Punitive Damages and Class Actions

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I. INTRODUCTION

The union of punitive damages and class actions can be aptly described with Samuel Johnson's famous quotation regarding marriage: "The triumph of hope over experience."[1] By most conventional wisdom, there is little future for plaintiffs or defendants who desire to resolve punitive damages claims globally using the procedural vehicle of a class action. From a conceptual perspective, however, there are circumstances under which the union could function. This Article explores those possibilities, not in the spirit of normative support, but in the spirit of exploring theories that may have some prospective vitality.

Notwithstanding the chilly reception that punitive damages class actions have received from appellate courts, there are several approaches at the micro and macro levels of analysis suggesting that "hope" is still persistent. By disaggregating the United States Supreme Court punitive damages jurisprudence, it is possible to identify a limited number of factual scenarios where a class action for punitive damages could be successful. These micro-level observations can constitute a road map for navigating the current seemingly insurmountable barriers that have severely limited the use of class actions in punitive damages claims. At the macro level, there are two observations that could lead to a revision of punitive damages class actions: the seemingly undaunted, pragmatic desire on the part of trial judges to resolve similar cases collectively, and the powerful support for an economic vision of punitive damages that leads inevitably to a global, rather than individual, procedural approach.

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1. JAMES BOSWELL, LIFE OF JOHNSON 128 (1791) (attributed to Samuel Johnson).

II. RECENT SUPREME COURT JURISPRUDENCE ON PUNITIVE DAMAGES AND CLASS ACTIONS

Over the last twenty years of Supreme Court jurisprudence, there have been nine influential decisions devoted to punitive damages and two similarly influential cases related to class actions. The interests of the Supreme Court in both areas have been driven by a major effort on the part of defendants to limit both the scope of liability for compensatory awards and the circumstances and amounts available for punitive damages awards.[2] At the same time, there have been significant efforts in the state and federal judicial and legislative arenas to accomplish similar goals by tightening the prerequisites for an award of punitive damages and limiting the amount that could be awarded, as well as channeling class actions into federal court.

The outcome of these substantive law cases has been a critical examination of almost every aspect of a punitive damages claim and judicial restrictions on the flexibility of juries and lower courts to sustain punitive damages awards.[3] The most recent cases, for example, have demonstrated a linear, numeric ratio between compensatory and punitive damages that is in accord with constitutional standards.[4] Although most legal research has

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2. *See* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 414–15 (2003) (plaintiff arguing that an "'honest mistake' . . . did not warrant punitive damages"). *See also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2619 (2008) ("Exxon raises an issue of first impression about punitive damages in maritime law, which falls within a federal court's jurisdiction to decide in the manner of a common law court, subject to the authority of Congress to legislate otherwise if it disagrees with the judicial result."); BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 564–65 (1996) (BMW argued that its "good-faith belief made a punitive award inappropriate," that "its nondisclosure policy was consistent with the laws of roughly 25 States defining the disclosure obligations of automobile manufacturers, distributors, and dealers," and that "its nondisclosure policy had never been adjudged unlawful before this action was filed"); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 451 (1993) ("TXO argued that the punitive damages award violated the Due Process Clause," and that "vagueness, lack of guideline and the lack of any requirement of a reasonable relationship between the actual injury and the punitive damage award, in essence, would cause the Court or should cause the Court to set it aside on Constitutional grounds").

3. *See Exxon*, 128 S. Ct. at 2623 ("Despite these limitations, punitive damages overall are higher and more frequent in the United States than they are anywhere else.").

4. *Compare* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991) (stating that although "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety"), *and Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to

revealed that punitive damages are awarded relatively infrequently and amounts are often reduced by appellate courts, the "shadow effect" of punitive damages has had a major effect on settlement values: defendants tend to settle compensatory damages at a higher level in order to avoid the risk of large punitive damages being awarded at a jury trial.[5]

Defendants have generally reacted quite negatively and independently to the use of class actions, particularly in personal injury cases, where large numbers of plaintiffs can be aggregated into one case for trial.[6] The attitude of defendants toward the use of class actions to settle cases is more nuanced, however. Threatened by large numbers of individual claims, some defendants prefer to obtain the global peace that might be afforded by a class action.[7] However, the Supreme Court has been extremely skeptical of class actions in personal injury cases. In both *Amchem Products v. Windsor* (*Amchem*)[8] and *Ortiz v. Fibreboard Corp.*,[9] the Court rejected class action settlements

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the punitive award."), *with Campbell*, 538 U.S. at 429 (stating that "[i]n the context of this case . . . there is a presumption against an award that has a 145-to-1 ratio").

5. *See generally* MARK PETERSON, SYAM SARMA, & MICHAEL SHANLEY, INST. FOR CIVIL JUSTICE, PUNITIVE DAMAGES: EMPIRICAL FINDINGS (1987).

6. *See* Francis E. McGovern, *The Defensive Use of Federal Class Actions in Mass Torts*, 39 ARIZ. L. REV. 595, 600 (1997) [hereinafter McGovern, *Defensive Use of Federal Class Actions*] ("Plaintiffs' counsel did not want to lose control of their cases or have their fees set by judges; defendants felt that a divide and conquer strategy was preferable to any form of aggregation where a defendant might be forced into a bet-your-company trial."). *See also* Tetracycline Cases, 107 F.R.D. 719 (W.D. Mo. 1985). *See generally In re* Fed. Skywalk Cases, 680 F.2d 1175 (8th Cir. 1982).

7. McGovern, *Defensive Use of Federal Class Actions*, *supra* note 6, at 601 (stating that "in the late 1980's, defense counsel began to see the potential for closing the floodgates of mass tort litigation by the use of settlement classes"). *See generally* Bowling v. Pfizer, Inc., 143 F.R.D 141 (S.D. Ohio 1992).

8. *See* 521 U.S. 591, 628–29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it.").

9. *See* 527 U.S. 815, 864 (1999) (stating that "limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the

under Rules 23 (b)(3) and 23(b)(1)(B) with rationales that leave limited room for a successful certification of a class in future mass tort litigation.

The Supreme Court cases that have reviewed punitive damages and class actions together—*State Farm Mutual Automobile Insurance Co. v. Campbell*[10] and *Philip Morris USA v. Williams*[11]—have been similarly limiting. The future opportunities for a class certification of punitive damages causes of action are narrow, indeed.

III. DISAGGREGATING THE JURISPRUDENCE OF PUNITIVE DAMAGES AND CLASS ACTIONS

Probably the most productive approach for discerning any possibility for the certification of a class action for punitive damages is to disaggregate the Supreme Court jurisprudence and examine each key variable of that jurisprudence separately. Then it might be possible to determine which aspect of each variable could still lead to a possible scenario for a successful certification of a punitive damages class.[12]

A. Causes of Action

There has been substantial discussion of the similarity, or lack thereof, among the elements of the theories of liability among

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settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses"). Of note, in both *Amchem* and *Ortiz*, the lead opponents are plaintiff attorneys.

10. State Farm Mut. Auto Ins. Co. v. Campbell, 538 U.S. 408, 427 (2003) (stating that "[i]n the context of this case . . . there is a presumption against an award that has a 145-to-1 ratio").

11. *See* Philip Morris USA v. Williams, 549 U.S. 346, 354 (2007) (stating that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation").

12. *See* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 457 (1993) (stating that punitive damages "awards are the product of numerous, and sometimes intangible, factors; a jury imposing a punitive damages awards must make a qualitative assessment based on a host of facts and circumstances unique to the particular case before it"). *See also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2631, 2631 (2008) ("Although the legal landscape is well populated with examples of ratios and multipliers expressing policies of retribution and deterrence, most of them suffer from features that stand in the way of borrowing them as paradigms of reasonable limitations suited for application to this case."); *Campbell*, 538 U.S. at 425 ("The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.").

potential plaintiffs, particularly with differences in causation and defenses. There also seems to be a focus on the level of fungibility of damages incurred by plaintiffs with personal injuries as being more individually unique,[13] financial loss as being more similar,[14] and property and other damages as being somewhere in between.[15]

B. Relationships

Attention has also been given to the relationship between and among various elements of a putative case:[16] the relationship between the act and the harm,[17] the replicability or hypothetical nature of the conduct,[18] and the relationship among the potential class members.[19] There is an underlying Seventh Amendment

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13. *See Williams*, 549 U.S. at 349; *see also* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1261 (Fla. 2006)

14. *See generally* BMW of N. Am., Inc. v. Gore, 517 U.S. 559 (1996). *See also Campbell*, 538 U.S. at 426 (stating that "[t]he harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries"); *TXO Prod. Corp.*, 509 U.S. at 447; Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, 492 U.S. 257 (1989).

