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Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class

Kevin M. Forde*

INTRODUCTION

In recent years, the occurrence of mass torts has increased dramatically. A mass tort is the phenomenon where numerous persons suffer the same or similar kinds of injuries resulting from another individual's or entity's action, course of conduct, or product.¹ Such occurrences generally spawn a multiplicity of lawsuits against the tortfeasor. Moreover, the increasing frequency of such occurrences has led to an explosion in the area of complex mass tort litigation.

In the last twenty years, numerous incidents have given rise to mass tort litigation. Such litigation is especially common in the area of products liability. The MER/29 litigation² in the late

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1960's and the more recent DES\textsuperscript{3} and Dalkon Shield IUD\textsuperscript{4} litigation are vivid examples of mass torts arising out of the distribution of drugs and medical supplies.\textsuperscript{5} Current litigation arising from the manufacture and distribution of asbestos products\textsuperscript{6} and from the government's use of "Agent Orange"\textsuperscript{7} during the Vietnam War demonstrate the enormous amount of litigation which may be generated by the distribution of a dangerous or defective product.\textsuperscript{8} Mass tort litigation has also resulted from single disastrous occurrences such as airplane crashes and fires. Recent examples of catastrophes which generated mass tort litigation include the Chicago air crash disaster,\textsuperscript{9} the collapse of skywalks at the Kansas City Hyatt Regency Hotel,\textsuperscript{10}


\textsuperscript{5} Other examples of mass tort cases in the field of drug litigation include: "Braunwald-Cutter" Aortic Heart Valve Prods. Liab. Litig., 465 F. Supp. 1295 (J.P.M.D.L. 1979); In re Swine Flu Immunization Prods. Liab. Litig., 446 F. Supp. 244 (J.P.M.D.L. 1978).


\textsuperscript{10} In re Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), vacated, 680 F.2d 1175 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982).
and the fires at the MGM Grand Hotel11 and Beverly Hills Supper Club.12

Modern courts have struggled to resolve difficulties which result from mass tort litigation. The mass tort poses complex problems because litigation often involves numerous transactions occurring in several states.13 This complexity has led to the demand for legislation to resolve the problems generated by certain mass torts.14 While legislation may be one solution for the difficulties created by mass accident and mass products liability actions, modern courts have a procedural device, the class ac-

13. See Dalkon Shield, supra note 4, 526 F.Supp. at 892, 902; Note, Mass Liability, supra note 1, at 1797-98; Note, Punitive Damages, supra note 1, at 1273.
14. For example, after hearing portions of the litigation arising from the O'Hare DC-10 crash, a case replete with choice of law and other problems, a somewhat frustrated Judge Hubert Will testified before Congress and urged adoption of a national statute to deal with air disasters. See In re Air Crash Disaster Near Chicago, Ill., 500 F.Supp. at 1049-52 (applying the law of defendants' principal place of business to determine liability for punitive damages in wrongful death actions. Defendant McDonnell Douglas was subjected to Missouri law which allows punitive damages; defendant American Airlines' liability was decided under New York law which does not permit punitive damages in wrongful death cases), rev'd, 644 F.2d at 632-33 (applying the substantive law of the place of injury, Illinois, to the issue. Because Illinois does not allow punitive damages in wrongful death suits, neither defendant was liable for punitive damages). In addition to the choice of law problems, both the District Court and the Court of Appeals for the Seventh Circuit dealt with the problem of prejudgment interest. In re Air Crash Disaster Near Chicago, Ill., 480 F.Supp. 1280 (N.D. Ill. 1979), aff'd, 644 F.2d 633, 635 (7th Cir. 1981). See Kennelly, Litigation Implications of the Chicago O'Hare Airport Crash of American Airlines Flight 191, 15 J. MAR. L. Rev. 273, 297-301 (1982). Approximately 260 cases were filed in state and federal courts throughout the United States. Many of the state cases were removed to federal court and all federal court cases were consolidated for pre-trial hearings in Chicago. In re Air Crash Disaster Near Chicago, Ill., 476 F. Supp. 445 (J.P.M.D.L. 1979). The author served as liaison counsel for all plaintiffs.


tion,\textsuperscript{15} to deal with certain problems generated by mass tort litigation.

The class action is particularly effective in dealing with the complex issue of the proper scope of recovery of punitive damages in mass tort litigation.\textsuperscript{16} The primary goals of punitive damages are to punish a defendant for his outrageous behavior and to deter the defendant and others similarly situated from engaging in like conduct in the future.\textsuperscript{17} Punitive damages awards are particularly problematic in modern multiparty litigation because of the danger that numerous awards will bankrupt a defendant, thereby precluding other plaintiffs from recovery. Such awards also may penalize a defendant in a manner which is disproportionate to his wrongdoing because of the imposition of numerous punitive damages awards.

Accordingly, there is clearly a need to re-evaluate the doctrine of punitive damages and adapt it to the mass tort context in order to achieve fair and efficient adjudication of punitive damages liability in circumstances where a defendant faces liability to numerous plaintiffs. The court system should redress wrongs committed against contemporary society while protecting liable parties from financial catastrophe. The class action device is one method courts have used to provide an appropriate remedy for plaintiffs and defendants.\textsuperscript{18}

This article will discuss the problems associated with the application of the punitive damages doctrine to mass tort litiga-


There are situations where a class action may not be appropriate for mass tort litigation, such as in the case of a mass accident resulting in individual issues of compensatory damages. Advisory Comm. Note, 39 F.R.D. 69, 103 (1966).

\textsuperscript{16}In re Federal Skywalk Cases, 680 F.2d 1175, 1185-91 (8th Cir.) (Heaney, J., dissenting), cert. denied, 103 S. Ct. 342 (1982). See Note, Punitive Damages, supra note 1, at 1275-82.

\textsuperscript{17}Dalkon Shield, supra note 4, 526 F. Supp. at 898-99.

\textsuperscript{18}E.g., In re Federal Skywalk Cases, 93 F.R.D. at 420; Dalkon Shield, supra note 4, 526 F. Supp. at 897. See Note, Class Actions for Punitive Damages, 81 MICH. L. REV. 1787, 1791-97 (1983) [hereinafter cited as Note, Class Actions]; Comment, supra note 11, at 383-87.
Class Actions

It will examine the goals punitive damages are designed to promote, as well as the criticisms which have been directed against such awards. Next, this article will discuss judicial commentary regarding the appropriate control of multiple punitive damages awards in mass tort litigation. This article will then present the goals and procedural prerequisites of federal class actions. Following this background, this article’s discussion will focus on three federal court cases where district courts have attempted, with varying degrees of success, to use Rule 23 of the Federal Rules of Civil Procedure to certify a class for punitive damages claimants. Following an analysis of the class action approach to punitive damages, this article will conclude by offering some suggestions for future use of this innovative technique in mass tort cases.

BACKGROUND

The Punitive Damages Doctrine

The doctrine of punitive damages developed as part of the English common law and it gained substantial acceptance in the United States by the middle of the nineteenth century. Today, the doctrine is recognized by nearly all fifty states. The term “punitive damages” is used interchangeably with exemplary damages. Historically, punitive damages have also been referred to as “indicative,” “punitive,” and “presumptive” damages. See Riley, Punitive Damages: The Doctrine of Just Enrichment, 27 Drake L. Rev. 195, 199 (1977).


doctrine of punitive damages serves important functions in our society. Both the historic development and the continued viability of this remedy demonstrate that public policy demands fair retribution for serious wrongdoing.

Punitive damages have at least two major goals. First, they are designed to punish the defendant for his outrageous conduct. Second, they are intended to deter the defendant, and others similarly situated, from engaging in like conduct in the future. The punishment aspect of the punitive damages doctrine may be characterized as an expression to the defendant that his conduct is so malicious, oppressive or otherwise outrageous that


24. See generally Morris, supra note 20, at 1179; Owen I, supra note 21, at 1262-68; Riley, supra note 19, at 198-201. Despite criticism, punitive damages are an established part of our legal system, and there is no indication of any present desire or tendency to abandon them.” W. Prosser, Handbook of the Law of Torts § 2, at 11 (4th ed. 1971).


27. E.g., Newport v. Fact Concerts, 453 U.S. 247, 266-67 (1981). See D. Dobbs, Handbook on the Law of Remedies § 3.9, at 205 (1973). For a complete discussion of the goals of punishment and deterrence, see Schwartz, Deterrence and Punishment in the Common Law of Punitive Damages, 56 S. Cal. L. Rev. 133 (1982). Although there are several other purposes which punitive damages may serve, punishment and deterrence are the primary rationales. See Long, supra note 23, at 876; Owen I, supra note 21, at 1277. Professor Owen notes two less prominent functions of punitive damages: to induce private persons to enforce the laws by bringing wrongdoers to justice and to compensate victims whose actual losses exceed those for which the law allows recovery. Id. at 1278. See W. Prosser, supra note 24, § 2.1, at 11. Cf. Note, Punitive Damages, supra note 1, at 1277-78 (punitive damages are an incentive to plaintiffs to bring suit).
it will not be tolerated by the rest of society.\textsuperscript{28} Theoretically, the infliction of punishment for past acts tends to control and deter future misconduct.\textsuperscript{29} Presumably, after being assessed punitive damages as a result of egregious behavior, the defendant and others will refrain from such conduct in the future so as to avoid the consequences.\textsuperscript{30}

Punitive damages awards are unique in the area of civil law. In contrast to compensatory damages which are designed to make the plaintiff whole,\textsuperscript{31} punitive damages are directed at the conduct of the defendant.\textsuperscript{32} Although punitive damages are awarded to an individual plaintiff, they are extracted for the benefit of society.\textsuperscript{33} They are assessed over and above compensatory damages when the defendant’s wrongful conduct rises

\textsuperscript{28} The United States Supreme Court recognized the element of punishment in a punitive damages award in Day v. Woodworth, 54 U.S. (13 How.) 363 (1851):

It is a well-established principal of the common law, that . . . a jury may inflict what are called exemplary, punitive or vindictive damages upon a defendant, having in view the enormity of his offence [sic] rather than the measure of compensation to the plaintiffs . . . By common as well as statute law, men are often punished for aggravated misconduct or lawless acts, by means of civil action and the damages inflicted, by way of penalty or punishment, given to the party injured.

\textit{Id.} at 371.

\textsuperscript{29} Owen I, supra note 21, at 1279. See generally, Ellis, supra note 25, at 4-8 (punishment and the consequent payment of a cost derived from the notion of “desert”).

