵

However, probability theory, like use of statistical sampling proof, has not been readily accepted by the courts in spite of the intellectual force behind it. This undoubtedly stems from the baseline reluctance of both the judicial system and the public to be treated "like a number" regarding issues of civil liability and legal obligation.³⁸⁶ Once again, the individual "day in court" ideal appears to hold powerful sway over the system, suggesting that any departure from targeted, individualized adjudication for all litigants is an unfair failure of justice. Although the sentiment is understandable, it is also erroneous.

An attractive variant of the sampling approach is proposed by Professors Hay and Rosenberg. They suggest having trials of a number of the claims of class members and then calculating a weighted average based on the win-loss outcomes and the range of damage awards. In this way, the judgment in a class action essentially mimics or parallels the

382. Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561 (1993).

383. Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815 (1992).

384. See Walker, *supra* note 103. While Professor Walker suggested statistical sampling as a means to resolve issues in federal class action cases, Professor Bone largely promoted use of statistical sampling as an alternative to class treatment of matters. See Bone, *supra* note 21, at 269–74. My view, which is consistent with that of the Saks-Blanck and Walker analyses, is that statistical sampling should not be seen as an alternative to class treatment but should be a primary fixture of class treatment of issues, claims, and cases.

385. See Neil B. Cohen, *Confidence in Probability: Burdens of Persuasion in a World of Imperfect Knowledge*, 60 N.Y.U. L. REV. 385 (1985); Ward Edwards, *Summing Up: The Society of Bayesian Trial Lawyers*, 66 B.U. L. REV. 937 (1986) (summarizing Symposium on evidentiary proof).

386. For a well-known and venerable example of an academic expression of this angst, see Laurence H. Tribe, *Trial by Mathematics: Precision and Ritual in the Legal Process*, 84 HARV. L. REV. 1329 (1971).

outcome that would result if the parties and the judicial system were sufficiently inclined to devote the massive resources required to litigating each and every class member's claim.³⁸⁷ And, of course, as the results of particular trials emerge, there is nothing to prevent the parties from settling the class matter prior to the court's calculation of the weighted average proposed by Professors Hay and Rosenberg.

As previously discussed, our system tolerates enormous variance in outcomes based on jurisdiction, venue, quality of legal representation, idiosyncratic inter-jury differences, idiosyncratic inter-judge differences, and temporal differences in the adjudication of a matter.³⁸⁸ By comparison, the degree of variance that may exist between class members when proof is streamlined or damages estimated through statistical sampling and use of test cases is likely to be considerably less. Certainly, the results from this method cannot be more variegated than under the present system, which gives lip service to individualized justice but routinely permits individualized injustice and error to stand. The focus should not be on whether sampling with statistical analysis is a valid means of proof. The inquiry should instead focus on whether the particular statistical sampling in question comports with sound practices.

Perhaps more important, if the alternative to use of statistical sampling and test cases is to refuse class treatment, essentially leading to the end of potentially meritorious claims or to bargain-basement settlement, it is hard to see how rigid insistence on individual proof serves justice. Although the use of statistical sampling and test cases poses some risk of inaccuracy, not only are these risks no greater than those inherent in the system, but they are risks worth taking in order to ensure that claimants in fact really do receive a "day in court," albeit in the form of class treatment rather than individual adjudication (which they would not really receive in any event if class treatment were denied). Like use of Rule 23(c)(4)(A) to certify a class on a given issue, the use of statistical sampling and test cases presents a "half a loaf" situation³⁸⁹ that is preferable to the alternative of giving plaintiff class rights essentially no real opportunity for vindication.

387. Hay & Rosenberg, *supra* note 2, at 1394–97.

388. *See supra* text accompanying notes 302–07.

389. *See* Romberg, *supra* note 323 (referring to partial class actions and issue certification as "half a loaf" in contrast to the presumed whole loaf of class certification of an entire case).

3. *Judicial Adjuncts and Initial Administrative Determinations*

Another underutilized tool for entertaining and processing class action disputes is use of judicial adjunct officers such as special masters or hearing masters.³⁹⁰ Similarly, courts could make greater use of administrative-agency-like processes for managing cases, particularly for determining damages.

For example, if the most highly individualized portion of a class suit is the question of the damages suffered by each class member (due to questions of reliance, degree of injury, comparative fault, set-off or mitigation of loss, etc.), this problem can be addressed in a number of ways. Perhaps the dominant approach is the traditional, formalist approach of simply refusing certification on the ground that common questions of fact or law do not “predominate” and that class treatment is therefore not the “superior” way to resolve the controversy.³⁹¹ As is apparent by this point in the article, I find this approach frequently misapplied to cases that could profit from at least partial class treatment. Further, the analysis of many courts reflects a narrow and grudging interpretative approach to Rule 23 that should not be placed above the purpose and societal mission of Rule 23 to permit uneconomic claims to be heard and to provide incentives for better behavior by commercial actors. The traditional, grudging approach to class treatment should not be the dominant approach in investor class actions and probably should fade to the background in mass tort class actions as well.

Instead of this more traditional approach requiring “predominance” as a condition to any sort of class certification and requiring that the class device be equivalent to or better than hypothetical individual litigation, a better approach to Rule 23 would first make greater use of issue certification under Rule 23(c)(4)(A), thereby removing the predominance

390. See Margaret G. Farrell, *The Function and Legitimacy of Special Masters: Administrative Agencies for the Courts*, 2 WIDENER L. SYMP. J. 235 (1997); Lynn Jokela & David F. Herr, *The Role of Special Masters in the Judicial System: Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005); Sean C. Flynn, Note, *The Totten Doctrine and its Poisoned Progeny*, 25 VT. L. REV. 793, 812 (2001) (special masters are an extremely useful but drastically underutilized judicial tool). See, e.g., Prudential Ins. Co. v. U.S. Gypsum Co., 991 F.2d 1080, 1083–88 (3d Cir. 1993) (rejecting use of Special Master in product liability cases); Apex Furniture Sales, Inc. v. Keinfeld, 818 F.2d 1089, 1096–97 (3d Cir. 1987) (disapproving of use of special master). See also Sylvia R. Lazos, Note, *Abuse of Plaintiff Class Action Settlement: The Need for a Guardian During Pretrial Settlement Negotiation*, 84 MICH. L. REV. 308 (1985) (arguing for special master-like figure to supervisor negotiation of class action settlement to assure fairness and adequate airing of issues).

391. See, e.g., *Newton v. Merrill Lynch*, 259 F.3d 154 (3d Cir. 2001).

inquiry from much of the case until facts could be established with some certainty. Use of issue certification can be used to test components of the claims, including the basic merit of the case (discussed in the next subsection) so as to determine whether the matter should even progress to more difficult questions of causation and damages.

Once the bona fides of the class claims are established in part through issue certification, the court has a choice to make about further processing on damages issues. The traditional approach to these matters, even among those who advocate for more aggressive use of issue certification, appears to be one of treating the issue determinations as preclusive but requiring separate individual lawsuits on the more individuated questions of damage.³⁹² Although this alone would be an improved expansion of class treatment, it continues to present the problem of failing to overcome the unattractive economics of individual litigation, even in cases where defendant wrongdoing is relatively clear. In many cases, a prior determination on liability-related issues will significantly streamline adjudication of damages, making subsequent individual actions economically feasible where they were not prior to the decision on the issue class matter. However, in another large group of cases, deciding the liability questions will not make individual litigation economically feasible where class member damages are relatively small or expensive to prove through traditional litigation.

The seemingly obvious solution, albeit one raising constitutional and prudential concerns, is to permit courts to establish streamlined means of assessing individual damages. This can and has been done as a part of a negotiated settlement.³⁹³ The plaintiff class and defendants agree on an amount to fund compensation, perhaps even agree on a schedule of compensation, and establish an administrative or ADR means of streamlined assessment under which parties can seek to prove a right to

392. For example, this appears to be an acceptable result to Professor Romberg in that it at least permits greater class treatment of common issues and as a practical matter should encourage informal resolution based on the results of adjudication of the issues class matters. He seems content to stop at this point and does not argue for particularly aggressive use of innovative fact-finding on damages matters. See Romberg, *supra* note 323, at 300–17, 326–33.

393. See McGovern, *Mature Mass Torts*, *supra* note 125 (noting and favoring practice under appropriate conditions); Linda S. Mullenix, *The Constitutionality of the Proposed Rule 23 Class Action Amendments*, 39 ARIZ. L. REV. 615, 635–37 (1997) (noting practice but questioning it on due process and accuracy grounds); David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 700 (1989); William B. Rubenstein, *A Transactional Model of Liability*, 89 GEO. L.J. 371, 402, n. 141 (2001) (noting use of damage schedules for large group of claimants).

compensation under a settlement fund or a deviation from a schedule of benefits.

This same approach can be applied even in cases where the parties are not able to settle. For example, Professors Hay and Rosenberg propose that the court presiding over a class action “should hold multiple class trials and base its judgment on some suitably weighted combination of the different verdicts.”³⁹⁴ They would apply this approach not only to the question of damages per se but also to the issue of liability (weighting awards according to pro-plaintiff and pro-defendant verdicts).³⁹⁵ They see this approach as one that reduces any unfair coercive effect class treatment may have on defendants.³⁹⁶ It is a most promising proposal that has the additional advantage of actually involving real jury determinations, making it less likely that it would be struck down by an appellate court on Seventh Amendment grounds.