15. *See generally* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424 (2001).

16. *See Williams*, 549 U.S. at 353 (stating that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation").

17. *See Williams*, 549 U.S. at 349–50 ("A jury found that Williams' death was caused by smoking; that Williams smoked in significant part because he thought it was safe to do so; and that Philip Morris knowingly and falsely led him to believe that this was so."); *Campbell*, 538 U.S. at 423 (stating that "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business"); *Gore*, 517 U.S. at 585 (stating that the court assumed "that the undisclosed damage to the new BMW's affected their actual value"); *TXO Prod. Corp.*, 509 U.S. at 460 (stating that "there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred").

18. *See Gore*, 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."); *see also TXO Prod. Corp.*, 509 U.S. at 460 (stating that "there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant's conduct as well as the harm that actually has occurred" (quoting Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 21 (1994)).

19. *See* Amchem Prods. v. Windsor, 521 U.S. 591, 613 (1997) ("Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4)

concern that the individual right to a jury trial is maintained and that rights are not violated simply because of a mere "relationship" to others.[20]

C. Goals

The focus of the Supreme Court cases has been almost completely on overdeterrence,[21] with virtually no discussion of underdeterrence. This instrumental analysis has been extremely forceful in the arguments made by defendants. Because of the procedural posture of these cases, there has been no substantial occasion or incentive for a plaintiff to focus on the overall efforts of coping with overdeterrence at the expense of underdeterrence. A second goal has been ending the possibility of multiple punitive damages awards against a single defendant arising out of an incident with many potential plaintiffs.[22] If a defendant moves for

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adequacy of representation (representatives 'will fairly and adequately protect the interests of the class')").).

20. *See* Elizabeth J. Cabraser & Robert J. Nelson, *Class Action Treatment of Punitive Damages Issues after* Phillip Morris v. Williams*: We Can Get There from Here*, 2 CHARLESTON L. REV., 407, 429–30 n.66 (2008) (stating that "[w]e recognize the concerns expressed by the Fifth Circuit Court of Appeals in Castano v. American Tobacco Co., 84 F.3d 734, 750–51 (5th Cir. 1996), in which that court held that bifurcation of issues in a nationwide smoking class action violated the Seventh Amendment to the United States Constitution. However, subsequent to its decision in *Castano*, the Fifth Circuit held that the risk of infringing on the parties' Seventh Amendment rights is not significant and is in fact avoided where the liability issues common to all class members are tried together by a single initial jury, and issues affecting individual class members such as causation, damages, and comparative negligence are tried by different juries").

21. *See, e.g.*, Watson v. Philip Morris Cos., 551 U.S. 142 (2007). *See also* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2621 (2008) (stating that "the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct"); *Campbell*, 538 U.S. at 419 (stating "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence"); Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, 492 U.S. 257, 275 (1989) ("[P]unitive damages advance the interests of punishment and deterrence, which are also among the interests advanced by the criminal law . . . ."); RESTATEMENT (SECOND) OF TORTS § 908 cmt. a (1977) (purposes of punitive damages are "the same" as "that of a fine imposed after a conviction of a crime").

22. *See* Roginsky v. Richardson-Merrill, Inc., 378 F.2d 832, 840 (2d Cir. 1967) ("Although multiple punitive awards running into the hundreds may not add up to a denial of due process, nevertheless if we were sitting as the highest court of New York we would wish to consider very seriously whether awarding punitive damages with respect to the negligent—even highly negligent—

certification of a class to cabin all future punitive damages awards, there is a greater chance for success than if plaintiffs make the same motion.

D. Damages

Aside from the nature of the damages, there has been great attention paid to whether compensatory damages were determined prior to an award of punitive damages,[23] the ratio between compensatory and punitive damages,[24] and a comparison of comparable civil penalties and punitive damages.[25] The single digit

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manufacture and sale of a drug governed by federal food and drug requirements, especially in the light of the strengthening of these by the 1962 amendments, 76 Stat. 780 (1962), and the present vigorous attitude toward enforcement, would not do more harm than good.").

23. *See, e.g.*, Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1262 (Fla. 2006) ("Engle Class'[] punitive damages claim, we must vacate the classwide punitive damages award because we unanimously agree with the Third District that the trial court erred in allowing the jury to determine a lump sum amount before it determined the amount of total compensatory damages for the class. As a matter of law, the punitive damages award violates due process because there is no way to evaluate the reasonableness of the punitive damages award without the amount of compensatory damages having been fixed. The amount awarded is also clearly excessive because it would bankrupt some of the defendants.").

24. *See* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award."). *See also Exxon*, 128 S. Ct. at 2633 ("Accordingly, given the need to protect against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary, either for deterrence or for measured retribution, we consider that a 1:1 ratio, which is above the median award, is a fair upper limit in such maritime cases."); *Campbell*, 538 U.S. at 428–29 (stating that "when used to determine the dollar amount of the award, however, the criminal penalty has less utility. Great care must be taken to avoid use of the civil process to assess criminal penalties that can be imposed only after the heightened protections of a criminal trial have been observed, including, of course, its higher standards of proof" and that "[i]n the context of this case . . . there is a presumption against an award that has a 145-to-1 ratio"); TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 462 (1993) (stating that "trickery and deceit" may be more reprehensible than negligence); Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (1991) (stating that although "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety"); RESTATEMENT (SECOND) OF TORTS, *supra* note 21, § 908 cmt. c ("Thus an award of nominal damages . . . is enough to support a further award of punitive damages, when a tort, . . . is committed for an outrageous purpose, but no significant harm has resulted.").

25. *Exxon*, 128 S. Ct. at 2634; *Gore*, 517 U.S. at 583 ("Comparing the punitive damages award and the civil or criminal penalties that could be

ratio between compensatory and punitive damages has been the "holy grail" for defendants seeking caps on punitive damages awards, with its focus on the individual and the individual's right to receive compensation.[26]

E. Scope

The scope of any punitive damages award—state or national;[27] individual or group;[28] party or non-party[29]—has also been the

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imposed for comparable misconduct provides a third indicium of excessiveness."); *TXO Prod. Corp.*, 509 U.S. at 456 ("TXO . . . argues that punitive damages awards should be scrutinized more strictly than legislative penalties because they are typically assessed without any legislative guidance expressing the considered judgment of the elected representatives of the community."); *Haslip*, 499 U.S. at 23 ("We are aware that the punitive damages award in this case is more than 4 times the amount of compensatory damages, is more than 200 times the out-of-pocket expenses of respondent . . . and, of course, is much in excess of the fine that could be imposed for insurance fraud under Ala. Code §§ 13A-5-11 and 13A-5-12(a) (1982), and Ala. Code §§ 27-1-12, 27-12-17, and 27-12-23 (1986)."); *Browning-Ferris Indus.*, 492 U.S. at 301 (stating that "the reviewing court must accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue" and that "because punitive damages are penal in nature, the court should compare the civil *and* criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil *and* criminal penalties imposed by different jurisdictions for the same or similar conduct").