\textsuperscript{30} One commentator recognized that “w]hile the practical effectiveness of punishment in deterring misbehavior is a source of constant debate, most commentators agree that punishment does achieve a measure of deterrence in many cases.” Owen I, supra note 21, at 1283. See Andenais, \textit{The General Preventive Effects of Punishment}, 114 U. PA. L. REV. 949, 961 (1966); Mallor & Roberts, supra note 26, at 648. For a more detailed discussion of the deterrent aspect of punitive damages, see Morris, supra note 20, at 1175-77; Owen I, supra note 21, at 1282-87. See also Moran v. Johns-Manville Sales Corp., 691 F.2d 811, 816 (6th Cir. 1982); Wangen v. Ford Motor Co., 97 Wis. 2d 260, 278, 294 N.W.2d 437, 451-52 (1980) (Coffey, J., dissenting).

\textsuperscript{31} See \textit{Restatement (Second) of Torts} § 908, comment (b) (1979). Punitive damages are not awarded for mere inadvertence, mistake, or errors of judgment which constitute ordinary negligence. \textit{Id.}

\textsuperscript{32} See Riley, supra note 19, at 225. Typical types of actions where punitive damages are awarded are fraud, assault and battery, seduction, criminal conversion, alienation of affections, malicious prosecution, false arrest and imprisonment, abuse of process, libel, slander, trespass, nuisance, gross negligence and recklessness. \textit{Id.} at 225-32. See also W. PROSSER, supra note 24, § 2, at 10-11. While punitive damages have been traditionally assessed in tort actions, some jurisdictions have imposed punitive damages in contract actions involving oppressive or malicious conduct. Mallor & Roberts, supra note 26, at 658-63. See \textit{Redden}, supra note 25, § 2.5, at 41-42.

\textsuperscript{33} E.g., Dalkon Shield, supra note 4, 526 F.Supp. at 899; Wangen, 97 Wis. 2d at 270, 294 N.W.2d at 442. See Morris, supra note 20, at 1177 n. 7.
above the level of mere negligence. As a general rule, intentional, illegal, malicious, wanton, reckless, or grossly negligent conduct will justify an award of punitive damages.

It is generally accepted that it is not possible to establish a quantitative formula for determining the proper amount of punitive damages which can be applied in all cases. However, the same may be said of many other forms of damages. Moreover, there are some general criteria which may assist a jury in determining an appropriate punitive damages award. Currently, a number of identifiable factors are considered relevant to a jury’s determination. A jury may consider the nature of the act itself, the circumstances surrounding the commission of the act, the extent of harm to the plaintiff, and the wealth of the defendant. Also, significant in certain cases is the existence of multiple claims by other persons based on the same wrongful conduct.

34. The RESTATEMENT (SECOND) OF TORTS (1979) provides in parts:

(1) Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future.

(2) Punitive damages may be awarded for conduct that is outrageous, because of defendant’s evil motive or his reckless indifference to the rights of others.

Id. § 908.

35. REDDEN, supra note 25, § 2.6, at 42. See Illinois Pattern Jury Instructions, I.P.I. § 35.01 (1961). In products liability suits, Professor Owen suggests that punitive damages should be assessed against a defendant manufacturer for “conduct that reflects a flagrant indifference to the public safety.” Owen I, supra note 21, at 1367. See also Moore v. Remington Arms Co., 100 Ill. App. 3d 1102, 1115, 427 N.E.2d 608, 617 (1981).

36. See Mallor & Roberts, supra note 26, at 664. The authors point out that a quantitative formula would be undesirable. First, the deterrent impact of punitive damages would be minimized if a person contemplating wrongful conduct could gauge his or her maximum liability in advance. Second, any uniformity in a sanction that strikes at wealth would pose the danger of being excessive for poor defendants and inadequate for rich ones. Id. at 666. See also WANGEN, 97 Wis. 2d at 302-03, 294 N.W.2d at 459 (stating that “punitive damages must be decided on a case-by-case basis”).

37. These include the motives of the wrongdoers, the relations between the parties, and the provocation or want of provocation for the act. See RESTATEMENT (SECOND) OF TORTS § 908, comment (e) (1979).

38. Id. However, it is not essential to the award of punitive damages that the plaintiff has suffered physical or pecuniary harm. Id. § 908, comment (c).

39. See id. § 908, comment (e). It is obvious that the defendant’s wealth would be an important consideration in arriving at an amount which would effectively punish and deter. While an amount of $50,000 would have a significant impact on a company worth $500,000, it would hardly have any effect on a multi-billion dollar corporation. See also Owen II, supra note 22, at 19-20.

40. RESTATEMENT (SECOND) OF TORTS § 908, comment (e) (1979).
Despite these criteria, a primary criticism of the punitive damages doctrine focuses on the difficulties in determining an appropriate amount of damages to be assessed in a particular case. Critics contend that there is a need for more precise guidelines and more effective controls on the extent of punishment juries should be allowed to impose in the form of punitive damages. Critics maintain that the lack of concrete guidelines and controls give jurors too much discretion, thereby allowing them to award excessive amounts of punitive damages based on their passions and prejudices, instead of basing such awards on specific standards which would insure just results. Some critics argue that even if there were more concrete guidelines governing the determination of punitive damages awards, juries should not decide the amounts of such awards because jurors are inexperienced and unqualified to mete out the proper punishment.

The amount of punitive damages awards has increased in recent times, especially in products liability suits. Awards in excess of several million dollars have been upheld in many instances. Because of the explosion of claims in the area of mass tort litigation, which frequently involve claims for punitive

41. See Owen I, supra note 21, at 1314-15; Riley, supra note 19, at 201, 216. See generally Carsey, The Case Against Punitive Damages, 11 FORUM 57 (1975); Sales, The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on the Citadel, 14 ST. MARY'S L.J. 351 (1983). See also supra note 23. Much of the criticism of punitive damages has been directed at large awards in products liability suits. See Owen II, supra note 22, at 6-7, 7 n.33.

42. E.g., Owen I, supra note 21, at 1315-19, 1361-71 (suggesting considerations for measuring punitive damages in products liability cases); Riley, supra note 19, at 249-51 (advocating that courts should redefine the terms for defendant's conduct and use procedural devices to limit and assess punitive damages). See also Morris, Punitive Damages in Personal Injury Cases, 21 OHIO ST. L.J. 216, 227 (1960); Owen, Civil Punishment and the Public Good, 56 S. CAL. L. REV. 103, 117-21 (1982); Owen II, supra note 22, at 50-59.

Some commentators recommend that the judge, rather than the jury should determine the amount of a punitive damages award. Mallor & Roberts, supra note 26, at 664. The court would consider the following factors: severity of threatened harm, degree of reprehensibility of defendant's conduct, profitability of the conduct, financial position of the defendant, amount of compensatory damages assessed, costs of litigation, potential criminal sanctions and other civil actions against the defendant based on the same conduct. Id. at 667-69.

43. See Ellis, supra note 25, at 42-43, 53; Mallor & Roberts, supra note 26, at 646.

44. Mallor & Roberts, supra note 26, at 663-64. See also Morris, supra note 20, at 1179; Owen I, supra note 21, at 1320-21.

45. See Owen II, supra note 22, at 6; Putz & Astiz, supra note 1, at 5.

damages, the conflict between the goals of punitive damages and the criticism regarding the lack of necessary guidelines to determine the appropriate amounts of awards has increased significance and a greater need for resolution.

The Problem of Punitive Damages in the Mass Tort Context

Although the doctrine of punitive damages presents problems and has generated controversy even in single party litigation, these problems are exacerbated and the controversy intensified when the doctrine is viewed in the mass tort context.\textsuperscript{47} The lack of standards and controls over punitive damages awards by juries becomes especially troublesome in the typical mass tort situation where a defendant faces potential liability to hundreds or even thousands of plaintiffs across the country.\textsuperscript{48} Serious problems are created not only for defendants, but also for plaintiffs.

There are several identifiable problems associated with awards of punitive damages in mass tort cases. One difficulty is the danger that punitive damages in the mass tort context will have a devastating financial impact on the defendant. The most obvious result of multiple claims for punitive damages is the possibility of multiple awards of punitive damages.\textsuperscript{49} It is clear that all defendants, even large corporations, have finite assets from which punitive damages awards can be satisfied.\textsuperscript{50} The widely publicized Johns Manville Corporation’s filing of a chapter 11 bankruptcy in response to the bringing of claims against it

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\textsuperscript{47} See supra note 1. See also W. Prosser, supra note 24, § 2, at 13. Cf. Owen II, supra note 22, at 13-16, 45-46 (explaining that the purpose and measurement of punitive damages in traditional contexts does not extend to current products liability actions against major manufacturing corporations).

\textsuperscript{48} E.g., Dalkon Shield, supra note 4, 526 F.Supp. at 892-93, 899-900. See Putz & Astiz, supra note 1, at 12-14.

\textsuperscript{49} See Roginsky v. Richardson-Merrell, Inc., 378 F.2d 832, 839 (2d Cir. 1967). See also Owen I, supra note 21, at 1322-25; Note, Class Actions, supra note 18, at 1791-94.

which relate to injuries caused by exposure to asbestos is a vivid example of such a problem.\textsuperscript{51} It is apparent that hundreds or thousands of substantial punitive damages awards can have severe financial consequences for even the wealthiest defendant.\textsuperscript{52} Defendants may be unable to satisfy these awards and may be forced into bankruptcy in the process.\textsuperscript{53}

Furthermore, multiple punitive damages awards may not advance the ultimate objectives which justify the imposition of punitive damages.\textsuperscript{54} In accordance with the goals of punitive damages, awards should total an amount in relation to the wealth of the defendant that will effectively punish the defendant for his wrongdoing and deter him and others from engaging in similar conduct in the future.\textsuperscript{55} In the context of mass tort litigation, depending on the amount of individual awards, one or a few punitive damages awards may effectively punish and


\textsuperscript{52} See Roginsky, 378 F.2d at 838-39. Judge Friendly’s prediction of economic destruction for defendant Richardson-Merrill, Inc. in the MER/29 litigation was not fulfilled. See Owen I, supra note 21, at 1324-25. See also Wangen, 97 Wis. 2d at 297-98, 294 N.W.2d at 457 (rejecting defendant’s argument that severe economic consequences precluded an award of punitive damages because courts could effectively control the amount of punitive damages).

\textsuperscript{53} See Roginsky, 378 F.2d at 839; Coburn v. 4-R Corp., 77 F.R.D. 43, 45 (E.D. Ky. 1977). In Dalkon Shield, supra note 4, 526 F.Supp. at 897, the court’s decision was influenced by the fact that, in light of the substantial number of claims against the defendant, the threat of constructive bankruptcy pervaded the matter. See, Note, Class Actions, supra note 18, at 1792-93.