To be sure, settlement followed by court approval removes potentially thorny questions regarding the Seventh Amendment right to jury trial and due process rights to damages adjudication through a traditional Article III tribunal. Somewhat radically, perhaps, I am suggesting that although these constitutional constraints should be of concern, they should not be fatal to judicial experimentation in this regard. Over the past twenty years, particularly in the mass tort context but also in connection with “Frankenstein monster” investor litigation,³⁹⁷ commentators have been arguing that only a legislative or administrative-like solution will truly serve justice for both claimants and defendant companies.³⁹⁸

Courts have been reluctant to create such administrative infrastructure on their own. For example, Judge Jack Weinstein has been accused of essentially embarking on this sort of ADR quest in the mass tort arena.

394. Hay & Rosenberg, *supra* note 2, at 1382.

395. *Id.* at 1394–97.

396. *Id.* at 1382.

397. The phrase is of course taken from Judge Lumbard’s characterization of the shareholder litigation in *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 572 (2d Cir. 1968) (Lumbard, J., dissenting), of which the U.S. Supreme Court took a similar view—and then compounded the problem by requiring individual notice to class members of a Rule 23(b)(3) class. See *Eisen v. Carlisle v. Jacqueline*, 417 U.S. 156 (1974). See also Miller, *supra* note 27.

398. See, e.g., Lester Brickman, *The Asbestos Litigation Crisis: Is There a Need for an Administrative Alternative?*, 13 CARDOZO L. REV. 1819 (1992); Ora Fred Harris, Jr., *Toxic Tort Litigation and the Causation Element: Is There Any Hope of Reconciliation?*, 40 SW. L.J. 909, 965 (1986) (contending that an administrative compensation scheme is necessary because of adjudication and cost aspects of toxic tort litigation); Rosenberg, *supra* note 393 at 705 (commenting on Professor McGovern’s damage schedule plan for the Dalkon Shield litigation and concluding that it “adequately answers critics of collective processing”); Peter H. Schuck, *The Worst Should Go First: Deferral Registries in Asbestos Litigation*, 15 HARV. J.L. & PUB. POL’Y 541 (1992).

Although this has earned him praise, it has also attracted a good deal of criticism.³⁹⁹ But today, twenty years after the *Agent Orange* settlement, the perspective of time appears to have vindicated the Weinstein approach. Use of special masters, hearing masters, presumptions, stylized means of presenting claims, and judicial arm-twisting to settle large class actions or mass actions may offend litigation purists. But employing any one of these devices or a combination of them may often be better than the traditionalist alternatives of refusing class treatment altogether or forcing claimants into individual pursuit of claims that will (a) never happen because of the adverse economics of the matter or (b) result in a settlement that likely is not better for the plaintiffs than what would obtain under an eclectic approach to adjudicating class actions. Take for example, the role of judicial adjuncts such as special masters and hearing masters. Although they may seem to be fixtures of complex litigation, they could be used to significantly greater degree. Again, let me use the *Rhone-Poulenc* and *Newton* litigation as examples of what might have been.

In *Rhone-Poulenc*, the concern was that a trial on negligence alone would be misleading or inadequate because it would separate the question of defendants' negligence from issues of comparative negligence and alternative causation.⁴⁰⁰ As previously discussed, I find these concerns overstated.⁴⁰¹ But assume they are not. Alternatives remain that could permit class treatment of the case. Instead of refusing class treatment of damages altogether, the court could have provided for streamlined presentation of damages claims before a hearing master, with the master making a determination that could either be accepted by the parties or pursued through an individual action seeking de novo review. In essence, hearing masters could be utilized as a form of case-specific court-annexed arbitration of damages issues. Such an approach has the potential benefit of improving the economic incentives to prompt prosecution of valid claims that might otherwise be bypassed.

The arguable detriment is that it is too favorable to the plaintiff class members because it will cultivate claims that might otherwise lie fallow or because the master will too easily award damages, putting pressure on defendants to seek de novo trial in order to protect their rights. This

399. See Martha Minow, *Judge for the Situation: Judge Jack Weinstein, Creator of Temporary Administrative Agencies*, 97 COLUM. L. REV. 2010 (1997) (generally praising Weinstein but arguing that his unorthodox methods should not be adopted by others). See also Linda S. Mullenix, *Mass Tort as Public Law Litigation: Paradigm Mislabeled*, 88 NW. U. L. REV. 579 (1994) (criticizing Weinstein for stretching traditional procedural approaches to preside over administrative-like resolution of cases).

400. See *supra* notes 164–71 and accompanying text.

401. See *supra* notes 171–77 and accompanying text.

objection is only superficially persuasive. At first blush, it may seem that class defendants are being treated differently than non-class defendants, but this simply is not true. The class defendant has only been brought to this point because it lost on an issue-certification adjudication regarding liability, or at least some significant element of liability. The plaintiff class has thus “earned” the right to benefit from a streamlined, presumptive presentation of damages and possible attainment of a damage award without shouldering the greater cost of proof through jury trial.

Further, compare the “plight” of Rhone-Poulenc or any other hypothetical class defendant to that of a plain vanilla defendant. In hundreds of thousands of cases, individual case defendants are routinely required to submit to court-annexed arbitration or other forms of ADR.⁴⁰² Because of Seventh Amendment concerns, such arbitration results (or ADR outcomes like Early Neutral Evaluation) are not binding on the defendant.⁴⁰³ When the arbitration award or ADR damage figure emerges, the plaintiff and defendant may either accept the result of the streamlined process or may challenge it through trial de novo.⁴⁰⁴ This is no different from what I am proposing for presumptively determining the damages of class members after a court has found the class defendant to be culpable.

In *Newton*, the concern was that different class members incurred different economic effects from having the NBBO price used for their transactions. Because of this variation among class members, the Third Circuit was unwilling to certify the matter for class treatment as to damages. As an alternative, the court could have certified the class, perhaps into two subclasses, one in which use of the NBBO price was not injurious and one in which class members suffered losses because the NBBO price was higher than other reasonably available prices. The court could have also appointed a special master charged with ascertaining the degree to which the class as a whole was injured by use of the NBBO

402. See Sarah Rudolph Cole, *Managerial Litigants? The Overlooked Problem of Party Autonomy in Dispute Resolution*, 51 HASTINGS L.J. 1199, 1199–1200 (2000) (court-annexed arbitration common); Kim Dayton, *The Myth of Alternative Dispute Resolution in the Federal Courts*, 76 IOWA L. REV. 889, 898 (1991) (same); Tom R. Tyler, *Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform*, 45 AM. J. COMP. L. 871, 876 (1997) (same). See also Raymond J. Broderick, *Compulsory Arbitration: One Better Way*, 69 A.B.A. J. 64 (1983); Paul Nejelski & Andrew S. Zeldin, *Court-Annexed Arbitration in the Federal Courts: The Philadelphia Story*, 42 MD. L. REV. 787 (1983).

403. See *Kimbrough v. Holiday Inn*, 478 F. Supp. 566 (E.D. Pa. 1979) (requiring parties to participate in court-annexed arbitration of certain claims could present serious Seventh Amendment problem if the parties were not permitted to demand trial de novo after completion of the arbitration and rendering of award).

404. See, e.g., N.D. CAL. CIV. R. 500; M.D. FLA. LOC. R. 8.01; E.D. PA. LOCAL R. CIV. P. 49.

prices. This could be determined through random sampling of the class and statistical calculation. The master could determine the average amount of loss to each class member. This figure would constitute the amount of compensation due class members, along with nominal damages or exemplary damages as otherwise determined by the court and perhaps with jury consideration of the exemplary damages issues.

Purists (and perhaps even impure but strong proceduralists) who have stayed with the article thus far are now perhaps figuratively jumping up in rage. The method I propose has the effect of homogenizing the class injury and results in a judgment that will undercompensate some class members (as averaging always does) and overcompensate the class members that actually came out ahead because of defendants' failure to use best execution in conducting their trades. Although this is of course imperfect, so is the litigation world. What actually happened in *Newton*—stoppage of a valid class-action claim in its tracks—seems to me far worse for the plaintiff class than my proposed blended damage award based on statistical sampling conducted by a special master.⁴⁰⁵

In similar fashion, *Broudo v. Dura Pharmaceuticals*, if permitted to go forward under the Ninth Circuit's theory of causation (that fraud that inflates share price presumptively causes a loss because the purchaser of a security is out-of-pocket in some amount because of the fraud),⁴⁰⁶ could be tried and resolved through use individually or collectively of the types of devices advocated in this article. Sampling and statistical analysis could be used to assess the amount of share price decline due to misleading statements about product development as opposed to a generally declining market. Or a special master could assess the facts emanating from discovery and put forth a presumptive schedule of damages calculation. Or the court could hold one large trial with expert witness testimony. Alternatively, the court could use several trials as per the Hay-Rosenberg

405. I should emphasize that there is no requirement that the statistical sampling be conducted by a special master or other type of judicial adjunct officer. The Article III trial judge presiding over the case could preside over hearings and receive evidence on the point, both through the adversarial process and court-appointed experts. However, because of the technical issues presented by the endeavor, I am more confident that it would proceed smoothly if done in the first instance by a special master, subject to judicial review.