26. *See Exxon*, 128 S. Ct. at 2613 ("In the aftermath of the disaster, Exxon spent around $2.1 billion in cleanup efforts. The United States charged the company with criminal violations of the Clean Water Act, 33 U.S.C. §§ 1311(a) and 1319(c)(1); the Refuse Act of 1899, 33 U.S.C. §§ 407 and 411; the Migratory Bird Treaty Act, 16 U.S.C. §§ 703 and 707(a); the Ports and Waterways Safety Act, 33 U.S.C. § 1232(b)(1); and the Dangerous Cargo Act, 46 U.S.C. § 3718(b). Exxon pleaded guilty to violations of the Clean Water Act, the Refuse Act, and the Migratory Bird Treaty Act and agreed to pay a $150 million fine, later reduced to $25 million plus restitution of $100 million. A civil action by the United States and the State of Alaska for environmental harms ended with a consent decree for Exxon to pay at least $900 million toward restoring natural resources, and it paid another $303 million in voluntary settlements with fishermen, property owners, and other private parties."); *Campbell*, 538 U.S. at 425 ("The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish.").

27. *See generally Exxon*, 128 S. Ct. 2605. *See also Campbell*, 538 U.S. at 421 (stating that a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State[]").

28. *See generally Campbell*, 538 U.S. 408. *See also* Philip Morris USA v. Williams, 549 U.S. 346 (2007).

subject of much discussion. Because state common law generally controls tort damages and because of limits in various state jurisdictions, it can be important that any award of punitive damages is limited in its scope. Any application of one state's laws on punitive damages or class actions to another state's citizens can be problematic. The same argument applies to damages for an individual as opposed to a group and to parties as opposed to non-parties.[30] The classic view of individualistic determinations of liability and damages is difficult to translate into a larger setting; applying the unique facts of a single party to a group or to non-parties is usually incompatible with a vision of individual rather than group justice.[31]

F. Nature of Conduct

Another critical variable in determining the appropriateness of punitive damages in Supreme Court jurisprudence is the nature and reprehensibility of the conduct:[32] whether or not the harm is physical or economic,[33] whether there is financial vulnerability on the part of the plaintiffs,[34] and whether or not the conduct involves

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29. *See Williams*, 549 U.S. at 354 (stating that "to permit punishment for injuring a nonparty victim would add a near standardless dimension to the punitive damages equation. How many such victims are there? How seriously were they injured? Under what circumstances did injury occur? The trial will not likely answer such questions as to nonparty victims").

30. *Id*.

31. *Id.*

32. *See Campbell*, 538 U.S. at 424 ("The reprehensibility guidepost does not permit courts to expand the scope of the case so that a defendant may be punished for any malfeasance, which in this case extended for a 20-year period.").

33. *See id*. at 425–26 (stating that "because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages'" and that "the harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells' suffered only minor economic injuries for the 18-month period in which State Farm refused to resolve the claim against them"). *See also* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (stating that a high ratio may be required when "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"); Solem v. Helm, 463 U.S. 277, 292–93 (1983) ("For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.").

34. *Compare* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2625 (2008) ("And a study of 'financial injury' cases using a different data set found that

an isolated incident or systematic activity.[35] In addition, the extent to which the conduct is intentional,[36] accidental,[37] or involves reckless disregard[38] for the well-being of others can implicate the level of reprehensibility.

G. Type of Class Action

The types of class actions, both state and federal—for example, under Federal Rules of Civil Procedure 23(b)(1),[39] 23(b)(2),[40] and 23(b)(3)[41]—constitute an important factor in analyzing whether or not punitive damages are appropriate. Of course, the Rule 23(a)

34% of the punitive awards were greater than three times the corresponding compensatory damages."), *with* TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 464 (1993) ("We note, however, that in *Haslip* we referred to the 'financial position' of the defendant as one factor that could be taken into account in assessing punitive damages.").

35. *Compare Gore*, 517 U.S. at 581, *and Campbell*, 538 U.S. at 429 (stating that "[t]he Campbells' have identified scant evidence of repeated misconduct of the sort that injured them"), *and* Philip Morris USA v. Williams, 549 U.S. 346, 349, *and* Ciraolo v. City of N.Y., 216 F.3d 236, 248 (2d Cir. 2000), *with Exxon*, 128 S. Ct. at 2634.

36. *See Campbell*, 538 U.S. at 429; *Gore*, 517 U.S. at 581; *Browning-Ferris Indus.*, 492 U.S. at 259; *Ciraolo*, 216 F.3d at 248.

37. *See Exxon*, 128 S. Ct. at 2612 ("On the night of the spill it was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings.").

38. *See Exxon*, 128 S. Ct. at 2621 ("Reckless conduct is not intentional or malicious, nor is it necessarily callous toward the risk of harming others, as opposed to unheedful of it."). *See also* RESTATEMENT (SECOND) OF TORTS, *supra* note 21, § 500 cmt. a ("Recklessness may consist of either of two different types of conduct. In one the actor knows, or has reason to know . . . of facts which create a high degree of risk of . . . harm to another, and deliberately proceeds to act, or to fail to act, in conscious disregard of, or indifference to, that risk. In the other the actor has such knowledge, or reason to know, of the facts, but does not realize or appreciate the high degree of risk involved, although a reasonable man in his position would do so.").

39. *See* Amchem Prods. v. Windsor, 521 U.S. 591, 614 (1997) ("Rule 23(b)(1) covers cases in which separate actions by or against individual class members would risk establishing 'incompatible standards of conduct for the party opposing the class . . . .").

40. *See id.* ("Rule 23(b)(2) permits class actions for declaratory or injunctive relief where 'the party opposing the class has acted or refused to act on grounds generally applicable to the class.' Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples.").

41. *See id*. at 615 ("Rule 23(b)(3) permits certification where class suit 'may nevertheless be convenient and desirable.'").

prerequisites must be met as well.[42] The post-Class Action Fairness Act (CAFA) sensibilities can also have some effect on the attitudes of courts toward class actions.[43]

IV. POSSIBLE REAGGREGATION SCENARIOS FOR A PUNITIVE DAMAGES CLASS ACTION

Exxon Shipping Co. v. Baker (*Exxon*) provides at least one scenario in which there can be a punitive damages class action.[44] In that case the cause of action was the same for all plaintiffs arising from a single catastrophe; the relationship among the plaintiffs was similar and real; the goal was to prevent overdeterrence; the movant was the defendant; the compensatory damages were for non-personal injuries—financial and property damage—and had been determined; the scope was within a single state and all parties were included; the conduct was determined to be reprehensible; and the class action was under Rule 23(b)(1)(B) in federal court.[45]

Looking to the future, there may be circumstances similar to *Exxon* that will occur. Other scenarios that would meet appellate scrutiny for the certification of a punitive damages class action could deviate from the *Exxon* model, but probably not too far. The most likely deviations could involve a consumer fraud fact situation in a single jurisdiction with all of the parties joined, compensatory financial damages determined, and reprehensible conduct. There could also be another catastrophe or disaster that would contain enough similar variables to *Exxon* to warrant a punitive damages class.[46]

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42. See *id.* at 613 ("Rule 23(a) states four threshold requirements applicable to all class actions: (1) numerosity (a 'class [so large] that joinder of all members is impracticable'); (2) commonality ('questions of law or fact common to the class'); (3) typicality (named parties' claims or defenses 'are typical . . . of the class'); and (4) adequacy of representation (representatives 'will fairly and adequately protect the interests of the class').").

43. *See generally* United States Class Action Fairness Act of 2005, 28 U.S.C. §§ 1332(d), 1453, 1711–1715 (2006).

44. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008) ("The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000."). The plaintiffs opposed class certification for punitive damages; however, the Supreme Court did not review the class certification issue.

45. *See generally id.*

46. *Id*. at 2611 ("On March 24, 1989, the supertanker *Exxon* grounded on Bligh Reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. . . . On the night of the spill it

Needless to say, these potential scenarios are extremely limited. How far a court could go beyond the currently approved model is problematic. Another uncertainty is the motivation of plaintiffs' counsel ever to attempt to satisfy these restrictive requirements contained in Supreme Court jurisprudence. It is far more likely that the plaintiffs would attempt to maximize their compensatory damages claims rather than swing for the fences in a much riskier endeavor. "Experience" seems to dominate "hope," particularly since the Supreme Court did not address the class certification issue in *Exxon*.