Some might say that if the defendant is guilty of conduct which is culpable enough to warrant an award of punitive damages, then it deserves to be financially devastated or even forced into bankruptcy. But see Wangen, 97 Wis. 2d at 294, 294 N.W.2d at 455; Owen II, supra note 22, at 6-7.

\textsuperscript{54} Note, Punitive Damages, supra note 1, at 1280-82.

deter. Substantial multiple awards, therefore, may result in punishing a defendant in a manner which is disproportionate to his wrongdoing. The purposes of punitive damages are not served by awarding an amount which, in light of the defendant's net wealth and the gravity of a particular act, exceeds a level necessary to properly punish and deter.

Some even argue that multiple punitive damages awards may violate a defendant's constitutional rights. In the realm of criminal law, the double jeopardy prohibition on multiple prosecutions of a defendant for the same crime protects the defendant from multiple punishments. Although restricted to the civil law context, the doctrine of punitive damages serves similar objectives as criminal punishment. Both are designed to punish a defendant for wrongful conduct and to deter him and others like him from engaging in such conduct in the future. The double jeopardy analogy to multiple punitive damages awards has been rejected by courts presented with this issue, nevertheless this argument highlights the potential inequities that can

56. Roginsky, 378 F.2d at 838-39; Dalkon Shield, supra note 4, 526 F. Supp. at 899.
58. See In re Federal Skywalk Cases, 680 F.2d 1175, 1188-91 (8th Cir.) (Heaney, J., dissenting) (addressing defendants' seventh amendment and due process claims), cert. denied, 103 S. Ct. 342 (1982); Dalkon Shield, supra note 4, 526 F. Supp. at 899-900. See also K. REDDEN, supra note 25, § 7.2, at 602-10 (suggesting that punitive damages violate the fourth, fifth and sixth amendments); Putz & Astiz, supra note 1, at 29-31; Riley, supra note 19, at 243-45.
59. U.S. CONST. amend. V. The fifth amendment provides in pertinent part: [N]or shall any person be subject for the same offense to be twice put in jeopardy of life or limb: . . . For a complete explanation of the double jeopardy argument, see K. REDDEN, supra note 25, at § 4.9, § 7.2(A)(2)(b). See also Putz & Astiz, supra note 1, at 17-18; Note, Mass Liability, supra note 1, at 1805-06.
60. See Mallor & Roberts, supra note 26, at 647-49; Note, supra note 23, at 1180-81. The quasi-criminal nature of punitive damages has led some critics to suggest that punitive damages should not be awarded in the absence of the appropriate procedural safeguards which apply in criminal cases. See K. REDDEN, supra note 25, § 4.7(c)(1), § 7.2(A)(6); Mallor & Roberts, supra note 26, at 644-45; Riley, supra note 19, at 243-45; Comment, Criminal Safeguards and the Punitive Damages Defendant, 34 U. CHI. L. REV. 408, 413-18 (1967). Such an argument was expressly rejected in Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 713, 60 Cal. Rptr. 398, 417-18 (1967). See Note, supra note 14, at 468-69.
61. E.g., Dalkon Shield, supra note 4, 526 F. Supp. at 899; Lemer v. Boise Cascade, Inc., 107 Cal. App. 3d 1, 7, 165 Cal. Rptr. 555, 559 (1980); Toole, 251 Cal. App. 2d at 718, 60 Cal. Rptr. at 418. One commentator noted that the double jeopardy argument has been rejected by every court that has heard it because double jeopardy only applies to two
result from multiple punitive damages awards. Some courts have viewed any questions regarding the constitutionality of punitive damages awards as involving due process considerations because of the argument that multiple awards violate notions of fundamental fairness. However, no assertions that multiple punitive damages awards are unconstitutional have been sustained by the courts.

As a result of potential inequities to a defendant in multiparty litigation involving punitive damages claims, some have argued that punitive damages should not be assessed, contending that compensatory damages in such a situation are sufficient to punish the defendant for his conduct and deter the defendant and others from future misconduct. However, allowing the defendant to escape liability for punitive damages would vitiate the goals of punitive damages. If a defendant corporation has injured a large number of people, then it should be punished to deter itself and others from future wrongdoing. Compensatory damages, alone, would be insufficient to accomplish these objectives even in the event of multiple judgments. Moreover, not-criminal sanctions by the sovereign, not to civil proceedings. Note, Mass Liability, supra note 1, at 1905.

62. See, e.g., In re Federal Skywalk Cases, 680 F.2d at 1188 (Heaney, J., dissenting); Roginsky, 378 F.2d at 840; In re “Agent Orange” Prod. Liab. Litig., MDL No. 381, Memorandum and Pretrial Order No. 72, at 28; Dalkon Shield, supra note 4, 526 F. Supp. at 899-900. See also K. Redden, supra note 23, § 7.2(B), at 610-11; Putz & Astiz, supra note 1, at 29-31. It has been suggested that overlapping awards not only may violate a sense of fundamental fairness, but constitutional due process may encompass principles of res judicata and the notion that litigation must come to an end. In re Federal Skywalk Cases, 680 F.2d at 1188; Dalkon Shield, supra note 4, 526 F. Supp. at 899.

63. E.g., Roginsky, 378 F.2d at 841.

64. J. GHIARDI & J. KIRCHNER, PUNITIVE DAMAGES: LAW AND PRACTICE § 6.10, at 40-41 (1981); Owen II, supra note 22, at 59. In Wangen, the Supreme Court of Wisconsin succinctly concluded: “Although the risk that manufacturers may be subjected to excessive punitive damages is real, the need for punitive damages as a tool for punishment and deterrence is also real.” 97 Wis. 2d at 309, 294 N.W.2d at 461.

65. Froud v. Celotex Corp., 107 Ill. App. 3d 654, 656, 437 N.E.2d 910, 913 (1982), rev’d, 98 Ill. 2d 324, 456 N.E.2d 1316 (1983). In Froud, the Illinois Appellate Court aptly stated: “We do not believe that defendants should be relieved of liability for punitive damages merely because, through outrageous misconduct, they have managed to seriously injure a large number of persons. Such a rule would encourage wrongdoers to continue their misconduct because, if they kept it up long enough to injure a large number of people, they could escape all liability for punitive damages.”

withstanding the Manville situation, the threat of bankrupting a corporation has proven to be more theoretical than real.67

Ideally, punitive damages in the mass tort context should result in a total award which in relation to the defendant's wealth effectively punishes and deters the defendant. Therefore, courts need to accurately assess the potential harm to the defendant in light of the goals of punitive damages. The purpose is to "sting, not kill, a defendant."68 In some circumstances, substantial individual punitive damages awards in mass tort litigation may prevent the achievement of such a result. Class actions, which would permit unitary consideration of such damages may be the most viable method of preventing defendants from being punished in a manner which is disproportionate to their wrongdoing, while insuring that defendants are appropriately punished and deterred from engaging in similar conduct in the future.

The defendant, however, is not the only party that may be adversely affected by the imposition of multiple punitive damages awards in the mass tort context. There are potential problems for plaintiffs who seek recovery from a defendant who faces multiple punitive damages liability.69 First, there is the danger that the defendant will be incapable of satisfying all punitive damages awards which are assessed.70 In addition, there is the possibility that at some point in time a determination will be made that there should be a limit on the amount of punitive damages that may be assessed against a defendant for the same analysis balancing human lives and limbs against corporate profits," id., and labeled Ford's conduct as "reprehensible in the extreme." Id. at 819, 174 Cal. Rptr. at 388. See Morris, supra note 20, at 1185-87; Owen I, supra note 21, at 1323-24; Note, Class Actions, supra note 18, at 1794 n.46. See also Wangen, 97 Wis. 2d at 288, 294 N.W.2d at 451.

67. Owen I, supra note 21, at 1323-24. Of the 1500 claims that were filed against Richardson-Merrell, Inc. in the MER/29 litigation, only eleven were tried to a jury verdict. Seven cases were decided for the plaintiff, and in only three of these were punitive damages awarded, one of which was reversed on appeal. Id. at 1324. See Rheingold, supra note 2, at 132-34; Note, supra note 14, at 469.

68. Dalkon Shield, supra note 4, 526 F. Supp. at 899. Accord Maxey v. Freightliner, 450 F. Supp. 955, 961 (N.D. Tex. 1978), aff'd, 623 F.2d 385 (5th Cir. 1980), modified, 665 F.2d 1367 (5th Cir. 1982). In Wangen, the Supreme Court of Wisconsin observed that an appropriate award "will serve the punishment and deterrent objectives of punitive damages, but... will not inflict a penalty on a defendant disproportionate to the defendant's wrong and contrary to public interest." 97 Wis. 2d at 299, 294 N.W.2d at 457.

69. See Roginsky, 378 F.2d at 839-41; Dalkon Shield, supra note 4, 526 F. Supp. at 898; Note, Class Actions, supra note 18, at 1787-90.

70. See In re Federal Skywalk Cases, 93 F.R.D. at 424.
conduct. In such a case, a court may determine that a defendant has been "punished enough" by awards in previous cases. Thus, it may deny or limit a plaintiff's punitive damages claim.

In either circumstance, the result will essentially be the same for the plaintiffs. The first plaintiffs that are able to bring their claims to judgment will receive all the punitive damages recovery, while later plaintiffs will receive nothing. This "race-to-the-courthouse syndrome" has been universally criticized. It is unfair to the late-filing plaintiffs. It may be even more unfair to plaintiffs who have filed early, but due to fortuitous circumstances such as docket congestion in their jurisdiction, may be unable to get to trial. It may also create problems for attorneys who represent more than one plaintiff in mass tort litigation. They may be placed in the difficult position of deciding which claim to pursue to judgment first, knowing that subsequent punitive damages claims in cases may be limited or even barred by the court, the jury, or the bankruptcy of the defendant. Therefore, from the plaintiffs' standpoint as well, class actions which would permit unitary consideration of plaintiffs' punitive damages claims may be the most desirable resolution of such claims.

71. At the present time, there is no universally accepted answer to the question of whether successive punitive damages awards for the same conduct are permissible. In State ex rel. Young v. Crookham, 290 Or. 61, 618 P.2d 1268 (1980), the Oregon Supreme Court rejected such a "one bite" or "first comer" rule of punitive damages. The plaintiffs were seventy-five persons who filed claims against Crater Lake Lodge for severe gastrointestinal injuries suffered as a result of exposure to a certain bacteria. The circuit judge ordered that plaintiffs' punitive damages claims were precluded because such damages were awarded in a previous case. Id. at 63, 618 P.2d at 1269-70. The Oregon Supreme Court held that although it recognized the potentially onerous effect of multiple punitive damages on the defendant, it rejected the "one bite/first comer" solution as inappropriate. Id. at 72, 618 P.2d at 1274. It noted that "[o]ther alternatives remain available to mitigate the potential effect of multiple punitive damages; class actions, in appropriate cases, provide for unitary consideration of such damages." Id. See also deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1977); Globus v. Law Research Serv., 418 F.2d 1276 (2d Cir. 1969). But see In re Federal Skywalk Cases, 93 F.R.D. at 424-25 (indicating some uncertainty as to whether multiple punitive damages awards are permissible under Missouri law). However, some courts and commentators have suggested to the contrary. See supra note 62 and accompanying text.