In addition, there is no requirement that there be only a single special master. For example, in *Newton*, three special masters (e.g., a statistician, a lawyer, and a stockbroker or compliance officer) working together would seem apt. In *Rhone-Poulenc*, a special-master committee composed of a lawyer, a doctor, and an economist would seem apt. Although use of multiple special masters presents issues of cost and coordination, spending the money up front for the expertise may prove more efficient in the long run.

406. 339 F.3d 933, 937–39 (9th Cir. 2003).

approach and determine an amount of weighted injury, one that would include the pharmaceutical company's "day in court" on the issue of whether its public statements were misleading. In short, it simply does not seem that *Broudo v. Dura Pharmaceuticals* is too hard to adjudicate or unfair to the defendant if tried (with the plaintiff merely permitted to survive dismissal because of the presumptive injury that the Supreme Court refused to recognize).

I am, at this juncture, not so much spurning the procedural "rules of the game" as I am arguing in favor of a more distributive approach and a more policy-purposivist approach in which court decisions look to further the public policy purposes of substantive law and Rule 23, even when this creates some tension (even considerable tension) with the proceduralist goals of due process, accuracy, individual determinations, and full adjudication of issues presented in lawsuits. In short, I am arguing that we accept the inevitable truth that perfection is unattainable in this context and that the justice system make a conscious choice to advance the relative "good" rather than withholding it while waiting for the "best" that is never to come.

The type of hearing master/special master use I advocate has been common as part of class action or mass tort settlements. Agent Orange,⁴⁰⁷ asbestos,⁴⁰⁸ discrimination,⁴⁰⁹ and securities claims⁴¹⁰ all provide examples. In my view, this approach has worked well, so well that we should not insist on settlement as a prerequisite to such use of judicial adjuncts to make preliminary factfinding on individual damages questions within a class. To be sure, incorporation of this approach in a settlement has certain advantages because the parties can agree to be bound by the

407. See, e.g., In re "Agent Orange" Prod. Liab. Litig., 597 F. Supp. 740 (E.D.N.Y. 1984). See Farrell, *supra* note 390, at 258 (noting use of Kenneth R. Feinberg, Sol Schreiber, David I. Shapiro, and Leonard Garment as special masters in *Agent Orange* case).

408. See, e.g., In re Joint Eastern and Southern District Asbestos Litigation, 737 F. Supp. 735 (E. & S.D.N.Y. & N.Y. Sup. Ct. 1990).

409. See, e.g., Rajender v. Univ. of Minn., 730 F.2d 1110, 1112 (8th Cir. 1984) (describing settlement in Title VII action utilizing three special masters to administer proceedings); Forehand v. Florida State Hosp., 839 F. Supp. 807 (N.D. Fla. 1993) (use of master to organize and preliminarily assess evidence in discrimination case); Officers for Justice v. Civil. Serv. Comm'n, 473 F. Supp. 801, 818 (N.D. Cal. 1979) (use of special master to distribute damages in job discrimination class action). See also State v. Marshall, 613 A.2d 1059, 1063 (N.J. 1992) (appointing special master in case challenging death penalty on bias grounds). See generally Tristin Green, *Targeting Workplace Context: Title VII as a Tool for Institutional Reform*, 72 *FORDHAM L. REV.* 659 (2003); Timothy G. Little, *Court-Appointed Special Masters in Complex Environmental Litigation: City of Quincy v. Metro. Dist. Comm'n*, 8 *HARV. ENVTL. L. REV.* 435 (1984).

410. See, e.g., In re Chambers Dev. Sec. Litig., 912 F. Supp. 822, 825 (W.D. Pa. 1995); In re Activision Sec. Litig., 723 F. Supp. 1373, 1374 (N.D. Cal. 1989); In re Sunrise Sec. Litig., 124 F.R.D. 99 (E.D. Pa. 1989).

master's findings, thereby eliminating the additional cost and uncertainty of de novo challenge to the master's work. But if the master-managed damages processing is done well, de novo challenges (or at least de novo challenges that are taken very far) should be relatively few in number. This appears to have been the experience with court-annexed arbitration, where litigants appear either to accept their awards or to file for de novo trial only to have some negotiating leverage, eventually resolving the matter well short of trial.⁴¹¹

In cases where proof of damages is based on objective, transparent information, the hearing master should be entitled to issue a damages award and indicate that he or she finds no genuine dispute of material fact as to the underlying data or the calculation of the proper damages award. In this way, the prevailing party can move for summary judgment on the award. The court is of course not bound by the master's findings and may not even give these findings deference.⁴¹² Framing the issue in this way gives the court an opportunity to reduce the cost of obtaining damages awards for deserving plaintiffs (and they have been found to be deserving due to previous proceedings in the case) and to eliminate defense incentives to seek review of a master's findings only to create settlement leverage or to raise plaintiffs' cost of obtaining relief.

The case for more forceful use of masters either as fact-finders or as streamlined preliminary adjudicators is strong, so strong that one puzzles as to why the idea has not received greater support. As with reservations about the class action generally, the answer appears to be that an amalgam of history, tradition, politics, and ideology combined to favor (at least in theory) highly individualized adjudication before an Article III tribunal (or its state law equivalent). Defense political interests have exploited this sentiment to their advantage. Witness the anti-class-action public relations campaigns attending passage of the PSLRA and CAFA. In addition, particular episodes in the history of complex litigation have tended to make courts reluctant to employ masters to their fullest extent in spite of their longstanding presence on the periphery of complex litigation.⁴¹³

411. See Nejeski & Zeldin, *supra* note 402 (describing Eastern District of Pennsylvania court-annexed arbitration program); Broderick, *supra* note 402 (same).

412. FED. R. CIV. P. 53(g)(3) provides:

The court must decide de novo all objections to findings of fact made or recommended by a master unless the parties stipulate with the court's consent that:

(A) the master's findings will be reviewed for clear error, or

(B) the findings of a master appointed under Rule 53(a)(1)(A) or (C) will be final.

413. See Wayne D. Brazil, *Special Masters in Complex Cases: Extending the Judiciary or Reshaping Adjudication?*, 53 U. CHI. L. REV. 394 (1986); David I. Levine, *The Authority for the*

Consider as a telling example the long-running litigation of *Halderman v. Pennhurst State School and Hospital*,⁴¹⁴ a class action brought on behalf of persons with mental disabilities contesting their treatment at Pennhurst, a large institution in Eastern Pennsylvania. The litigation resulted in the noteworthy relief of requiring the defendants to develop individual habilitation plans for each class member and to provide for community-based living arrangements to the extent possible for eligible class members. In essence, the trial court ordered that Pennhurst be depopulated and that class members received community-based living and habilitation in contrast to the “warehousing” and mistreatment the court found (after weeks of hearings) at Pennhurst.

This of course presented a rather daunting relief problem: how to effect and administer such an order. The trial court’s solution was the appointment of a special master to represent the class members during the relief stage of proceedings, develop implementation plans for the order, and monitor compliance with the order.⁴¹⁵ Subsequently, in response to the Third Circuit’s analysis on review, the court established a hearing master to make a preliminary resolution of disputes over habilitation arrangements.⁴¹⁶ For example, the families of disabled class members and the special master might disagree over the appropriateness of a particular placement or treatment. In addition, because of the nature of the disabilities of most class members, they were not articulate but could in many cases be determined to have a preference for a particular living and treatment situation. The hearing master heard contested cases of this type and made reports and recommendations to the trial judge, who ruled accordingly.

This large remedial undertaking moved forward, with class members eventually receiving habilitation plans and most placed in low-density (at least as compared to the Pennhurst facility) community living arrangements. Fairly late in the litigation, defense lawyers hit upon legal defenses to the court’s order that had not been emphasized below but found traction in the Supreme Court’s chariness of new individual rights and solicitude for states rights via expanded Eleventh Amendment power.⁴¹⁷ In *Pennhurst I*, the Supreme Court held that the relief requested

Appointment of Remedial Special Masters in Federal Institutional Reform Litigation: The History Reconsidered, 17 U.C. DAVIS L. REV. 753 (1984).

414. The original *Halderman v. Pennhurst* merits decision of the trial court is reported at 446 F. Supp. 1295 (E.D. Pa. 1977). The case is marked by dozens of opinions thereafter.