V. PROPENSITY FOR A GLOBAL VIEW OF SIMILARLY SITUATED CASES

There has been, however, a persistent tendency on the part of trial judges when confronted by large numbers of similarly situated cases to attempt to resolve them globally.[47] This has been the case particularly when litigation presents the possibility of multiple punitive damages awards. Trial judges have sought, and will continue to seek, procedures for the aggregation of claims in order to preempt the need for separate trial after separate trial of cases that seem to them quite similar.[48] There are also occasions where a

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was carrying 53 million gallons of crude oil, or over a million barrels. Its captain was one Joseph Hazelwood, who had completed a 28-day alcohol treatment program while employed by Exxon, as his superiors knew, but dropped out of a prescribed follow-up program and stopped going to Alcoholics Anonymous meetings.").

47. *See* Francis E. McGovern, *Judicial Centralization and Devolution in Mass Torts*, 95 MICH. L. REV. 2077, 2082 (1997) (citing JACK B. WEINSTEIN, INDIVIDUAL JUSTICE IN MASS TORT LITIGATION: THE EFFECT OF CLASS ACTIONS, CONSOLIDATION, AND OTHER MULTIPARTY DEVICES 131–32 (1995)) (stating that mass tort management should consist of "(1) the concentration of decision making in one or a few judges; (2) a single forum responsible for resolving legal and factual issues; (3) a single substantive law; (4) adequate judicial support facilities; (5) reasonable fact-finding procedures, particularly as to scientific issues; (6) a cap on the total cost to defendants such as by limiting punitive damages and allocations for pain and suffering and a method of allocating that cost among multiple defendants; (7) a single distribution plan with fairly inflexible scheduled payments by injury based on the need of those injured, rather than the social and economic status of plaintiffs, and tailored to the availability of private resources").

48. *See* Jenkins v. Raymark Indus., 782 F.2d 468, 474 (5th Cir. 1986) ("Should the jury be allowed to award in the aggregate any punitive damages it finds appropriate, it must be instructed to factor in the possibility that none of the unnamed plaintiffs may have suffered *any* damages. Alternatively, the jury could be allowed to award an amount of money that each class member should receive for each dollar of actual damages awarded.").

judge will see a circumstance where punitive damages are warranted but have never been awarded.[49]

In the drug context there was *Roginsky v. Richardson-Merrill*, in which Judge Friendly bewailed the risks of multiple punitive damages awards.[50] With medical devices, there was the *Dalkon Shield* litigation, in which Judge Williams tried to use the class action device to have one trial for punitive damages against the A.H. Robins Company.[51] In the asbestos litigation, Judges Parker,[52] Sarokin,[53] and Weiner[54] all attempted to use class actions to resolve large numbers of separate lawsuits with one procedural

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49. *See In re* Simon II Litig., 211 F.R.D. 86, 106 (E.D.N.Y. 2002) ("The class action now certified provides a reasonable and conservative solution consonant with legal and equitable tradition" and "provides an opportunity to effectively address problems of punitive damages in mass torts. The Tobacco litigation is a particularly useful vehicle because it addresses a mature tort with many cases already tried, providing some benchmarks for both compensatory and punitive damages. An immature mass litigation, where an early punitive damage class is assembled without any testing of what juries will do, does not permit the mega-analysis appropriate in this mature dispute approaching its closing stages.").

50. *See* 378 F.2d 832, 840 (2d Cir. 1967) ("Although multiple punitive awards running into the hundreds may not add up to a denial of due process, nevertheless if we were sitting as the highest court of New York we would wish to consider very seriously whether awarding punitive damages with respect to the negligent—even highly negligent—manufacture and sale of a drug governed by federal food and drug requirements, especially in the light of the strengthening of these by the 1962 amendments, 76 Stat. 780 (1962), and the present vigorous attitude toward enforcement, would not do more harm than good.").

51. *See In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1190 (N.D. Cal. 1981).

52. *See generally Jenkins*, 782 F.2d 468. *See also* Cimino v. Raymark Indus., 751 F. Supp. 649 (E.D. Tex. 1990).

53. *See* Juzwin v. Amtorg Trading Corp., 705 F. Supp. 1053, 1056 (D.N.J. 1989) (arguing that "[a]nother suggestion for blunting the potential of multiple punitive damage awards is a preemptive class action by the manufacturer to establish a single punitive damage award binding upon all present or potential claimants." Yet "[i]f the existence of this alternative serves to deny defendants so situated the right to claim that successive punitive damage awards for the same wrongful conduct are unconstitutional, then manufacturers would be placed in an unenviable dilemma as soon as a second suit was instituted." Further, "even if a defendant were inclined to adopt this suicidal course, there is some doubt whether it would be successful").

54. *See* Order, *In re* Asbestos Bankr. Litig., 1992 WL 423943 (J.P.M.L. Dec. 9, 1992) (No. 950) (Judge Weiner argued for and eventually succeeded in consolidating 26,639 asbestos claims and conducting multi-district litigation before his court).

device.[55] In the tobacco litigation, Judge Weinstein and the Florida judiciary sought to bring finality to punitive damages claims.[56]

With the exceptions of *Exxon*[57] and the older *Agent Orange*[58] case, there has been little judicial success in these aggregation efforts, regardless of whether it has been to avoid multiple punitive damages awards, eliminate the need for multiple trials, or assess additional damages. A reading of these appellate opinions suggests that differences in opinion on this subject are driven less by liberal or conservative ideology and more by judges who favor a pragmatic, if imperfect, resolution of cases, as opposed to judges who view the individual's right to an individual trial as a matter of principle that cannot be violated.

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55. *See* Amchem Prods. v. Windsor, 521 U.S. 591, 628–29 (1997) ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it."). *See also* Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999) (stating that "limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses").

56. *See generally In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y. 2002). *See also* Engle v. Liggett Group, Inc., 945 So. 2d 1246 (Fla. 2006).

57. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008) ("The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000.").

58. *See In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 723 (E.D.N.Y. 1983) ("Unlike the asbestos, *DES*, *Dalkon Shield*, and *Federal Skywalk* cases, defendants contest liability not just as to individual members of the class, but as to any members of the class. Thus, unlike other mass product liability cases, a determination of general causation will serve both the interests of judicial economy and assist in the speedy and less expensive resolution of individual class member's claims.").

The *Amchem*[59] and *Ortiz*[60] cases illustrate this point rather well. The opponents of class action treatment of the asbestos personal injury cases were drawn from both the left and right of the political spectrum, and they joined in promoting a more deontological approach with the fundamental principle that personal injury lawsuits were, indeed, personal and that the individual aspects of lawsuits were not fungible.[61] This view holds that it is impossible to take a global view of the inherent differences in each plaintiff's own circumstances and still satisfy due process in the context of the Seventh Amendment.[62]

The pragmatists tend to represent a more centrist political view that "the perfect is the enemy of the good" and that the lack of ideal individualization for each case is more than outweighed by a faster and more homogenized aggregated process. They favor consolidation of similarly situated mass tort cases in order to promote access to some justice rather than perfect justice.[63] They

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59. *Amchem Prods.*, 521 U.S. at 628–29 ("The argument is sensibly made that a nationwide administrative claims processing regime would provide the most secure, fair, and efficient means of compensating victims of asbestos exposure. Congress, however, has not adopted such a solution. And Rule 23, which must be interpreted with fidelity to the Rules Enabling Act and applied with the interests of absent class members in close view, cannot carry the large load CCR, class counsel, and the District Court heaped upon it.").

60. *Oritz*, 527 U.S. at 864 (stating that "limited fund rationale could under some circumstances be applied to a settlement class of tort claimants, it would be essential that the fund be shown to be limited independently of the agreement of the parties to the action, and equally essential under Rule 23(a) and (b)(1)(B) that the class include all those with claims unsatisfied at the time of the settlement negotiations, with intraclass conflicts addressed by recognizing independently represented subclasses").

61. *Compare Amchem Prods.*, 521 U.S. 591, *and Ortiz*, 527 U.S. at 864, *with* BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 582 (1996) (stating that a high ratio may be required when "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine"), *and* Solem v. Helm, 463 U.S. 277, 292–93 (1983) ("For example, as the criminal laws make clear, nonviolent crimes are less serious than crimes marked by violence or the threat of violence.").