72. See Dalkon Shield, supra note 4, 526 F. Supp. at 900 (where the court noted that its decision was influenced by this possibility).

73. See deHaas v. Empire Petroleum Co., 435 F.2d 1223 (10th Cir. 1971); Globus v. Law Research Serv., 418 F.2d 1276 (2d Cir. 1969); Roginsky, 378 F.2d at 839; State ex rel. Young, 290 Or. at 67, 618 P.2d at 1271-72. See also Annot., 11 A.L.R.4th 1261 (1982).

74. The district court mentioned that this was "one final consideration that indirectly bears on [its] decision." In re Federal Skywalk Cases, 93 F.R.D. at 425.
because it would prevent the race-to-the-courthouse syndrome, thereby insuring that all plaintiffs would receive a share of the punitive damages assessed against a defendant for his outrageous conduct.

The mass tort punitive damages problem is exacerbated by the lack of uniformity regarding whether punitive damages are covered by the defendant’s liability insurance. This question has been resolved in three different ways. Some states have held that ordinary liability insurance does cover punitive damages. Other states, including Illinois, have determined that permitting such coverage would violate public policy. This view is based on the principle that no one should be permitted to profit from his own wrongdoing. The theory is that if a person is able to insure himself against punishment, he gains freedom to engage in misconduct. Finally, other courts have construed liability policy lan-


78. The leading case which explains the rationale for prohibiting punitive damages on public policy grounds is Northwestern Nat’l Cas. Co. v. McNulty, 307 F.2d 432 (5th Cir. 1962). There, the court recognized the similarity between punitive damages and criminal sanctions and found that public policy prohibits insuring against civil punishment
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guage so that it does not encompass punitive damages.\textsuperscript{79}

Regardless of the approach taken by a particular jurisdiction, there exists the possibility that a defendant's punitive damages liability will not be covered by insurance.\textsuperscript{80} Where no coverage is permitted, the defendant will have to shoulder the burden of the total amount of punitive damages liability. Even where insurance coverage is allowed, it may be inadequate to cover the total amount of damages which may be assessed in a mass tort situation.\textsuperscript{81}

Punitive damages, therefore, cause problems to both defendants and plaintiffs in the mass tort context. Multiple awards may bankrupt a defendant and fail to promote the punishment and deterrent goals of punitive damages. If a limited amount of punitive damages may be awarded against a defendant, later-suing plaintiffs will receive reduced or no punitive damages. Furthermore, lack of insurance coverage for punitive damages may jeopardize a defendant's interest in full payment without financial destruction, and plaintiffs’ interest in receipt of the award. Accordingly, both the amounts of punitive damages awards and the manner of distribution of such awards requires careful consideration by the courts in mass tort cases.

\textit{Judicial Commentary on Punitive Damages in Mass Tort Litigation}

Until recently, the problem of punitive damages in the mass tort context received little judicial commentary. One of the first instances where this issue was given meaningful discussion was in the opinion written by Judge Henry Friendly of the Court of Appeals for the Second Circuit in \textit{Roginsky v. Richardson-Merrell},

for the same reasons one cannot insure against the imposition of a criminal fine. \textit{Id.} at 441-42.


\textsuperscript{80} J. GHIAIRDI & J. KIRCHNER, supra note 64, § 7.29; Owen I, \textit{supra} note 21, at 1310. \textit{Cf.} Ellis, \textit{supra} note 25, at 71.

\textsuperscript{81} The litigation arising out of injuries allegedly caused by asbestos products provides a dramatic example of the inadequacies of ordinary liability insurance coverage in the context of a mass tort. \textit{See generally} Mansfield, \textit{Asbestos: The Cases and The Insurance Problem}, 15 \textit{Forum} 860 (1980); Oshinsky, \textit{Insurance Coverage For Asbestos Tort Liability Litigation}, 5 \textit{J. Prod. Liab.} 69 (1982). \textit{See also In re Federal Skywalk Cases}, 93 F.R.D. at 419 (where the court noted that the defendants’ total liability coverage was 333 million dollars and the pending claims already totaled in excess of one billion dollars in
Inc. Roginsky was one of the cases which arose out of injuries caused by the distribution of the drug MER/29. It was the first case to reach trial of some seventy-five cases arising out of the use of the drug which were then pending in the Southern District of New York. There were also hundreds of MER/29 cases pending in other courts nationwide.

The trial court in Roginsky had awarded $17,500 in compensatory damages and $100,000 in punitive damages to the plaintiffs. On appeal, the defendant argued that because of the multiplicity of claims, there should be some limitation on the total amount of punitive damages which could be awarded in all the MER/29 cases.

The Second Circuit did not reach the issue of multiple punitive damages awards because it reversed the lower court’s decision on the basis that there was insufficient evidence to warrant submission of the damages issue to the jury. Judge Friendly, writing for the Second Circuit, nonetheless discussed the staggering legal difficulties engendered by multiple punitive damages claims based on the defendant’s same wrongful conduct.

compensatory damages and 500 million dollars in punitive damages).

82. 378 F.2d 832 (2d Cir. 1967).

83. MER/29 was a drug, developed by the defendant Richardson-Merrell, Inc. in the late 1950's, which was designed to lower blood cholesterol levels. At that time most physicians believed that a high level of cholesterol was a significant precursor of atherosclerosis. Id. at 835. For an explanation of the medical background of MER/29, see Rheingold, supra note 2, at 116-20.

84. 378 F.2d at 835. In early 1962, use of MER/29 was connected to the development of cataracts and the drug was removed from the market. Id. at 836. However, the defendant had falsified the testing of MER/29 which eventually caused severe eye injuries, hair loss and skin disorders. Toole v. Richardson-Merrell, Inc., 251 Cal. App. 2d 689, 695-701, 60 Cal. Rptr. 398, 404-08 (1967). For a complete discussion of the national litigation planned by plaintiffs’ attorneys, see Rheingold, supra note 2, at 121-30.

85. 378 F.2d at 834. See Owen I, supra note 21, at 1323-25.

86. 378 F.2d at 834.

87. Id. at 835. In Roginsky, the Court specifically noted that there were three trial courts that had already rendered large judgments for the plaintiffs in MER/29 cases. Id. at 834 n.3. In Toole v. Richardson-Merrell, Inc., No. 524 722 (Super. Ct. Cal.), the jury awarded $175,000 in compensatory damages and $500,000 in punitive damages. The latter was later reduced to $250,000 in light of other pending cases. Toole, 251 Cal. App. 2d at 693-94, 60 Cal. Rptr. at 403. In Ostopowitz v. Wm. S. Merrell Co. (N.Y. Sup. Ct. Jan. 4, 1967), the jury awarded $350,000 in compensatory damages and $850,000 in punitive damages (the latter award was later reduced to $100,000). In Golden v. Richardson-Merrell, Inc., Civ. No. 5992 (W.D. Wash. April 7, 1966), a verdict of $150,000 was rendered for the plaintiff. See K. REDDEN, supra note 25, § 4.7(B), at 119-20.

88. 378 F.2d at 835. Moreover, the threat of bankruptcy to the defendant was not realized. See supra note 67.

89. 378 F.2d at 839. Judge Friendly specifically noted that damages would run into
expressed the court’s view that it had the gravest difficulty in perceiving how such a multiplicity of actions throughout the nation could be administered so as to avoid “overkill.” Specifically, the court found jury instructions regarding punitive damages awards in other actions to be an inadequate safeguard. In this regard, the court noted that a jury was incapable of knowing what punitive damages, if any, other juries in other states may award in actions yet untried.

Despite the danger that multiple awards may result in a defendant being punished in a manner which is disproportionate to his wrongdoing, Judge Friendly also observed that the court was unaware of any legal principle whereby the first punitive damages award exhausts all potential future awards. Furthermore, the court did not think it was fair or practicable to limit punitive damages recoveries to some indeterminate number of first-comers to court. The Second Circuit found no basis either in law or equity for determining that some plaintiffs should recover punitive damages while other equally worthy plaintiffs receive nothing.

Since Judge Friendly opined the Second Circuit’s decision in *Roginsky*, the mass tort punitive damages problem has been the subject of some commentary by writers and other courts.

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90. 378 F.2d at 839.
91. Id.
92. Id. Judge Friendly also found that jury instructions regarding previous awards of punitive damages to be inadequate. He noted that it was unrealistic to expect a judge in one state to tell a jury that their fellow townsman should get little or nothing in the way of punitive damages because someone else in another state had already recovered punitive damages from the defendant. He found it even more unrealistic to expect a jury to follow such an instruction. Id. at 840.
93. 378 F.2d at 839. The court failed to find a limitation in the principles of *res judicata* or due process.
94. Id.
95. Id. at 840. In a telling footnote, Judge Friendly noted that “[i]f there were any way in which all cases could be assembled before a single court, as in a limitation proceeding in admiralty, it might be possible for a jury to make one award to be held for appropriate distribution among all successful plaintiffs.” Id. at 839-40 n.11.
ever, there has been little legislative action and few court decisions which have developed ways of dealing with these problems. Most courts have adhered to the traditional devices available for controlling excessive amounts of punitive damages. Traditional devices and procedures, however, are less effective in the mass tort context.

One method used by courts to achieve control over punitive damages awards is the exercise of their remittitur power to reduce excessive judgments. Although remittitur may alleviate some of the burden on defendants facing mass liability by enabling the reduction of clearly excessive awards, it is insufficient to insure that the proper amount of punishment will be meted out in a mass tort case. The existence of hundreds or thousands of suits and claims at various stages in litigation make it difficult, if not impossible, to determine how much punishment has already been or is about to be imposed on a defendant. Thus, a judge has no basis for determining what the total amount of punitive damages assessed against a defendant will be, and accordingly, a judge has no basis upon which to reduce a particular judgment.