415. See 446 F. Supp. at 1326–28.

416. See 612 F.2d 84 (1979); 533 F. Supp. 661 (E.D. Pa. 1982).

417. See *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. at 126, 165–67 (Stevens J.,

could not be supported by the patient's "Bill of Rights" in the Developmental Disabilities Act of 1975, on the ground that this language was "merely in precatory terms" and did not confer substantive legal rights.⁴¹⁸ On remand, the Third Circuit court persevered, finding that the relief was nonetheless justified by the substantive rights created by Pennsylvania's own statutes.⁴¹⁹ In *Pennhurst II*, however, the Supreme Court held that the Eleventh Amendment prevented the federal district court from requiring that the defendants follow state law.⁴²⁰ (I wish I were making this up; *Pennhurst II*'s legal analysis is as silly as it sounds, a point more eloquently made in Justice Stevens's dissent.)⁴²¹

By this time, the Pennhurst State School and Hospital was well on its way to closure, the victim of depopulation, age, and changing state policy. Class members had generally found community placements long before. For purposes of this article, what makes the *Pennhurst* litigation more than an interesting remedial case study, an embarrassing example of judicial result-orientation, or a bad constitutional law precedent is the tone it set

dissenting regarding Court's willingness to consider Eleventh Amendment defense so late in the case and in contradiction to the Court's previous ruling requiring Third Circuit to consider whether Pennsylvania state law supported trial court decision).

418. See *Pennhurst State Sch. and Hosp. v. Halderman*, 451 U.S. 1 (1981).

419. 673 F.2d 647 (3d Cir. 1982).

420. 465 U.S. 89 (1983).

421. See 465 U.S. at 126–67 (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting) (footnotes and citations omitted). Justice Stevens stated:

This case has illuminated the character of an institution. The record demonstrates that the Pennhurst [facility] has been operated in violation of state law. . . . In 1981, after [years of litigation and adjudication] this Court ordered the . . . Third Circuit to decide whether the law of Pennsylvania provides an independent and adequate ground which can support the District Court's remedial order. The Court of Appeals, sitting en banc, unanimously concluded that it did. This Court does not disagree with that conclusion. Rather, it reverses the Court of Appeals because it did precisely what this Court ordered it to do; the only error committed by the Court of Appeals was its faithful obedience to this Court's command.

This remarkable result is the product of an equally remarkable misapplication of the ancient doctrine of sovereign immunity. In a completely unprecedented holding, today the Court concludes that Pennsylvania's sovereign immunity prevents a federal court from enjoining the conduct that Pennsylvania itself has prohibited. No rational view of sovereign immunity of the States supports this result. . . .

....

. . . Today, however, the Court casts aside well-settled, respected doctrine that plainly commands affirmance of the Court of Appeals—the doctrine of the law of the case, the doctrine of *stare decisis* (the Court repudiates at least 28 cases), the doctrine of sovereign immunity, the doctrine of pendent jurisdiction, and the doctrine of judicial restraint. No sound reason justifies the further prolongation of this litigation or this Court's voyage into the sea of undisciplined lawmaking. As I said at the outset, this case has illuminated the character of an institution.

Id. at 126, 165–67.

against use of masters in litigation.⁴²² In *Pennhurst I*, Justice White concurred specially to attack the appointment of a special master, stating that instead of using a special master

the court should have announced what it thought was necessary to comply with the Act and then permitted an appropriate period for the State to decide whether it preferred to give up federal funds and go its own route. . . . In any event, however, the court should not have assumed the task of managing Pennhurst or deciding in the first instance which patients should remain and which should be removed. . . . In enacting [the statute in question], Congress eschewed creating any specific guidelines on the proper level of institutionalization, leaving the question to the States to determine in the first instance. A court-appointed Special Master is inconsistent with this approach.⁴²³

Unfortunately, Justice White's factual presentation was a bit misleading in suggesting widespread usurpation of power over state and local executives or abdication of judicial duties. The Special Master was not charged with making "first instance" decisions as to habilitation but with monitoring the habilitation plans drawn by the government defendants and the conditions of the institution. The Special Master did not manage the facility but monitored the government defendants' compliance with the remedial order. The government defendants were cleared in the first instance of administering a program in which each disabled class member received a customized habilitation plan drawn by a mental health professional pursuant to a court order resulting after trial on the merits. As discussed above, the habilitation plan was subject to review and challenge by the Special Master and as necessary, further review before the Hearing Master and eventually the District Court. In subsequent *Pennhurst* opinions, Judge Raymond J. Broderick, who had presided over

422. *Pennhurst* will also always be interesting to me because of my peripheral personal involvement as law clerk to the Hon. Raymond J. Broderick (E.D. Pa.), who decided *Pennhurst* on the merits and presided over the ensuing years of enforcement of the decision. I worked with Judge Broderick on many *Pennhurst* decisions, some of which are reported, (*see, e.g.*, 526 F. Supp. 423 (E.D. Pa. 1981), 555 F. Supp. 1138 (E.D. Pa. 1982), 566 F. Supp. 185 (E.D. Pa. 1983)) so I am hardly neutral in the matter. I think *Pennhurst* was rightly decided in first instance, that the Eleventh Amendment should not have been considered a bar to the decision or relief, and that the remedies ordered were apt under the circumstances, including appointment of both a special master (which required a considerable staff) and a hearing master. I also found the performance of the masters (Special Master Carla Morgan, a health policy professional, and Hearing Master Michael Lottman, an attorney with expertise in disability law) to be exemplary during the time I was involved with the case.

423. 451 U.S. at 54–55 (White, J., joined by Brennan and Marshall, JJ., dissenting in part).

the case from the outset, occasionally tried to correct the record in this regard, but felt significantly chilled in his use of judicial authority by Justice White's criticism.⁴²⁴ But for purposes of influencing the judicial body politic, the damage was done. In a Supreme Court opinion that would be read by hundreds of judges, thousands of lawyers, and cited nearly 1,800 times during the ensuing twenty-four years (710 legal periodical citations and more than a thousand caselaw citations),⁴²⁵ a justice had condemned use of a master even in a complex case that seemed to call for use of a master or similar creative approach to remedial enforcement.

Of course, Justice White's salvo was not the first attack on masters. Although the Federal Rules of Civil Procedure have provided for use of masters since their inception of the Rules in 1938, there has always been concern that overly liberal use of masters will lead to unwise "outsourcing" of the judicial function. Then, the 1957 case of *La Buy v. Howes Leather Co.*,⁴²⁶ gave use of masters a particularly bad name because of Judge La Buy's conduct. Faced with an antitrust case that he found complex, Judge La Buy decided to appoint a master, presumably on the ground that this was easier than actually becoming a bit educated on the subject. The Supreme Court struck down the appointment of the master in an opinion that reads interstitially like a criticism of a judge who was a bit too worried about losing golf course time if forced to roll up his sleeves presiding over a major trial in a complex area.

In the wake of *La Buy*, special masters were in something of disrepute. Or at least there was reluctance to utilize masters unless the case was clear and the master's role was confined to one more peripheral to the merits to be decided by the court. Over time, the increasing complexity of litigation made masters popular as part of settlement arrangements, but masters appear not to have become well-established in litigation when, at the time of *Pennhurst I*, Justice White's attack provided another setback. Although masters continued to be used and grew in use during the course of the litigation growth of the 1980s and 1990s, this was often in the context of

424. See, e.g., 545 F. Supp. 410, 416–20 (E.D. Pa. 1982) (describing "Need for the Special Master" and describing primary functions of special master as monitoring community living arrangements, reviewing defendant-drawn individual habilitation plans, and monitoring conditions at Pennhurst facility).

425. Shepardization of *Pennhurst I* via LexisNexis as of July 15, 2005. The Court's 1984 *Pennhurst II* decision finding an Eleventh Amendment bar to the class claims has been even more widely cited (4,664 citations as of July 15, 2005, 715 in legal periodicals).

426. *La Buy v. Howes Leather Co.*, 352 U.S. 249 (1957).

administering a settlement⁴²⁷ or making preliminary discovery and case management decisions (as in the AT&T antitrust litigation)⁴²⁸ rather than as judicial adjuncts empowered to make preliminary determinations regarding aspects of liability and damages.

In addition, the mass tort cases of the 1980s created renewed interest in use of special masters and prompted considerable activity and innovation by masters.⁴²⁹ In part, my historical thesis is that the judicial system's use of masters has been disfavored on an official level while being embraced as a practical matter by many courts. Now, frankly, more than twenty years after *Pennhurst I* and nearly forty years after *La Buy*, it is time to give special masters and hearing masters a little more official recognition and a significant place at the litigation table for purposes of addressing the merits of disputes.

Even where the strictures of the system prevent factfinding or adjudication by masters, masters can nonetheless play an important role in framing issues and in clearing out the "underbrush" of contested matters to facilitate better deployment of judicial resources. In particular, greater use of masters can be used as an alternative to shutting the door on class actions when the inability to certify an entire matter for class treatment would otherwise effectively extinguish the claim. My proposal is that masters be deployed more in connection with adjudication of the merits of class claims, even in cases where the claims are emerging or novel rather than mature.⁴³⁰ In appropriate cases, masters may make the claim mature through use of information development, sampling, statistical analysis, and administration of test cases, setting parameters for more routinized analysis.

427. See, e.g., *Rajender v. Univ. of Minn.*, 730 F.2d 1110, 1112 (8th Cir. 1984) (describing settlement in Title VII action utilizing three special masters to administer proceedings).

428. See *United States v. AT&T*, 461 F. Supp. 1314, 1348–49 (D.D.C. 1978). See also *Special Master's Guidelines for the Resolution of Privilege Claims in United States v. AT&T*, 86 F.R.D. 603, 604 (D.D.C. 1979).