62. *See* Cooper Indus. v. Leatherman Tool Group, 532 U.S. 424, 437 (2001) ("Because the jury's award of punitive damages does not constitute a finding of 'fact,' appellate review of the district court's determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by respondent and its *amicus*.").

63. *See* McGovern, *Defensive Use of Federal Class Actions*, *supra* note 6, at 607 (stating that "[i]n the mature mass torts, so the pragmatist argument goes, the bulk of the cases are currently handled by counsel in the aggregate anyway without the trappings of individual rights characterized by an idealistic view of due process, so why not recognize this reality and use procedures such as class actions that at least would have the benefit of some judicial scrutiny?" McGovern also states that "[e]ven if there were agreement with this view of

look more to the practicality available in bankruptcy procedure and to the instrumentalism associated with the mass resolution of claims via the class action.

The principle versus pragmatism debate will not end with *Exxon*. In that case, both the plaintiffs and the defendants supported a single resolution of punitive damages, and they joined issue to contest the appropriate amount of those punitive damages.[64] The less a cause of action seems unique, the more powerful the pragmatic arguments. The more unique the claim—be it because of scope, conduct, damages, or relationships—the more persuasive the arguments based upon principle.[65] The strong impetus provided by a trial judge's desire to approach the claim in the interest of judicial economy will probably lead to future opportunities to test the limits of the position based upon principle.

VI. ECONOMIC RATIONALE FOR "PUNITIVE DAMAGES"

The current punitive damages jurisprudence focuses on punishment, retribution, and overdeterrence.[66] There is another rationale that, if adopted by the Supreme Court, would open a new avenue for the use of class actions and "extra compensatory,"

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reality, the more doctrinaire left and right would argue that this is a problem for someone other than the federal judicial system: from the left, the legislature should provide more judicial resources and from the right, provide a legislative claims process; from the left, state courts do a great job and from the right, these types of cases belong in state courts anyway.").

64. *See* Exxon Shipping Co. v. Baker, 128 S. Ct. 2605, 2613 (2008) ("The District Court for the District of Alaska divided the plaintiffs seeking compensatory damages into three classes: commercial fishermen, Native Alaskans, and landowners. At Exxon's behest, the court also certified a mandatory class of all plaintiffs seeking punitive damages, whose number topped 32,000.").

65. *Compare id.* at 2613, *and* State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 419 (2003), *with* Philips Morris USA v. Williams, 549 U.S. 346, 354 (2007), *and* Engle v. Liggett Group, Inc., 945 So. 2d 1246, 1261 (Fla. 2006).

66. *See generally* Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982). *See also* Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 23–24 (stating that although "more than 4 times the amount of compensatory damages" might be "close to the line," it did not "cross the line into the area of constitutional impropriety"); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003) (stating that "punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case").

"exemplary," or "punitive" damages.[67] That argument has arisen out of an economic analysis of deterrence in the law that suggests a need for additional damages—whether they be called "public," "punitive," "societal," or "extra-remedial"—to be assessed against a tortfeasor beyond the compensatory damages sought by individual plaintiffs.[68] These damages are designed to ensure that the tortfeasor internalizes all of the costs associated with its tortious conduct, rather than only the costs associated with the limited number of plaintiffs who file a lawsuit.[69]

The argument from the perspective of an economic analysis of deterrence and damages contends that underdeterrence is as much of a problem in motivating appropriate conduct by parties as overdeterrence.[70] The optimal investment in safety for a party occurs when the marginal cost of an investment in safety equals the marginal benefits of that investment.[71] The tort system mandates liability—either through negligence or a strict liability

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67. *See* Thomas B. Colby, *Clearing the Smoke from Philip Morris v. Williams: The Past, Present, and Future of Punitive Damages*, 118 YALE L.J. 392, 392 (2008) [hereinafter Colby, *Clearing the Smoke*] (stating prior to *Williams*, the court "awarded punitive damages to punish the defendant for the harm it caused to all of society, not just the harm that is visited upon the individual plaintiff before the court"); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 584 (2003) [hereinafter Colby, *Multiple Punishment Problem*] (stating that "[t]he plaintiff's attorney . . . will ask the jury to impose punitive damages in an amount sufficient not only for harming the plaintiff, but also for the full scope of harm that its conduct caused to all victims and to all of society"); A. Mitchell Polinksy & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 874 (1998) (stating that "the proper level of total damages to impose . . . is the harm caused multiplied by the reciprocal of the probability of being found liable"). *See generally* WILLIAMS M. LANDES & RICHARD A. POSER, THE ECONOMIC STRUCTURE OF TORT LAW (1987); STEVEN SHAVELL, ECONOMIC ANALYSIS OF ACCIDENT LAW (1987).

68. *See generally* Colby, *Multiple Punishment Problem*, *supra* note 67, at 584 (stating that "[t]he plaintiff's attorney . . . will ask the jury to impose punitive damages in an amount sufficient not only for harming the plaintiff, but also for the full scope of harm that its conduct caused to all victims and to all of society"); Sharkey, *supra* note 66, at 351–52 (stating that "punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case").

69. *See supra* note 67.

70. *See id.*

71. *See* Polinksy & Shavell, *supra* note 67, at 878 ("If damages are either lower or higher than the harm, various socially undesirable consequences will result."). *See generally* Kenneth W. Simons, *Deontology, Negligence, Tort, and Crime*, 76 B.U. L. REV. 273, 273 (1996).

standard—if a party does not invest appropriately in safety; it deters by placing liability costs on parties whose conduct results in an under-investment in safety.[72] The overdeterrence rationale focuses on the possibility that the tort system will force a party to overinvest in safety because of the threat of tort liability.[73] Excessive punitive damages awards, or even the threat of excessive punitive damages awards, might lead a party to exceed the optimal level of safety in order to avoid liability. Any such overdeterrence would create a suboptimal allocation of resources between the marginal costs and benefits.[74] Likewise, if the tort system underdeters parties from investing in safety, there will also be a suboptimal allocation of resources.[75] In any given instance of conduct by a defendant, this economic analysis suggests that there should be no liability for negligence if the marginal cost of safety equals its marginal benefit.[76] If the legal regime is strict liability, the defendant will be liable for all losses caused but will still invest the same optimal amount in safety because an appropriate allocation of resources will occur when the marginal costs of safety and benefit are equal.[77] Liability under a strict liability legal doctrine will affect the distribution of resources between plaintiff and defendant but not the allocation of those resources.

A problem of underdeterrence can arise in the context of mass tortious activity, however, when the tort system does not incorporate the harm imposed by a defendant. From the perspective of society as a whole, if a defendant faces litigation from only ten to twenty percent of the plaintiffs who are tortiously harmed—a normal range of lawsuit filings—then that defendant will underinvest in safety because it is not fully benefitting from

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72. These concepts are covered in many torts casebooks. *See, e.g.*, JAMES A. HENDERSON, JR. & RICHARD N. PEARSON, THE TORTS PROCESS 38–42, 327–33 (3d ed. 1988) (discussing the debates concerning the proper goals of tort law and the judiciary's role in achieving these objectives). *See also* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS 24–33 (1970); RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 206–11 (4th ed. 1992); Symposium, *Efficiency as a Legal Concern*, 8 HOFSTRA L. REV. 485 (1980). *See also* AARON D. TWERSKY & JAMES A. HENDERSON, JR., TORTS: CASES AND MATERIALS (2d ed. 2008); Jules Coleman, *Corrective Justice and Wrongful Gain*, 11 J. LEGAL STUD. 421, 422–24 (1982).

73. *See generally* CASS R. SUNSTEIN, RISK AND REASON: SAFETY, LAW, AND THE ENVIRONMENT (2004).

74. *Id.*

75. *See* Polinksy & Shavell, *supra* note 67, at 878 ("If damages are either lower or higher than the harm, various socially undesirable consequences will result.").

76. *See generally* TWERSKY & HENDERSON, *supra* note 72.