Another procedure that has been used by courts in an attempt to control excessive punitive damages awards is to instruct the

97. The United States Congress recently addressed the issue of punitive damages, especially in the area of products liability, but no measures were enacted. A House Resolution sponsored by Rep. Shumway proposed a limitation on an individual plaintiff's punitive damages award to the lesser of twice the plaintiff's compensatory damages or one million dollars. H.R. Res. 5214, 97th Cong., 1st Sess. (1981). An earlier House Resolution, H.R. Res. 7921, 96th Cong., 2nd Sess. (1980), proposed the adoption of a Federal Uniform Product Liability Act, based on the Model Uniform Product Liability Act promulgated by the U.S. Department of Commerce. 44 Fed. Reg. 62,714 (1979). Although this resolution was not reported out of the Interstate and Foreign Commerce Committee, a similar Senate bill was introduced by Sen. Kasten. S. 2631, 97th Cong., 2d Sess. (1982). This bill required a higher standard of proof for the recovery of punitive damages in products liability cases. Id. § 13(A)(2). It also provided that the jury determine defendants' liability for punitive damages, but the judge assess the amount of the award. Id. § 13(B)(1). The Kasten bill was reported out of the Senate Committee on Commerce, Science and Transportation with amendments on Dec. 1, 1982, but was not enacted into law. S. Rep. No. 670, 97th Cong., 2d Sess. 1 (1982). See Note, supra note 14, at 475-76. For a judicial response to Judge Friendly, see infra notes 105-18 and accompanying text.

98. E.g., Wangen, 97 Wis. 2d at 297-306, 294 N.W.2d at 457-61. See Sullivan, supra note 96, at 132-35.

99. Remittitur allows trial and review courts in their discretion to reduce punitive damages awards which they view as excessive. See Wangen, 97 Wis. 2d at 303, 294 N.W.2d at 461; Owen II, supra note 22, at 58. See also 22 AM. JUR. 2D, Damages § 366, at 472 (1965); 5 AM. JUR. 2D, Appeal and Error § 942, at 367-70 (1965).

100. Note, supra note 14, at 475.
jury that both the amount of punitive damages which have already been assessed against the defendant and the number of pending claims are relevant to its determination of the amount of punitive damages which should be awarded in the case before it.\textsuperscript{101} This procedure, however, also has serious defects. As the Second Circuit indicated in Roginsky, it is unreasonable to expect a jury in one state to deny punitive damages to a particular plaintiff simply because a plaintiff in another state has already received an award of punitive damages.\textsuperscript{102} In addition, like judges, jurors are incapable of knowing what the outcome of pending cases will be, and how much, if any, punitive damages will eventually be awarded.\textsuperscript{103} Finally, it may be strategically unwise for the defendant to inform a jury that he has already been found guilty of willful and wanton misconduct. Clearly such information may prejudice the jury against the defendant. His denial of egregious misconduct may influence the jury to make an award when they would not have otherwise.\textsuperscript{104}

Despite the risk of excessive multiple punitive damages awards, the Supreme Court of Wisconsin in Wangen v. Ford Motor Co.\textsuperscript{105} allowed a cause of action for punitive damages in a products liability suit. The suit arose out of an automobile accident involving a 1967 Ford Mustang.\textsuperscript{106} The fuel tank of the automobile, designed, manufactured and distributed by the defendant, ruptured upon impact, causing a fire.\textsuperscript{107} The four occupants of the car sustained serious injuries, and two of them died as a result of their injuries.\textsuperscript{108} Although there were no similar suits pending, Ford

\textsuperscript{101} See \textit{Restatement (Second) of Torts} § 908, comment (e) (1979):

Another factor that may affect the amount of punitive damages is the existence of multiple claims by numerous persons affected by the wrongdoer's conduct. It seems appropriate to take into consideration both the punitive damages that have been awarded in prior suits and those that may be granted in the future, with greater weight being given to the prior awards . . . .

\textit{Id.} \textit{See also} Wangen, 97 Wis. 2d at 301, 294 N.W.2d at 459-60.

\textsuperscript{102} Roginsky, 378 F.2d at 839-40; Note, \textit{Mass Liability, supra} note 1, at 1806.

\textsuperscript{103} 378 F.2d at 840.

\textsuperscript{104} \textit{See} Morris, \textit{supra} note 20, at 1195 n.40; Note, \textit{Mass Liability, supra} note 1, at 1806-07.


\textsuperscript{106} 97 Wis. 2d at 262, 294 N.W.2d at 440.

\textsuperscript{107} \textit{Id.} at 263, 294 N.W.2d at 440.

\textsuperscript{108} \textit{Id.} Plaintiffs, administrators of the estates of the decedents, alleged survival and wrongful death causes of action and also sought damages for loss of a child's society and companionship. \textit{Id.} at 264-65, 294 N.W.2d at 441. Plaintiffs sought compensatory and punitive damages from the car manufacturer Ford Motor Co., but only compensatory
Motor Company argued that punitive damages should not be allowed in a products liability case because of the potential danger of multiple awards. The court, however, concluded that punitive damages were recoverable in a products liability action and addressed the issue of multiple punitive damages.

In a cogent reply to the Second Circuit's assertion in Roginsky that multiple punitive damages awards would lead to catastrophic results, the Wisconsin Supreme Court in a decision authored by Justice Shirley Abrahamson, stated that existing judicial controls provide for the fair administration of multiple punitive damages. Furthermore, the court stressed that punitive damages serve an important societal function by deterring and punishing manufacturers of defective products. In the court's view, traditional judicial controls enable courts to not only carry out the objectives of punitive damages, but also to avoid inflicting a disproportionate penalty on the defendant in a multiple award setting.
The court listed the following judicial controls as insuring the proper determination regarding both the imposition and the amount of punitive damages: adoption of a higher burden of proof, "clear, satisfactory and convincing," for punitive damages claims;\textsuperscript{114} consideration of defendant's wealth, including its depletion by compensatory and punitive damages already imposed and pending awards;\textsuperscript{115} and the use of specific factors which the jury should be instructed to consider in determining the amount of punitive damages which will effectively serve to punish and deter the defendant.\textsuperscript{116} The court also noted that both the trial and appellate court have the power to reduce an excessive jury award.\textsuperscript{117} Dismissing the Second Circuit's skepticism that state courts may be unwilling to exert sufficient restraint, the Wisconsin Supreme Court reasoned that the need for punitive damages demanded that state courts exercise critical control to insure the fair administration of multiple awards.\textsuperscript{118}

Although the Wisconsin Supreme Court's discussion refutes the criticism that state courts are unable and unwilling to impose stricter standards, the Wangen opinion does not resolve the major problem posed by multiple punitive damages awards which is that jurors' and judges' knowledge of past awards and pending claims may be insufficient to determine an appropriate amount to punish and deter a defendant. The specter of multiple punitive damages awards in the mass tort context specifically
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raises the issue of reconciling the goals of punitive damages with the need to avoid overkill. However, Justice Abrahamson correctly concluded that punitive damages continue to play a vital role in modern society and that courts have the resources to control their award. A defendant should not be able to escape liability for punitive damages because many people were injured by a single product or were victims of a mass disaster.

As the incidents of mass tort litigation increases, the need for an efficient solution to the punitive damages problem becomes more critical. The class action is the most viable method to insure that the total punitive damages award assessed against a defendant will reflect a proportion of his wealth which will effectively punish him and deter him and others from similar conduct in the future.\textsuperscript{119} The class action remedies the inability of jurors and judges to consider the totality of past and future punitive damages awards because all claims are litigated as a class. The class action also has the advantage of protecting the interests of plaintiffs as a whole by insuring that all plaintiffs, instead of

\begin{footnotesize}
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\item 120. E.g., Dalkon Shield, supra note 4, 526 F. Supp. at 896-900 (Judge Spencer Williams); In re Federal Skywalk Cases, 93 F.R.D. at 419 (Judge Scott O. Wright); In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 27-28. (Judge Jack B. Weinstein).
\end{itemize}
\end{footnotesize}
some, receive a share of the punitive damages assessed against a
defendant for his outrageous conduct. Furthermore, because the
class action results in the fair administration of multiple puni-
tive damages claims, it vindicates the role of punitive damages
in the mass tort context.

Goals and Prerequisites of Federal
Class Actions

Class actions were designed, in part, to prevent a multiplicity
of actions in those situations where a large number of people
possess a similar claim. Class actions are intended to promote
judicial economy and uniformity of result. However, these
goals have been tempered by the need to safeguard the proce-
dural due process rights of class members as well as those oppos-
ing the class. Therefore, prerequisites to a class action suit
were established to ensure adequate protection of the litigants
before subjecting them to a binding judgment.

Class actions in federal court are governed by Rule 23 of the
Federal Rules of Civil Procedure. Most states have an identi-
cal or similarly worded class action rule or statute.

Rule 23(a) lists four essential prerequisites to bringing a class action: (1) the
class must be so numerous that joinder of all members is imprac-

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Shield, supra note 4, 526 F. Supp. at 892. The Advisory Committee's Note to the 1966
amendments to Rule 23 noted that class actions were designed to achieve “economies of
Moore & J. Kennedy, Moore's Federal Practice § 23.01(8) (2d ed. 1982); Comment, supra
note 11, at 384-85.

122. Advisory Comm. Note, 39 F.R.D., at 101 (emphasizing the drafter's concern for
Kamp, Civil Procedure in the Class Action Mode, 19 Wake Forest L. Rev. 401, 404-05
(1983).

123. See Kennedy, supra note 119, at 13-14; Putz & Astiz, supra note 1, at 24-25; Note,
Mass Tort Class Actions, supra note 120, at 523-29. See also Restatement (Second) of
Judgments §§ 41-42 (1982).

and Procedure § 1753 (1980).

125. See 1 H. Newberg, supra note 120, § 1210(b); Smith, supra note 15, at 8. For a list
of the state class actions statutes, see Note, Multistate Plaintiff Class Actions: Jurisdic-
tion and Certification, 92 Harv. L. Rev. 718, 718-19 nn.7-8 (1979). For a discussion of the
Illinois class action statute, see Forde, Class Actions, Illinois Institute for Continuing
Legal Education (1979); Forde, Illinois' New Class Action Statute, 59 Chi. B. Rec. 120
(1977); Forde, Class Actions in Illinois: Toward a More Attractive Forum for this Essen-
ticable; (2) there must be common questions of law or fact; (3) the claims or defenses of the representative parties must be typical of the claims or defenses of the class; and (4) the representative parties must fairly and adequately protect the interests of the class.\textsuperscript{126}

In addition to the prerequisites of Rule 23(a), any proposed class action must also properly fall within one of the three categories listed in Rule 23(b).\textsuperscript{127} Rule 23(b)(1), the "prejudice" class action provision, permits class actions as a method of obviating potential prejudice to either class members or those opposing the class which may result from a series of individual actions.\textsuperscript{128} Specifically, Rule 23(b)(1) authorizes class treatment where the prosecution of separate actions by the class would create a risk of either: (A) inconsistent adjudications which would establish incompatible standards of conduct for the party opposing the class; or (B) individual adjudications which would, as a practical matter, be dispositive of or impair or impede the interests of others not parties to the litigation.\textsuperscript{129} The latter category,
Rule 23(b)(1)(B), is known as the "limited fund" theory and involves the situation where "there is a risk that if litigants are allowed to proceed on an individual basis those who sue first will deplete the fund and leave nothing for late comers." 130

Rule 23(b)(2) authorizes a class where the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making final injunctive relief or corresponding declaratory relief appropriate with respect to the class as a whole. 131 In addition to declaratory relief, monetary relief is available in Rule 23(b)(2) actions. 132 The final category, Rule 23(b)(3), authorizes class certification where the court finds "that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient resolution of the controversy." 133 Most class actions involving commercial litigation are certified under Rule 23(b)(3). This rule also lists four matters pertinent to the court's consideration of the predominance and

individual actions would have on the party opposing the class. In contrast, Rule 23(b)(1)(B) focuses on the potential undesirable effects on class members, rather than on the party opposing the class. Dalkon Shield, supra note 4, 526 F. Supp. at 896; In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 789. See, Note, Mass Tort Class Actions, supra note 120, at 532-33.