429. See Symposium, *The Role of Special Masters in the Judicial System*, 31 WM. MITCHELL L. REV. 1193 (2005); Mark A. Fellows & Roger S. Haydock, *Federal Court Special Masters: A Vital Resource in the Era of Complex Litigation*, 31 WM. MITCHELL L. REV. 1269 (2005); Lynn Jokela & David F. Herr, *Special Masters in State Court Complex Litigation: An Available and Underused Case Management Tool*, 31 WM. MITCHELL L. REV. 1299 (2005); Margaret G. Farrell, *The Function and Legitimacy of Special Masters*, 2 WIDENER L. SYMP. J. 235 (1997) (reviewing law, history, and practice under Fed. R. Civ. P. 53); McGovern, *supra* note 125 (describing use of masters, including author's own activity, in working to streamline mass tort case processing); Rosenberg, *supra* note 398 (noting and approving practice and describing author's own experiences).

430. See McGovern, *supra* note 125 (suggesting that use of masters is most apt where the tort claim is mature and thus more susceptible to systemic valuation and treatment and that masters may be inappropriate for cases with less developed track records).

In addition, federal courts, now the dominant forum for class actions, may wish to consider developing a cadre of judicial adjuncts to which judges may refer portions of class actions for statistical sampling, fact development, and preliminary decision-making. Two practical drawbacks of using masters are the cost and the logistics of selection. Generally, appointment of a master or stipulation as to the appointment of a master entails cost-sharing by the parties. Even in large cases with well-heeled parties, this can be a significant cost. Masters are usually drawn from the ranks of private practice, private industry, or academia. These persons normally are paid an hourly rate commensurate with their station. Figures of \$500 or more per hour are common. In a large matter, this adds up. In addition, although the expertise of these masters is attractive, there may be disputes over their neutrality. Most persons with expertise in a field (law, science, accounting, the stock market) have acquired a point of view (or at least a perceived point of view) with this expertise. As a result, the type of master that may be attractive to plaintiffs may be an anathema to defendants, and vice versa.

As an alternative, the federal system may find it relatively cost-effective to develop a group of masters with a variety of expertise in the fields that tend to be at issue in class actions or mass actions. These government-employed masters could be either civil servants or Article I judicial officers. Their status should not make much difference in light of the role I advocate for them and the judicial control to which they would be subject. Obviously, there would not be high demand for their expertise in all judicial districts. Although there might be sufficient demand in places like New York, Chicago, Los Angeles, or Washington, D.C., it is not relevant where the Federal Masters would be headquartered. Either they could come to the venue of a matter for purposes of conducting conferences, investigations, or hearings—or the litigants can come to the location of the Masters (I am mightily resisting the urge to call this situs the “Master’s Chambers”). As a matter of experimentation, an Office of Federal Masters could be established in Washington that could be used at the discretion of trial judges in class actions, mass actions, or any other matter on which the court found it useful to employ a master, without separately “employing” a master from the private sector and taxing the parties for the costs of the master.⁴³¹

431. I have made similar suggestions for creation of a group of Article I specialist discovery jurists. See Jeffrey W. Stempel, *Ulysses Tied to the Generic Whipping Post*, 64 LAW. & CONTEMP. PROBS. Spring/Summer 2001, at 197, 241. I have also proposed a similar wing of the “multi-door courthouse” composed of government-employed ADR officers assisting in dispute resolution. See

I realize that I am advocating an enlargement of the federal judicial force in a manner that tends to make it look more administrative/Continental and less adjudicatory/Anglo-American. But fidelity to historical self-concept seems at best only a rebuttable default rule of how best to process difficult litigation. For the reasons set forth in this article, I am advocating greater drive toward administrative-bureaucratic treatment of class actions (and other complex matters as well, I suppose) because of the shortcomings of the traditional court-adjudication model. Although this model can be a powerful force for investigating matters, developing new claims and defenses, and providing an avenue of relief when the executive and legislature fail, the traditional judiciary has been hampered in its ability to deal with class actions, mass torts, and similarly complex matters. Because of these limitations, some worthy class actions are not fruitfully resolved and some large, chronic social ills persist in an expensive way that compensates lawyers at considerable cost to victims and defendants.

The asbestos litigation phenomenon is perhaps the shining example of this problem. It cries out for a legislative solution, but none has come during the past twenty years. Other mass torts present variants of this problem of ongoing disputing with high transaction costs even after liability issues are reasonably clear. Some, as with the tainted blood of *Rhone-Poulenc*, present a perhaps even bigger problem of victims lacking full recompense when denied class treatment of their claims. So, too, with the smoking victims of *Castano*. In the realm of investor litigation, the problem may not be as severe, but there are nonetheless too many cases like *Newton* in which blameworthy behavior by those in the securities industry is not well-deterred because it slips through the economic cracks of the current system.

4. *Peeking at the Merits and Peaking at the Merits*

The traditional view of class-action certification posits that the decision should be made on the basis of the allegations of the complaint and not in connection with the actual strength of the contentions. At one level, this

Jeffrey W. Stempel, *Reflections on Judicial ADR and the Multi-Door Courthouse at Twenty: Fait Accompli, Failed Overture, or Fledgling Adulthood?*, 11 OHIO ST. J. DISP. RESOL. 297 (1996). Although those ideas, like this article's proposal of an "Office of Federal Special Masters," are unlikely to be adopted in the current environment, in which Congress has given only tepid resource support to the Third Branch, I continue to like both ideas and in general argue that the judiciary should have more judicial adjuncts under its control and should depend less on private individuals serving tours of duty as special masters, arbitrators, ADR professionals, or the like.

makes sense as consistent with the prevailing view that pretrial proceedings should not substitute for the factual determinations to be made at trial (unless the facts are not genuinely in dispute, making the case apt for summary judgment). For class actions, this view has probably become outmoded. Even if class certification lacks the *in terrorem* effect posited by its critics, class certification changes the dynamics of the litigation in a manner favorable to the plaintiff. As a result, it is not unreasonable for courts to engage in a modest examination of the strength of plaintiffs' contentions when determining whether to accord class treatment to all or part of a matter.⁴³²

Although this puts some significant pressure on plaintiffs to expend resources early so they can demonstrate at least a non-speculative, non-frivolous basis for the claims asserted, this seems better than the alternative of refusing class treatment in cases where liability is assumed (for purposes of deciding a motion) because of generalizations about the degree of difference found among the members of the plaintiff class. As an alternative, courts that satisfy themselves that the plaintiffs' contentions have some strength are in a position in which they can feel comfortable according the matter the type of flexible treatment advocated in this article.

If the plaintiffs' complaint is merely unverified assertion, one can understand judicial reluctance to accord even partial class treatment of a matter to plaintiffs and counsel who may not be "deserving" of such procedural support. However, if the claims appear to have merit, the court is not favoring the claimants with class treatment but is merely refusing to favor the defendants by withholding class treatment. For example, if the initial look at the merits is promising, a court should feel comfortable invoking Rule 23(c)(4)(A) to provide class treatment of common issues. If determination of the class-certified issue(s) demonstrates validity to all or part of the plaintiffs' liability claim, the court should be willing to be more flexible in use of statistical sampling, use of masters, use of test cases, presumptive compensation schedules, or other tools that will streamline resolution of the case so that the plaintiffs are not deprived of the benefits of class treatment merely because of some variation in their injury.

Use of the Rule 23(c)(4)(A) issues class on key elements of the claim is particularly important in that it provides a sound justification for the

432. See Bone & Evans, *supra* note 103 (advocating earlier and increased examination of the merits of class action claims); Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 3 (2001) (proposing that courts examine value of claims and number of claims as part of certification decision).

admittedly aggressive use of non-traditional resolution advocated in this article. In the abstract, defendants can rightly complain if a court relaxes traditional approaches to adjudication and proof in a manner that favors plaintiffs. These defendants can rightly complain that they should be entitled to hold plaintiffs to the ordinary standards of litigation proof, even if this presents adverse economic consequences for the plaintiffs.

However, after a court has determined that a defendant concealed information, misrepresented, made a dangerous product, engaged in fraud, or failed to discharge a legal duty, everything changes. At this juncture, the defendants no longer should be accorded the presumptions of non-liability that impose most litigation burdens on a plaintiff as the party seeking relief. Now, a court has adjudicated the defendant to be blameworthy in some significant way, even if the court has yet to find all elements of a cause of action satisfied as to the plaintiff class as a whole. At this juncture, it is no longer unfair to depart in reasonable ways from the traditional modes of proof and adjudication.

Consider, for example, the question of damages in a mass tort claim among a class of litigants that has injuries, but not the type of grave injuries that attract lawyers willing to work for a contingency fee and invest significant expenditures developing and proving the individual's claim. If, after a class-action determination that defendant has engaged in tortious conduct, it would seem to elevate form over substance to refuse to permit courts to at least explore assessing damages through use of test cases, samples, statistical analysis, presumptive schedules of compensation, and processing by masters.

A more persuasive case still for a flexible approach to damages can be made for investor claims. Consider *Newton v. Merrill Lynch*, for example. Once it has been determined that the broker-defendants did not satisfy the duty of best execution and did not disclose this to class members and that this constitutes a violation of the anti-fraud provisions of Rule 10b-5, it is hard to be sympathetic if the defendants complain about statistical sampling, test cases, or administrative-like master's hearings to assess presumptive damages. Damages may even be determinable as a matter of law for some class members.