77. *Id.*

the avoidance of liability resulting from an optimal investment in safety.[78] If only twenty percent of injured plaintiffs sue, then the defendants will be responsible for only twenty percent of the damages and will, therefore, invest less in safety to correspond with the lower benefit of the avoided accidents. Although the defendant may thus invest rationally in safety from its own perspective, there is a lower than optimal investment in safety from the perspective of society reflected in the uncompensated harms of the eighty percent of injured plaintiffs who did not sue. As a result, from the perspective of society, there has been underdeterrence; more accidents were caused because the defendant did not have to pay for them—society at large paid for them. If a defendant is not obligated to pay for all the harm it causes, it will underinvest in safety.[79] The ramifications of the defendant's underinvestment in safety are an excess of harm caused to society. The tort system has underdeterred defendants.

It is this potential underdeterrence that leads economists to argue that additional damages should be imposed on defendants who underinvest in safety because they anticipate that only a small percentage of harmed parties will actually seek compensation by

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78. *See generally* Francis E. McGovern, *Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721 (2002) [hereinafter McGovern, *Tragedy*]. *See also* DEBORAH HENSLER ET AL., COMPENSATION FOR ACCIDENTAL INJURIES IN THE UNITED STATES 110 (1991); Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995). For the other most frequently cited studies of claiming rates, see ALFRED F. CONRAD ET AL., AUTOMOBILE ACCIDENT COSTS AND PAYMENTS: STUDIES IN THE ECONOMICS OF INJURY REPARATION 262–96 (1964) (outlining attitudes and opinions of plaintiffs and potential plaintiffs toward filing lawsuits); PATRICIA M. DANZON, MEDICAL MALPRACTICE: THEORY, EVIDENCE, AND PUBLIC POLICY 60 (1985) (noting that medical malpractice claims peaked in 1975 at one claim for every eight physicians); HARVARD MEDICAL PRACTICE STUDY, PATIENTS, DOCTORS AND LAWYERS: MEDICAL INJURY, MALPRACTICE LITIGATION AND PATIENT COMPENSATION IN NEW YORK, 7-1 to 7-35 (1990) (analyzing the potential plaintiffs that filed medical malpractice claims); Hazel Glenn, *Who Claims Compensation: Factors Associated with Claiming and Obtaining Damages*, *in* COMPENSATION AND SUPPORT FOR ILLNESS AND INJURY 45–65 (Donald Harris et al. eds., 1984) (reporting the results of a study that showed only twelve percent of injured individuals obtained compensation through the legal system); Richard E. Miller & Austin Sarat, *Grievances, Claims and Disputes: Assessing the Adversary Culture*, 15 LAW & SOC'Y REV. 525, 544–45 (1981) (reporting the results of an empirical study that showed that only three point eight percent of people with tort grievances actually filed suit).

79. Sharkey, *supra* note 66, at 367 (stating that "the addition of punitive damages in some amount above and beyond compensatory damages is warranted" to combat underdeterrence "so that the wrongdoer internalizes all of the costs of its actions, and is thus appropriately deterred from causing harm").

filing a lawsuit.[80] The type of damages that can be imposed on defendants to raise their marginal benefit curve to the level of society's marginal benefit are often referred to as "public," "exemplary," "extra compensatory," or "punitive" damages.[81] This type of damages does not, however, have a punishment or retributive rationale. It is designed to counteract the normal underdeterrence of the tort system because of a low propensity of individuals to sue, and it has the instrumental goal of achieving optimal investment in safety from the perspective of society in general.

Unlike the conception of litigation as a one plaintiff–one defendant endeavor, the economic perspective looks at the welfare of society as a whole and is correspondingly much more in tune with the more pragmatic jurisprudence of supporters of punitive damages class actions.[82] A single award of damages to achieve an optimal level of investment in safety for a defendant could be achieved if all plaintiffs in a mass tort brought suit and were compensated; there would be no need for an overall damages assessment. The reality is, however, that underdeterrence is the norm because parties simply do not avail themselves of the tort system. The economic rationale argues that the only method of achieving optimal deterrence is to make an assessment of all the harm caused by tortious conduct.

VII. ASSESSING SOCIETAL HARM

A logical question is whether or not it is possible to define a marginal benefit curve for society associated with any type of tortious conduct. Measuring the volume of tort claims past and future has been the subject of extensive analysis and research in a

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80. *See supra* note 67.

81. *See generally* VICTOR E. SCHWARTZ, KATHRYN KELLY & DAVID F. PARTLETT, TORTS: CASES & MATERIALS (10th ed. 2001). *See also* Colby, *Multiple Punishment Problem*, *supra* note 67, at 584 (stating that "[t]he plaintiff's attorney . . . will ask the jury to impose punitive damages in an amount sufficient not only for harming the plaintiff, but also for the for the full scope of harm that its conduct caused to all victims and to all of society"); Sharkey, *supra* note 66, at 351–52 (stating that "punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case").

82. *See* Sharkey, *supra* note 66, at 365 (stating that "[t]he goal is to force tortfeasors, and others similarly situated, to internalize the harms to society caused by their conduct").

number of different cases.[83] The insurance industry has extensive expertise in this type of analysis, and companies set up reserves for potential liability on a regular basis.[84] In bankruptcy proceedings, it is not unusual for a court to estimate the present and future value of all tort claims pending against a defendant in accordance, for example, with Section 502(c) of the Bankruptcy Code.[85] Variations on these themes include litigation settlement viability, design, and support; insurance buyouts; litigation risk assessment and planning; and operational planning and damage calculation.[86] The quantitative literature and the experience in economic prognostication suggest that it is feasible to assess both individual and societal harm with significant predictive power.[87]

At the individual case level, there are numerous analytic tools to estimate the value of claims, from case matching, to grids, to expert systems, to decision trees, to single algorithms to complex algorithms.[88] It is possible to look to the history of trials and settlements to compare the characteristics of a pending case with similar characteristics of previously resolved cases in order to

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83. *See* PRACTISING LAW INSTITUTE, LITIGATION RISK ASSESSMENT FOR INSURANCE COUNSEL (1996).

84. *Id*.

85. Estimation of the Number and Value of Pending and Future Asbestos-Related Personal Injury Claims, *In re* W.R. Gace & Co., 366 B.R. 302 (Bankr. D. Del. 2007) (No. 01-01139 (JFK)); Projected Liabilities for Asbestos Personal Injury Claims as of April 2001, *In re W.R. Grace & Co.*, 366 B.R. 302; FREDERICK C. DUNBAR, DENISE NEUMANN MARTIN & PHOEBUS J. DHYMES, ESTIMATING FUTURE CLAIMS: CASE STUDIES FROM MASS TORT AND PRODUCT LIABILITY (2004). *See also* 11 U.S.C. § 502(c) (2006).

86. *See generally* DUNBAR ET AL., *supra* note 85.

87. *See generally* DUNBAR ET AL., *supra* note 85; Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 660 (1989) [hereinafter McGovern, *Resolving Mass Tort Litigation*] (stating that "fairness—values of predictability, rationality, and equality of opportunity and strategy" are at issue in mass tort litigation).

88. *See* McGovern, *Tragedy*, *supra* note 78, at 1729–31. *See generally* Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U. CHI. L. REV. 440 (1986) [hereinafter McGovern, *Managing Complex Litigation*]; Francis E. McGovern, *Dispute Systems Design: The United Nations Compensation Commission*, 14 HARV. NEGOT. L. REV. 171, 184–87 (2009) [hereinafter McGovern, *UN Compensation*]; Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1364 n.5 (2005) [hereinafter McGovern, *Claims Resolution Facilities*] ("The United Nations Compensation Commission was established after the 1990 invasion of Kuwait by Iraq. Its role was to determine the amount of money to be paid by Iraq to claimants from nearly 100 countries, based upon eligibility criteria determined by the U.N. Security Counsel. The money was to be paid from a twenty-five percent share of the proceeds from the oil-for-food program operating under U.N. auspices.").