130. A. MILLER, supra note 15, at 43. As explained by Judge Williams: "Class certification under Rule 23(b)(1)(B) generally is designed to accomplish equitable distribution of a limited fund to all members of a proposed class who have a claim and whose interest may otherwise be impaired by damage awards in individual actions that deplete or diminish the fund." Dalkon Shield, supra note 4, 526 F. Supp. at 789; Advisory Comm. Note, 39 F.R.D. 69, 101 (1966).


132. See Pettway v. American Cast Iron Pipe Co., 494 F.2d 211, 257 (5th Cir. 1974) (noting that Rule 23(b)(2) is not to be read as "making appropriate only final injunctive relief"). See also 1 H. NEWBURG, supra note 120, § 1145b, at 243 (monetary relief is granted in Rule 23(b)(2) actions where the awards are equitable in nature or ancillary to the general scheme of injunctive relief sought by plaintiffs). Cf. McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1087 (9th Cir. 1975), cert. denied, 425 U.S. 911 (1976); In re "Agent Orange" Prod. Liab. Litig., 506 F. Supp. at 790; Advisory Comm. Note, 39 F.R.D. at 102 (Rule 23(b)(2) "does not extend to cases in which the appropriate final relief relates exclusively or predominantly to money damages.").

133. Fed. R. Civ. P. 23(b)(3). The predominance and superiority requirements of Rule 23(b)(3) require courts to pragmatically evaluate the interests of class members. In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 10. "In general a Rule 23(b)(2) action is appropriate whenever the actual interests of the parties can be served best by a single action." Id. (quoting 7A C. WRIGHT & A. MILLER, supra note 120, § 1177). See also Note, Developments in the Law, supra note 120, at 1505.
superiority issues: the interest of class members in individually controlling the litigation; the extent and nature of currently pending litigation; the desirability of concentrating the litigation in the particular forum; and the difficulties likely to be encountered in the management of the class action.\textsuperscript{134}

There are important procedural differences between actions brought under Rule 23(b)(1) or (b)(2) and those brought under Rule 23(b)(3). In actions brought under Rule 23(b)(3), notice to the class is required.\textsuperscript{135} This mandatory notice requirement can be expensive and burdensome.\textsuperscript{136} In addition, under Rule 23(b)(3), members of the class have a right to be excluded from the class upon request.\textsuperscript{137} This right to “opt out” of the class, if exercised, will prevent the court’s decision from binding all litigants originally intended to be covered by the action.\textsuperscript{138}

Federal Rule 23 furthers the goals of class actions while protecting the rights of the litigants. In cases which meet the prerequisites of Rule 23(a) and one of the categories listed in Rule 23(b), a class action will bind the class members to a single judgment and will serve judicial economy by avoiding multiple suits.\textsuperscript{139} Class actions are an exception to the due process requirements of personal jurisdiction, notice and an opportunity to be

\begin{footnotes}
\item[135] Fed. R. Civ. P. 23(c)(2). Rule 23(c)(2) also provides that discretionary notice may be given in Rule 23(b)(1) or Rule 23(b)(2) actions. See Note, Class Actions: Certification and Notice Requirements, 68 GEO. L.J. 1009, 1028 (1980).
\item[136] In Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974), the United States Supreme Court interpreted the notice provisions of Rule 23(c)(2). The Court required individual notice sent to reasonably identifiable absentee class members in 23(b)(3) actions. Id. at 176-77. See Kennedy, supra note 119, at 21-22.
\item[137] Fed. R. Civ. P. 23(c)(2)(A). The “opt-out” provision of Rule 23(b)(3) actions has led commentators to label this action as “voluntary” or “permissive.” Kennedy, supra note 119, at 14-15; Wright & Colussi, supra note 119, at 142 n.5; Note, Developments in the Law, supra note 120, at 1318-22. Courts and commentators also refer to Rule 23(b)(1)(B) actions as “mandatory.” In re Federal Skywalk Cases, 680 F.2d 1175, 1180, 1191 (8th Cir.), cert. denied, 103 S. Ct. 342 (1983); In re “Agent Orange” Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 18; Kennedy, supra; Wright & Colussi, supra. Additionally, courts prefer a mandatory class action over a voluntary action. A class which can be certified under either Rule 23(b)(1) or Rule 23(b)(3) should be certified under Rule 23(b)(1). Reynolds v. National Football League, 584 F.2d 280, 284 (8th Cir. 1978). See 7A C. WRIGHT & A. MILLER, supra note 120, § 1772, at 7-8.
\item[138] 7A C. WRIGHT & A. MILLER, supra note 120, § 1783.
\end{footnotes}
DISCUSSION

The Application of Rule 23 to Punitive Damages in Mass Tort Litigation

In mass tort litigation where there are multiple punitive damages claims brought against one or several defendants, the Rule 23 class action is an appropriate form of litigation. The type of federal class action utilized to determine liability for, and the amount of, punitive damages may depend on the nature of the remedy. Generally, courts and commentators have stated that a Rule 23(b)(1)(A) class action does not apply to actions for damages because the risk of payment of damages does not establish "incompatible standards of conduct" that would prejudice a defendant. Rule 23(b)(2) actions are appropriate where injunctive or declaratory relief is requested, but not where money damages is the only relief sought. Finally, Rule 23(b)(3) actions may be ineffective in some cases if too many individual plain-
tiffs opt out and pursue independent litigation. The limited recovery fund may be exhausted unless all the claimants are joined in a single suit.

In contrast, certifying a Rule 23(b)(1)(B) class action would effectively manage the limited fund created by multiple punitive damages claims. The requirements of this category are met because the interests of subsequent plaintiffs would be impaired if the defendant's assets were depleted by the payment of numerous punitive damages awards or if a court determined that the amount of punitive damages assessed against a defendant were limited by law. Only a Rule 23(b)(1)(B) action would bind all the claimants to the limited fund, thereby controlling the total amount of punitive damages which are assessed to punish a defendant. The class action has been utilized in the following three cases where federal district courts have attempted to deal fairly with the problems posed by multiple punitive damages claims in the mass tort context. Of particular significance are the standards that the courts used to determine whether there is a limited fund.

**Dalkon Shield**

In *In re Northern District of California “Dalkon Shield” IUD Product Liability Litigation, (“Dalkon Shield”),* Judge Spencer Williams was one of the first to use the class action in an attempt to alleviate the problems presented by the specter of multiple punitive damages claims in a mass tort context. Judge Williams certified the class under Rule 23(b)(1)(B) on the basis that there was a limited fund available for payment of punitive damages claims.

The *Dalkon Shield* litigation arose out of the manufacture and

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145. See supra notes 137-38 and accompanying text. See also Green v. Occidental Petroleum Corp., 541 F.2d 1335, 1339 (9th Cir. 1976); Dalkon Shield, supra note 4, 526 F. Supp. at 906; Note, Class Actions, supra note 18, at 1800.

146. Dalkon Shield, supra note 4, 526 F. Supp. at 897-98; Wright, 98 F.R.D. at 333. See infra notes 280-84 and accompanying text.

147. In re “Agent Orange” Prod. Liab. Litig., M.D.L No. 381, Memorandum and Pretrial Order No. 72, at 27; Wright & Colussi, note 119, at 142-43; Note, Class Actions, supra note 18, at 1800.


149. Id. at 896. Judge Williams certified the Rule 23(b)(1)(B) class sua sponte. Id. at
distribution of an interuterine contraceptive device called the "Dalkon Shield." The Dalkon Shield was invented in 1968. It was clinically tested from September, 1968 until November, 1969 and was then commercially introduced to the medical profession by Dalkon Corporation. In 1970, A.H. Robins, a manufacturer and distributor of pharmaceuticals, acquired all rights to the Dalkon Shield. It began its own testing of the device and simultaneously began to market it. During the period when it was marketed by A.H. Robins, some 2.2 million Dalkon Shields were inserted in women in the United States.

A large number of the women who used the Dalkon Shield had adverse reactions to the device. Injuries allegedly caused by its use included uterine perforations, infections, pregnancies, spontaneous abortions, fetal injuries and hysterectomies. At the time Dalkon Shield was decided, there were 165 tort actions pending against A.H. Robins in the Northern District of California alone. In addition, there were more than 1,500 similar suits pending in other courts throughout the country. Most of these suits sought punitive damages.