5. *Process Concerns*

As discussed throughout this article, many observers, particularly "hard-core" proceduralists, will object to the article's suggestions of relaxing traditional approaches and "working so hard," if you will, to allow class treatment to benefit plaintiffs. As discussed in the previous

subsection, part of my answer to this criticism is to suggest greater use of issue class actions to determine that defendants are in fact at least somewhat culpable, prior to departing significantly from the traditional models of adjudication and traditional restrictions on class treatment. Once this takes place, the inquiry should be significantly different than at the outset of the cases when the parties are unsullied by any adverse determinations about their behavior. Much of today's class action jurisprudence has it backwards in that courts attempt to make a very important decision on certification (often of the entire matter rather than merely a single issue) without plaintiffs having first established any bona fides of their assertions. By contrast, my proposal would more often ensure that class treatment is being accorded to claims that truly have merit.

In addition, I want to be clear about the degree to which I am advocating relaxation of the traditional approach. I am not suggesting that "any" selection of test cases, sampling, or statistical analysis will suffice. On the contrary, use of these devices would need to satisfy applicable quality control standards. Perhaps more important, they would have to satisfy the court that the procedures were sufficiently fair and likely to enhance resolution of the dispute so as to prompt the court to exercise its discretion in favor of such approaches. The approaches I advocate all require an affirmative judicial determination that they are apt for the case and context in question. I am not advocating a change in the general norms or default procedures of dispute resolution. Before any of what I propose can happen, the plaintiff class (or a defendant that sees value in pursuing class treatment of some matters) must convince the court to take these steps, which is itself a significant constraint on use of this sort of class treatment.

In like fashion, I am not suggesting repeal of the Seventh Amendment (although, after years of reliably Association of Trial Lawyers of America-like sentiments on the issue, I have come to see jury trial as vastly overrated).⁴³³ The Seventh Amendment will probably always be among us. But this does not mean that unreasonably constraining aspects of the jury-trial guarantee cannot be attacked through flexible devices like master-conducted hearings or presumptive compensation schedules, so long as these devices stop short of outright substitution of jury determination of

433. See *supra* text accompanying note 317 (discussing problems of jury determination); Graham C. Lilly, *The Decline of the American Jury*, 72 U. COLO. L. REV. 53 (2001) (noting perceived defects in jury system); Douglas G. Smith, *Structural and Functional Aspects of the Jury: Comparative Analysis and Proposals for Reform*, 48 ALA. L. REV. 441 (1997).

contested facts. I am only proposing making the exercise of that right less attractive under limited circumstances where the Amendment is being invoked more to thwart class treatment than to infuse adjudication with the voice of the people.

In similar vein, due process concerns should not impede greater use of class treatment of at least some aspects of cases. So long as the complaining litigant is permitted to challenge and attain review of the nontraditional class treatment to which it objects, it would seem that due process is satisfied. Due process should not impart a right to litigants to insist on traditional adjudication in the face of a judicial determination that the case may profit from partial class treatment coupled with use of nontraditional means of adjudication.

And, if nothing else, there is the right to opt out. Where a court embarks on nontraditional class treatment of a matter, it should provide class members with the chance to opt out at an apt juncture. For instance, in the examples used throughout this article, it would be appropriate to notify the class and permit opting out after liability has been determined in a mass tort and prior to the court's embarking on statistical sampling to determine class-member damages.⁴³⁴ In an investor's 10b-5 claim such as in *Newton*, it would be apt to provide disclosure and a chance of opting out after the court determines to examine the effect of use of a particular posted price through sampling, statistical analysis, or abbreviated hearings before a master.

One might also characterize my proposal as in many cases permitting, in effect, a very extended opt-out to class members. For example, if the court utilizes sampling or master's hearings to presumptively determine injury but permits demands for de novo review, the court has essentially established a fail-safe opt-out for the benefit of the class member. If the class member likes and accepts the results of the court's streamlined procedure for determining damages, the class member need do nothing. If the class member is unhappy with the result of an alternative procedure,

434. See, e.g., Mark C. Weber, *A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor*, 59 OHIO ST. L.J. 1155, 1158 (1998) (arguing that class actions with preclusive effect should not be settled unless all class members have the option to reject settlement and opt-out at time of offer, with exceptions for limited fund cases or in other circumstances "in which the problems of class members holding out their agreement would be insurmountable"). See also Coffee, *Class Action Accountability*, *supra* note 98 (suggesting that enhanced "exit" for class members is a more productive means of addressing concerns over class settlements than efforts to increase class-member voice or control or performance of class counsel); Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529 (2004).

the class member may demand trial de novo. Of course, the defendant resisting class treatment or streamlined adjudication may take that decision out of the hands of a plaintiff class member by demanding trial de novo on its own behalf. In any event, after the proverbial dust has settled, it is hard for me to be concerned that any litigant lacked meaningful ways to avoid class treatment and streamlined adjudication if that was the litigant's wish.

This, of course, raises a practical problem with my proposals: are they so free-form and subject to escape hatches that they operate to strip the class-action device of perhaps its greatest feature, the opportunity for the parties (particularly beleaguered defendants) to achieve global peace in the matter? I think not. I am not naive enough to think that even wise and creative judicial adoption of a more flexible approach to class actions will make trial itself more attractive. Parties will still want to settle and will settle. But in my envisioned world, plaintiffs need not settle too cheaply (or drop meritorious claims altogether) because of the economics of disputing and judicial hesitancy to utilize class treatment. As discussed, the net effect will be to provide more class treatment, which will put somewhat more pressure on defendants to settle in some circumstances. But, in the cases I posit of a preliminary showing of defendant culpability, defendants should face some pressure to settle as compensation to claimants and as deterrence against future wrongdoing.

Further, this article is not advocating any particular solution to the question of how to ensure fair settlements that are not tainted by impermissible conflicts among class members or counsel. There is considerable commentary on this issue that lies beyond the scope of this article.⁴³⁵ For the record, I am against settlements that unduly favor some class members at the expense of others (unless the differential treatment has a legal basis; for example, in asbestos cases mesothelioma victims should get more than pleural plaque victims). I am also against settlements that pay counsel fees disproportionate to class recovery. But none of the proposals in this article will necessarily increase the number of such settlements and certainly will not deprive courts of power to prevent such settlements pursuant to Rule 23(e). Those are separate issues presenting separate challenges for courts and the judicial system. Whether those challenges are successfully met turns on factors other than expanded class treatment as proposed by this article.

435. See, e.g., Coffee, *Class Action Accountability*, *supra* note 98; Weber, *supra* note 434; *Legal Study Questions Rationale for Limiting Class Actions*, LIAB. & INS. WEEK, Jan. 20, 2004; David A. Anderson, *Improving Settlement Devices: Rule 68 and Beyond*, 23 J. LEGAL STUD. 225 (1994).

In commenting on this article at the Symposium Conference, Judge Gerard Lynch diplomatically raised the question of whether the approaches proposed in this article were impractical not because of the barriers posed by legal doctrine but because of the practical limits of judicial resources. He specifically noted the long line of pending cases in the Southern District of New York that are not high-stakes mass torts or investor class actions but that nonetheless require equal consideration from the court.⁴³⁶ Even the federal court located in the epicenter of American commerce and litigation must deal with “minor” criminal matters, landlord-tenant disputes, student-loan delinquency, and the like. In this environment, he noted, there are practical limits on the opportunities for trial judges to entertain or craft new, creative, hybridized approaches to class treatment of cases.

Without doubt, Judge Lynch’s point has merit. In the real world, formal approaches and the status quo doctrine are the norm in part because this is the path of least resistance for overburdened courts⁴³⁷ that must process a large and eclectic mix of cases with efficiency, in light of budgetary and resource constraints. Unless a court is strongly motivated to work against the tide to provide class treatment or is pushed in that direction by very effective class counsel (who in most cases will be met with an equal and opposite reaction from defense counsel and thus be largely neutralized), an academic proposal for more expansive approaches to class treatment may be more likely than most academic proposals to remain an academic proposal.

But if the judicial system surmounts the politics and sociology of inertia, my own prediction is that the approaches suggested in this article would make the problem of constrained judicial resources better rather than worse, perhaps providing ancillary benefits in areas outside class-action litigation. For example, a cadre of special masters capable of deployment in service to the courts would presumably ease the burden on judges simply through the addition of more personnel alone. In addition, to the extent that these masters are delegated tasks that are time consuming but do not involve core adjudicative functions, this should give Article III judges more time for reflection as to case management and the structuring of disputes before the court. Greater use of issue certification pursuant to Rule 23(c)(4)(A) could well make large, complex cases more manageable

436. Hon. Gerard Lynch, Remarks at ILEP Conference (Panel III) (Apr. 8, 2005).

437. It may also even bring sound, perhaps even optimal results, notwithstanding my criticism to the contrary. I take pains to note that I am extrapolating from Judge Lynch’s comments in ways with which he might well disagree.

by dividing them for conquest, or could at least provide more expeditious and calibrated preparation for settlement by the parties. Sampling and statistical analysis (especially if it need not be done from the ground up by the judge) could avoid, shorten, or streamline trials and hearings.