"match" the unknown value of the former with the known value of the latter.[89] In circumstances where the value of cases is driven by a small number of variables, there are grids that can define the value of cases depending upon the differentiation in the variables.[90] As was done in the silicone gel breast implant cases, a typical grid might have age, disease, and disability as the three major variables defining values.[91] An expert system is a more complicated series of "if . . . then" statements organized from interviews of experts familiar with the relative values of cases. Experts can opine that if a person has the following combination of characteristics related to symptoms, exposure, age, dependants, income, health history, and an unlimited number of additional factors, then the value of the case is "x." Expert systems are also used in a number of other contexts, including medical diagnosis.[92] Decision trees are commonly used in decision analyses to isolate a number of independent variables to be resolved sequentially to reach a conclusion.[93] Typically there are several alternative decision paths determined, probabilities are placed on the likelihood of each path, and the chances of any given outcome are calculated mathematically. There are also algorithms that have been constructed to provide relative weights to either small or large numbers of variables that seem to combine to establish the value of a case.[94] Most of the asbestos trusts have fairly complex mathematical algorithms that can disaggregate the critical aspects of an individual's case and then reaggregate them in a formula that reflects the overall value of the case.[95] Most mass tort settlements

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89. *See* McGovern, *UN Compensation*, *supra* note 88, at 174 (comparing the Iran–U.S. Claims Tribunal to the United Nations Compensation Commission); McGovern, *Managing Complex Litigation*, *supra* note 88, at 440 (comparing United States v. Michigan, 471 F. Supp. 192 (W.D. Mich. 1979), *aff'd*, 712 F.2d 242 (6th Cir. 1983) with the asbestos litigation).

90. *See* Dow Corning Settlement Facility Annex A, *In re* Dow Corning Corp., 244 B.R. 705 (Bankr. E.D. Mich. 1999).

91. *See* McGovern, *Tragedy*, *supra* note 78, at 1736; McGovern, *UN Compensation*, *supra* note 88, at 184.

92. *See generally* PHILLIP C. GIARRATANO & GARY D. RILEY, EXPERT SYSTEMS: PRINCIPLES & PROGRAMMING (4th ed. 2004).

93. *See* S.C. Res. 686, ¶ 2(b), U.N. Doc. S/RES 686 (Mar. 2, 1991); McGovern, *Tragedy*, *supra* note 78, at 1736; McGovern, *UN Compensation*, *supra* note 88, at 192.

94. *See* Asbestos Personal Injury Settlement Trust Distribution Procedures at 6–15, *In re* W. Asbestos Co., 313 B.R. 832 (Bankr. N.D. Cal. 2003).

95. *See* Francis E. McGovern, *The Evolution of Asbestos Bankruptcy Trust Distribution Plans*, 62 N.Y.U. Annual Survey of American Law 163, 173 (2006) ("Probably the most dramatic evidence of a change in valuation criteria can be seen by the variation in the relative amount of money paid to malignancy claims as opposed to the lowest non-malignancy claims. Manville-Original can be used

result in trusts designed to pay all present and future claims based upon claim evaluation methodologies that are designed to create horizontal and vertical equity for all claimants.[96]

At the aggregate level, any number of methodologies are currently used to evaluate the total value of all defined tort claims.[97] These modeling and estimation methodologies typically include a factual analysis of available data concerning the relevant population, a series of assumptions about the effect of tortious conduct on that population, and, finally, a sophisticated mathematical analysis using regressions analysis, neural computation, and Monte Carlo simulations.[98]

VIII. MODELING METHODOLOGY

The methodology for modeling the total value of liabilities for a defined tort has been intensely scrutinized in the crucible of litigation.[99] This methodology can be applied both to cases that have a defined universe of claims, the expectation of future claims, or a combination of the two.[100]

The initial step is to define and describe the target population. In the *Dalkon Shield* case, for example, that definition was obtained from marketing data on customers, such as age, geographic region, duration, and initiation of use of the product.[101] In the asbestos cases, the sources of information were the industries using asbestos and publicly available data on the size, turnover, and composition of that workforce.[102]

The next step is to define and characterize the adverse effects of the tortious activity. For the *Dalkon Shield* case, public health

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to illustrate the ratio of Mesothelioma to Other Asbestos Disease which was in the range of 17:1; for Lung Cancer I 3:1; and for Severe Asbestosis 4:1.”).

96. *See* McGovern, *Claims Resolution Facilities*, *supra* note 88, at 138.

97. *See generally supra* note 67.

98. *See* Estimation of the Number and Value of Pending and Future Asbestos-Related Personal Injury Claims, *supra* note 85; Projected Liabilities for Asbestos Personal Injury Claims as of April 2001, *supra* note 85; DUNBAR ET AL., *supra* note 85.

99. *In re* Fed.-Mogul Global Inc., 411 B.R. 148 (Bankr. D. Del. 2008).

100. *See generally supra* note 67.

101. *See generally* RICHARD B. SOBOL, BENDING THE LAW: THE STORY OF THE DALKON SHIELD BANKRUPTCY (1993).

102. *See* Estimation of the Number and Value of Pending and Future Asbestos-Related Personal Injury Claims, *supra* note 85; Asbestos Personal Injury Claims as of April 2001, *supra* note 85; Supplemental Report for Mark A. Peterson, *In re* Fed. Mogul Global, Inc., 411 B.R. 148 (Bankr. D. Del. 2008) (No. 01-10578 (RTL)); DUNBAR ET AL., *supra* note 85.

experts provided the incidence of pelvic inflammatory disease and infertility.[103] For the asbestos cases, there were Occupational Health and Safety Act (OSHA) epidemiological models for asbestos-related diseases, including time, duration, and degree of exposure to asbestos.[104] There were also the various mortality rates for the population at large. Then there was the relationship between the incidence of adverse effects and the target population.[105] This involved matching the incidence of harm to the customers or exposed universe. Next was the task of characterizing the causal link between use and effect. In the *Dalkon Shield* case, there was no causal link assumed; the causal link was the subject of proof.[106] In the asbestos cases, the OSHA causal analysis was suggested.[107] It was then possible to estimate the potential population with the adverse effect. The incidence rates were applied to the customers or exposed population.[108]

Under the normal use of this methodology, the next step is to characterize the propensity to sue by looking at filings by state and age group; settlement values by age, injury, and geography; and dismissal rates.[109] Once that litigating population is estimated, it is possible to apply trial rates of lawsuit behavior to the estimated population with the adverse effect. This step illustrates why the calculus of a defendant in estimating potential liability for tortious conduct inevitably concludes that the cost of that conduct to the defendant will be less than the cost to society as a whole.

The modeling methodology for estimating the total cost of tortious conduct would eschew the need for analyzing the "propensity to sue" variable and go directly to historical values of the estimated population with the adverse effect.[110]

IX. ESTIMATION METHODOLOGIES IN BANKRUPTCY

Section 502(c) of the Bankruptcy Code provides for the judicial estimation of all legal claims pending against a bankrupt entity[111].

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103. *See In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847, 848–49 (9th Cir. 1982).

104. *See* DUNBAR ET AL., *supra* note 85.

105. CTR. FOR DISEASE CONTROL, ELEVATED RISK OF PELVIC INFLAMMATORY DISEASE AMONG WOMEN USING THE DALKON SHIELD (1983).

106. *See generally "Dalkon Shield" IUD Prods. Liab. Litig.*, 693 F.2d 847.

107. *See supra* note 95.

108. *See generally* KENNETH J. ROTHMAN, SANDER GREENLAND & TIMOTHY L. LASH, MODERN EPIDEMIOLOGY (3rd ed. 2008).

109. *Id.*

110. *Id.*

111. 11 USC § 50(c) (2006).

Three approaches have been utilized consistently with the modeling methodology described above: generic, sampling, and de novo.