Judge Williams recognized the serious problems associated with administration of the multiplicity of punitive damages claims pending against A.H. Robins. The court determined that certification of a "limited fund" class action was an appropriate manner to deal with the issue of punitive damages. The court

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894-96. See Williams, 98 F.R.D. at 332.
150. 526 F. Supp. at 892.
151. Id.
152. Id.
153. Id.
154. Id.
155. Id. at 893.
156. Id.
157. Id.
158. Id.
159. Id.
160. Id. For a more detailed discussion of the facts surrounding the "Dalkon Shield" litigation, see Van Dyke, The Dalkon Shield: A "Primer" in IUD Liability, 6 W. ST. U.L. REV. 1 (1978).
161. 526 F. Supp. at 897-900. Judge Williams concluded:

Without a Rule 23(b)(1)(B) class action, the individual and cumulative awards of punitive damages may reach astounding amounts. How often is the defendant to be punished? Under the doctrine of punitive damages there is no limiting rule in such a situation. There is no fair way to guide the juries. There is no basis for priority to punitive damages among the claimants, or for awarding such dam-
therefore certified a nationwide mandatory class action under Rule 23(b)(1)(B) on the issue of punitive damages and declared it binding on all persons with present or future punitive damages claims against A.H. Robins arising out of injuries caused by the Dalkon Shield.\footnote{162}

In determining that class certification was appropriate, the court examined both the threshold requirements for maintenance of all class actions contained in 23(a) and the specific requirements of 23(b)(1)(B). The court found that the punitive damages issue met the prerequisites for Rule 23(b)(1)(B) certification.\footnote{163} The court noted that Rule 23(b)(1)(B) requires that the prosecution of separate actions will create a risk of "adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."\footnote{164} This rule is generally designed to accomplish equitable distribution of a limited fund and to prevent impairment of individual interests through depletion of the fund.\footnote{165} The court stressed that Rule 23(b)(1)(B) certification does not require proof that claims will "certainly" exhaust the fund, but merely requires a showing that individual actions "may" affect the claims of parties not before the court.\footnote{166}

The court stated that such a showing was made in the Dalkon Shield litigation. The court noted that claims totaling in excess of three billion dollars had already been filed against the defendant. A.H. Robins had assets totaling only 280 million dollars.\footnote{167} The court found that there was good reason to believe that the total amount of the judgments could exceed the defend-
ant's ability to satisfy them.\textsuperscript{168} Therefore, the court determined that because it could not be said with certainty that the defendant would be able to satisfy all the judgments in toto there was a limited fund at issue.\textsuperscript{169} The court found that a fund could potentially be exhausted by some claimants which would impair the rights of non-parties. Accordingly, the court held that the determination of the defendant's liability for punitive damages was maintainable as a Rule 23(b)(1)(B) class action.\textsuperscript{170}

The court offered an alternative rationale in support of its conclusion that there was a "limited fund" available for recovery of punitive damages. It concluded that there was some implied-in-law ceiling on the amount of punitive damages that may be assessed against a defendant for the same conduct.\textsuperscript{171} Thus, at some point a determination will be made that a defendant has been adequately punished for its wrongdoing and that no more punitive damages may be assessed.\textsuperscript{172} As a result, the fund available for punitive damages awards is limited.\textsuperscript{173}

\textit{Skywalk Cases}

The innovative class action approach utilized by Judge Spencer Williams in \textit{Dalkon Shield} was followed by Judge Scott Wright

\textsuperscript{168} \textit{Id.}
\textsuperscript{169} \textit{Id.}
\textsuperscript{170} \textit{Id.} Judge Williams cited Coburn v. 4-R Corp., 77 F.R.D. 43 (E.D. Ky. 1977), in support of this use of the limited fund class action. Coburn arose out of a fire at a supper club which injured 50 to 60 persons and killed 164. \textit{Id.} at 44. In that case, claims in excess of $1.5 billion were filed against a defendant with assets totaling approximately $3 million. \textit{Id.} at 45. The Coburn court rejected the idea that punitive damages should be recovered by claimants on a first-come, first-serve basis. Thus, it characterized the defendants assets as a limited fund and permitted maintenance of a Rule 23(b)(1)(B) class action. \textit{Id.} Judge Williams found the Coburn court's reasoning persuasive. 526 F. Supp. at 897. He determined that in the Dalkon Shield litigation, because of the defendants' limited assets and the substantial number of claims, the threat of "constructive bankruptcy" was great. Thus, he found that Rule 23(b)(1)(B) certification was the best way to avoid the "race to the courthouse" syndrome. \textit{Id.}

\textsuperscript{171} 526 F. Supp. at 898.

\textsuperscript{172} \textit{Id.} As further justification for the implied-in-law limit to punitive damages, Judge Williams observed that defendants have a due process right to be protected against unlimited punishment for the same conduct. He stated: "overlapping damage awards violate that sense of 'fundamental fairness' which lies at the heart of constitutional due process." \textit{Id.} at 899. See supra note 62.

\textsuperscript{173} 526 F. Supp. at 898. Although plaintiffs have no right to punitive damages, they have a right to \textit{seek} punitive damages. \textit{Id.} at 898 n.37. See Note, \textit{Class Actions}, supra note 18, at 1790.
of the Western District of Missouri in *In re Federal Skywalk Cases*, ("Skywalk"). Skywalk involved the mass tort litigation which arose out of the collapse of two skywalks in the lobby of the Hyatt Regency Hotel in Kansas City, Missouri in 1981. At the time the Skywalk decision was rendered, approximately 150 civil lawsuits had been filed which sought compensatory damages in excess of one billion dollars and punitive damages in excess of 500 million dollars. The defendants to these actions were protected by 333 million dollars of liability insurance coverage and the court ascertained the defendant's approximate net worth by way of in camera revelation.

The court determined that a Rule 23(b)(1)(B) class action was a superior method of dealing with the issue of punitive damages in the Skywalk litigation. First, the court specifically examined each of the class action prerequisites contained in Rule 23(a). It found that the numerosity requirement had easily been met in light of the fact that 113 persons were killed, 212 persons were injured, and that approximately 1,500 to 2,000 persons were in the hotel lobby at the time of the collapse. In finding that the commonality requirement had been met, the court stressed that although Rule 23(a)(2) requires that there are significant common questions of law or fact, it does not require that all questions of law or fact be common or that common issues predominate. Furthermore, because all of the claims arose out of the

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175. Id. at 419.
176. Id.
177. Id. There were three defendants named in the suits: 1) Hyatt Corp., 2) Hallmark Cards Corp., and 3) Crown Redevelopment Corp.
178. The court stated:
   The magnitude of the litigation spawned by the collapse of two skywalks challenges this Court to administer these cases with flexibility and imagination. While other procedural vehicles might provide adequate guidelines for resolution of the complex issues posed by these cases, the circumstances of this litigation compel this court to adopt the far superior procedures of Rule 23 for the resolution of the many claims arising out of an unfortunate tragedy.
   Id. at 420.
179. Id. at 421. Judge Wright stressed that it is only necessary that joinder of all members of the class be "impracticable" but not "impossible." He found a sufficient showing of litigational inconvenience from the separate prosecution of claims to warrant certification. Id.
180. Id. Judge Wright made special note that he was aware that the punitive damages liability issue might require separate treatment for wrongful death and survival claims in
Class Actions

...collapse of the skywalks the operative facts of each claim were identical.\textsuperscript{181}

The court also determined that the claims of the named representatives were typical of the claims of the entire class in accordance with the requirement of Rule 23(a)(3). The court noted that although the amount of damages sought differed, the legal or remedial theories advanced by each claimant were the same.\textsuperscript{182}

Finally, the court found that the requirement of adequacy of representation was satisfied. The court determined that named class members would act as fiduciaries in protecting the interests of unnamed class members and had sufficient resources for the prosecution of the certified claim.\textsuperscript{183} Moreover, the class representatives did not have conflicting interests with other class members, were not motivated by inappropriate reasons, and held a substantial stake in the outcome of the case.\textsuperscript{184}

After finding that the Rule 23(a) prerequisites were satisfied, the court held that a Rule 23(b)(1)(B) class action on the issue of punitive damages was appropriate.\textsuperscript{185} Citing \textit{Dalkon Shield}, the court noted that where there exists a limited fund out of which to recover damages, individual class members face a "very real risk that the winner of the race to the courthouse might be awarded all the monies available."\textsuperscript{186} The court then specified the reasons why the fund available for recovery of punitive damages was limited in \textit{Skywalk}. First, all the defendants had limited assets and most were not sufficient to warrant a sizable punitive dam-

\textsuperscript{181} Id.
\textsuperscript{182} Id. at 422.
\textsuperscript{183} Id.
\textsuperscript{184} Id.
\textsuperscript{185} Id. at 423. Judge Wright also certified a Rule 23(b)(1)(A) class action on the issue of liability for compensatory and punitive damages. He noted that a Rule 23(b)(1)(A) class action is proper if the prosecution of separate actions by individual members of the class would create a risk of "inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class." Id. He found that the defendant did face a risk of varying adjudications and that a class action must be certified to achieve unitary adjudication. The court, however, determined that because there was no limited fund with respect to compensatory damages, that the settlement of such claims would continue. Because of the limited fund, it did not allow continued settlement of punitive damages claims. Id. at 423-24. See supra note 143.
\textsuperscript{186} 93 F.R.D. at 424.
ages award.\textsuperscript{187} Second, the fund might be limited by Missouri punitive damages law. Although the issue of the permissibility of successive punitive damages awards was still an open question, the court recognized the possibility that such awards could be prohibited in some future decision.\textsuperscript{188} In concluding that there was a limited fund, the court stated that only "a single classwide adjudication of the issues of liability for and amount of punitive damages can protect the interests of every victim in receiving his or her just share of any punitive damage award."\textsuperscript{189}

\textit{Dalkon Shield and Skywalk on Appeal}

The Rule 23(b)(1)(B) limited fund class action approach was not well-received by either the Court of Appeals for the Ninth Circuit (\textit{Dalkon Shield}),\textsuperscript{190} or the Court of Appeals for the Eighth Circuit (\textit{Skywalk}).\textsuperscript{191} Both courts expressed reservations concerning the use of Rule 23(b)(1)(B) as a means to remedy the punitive damages problem in mass tort cases.\textsuperscript{192} Both courts reversed the district courts' decisions and decertified the punitive damages classes.\textsuperscript{193} The appellate courts' reversals, however, were based on entirely different reasoning.

The Court of Appeals for the Ninth Circuit reversed the \textit{Dalkon Shield} decision for two reasons.\textsuperscript{194} First, it found that Rule 23(b)(1)(B) did not meet the requirements for class action certification. Second, the court was concerned that the limited fund approach might be unconstitutional due to the potential for the fund to be exhausted.

\begin{itemize}
\item \textsuperscript{187} Id.
\item \textsuperscript{188} Id. (citing Monsanto v. Parker, (Mo. Ct. App. argued Dec. 9, 1981), dismissed as moot, 634 S.W.2d 506 (Mo. Ct. App. 1982)). Judge Wright noted the uncertainty in Missouri law on this point. \textit{Id.} at 424-25. He refused, however, to abstain from deciding the class certification issue until a Missouri Appellate Court decided this issue. He pointed out that as long as the issue were undecided, "the specter of a limited fund remains." \textit{Id.} at 425.
\item \textsuperscript{189} Id. Judge Wright also explained that a final consideration bore indirectly on his decision to certify a Rule 23(b)(1)(B) class action. He noted that attorneys who represent more than one plaintiff face a potential conflict of interest in determining which case to proceed with first because they may be required to sacrifice the interests of one client over another. \textit{Id.} See \textit{supra} note 74 and accompanying text.
\item \textsuperscript{190} \textit{In re} Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 693 F.2d 847 (9th Cir. 1982) [hereinafter cited as Dalkon Shield], \textit{cert. denied sub nom.} A.H. Robins Co. v. Abed, 103 S. Ct. 817 (1983).
\item \textsuperscript{191} \textit{In re} Federal Skywalks Cases, 680 F.2d 1175 (8th Cir.), \textit{cert. denied}, 103 S. Ct. 342 (1982).
\item \textsuperscript{192} Dalkon Shield, \textit{supra} note 190, 693 F.2d at 850-52, \textit{In re} Federal Skywalk Cases, 680 F.2d at 1182-84.
\item \textsuperscript{193} Dalkon Shield, \textit{supra} note 190, 693 F.2d at 850-52, \textit{In re} Federal Skywalk Cases, 680 F.2d at 1183.
\item \textsuperscript{194} 693 F.2d at 851.
\end{itemize}
23(a) class action prerequisites had not been clearly satisfied, although the court noted that it was "not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases." Second, the court determined that Rule 23(b)(1)(B)'s requirement of a limited fund had not been adequately demonstrated. The Ninth Circuit held that the district court had applied an incorrect standard when it determined that the limited fund requirement was met if separate adjudications "may" affect the rights of non-parties. The appellate court relied on its earlier decision in *McDonnell Douglas Corp. v. United States District Court, Central District of California* in holding that before a 23(b)(1)(B) class may be certified the record in the case must establish that separate punitive damages awards will "inescapably affect" later awards.