Even the best of reform proposals normally require adequate institutional commitment if they are to succeed. This article's suggestions, perhaps being something less than the "best" of proposals, while still, I hope, "good" proposals, will need institutional support and financing as well.⁴³⁸ Ultimately, improved use of expanded class treatment depends on the electoral political system as much as it depends on the judicial system. But, at least during the past decade, the political arena has not been a friendly environ for class actions.

CONCLUSION: AN EQUILIBRIUM OPPORTUNITY FOR A FUNCTIONAL APPROACH TO CLASS TREATMENT

Class actions have been maimed but not killed by the past ten years of backlash against them. In particular, investor class actions retain considerable vitality in spite of the PSLRA. But class treatment remains underutilized in ways that tend to reduce legal deterrence and undercompensate victims of "small wrongs." This presents a problem that the judicial system can ignore or insist on "solving" only through specific legislation or Rule 23 revision.⁴³⁹ Alternatively, the judicial system can address these problems itself by taking a more encouraging approach to

438. Although my suggestions will result in an increase in the judicial branch payroll, I dispute any suggestion that they will raise net social costs. That remains to be seen and will vary according to the effectiveness with which the expanded approaches to class treatment improve adjudication and serve the public-policy purposes of the substantive law. If they do, this should reduce the degree to which tortfeasors and those committing securities law violations externalize the costs of their conduct on victims or society generally. For example, if a tortfeasor or its insurer does not compensate the victim, society might do so through government aid programs. If securities fraud is unpunished, it not only may beget more such fraud but will impose costs on those adversely impacted. It may well be cheaper in totality to expend more resources on judicial activity in order to reduce costs imposed on society by private parties and to force those parties to provide compensation to the injured.

439. And I am by no means against a revision of Rule 23 to expand its use. Some of the recent amendments to Rule 23 regarding interlocutory appeal and settlement have, in my view, been useful developments. But as a practical matter, it will be hard to develop the substantive professional consensus for an expanded Rule 23 and to obtain agreement on specific language. For example, a promising draft proposal of the 1990s was not implemented. See Robert G. Bone, *Rule 23 Redux: Empowering the Federal Class Action*, 14 REV. LITIG. 79 (1994). To a large degree, this is a function of not only ideological and political division within the bar but also the degree to which context is so important to determining proper treatment of class claims. Consequently, the area will always be heavily vested with judicial discretion. I am simply arguing for moving exercise of that discretion in a direction of greater receptiveness toward class treatment, notwithstanding some of the current backlash against class actions.

class treatment of matters and resolution of class claims, as suggested in this article. More specifically, I am suggesting that courts exercise their discretion and flexibility in favor of more class treatment rather than less and that courts adopt a less formalist and more functionalist approach to class claims.

Although the distinction is necessarily oversimplified, as a general matter, two central strands of thought in the law are the formalist and the functionalist (often labeled “instrumentalist”). Under a formalist approach,

correct legal decisions are determined by pre-existing ground rules, usually as expressed in legislation and judicial precedents setting forth rules of legal doctrine. A formalist court faced with interpretive issues attempts to reach its decision solely by logical deduction, applying pre-existing legal rules to the facts of a particular case. From the general rule, the formalist [court] reaches a specific resolution of the case before [the court].

Under this formalistic theory, the law is viewed as a complete and autonomous system of logical principles and rules, where the judge applies the law and remains socially neutral. Formalists view this approach as a matter of logical necessity rather than a matter of choice.

....

Accordingly, formalist judges generally apply the philosophy of judicial restraint, in favor of established legislative and administrative authority.⁴⁴⁰

Formalism also frequently operates in tandem with a restrained, textualist approach toward interpreting statutes, rules, regulations, contracts or other documents.⁴⁴¹ The formalist-textualist tends to read rules and statutes narrowly, sometimes even hyperliterally, to preclude relief requested, to refuse to excuse a deviation, or to otherwise limit judicial involvement.⁴⁴² Although it is comparatively rare, a formalist-textualist

440. FISCHER ET AL., *supra* note 316, § 2.03[A] (citations omitted).

441. See William N. Eskridge, Jr., *The New Textualism*, 37 UCLA L. REV. 621 (1990) (reviewing textualism in statutory interpretation and treating it as a formalist enterprise); Daniel A. Farber, *The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law*, 45 VAND. L. REV. 533 (1992) (countering formalist approaches to statutory interpretation with practical reason model of interpretation).

442. See, e.g., *Circuit City Stores, Inc. v. Adams* 532 U.S. 105 (2001) (adopting similar narrow view of the scope of section 1—that it only applies to workers directly involved in interstate transportation of goods, thus essentially mooting the importance of *Gilmer*); *Gilmer v.*

could be expansive rather than restrictive in approaching legal questions, perhaps the best example being Justice Hugo Black's absolutist views on the First Amendment.⁴⁴³ In addition, formalist analysis may be seen as more theoretical and less pragmatic,⁴⁴⁴ or more deductive and less inductive.⁴⁴⁵

Interstate/Johnson Lane Corp., 500 U.S. 20 (1991) (holding that broker employee's required assent to Stock Exchange arbitration agreement was not part of his "contract of employment" and hence was not subject to statutory provision in 9 U.S.C. § 1 stating that arbitration agreements are not enforceable if contained in contract of employment); United States v. Locke, 471 U.S. 84 (1985) (strictly interpreting statute requiring mining claims to be renewed "prior to December 31" to preclude renewal where application was made on December 31, thereby divesting family of gravel mining rights they had exercised for more than twenty years); Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982) (rigidly imposing per diem damages provision of Jones Act with result that seaman deprived of ten days' wages received award of more than \$300,000 due to long duration of litigation; the result could be defended as necessary to vindicate the purpose of the Jones Act but the Court instead took a formalist-textualist approach); Solomon v. U.S. Healthcare Systems of Pa., Inc., 797 A.2d 346 (Pa. Super. Ct. 2002) (rejecting doctors' action against insurance company for extremely slow payments under insurance agreement, taking view that since contract does not state that payments must be made within a reasonable time, insurer is permitted complete latitude as to when to pay physicians); see Jeffrey W. Stempel, *Reconsidering the Employment Contract Exclusion in Section 1 of the Federal Arbitration Act: Correcting the Judiciary's Failure of Statutory Vision*, 1991 J. DISP. RESOL. 259).

443. Justice Black took the position that the words "Congress shall make no law" operated as an absolute prohibition on any restrictions on freedom of speech or the press and was unwilling to engage in examination of historical factors or balancing of interests in First Amendment matters. See HOWARD BALL & PHILLIP J. COOPER, *OF POWER AND RIGHT: HUGO BLACK, WILLIAM O. DOUGLAS, AND AMERICA'S CONSTITUTIONAL REVOLUTION* 10, 138 (1992).

Among other prominent jurists, Judge Stephen Reinhardt of the Ninth Circuit occasionally appears to take this approach in reading a text broadly and absolutely to overpower a state law or practice. See, e.g. *Compassion in Dying v. Washington*, 79 F.3d 790, 799 (9th Cir. 1996) (finding a constitutional "right to die" based on insufficient justification for government interference with personal liberty, privacy, dignity, and freedom), *rev'd sub nom. Washington v. Glucksberg*, 521 U.S. 702 (1997) (holding that assisted suicide is not fundamental liberty interest protected by Due Process Clause).

Among academics, one finds some of this same broad formalist-textualism in the writings of Ronald Dworkin and Akhil Amar. See RONALD DWORKIN, *LAW'S EMPIRE* 160 (1986) ("Pragmatism is a skeptical conception of law because it rejects genuine, nonstrategic legal rights."); Akhil Reed Amar, *Fourth Amendment First Principles*, 107 HARV. L. REV. 757, 801-11 (1994) (arguing that the Framers intended the Fourth Amendment to embody a reasonableness requirement for all government evidence-gathering activity).

This type of expansive formalist-textualism is in general a more "liberal" formalist-textualism as contrasted to something like the conservative formalist-textualism of Justices Scalia and Thomas, but like so much other general legal description, it is an oversimplification. Justice Black's views would presumably have put him in the camp of jurists opposed to government regulation of "hate speech," a type of limitation on expression normally supported by political liberals. My larger point is that formalist textualism, whether applied with a liberal or conservative slant, is generally a less useful interpretative mode than functionalism.