Under the generic approach, historical data is compiled concerning the value of cases that have been previously resolved.[112] Then data is prepared projecting the potential number of claims that must be resolved, either from a defined or projected universe of claims. Generally, the estimation is based upon a linear calculation of past to future, adjusting for the passage of time.[113]

With the sampling approach, a statistically significant sample of both previously resolved cases and pending cases are related.[114] Each case is examined to determine its relevant characteristics so that the two universes of cases can be compared statistically. The values of the previously resolved cases are applied to the relevant pending cases, and then that data is extrapolated to the universe of cases as a whole.[115]

The de novo approach ignores history and creates a new history in the context of the estimation hearing.[116] Rather than rely on old litigation system values, a new series of values are created for representative cases, and those new values are then extrapolated to the entire universe of claims. Where there are future claims that must be estimated, various assumptions based upon the best available statistical evidence are used for purposes of extrapolation.[117]

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112. *See* Projected Liabilities for Asbestos Personal Injury Claims as of April 2001, *supra* note 85; Supplemental Report for Mark A. Peterson, *supra* note 102.

113. *See* Estimation of the Number and Value of Pending and Future Asbestos-Related Personal Injury Claims, *supra* note 85; Projected Liabilities for Asbestos Personal Injury Claims as of April 2001, *supra* note 85; Supplemental Report for Mark A. Peterson, *supra* note 102; DUNBAR ET AL., *supra* note 85.

114. *See* McGovern, *Resolving Mature Mass Tort Litigation*, *supra* note 87, at 660 (stating that "fairness—values of predictability, rationality, and equality of opportunity and strategy" are at issue in mass tort litigation). *See also* Francis E. McGovern, *Distribution of Funds in Class Actions—Claims Administration*, 35 J. CORP. L. 123 (2009) [hereinafter McGovern, *Claims Administration*]. *See generally* Cabraser & Nelson, *supra* note 20.

115. *See* Estimation of the Number and Value of Pending and Future Asbestos-Related Personal Injury Claims, *supra* note 85; Projected Liabilities for Asbestos Personal Injury Claims as of April 2001, *supra* note 85; Supplemental Report for Mark A. Peterson, *supra* note 102; DUNBAR ET AL., *supra* note 85.

116. Questionnaire, *In re* W.R. Grace & Co., 366 B.R. 302 (Bankr. D. Del. 2007) (No. 01-01139 (JFK)); Memorandum of Points and Authorities in Support of W.R. Grace & Co.'s Motion to Approve PI CMO and Questionnaire, *In re W.R. Grace & Co.*, 366 B.R. 302.

117. *See generally* SOBOL, *supra* note 101.

X. ALLOCATION OF RESOURCES

Once there has been a determination of the appropriate level of investment in safety and corresponding benefit, there are two additional issues that remain concerning those resources. For purposes of this Article, neither of these issues needs to be resolved, but they should be identified.

In our system of insurance for tortious liability, there are a number of mechanisms available to spread risk and compensation. Any full-fledged scheme to ensure that there is appropriate investment in safety must take into account the *ex post* nature of tort law.[118] Defendants make the decision about their safely levels prior to any determination concerning liability. As a result, there can be substantial moral hazard and adverse selection problems unless the tort and insurance systems are sufficiently coordinated to provide the predictability, insurability, and accountability necessary to make *ex ante* decisions that result in optimal deterrence.[119]

XI. DISTRIBUTION OF RESOURCES

The question then arises of what to do with the number determined to be the total societal harm caused by tortious conduct.[120] How should that money be distributed? Again, it is within the scope of this Article merely to raise the question, rather than answer it.

The goal in any distribution process would involve appropriate incentives to bring attention to tortious conduct, to make equitable distribution of available resources both horizontally and vertically, and to avoid windfalls.[121] There are a number of approaches that could be taken. Under the existing tort system, compensation is on a first-come, first-serve basis for compensatory damages. It would certainly be possible to deduct any compensatory damages paid by a tortious defendant from the total award of social damages. If there were a risk of an eventual shortfall, there is any number of partial distribution, pro rata, focused pro rata, or formal

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118. *See generally* Guido Calabresi, *The Complexity of Torts—The Case of Punitive Damages*, *in* EXPLORING TORT LAW 333, 345–46 (M. Stuart Madden ed., 2005).

119. *See generally* TWERSKY & HENDERSON, *supra* note 72.

120. *See* Sharkey, *supra* note 66, at 351 (2003) (stating that "punitive damages have been used to pursue not only the goals of retribution and deterrence, but also to accomplish, however crudely, a societal compensation goal: the redress of harms caused by defendants who injure persons beyond the individual plaintiffs in a particular case").

121. *See* McGovern, *Claims Resolution Facilities*, *supra* note 88, at 1366–67.

distribution alternatives.[122] It is also possible to award money to the state or use additional funds for *cy pres* awards.[123] There is vast experience with the distribution methodology used in the global settlement of mass tort claims that has generally been recognized as appropriate when there is a single sum of money to be divided among claimants.[124]

For a tortious defendant, one of the major benefits of an allocation and distribution of monies for all the harm caused by the tortious conduct is finality.[125] Under this theory, once a determination is made, either by trial or settlement, there would be no recourse outside the established fund for a plaintiff to pursue a defendant. The outcome would be analogous to bankruptcy in terms of the protection afforded a defendant from further litigation by the members of the class.[126]

XII. CONCLUSION

The marriage of punitive damages and class actions has almost inevitably ended in divorce. There are few cases approved by appellate courts that have allowed a class action to include punitive damages, and under existing Supreme Court jurisprudence there are only a limited number of discrete factual situations where any future class action may include punitive damages. In addition, this jurisprudence has disincentivized both plaintiffs and defendants from even attempting to use the class action device in this context and has encouraged lawyers to look to alternative procedural paths for seeking additional, exemplary, or punitive damages.

There are, however, several limited circumstances where there could be appellate approval of a punitive damages class action. These circumstances could occur, for example, in the context of a federal class action involving a catastrophe in a single state where all parties with similar and real relationships are included, the elements of their causes of action are identical, damages are financial and have been determined, the defendant has moved for class certification of punitive damages, and the punitive damages

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122. *Id*.

123. *See* PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (Proposed Final Draft 2009).

124. *See* McGovern, *Claims Resolution Facilities*, *supra* note 88, at 1381; McGovern, *UN Compensation*, *supra* note 88; *see also* McGovern, *Claims Administration*, *supra* note 114, at 109.

125. *See* McGovern, *Defensive Use of Federal Class Actions*, *supra* note 6.

126. 11 U.S.C.A. § 524(g) (2005); *see also* Francis E. McGovern, *Settlement of Mass Torts in a Federal System*, 36 WAKE FOREST L. REV. 871 (2001).

as determined are commensurate with the reprehensibility of the conduct.

From a purely theoretical perspective, another possible role for a class action in punitive damages cases could materialize if a court adopted a separate rationale for punitive damages based upon economic arguments that damages for tortious conduct should be fully borne by the tortfeasor in order to achieve optimal societal deterrence. Under current tort law, only a small measure of the total damages imposed by a tortious defendant on society as a whole is paid by that defendant because such a small percentage of the individual, affected plaintiffs bring lawsuits, resulting in underdeterrence from the perspective of society. If a court were to adopt a more global economic analysis and decide that those defendants were liable for the entire amount of harm that they cause, in order to achieve the appropriate balance of over and under deterrence there would be an opportunity for the class action device and an award of damages above and beyond the compensatory damages for individual lawsuits. This award could be determined with an analytical process commonly used in business and similar to the Section 502(c) estimation process found in the Bankruptcy Code.[127] Whether called "economic," "extra compensatory," "exemplary," or "punitive," these global damages would result in tortious defendants being held responsible for all the harm they cause rather than only the subset of harm calculated from the damages won by opportunistic plaintiffs. Rather than using the ill-fitting "punishment damages" moniker for performing the economic function of forcing defendants to internalize the costs of their tortious activities, the same outcome could be achieved by a combination of class action, estimation, and societal damages. In addition to the available methodologies to calculate the appropriate benefit from an optimal allegation of resources for safety, there is also any number of methods available for the distribution of those resources associated with that benefit. The suggestion here is not a normative one, but, in the spirit of the Symposium, an exploration of possible scenarios that could conceivably occur in the future. This combination of class actions and punitive damages would occur only if traditional legal doctrines of punitive damages are redefined to fit a paradigm consistent with the law and economics rationale.

127. 11 U.S.C. § 502(c) (2006).