444. See Ellen E. Sward, *Justification and Doctrinal Evolution*, 37 CONN. L. REV. 389, 393 (2004).

445. See William N. Eskridge, Jr., *Relationships Between Formalism and Functionalism in Separation of Powers Cases*, 22 HARV. J.L. & PUB. POL'Y 21 (1998). See also Frank Easterbrook, *Formalism, Functionalism, Ignorance, Judges*, 22 HARV. J.L. & PUB. POL'Y 13 (1998); Peter B. McCutchen, *Mistakes, Precedent, and the Rise of the Administrative State: Toward a Constitutional*

In tension with the formalist approach, which continues to reign as the dominant approach and what most observers deem “legal reasoning,” is the “countervailing school of American jurisprudence” that is willing to depart from precedent and literal application of rules in cases where such departure is justified by other factors, such as the policy underlying the respective area of law, the social facts of the matter, and the practical impact that will be felt by exercise of any of a court’s various options for adjudicating the dispute.⁴⁴⁶ The non-formalist approach, or portions of it, travels under names such as Instrumentalism, Legal Realism, or Legal Pragmatism, but Legal Functionalism seems to me to best capture the concept.⁴⁴⁷ “Put another way, where legal formalism emphasized logic, precedent, text, legal functionalism emphasizes sociology, party intent, and . . . purpose as well as social and individual expectations.”⁴⁴⁸

As is apparent by this point of this article, I am a proud functionalist, generally advocating this approach as the preferred method of addressing any legal problem. A few caveats are in order, however. My concept of functionalism is one in which formal norms set parameters on the types of functional decision-making that may be undertaken by a court. Linked to this is the notion that even well-reasoned sociological arguments cannot overcome clear positive-law directives such as the Constitution, a statute, longstanding settled judicial precedent and, of course, procedural rules such as Federal Rule of Civil Procedure 23. To the extent that clear positive law forecloses the expanded class treatment I advocate in this article, the expansion cannot occur. For example, the Supreme Court’s recent decision in *Dura Pharmaceuticals, Inc. v. Broudo*,⁴⁴⁹ unless subsequently modified, would preclude some—but by no means all—functional approaches to expanded class treatment proposed in this article, at least as to loss-causation questions presented in Rule 10b-5 claims.⁴⁵⁰

But being bound by clear authoritative text is not the same thing as giving a crabbed or hyperliteral reading to the text. To be bound by positive law is not the same thing as to be enslaved by traditional thinking on a subject. So long as functionalism does not become partisan straining in service of a personal policy preference (as opposed to a widely

Theory of the Second Best, 80 CORNELL L. REV. 1 (1994); Peter L. Strauss, *Formal and Functional Approaches to Separation-of-Powers Questions: A Foolish Inconsistency?*, 72 CORNELL L. REV. 488 (1987).

446. FISCHER ET AL., *supra* note 316, § 2.03[B].

447. *Id.*

448. FISCHER ET AL., *supra* note 316, § 2.03[B]. *Accord* Sward, *supra* note 444, at 393–94.

449. 125 S. Ct. 1627 (2005).

450. *See supra* text accompanying notes 206–300 (discussing *Dura Pharmaceuticals*).

recognized public policy), it is legitimate legal functionalism to attempt to avoid undue constraints in the use of Rule 23. Although functionalism traditionally and today takes a comparative back seat to law's normal preference for formalism, there is ample support for functionalist approaches throughout the mainstream legal community, with many contending that functionalist/pragmatist approaches in fact dominate, but do so sub silentio.⁴⁵¹ The same Supreme Court that was in my view crabbed and formalist in *Dura Pharmaceuticals* also decided a number of cases in the same term through functional analysis.⁴⁵²

Another circadian rhythm of the law is a drive toward equilibrium between the various polar opposites of law vying for dominance: stability and change; rights of plaintiffs and rights of defendants; text and context; duty and freedom; rights and responsibilities; deterrence of wrongdoing; inducement of care; facilitation of economic activity; and so on. The judicial system, through both the conscious and subconscious decisions of judges and policymakers, strives for equilibrium in a manner that mutes the largest potential impact of new developments or seeks to restore balance when the respective power of litigants or approaches has become lopsided.⁴⁵³

451. See RICHARD A. POSNER, *LAW, PRAGMATISM, AND DEMOCRACY* (2003) (arguing for idea of liberal state based on pragmatic theories of government); *THE REVIVAL OF PRAGMATISM: NEW ESSAYS ON SOCIAL THOUGHT, LAW, AND CULTURE* (Morris Dickstein ed., 1998); CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* (1999) (arguing that dominant theme in recent Supreme Court jurisprudence has been cautious and pragmatic functionalism).

452. See, e.g., *Rousey v. Jacoway*, 544 U.S. 320 (2005) (holding that Individual Retirement Accounts (IRAs) were not part of debtor's estate even though they were in theory funds available on demand due to practical impediment to withdrawals before age fifty-nine and a half because of substantial penalties for early withdrawal); *Smith v. City of Jackson*, 544 U.S. 228 (2005) (permitting disparate-impact claims under Age Discrimination in Employment Act even though such claims not expressly authorized in ADEA because of similarity to Title VII, which recognizes such actions, and because it serves functional policy purpose of ADEA); *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005) (permitting action under Title IX for retaliation by male high school coach who complained of school's neglect of girls sports); *Roper v. Simmons*, 543 U.S. 551 (2005) (finding execution of juveniles unconstitutional in part because of research establishing differences between adult and juvenile cognition, impulse control, and ability to appreciate consequences of acts).

All of these cases showing more of a functional or policy-purposivist orientation by the court were decided within a month of the more formalist *Dura Pharmaceuticals* decision. *But see* *Commissioner v. Banks*, 543 U.S. 426 (2005) (taking more formalist approach in holding that entire amount recovered by discrimination plaintiff must be treated as gross income for tax purposes notwithstanding that plaintiff is obligated to pay one-third of recovery to attorney pursuant to contingent fee agreement). Both formalism and functionalism appear to be alive and well at the U.S. Supreme Court and undoubtedly throughout the legal system. Although formalism may be dominant, it is not all-dominant.

453. See Jeffrey W. Stempel, *Arbitration, Unconscionability, and Equilibrium: The Return of Unconscionability Analysis as a Counterweight to Arbitration Formalism*, 19 OHIO ST. J. ON DISP. RESOL. 757 (2004) (arguing that courts have rediscovered unconscionability as a defense to contract

Class actions have been under attack of sorts for more than ten years. Although the assault has been only partially successful, use of class treatment has been restrained and even discouraged by the combination of the PSLRA, adverse court decisions, ongoing political criticism, and CAFA. Although these efforts are not all strictly “anti-class action” and arguably have had some salutatory effect on class actions, the net effect has been law reform in the direction of restricting class treatment rather than expanding it.

At this juncture, some equilibrium adjustment is arguably in order. Despite the past ten years of largely anti-class effort, class actions have retained vitality and continue in frequent use. But class actions have been set back and remain underutilized. Class treatment could be given to a significant number of mass torts and to investor claims in which it is now severely limited or denied altogether. Courts taking a more flexible approach could restore equilibrium by making it easier to provide society with the benefits of class treatment in ways that do not invite the types of purported class abuses that animated passage of the PSLRA and CAFA.

Taking a more flexible approach to class actions and restoring equilibrium would provide the advantages of vindicating small claims, encouraging apt corporate behavior, and deterring wrongdoing in a manner designed to be less costly than traditional, stand-alone individual litigation. Such efforts would seem particularly in order for investor class actions, which tend not to present some of the problems commonly associated with mass tort class actions. Unless one embraces corporate immunity as a greater goal, the type of incremental, cautious expansion of class treatment urged in this article would appear to be a clear improvement over the status quo. At the very least, our jurisprudence of class treatment should not foreclose the effort.

The modern class action is now nearly forty years old. When promulgated in 1966, Rule 23 was surrounded by an atmosphere of optimism for legal and government enterprise. Lyndon Johnson’s “Great Society” and “War on Poverty”⁴⁵⁴ and the Warren Court’s expansion of

enforcement in response to shift in favor of enforcing arbitration agreements, requiring courts to give greater scrutiny to unconscionability issues presented in arbitration clauses). A similar form of equilibrium analysis has been applied to assess Supreme Court decision-making, William N. Eskridge, Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 HARV. L. REV. 26 (1994), and retroactive application of judicial decisions, Jill E. Fisch, *Retroactivity and Legal Change: An Equilibrium Approach*, 110 HARV. L. REV. 1056 (1997).

454. See BRUCE J. SCHULMAN, LYNDON B. JOHNSON AND AMERICAN LIBERALISM: A BRIEF BIOGRAPHY WITH DOCUMENTS (1995).

civil rights⁴⁵⁵ were contemporaries to the Advisory Committee's movement in favor of the more forceful class-action rule that was intended to provide voice to those who might otherwise not have it and to deter wrongdoers who previously were effectively insulated from responsibility by the economics of disputing.

Rule 23 was promulgated in an atmosphere of optimism regarding the legal system's ability to help. That optimism has waned and been to a degree replaced by far more limited notions as to what class actions can accomplish and whether they are a net good for society. Although starry-eyed optimism can be as much the foe of progress as any reactionary, there is a difference between tempering optimism with realism and having optimism descend into pessimism or cynicism. The fortieth anniversary of the modern class action provides a good juncture for taking stock and correcting course to recapture some of the optimism about and potential for class treatment of claims.

455. The most widely known examples are the Warren Court's expansion of the rights of criminal suspects and defendants. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 436 (1966); *Escobedo v. Illinois*, 378 U.S. 478 (1964). But this rights revolution was hardly confined to criminal law. *See, e.g.*, *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969) (holding that First Amendment permits high school student to wear black armband to school in protest of Vietnam War notwithstanding school dress code); *Baker v. Carr*, 369 U.S. 186 (1962) (holding that state legislative apportionment must not dilute voter strength, effectively liberating states from control by rural minority of population).