The Ninth Circuit stated that the trial record in *Dalkon Shield* failed to reveal that individual punitive damages awards would inescapably affect later awards thereby establishing a limited fund. It found that the district court had erred when it certi-
fied the class action without first obtaining sufficient evidence concerning the defendant’s actual assets, insurance, settlement experience, and continuing exposure. The appellate court also rejected the district court’s holding that there was a limited fund as a result of an implied-in-law ceiling on the total amount of punitive damages which can be assessed against any one defendant. The Ninth Circuit found no evidence that such a rule of law exists.

The Court of Appeals for the Eighth Circuit vacated the class action certification in the Skywalk litigation on grounds differing from those employed by the Ninth Circuit in Dalkon Shield. The Eighth Circuit did not reach the issue as to whether Rule 23 requirements for class certification had been met. Instead, its decision relied on the Anti-Injunction Act which prohibits federal courts from enjoining state court proceedings except under limited and enumerated circumstances. Although the appellate court commended the district judge for his “creative efforts,” it found that the effect of the class certification order was to enjoin pending state proceedings by prohibiting plaintiffs from litigating their punitive damages claims and by prohibiting the settlement of claims. At the time of this appeal, there were approximately 120 cases filed in the Missouri state courts and eighteen cases filed in the federal district courts. Thus, the fund” at issue, or that the rights of non-parties would necessarily be altered by the maintenance of separate actions.

202. Id. at 852. The court relied on In re “Agent Orange” Prod. Liab. Litig., 506 F. Supp. at 789-90, where Rule 23(b)(1)(B) certification was denied because the plaintiffs offered no evidence of the likely insolvency of the defendants, and on Payton v. Abbott Laboratories, 83 F.R.D. 382, 389 (D. Mass. 1979), where the court also denied Rule 23(b)(1)(B) certification because the plaintiffs offered no evidence of the likely insolvency of the defendants. In Payton, the court concluded that “without more, numerous plaintiffs and a large ad damnum clause should [not] guarantee (b)(1)(B) certification.” Id. at 389.

203. 693 F.2d at 852. Without elaboration, the court declared that “[a] class action, ... is not the only way to protect a defendant from unreasonable punitive damages.” Id.

204. See In re Federal Skywalk Cases, 680 F.2d 1175, 1183-84 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982).

205. 28 U.S.C. § 2283 (1982). The Anti-Injunction Act provides that “[a] court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.” Id.

206. 680 F.2d at 1182-83.

207. Id. at 1184.

208. Id. at 1180.

209. Id. at 1177 n.5.
The court held that the order was prohibited by the Anti-Injunction Act.\textsuperscript{210}

The court refuted the argument that class action certification was necessary in aid of the court’s jurisdiction and thus was excepted from the Act.\textsuperscript{211} The plaintiffs argued that the circumstances in this case were analogous to circumstances which would support a Rule 22 Interpleader action where injunctions against state court proceedings are permissible because of the existence of a limited fund.\textsuperscript{212} The court rejected the analogy to federal interpleader jurisdiction because it found there was no limited fund.\textsuperscript{213} It held that a limited fund could not be predicated on uncertain claims for punitive damages to which the defendants had not yet conceded liability and, therefore, the jurisdictional prerequisite was not satisfied.\textsuperscript{214} The court further explained that the Supreme Court had narrowly interpreted the “necessary in aid of jurisdiction” exception to the Act and that pending state suits must “truly interfere with the federal court’s jurisdiction.”\textsuperscript{215}

In a lengthy and thorough dissent, Judge Gerald Heaney stated that the district court’s decision could be modified such that it did not violate the Anti-Injunction Act and therefore could satisfy Rule 23.\textsuperscript{216} Instead of an absolute prohibition on the pursuit of state claims, he proposed that the order permit plaintiffs to settle punitive damages claims. Defendants would then receive a credit for the amount of such settlements against an eventual class-
wide award of punitive damages.\textsuperscript{217}

Judge Heaney supported the use of the class action device as the most efficient mechanism for resolution of the complex problems posed by punitive damages in mass tort cases because it would avoid a multiplicity of lawsuits on the same issues involving the same facts and the same defendants.\textsuperscript{218} Additionally, he pointed out that a single classwide adjudication of punitive damages insures that every victim will receive a just share of any punitive damages award.\textsuperscript{219} Judge Heaney believed that the existence of a limited fund was established on two bases. First, he noted that Missouri law may preclude multiple awards of punitive damages.\textsuperscript{220} Second, he stated that the defendants may not have the capacity to satisfy the judgments against them.\textsuperscript{221} Regretably, the Supreme Court denied certiorari in both the \textit{Dalkon Shield} and Skywalk cases.\textsuperscript{222}

\textbf{The “Agent Orange” Litigation}

Undaunted by the Courts of Appeals’ reversals in \textit{Dalkon Shield} and Skywalk, Judge Jack B. Weinstein, Chief Judge of the Eastern District Court of New York, entered the fray. Judge Weinstein, a distinguished professor of law and commentator on Federal Procedure and Evidence,\textsuperscript{223} assumed responsibility for the Agent Orange litigation when Judge George C. Pratt was elevated to the Court of Appeals for the Second Circuit.

\textsuperscript{217} Id. at 1184-85 (Heaney, J., dissenting).

\textsuperscript{218} Id. at 1186 (Heaney, J., dissenting). Judge Heaney emphasized that a single trial would conserve the resources of both litigants and the judiciary. \textit{See also Manual for Complex Litigation} § 1.94, at 93 (5th ed. 1982) (recommending coordination of proceedings in simultaneously pending state and federal court cases).

\textsuperscript{219} 680 F.2d at 1186. (Heaney, J., dissenting).

\textsuperscript{220} Id. at 1187 (Heaney, J., dissenting).

\textsuperscript{221} Id. at 1187-88 (Heaney, J., dissenting). In support of class action treatment for punitive damages in the mass tort context, Judge Heaney relied heavily on Dalkon Shield.

\textsuperscript{222} A.H. Robins Co. v. Abed, 103 S. Ct. 817 (1983) (Dalkon Shield); \textit{In re} Federal Skywalk Cases, 103 S. Ct. 342 (1982).

In re “Agent Orange” Product Liability Litigation\textsuperscript{224} concerns the claims of Vietnam War veterans and members of their families who allegedly were injured as a result of the veterans’ exposure to Agent Orange and other herbicides.\textsuperscript{225} Agent Orange is a chemical that was disseminated in the air over southeast Asia during the Vietnam War.\textsuperscript{226} It was used by United States military forces to defoliate the jungle in that area between 1961 and 1972.\textsuperscript{227} Plaintiffs sought damages for personal injury and wrongful death from numerous chemical corporations named as defendants who manufactured and supplied Agent Orange to the government.\textsuperscript{228} The injuries claimed by the veterans included: severe skin disorders, liver dysfunction, respiratory problems, neurological problems, cancer and defective genes.\textsuperscript{229} Their children claimed genetic injury and birth defects and the veterans’ wives allegedly suffered miscarriages.\textsuperscript{230}

At the time that Judge Pratt considered the Agent Orange litigation in 1980, there were approximately 167 suits pending in

\textsuperscript{225} 506 F. Supp. at 768-69. Four groups of plaintiffs, claimed to have suffered injury: Vietnam veterans, their spouses, their parents, and their children. \textit{Id.} at 769. The veterans alleged direct injuries. The other groups sought recovery on direct and derivative claims. \textit{Id.}
\textsuperscript{229} For a description of the health problems allegedly caused by Agent Orange, see Comment, \textit{Agent Orange: Government Responsibility}, supra note 226, at 145-49.
\textsuperscript{230} 506 F. Supp. at 769. Some family members sought recovery on derivative claims; others claimed direct injuries.
the federal courts involving over 3,400 plaintiffs and nineteen
defendants.\textsuperscript{231} After dismissing the defendants’ third party claims
against the United States,\textsuperscript{232} the court concluded that the class
action device was the most flexible and efficient procedure to
manage this complex case.\textsuperscript{233} Granting a conditional class certi-
fication order,\textsuperscript{234} the court ruled that the suit should proceed as
a class action under Rule 23(b)(3) on the general issues of liabil-
ity.\textsuperscript{235} However, there was no separate treatment of the damages
issues, including punitive damages, at this initial stage of liti-
gation.

Upon reconsideration of the conditional certification, Judge
Weinstein modified Judge Pratt’s ruling and certified the class
on all issues of liability and damages under Rule 23(b)(3) and on

\begin{itemize}
\item \textsuperscript{231} \textit{Id.} at 783. The plaintiffs came from the fifty states, Australia
and New Zealand, \textit{Id.} For a list of the named defendants, see \textit{id.} at 788 n.2.
\item \textsuperscript{232} \textit{Id.} The defendants sought to implead the United States as a third-party defend-
ant under theories of contribution or indemnity. \textit{Id.} at 768-69. See Fed. R. Civ. P. 14. The
government claimed “intra-military immunity” under the doctrine of sovereign immu-
Claims Act did not waive sovereign immunity with respect to claims of servicemen arising
out of activities “incident” to their military service). Applying the \textit{Feres} doctrine, the
court held that the plaintiffs’ claims were “incident to and arising out of service” and,
therefore, did not subject the government to liability. 506 F. Supp. at 780-81.
\item \textsuperscript{233} 506 F. Supp. at 785. Judge Pratt thoroughly discussed the legal problems engen-
dered by this “unprecedented controversy,” including the large number of potential plain-
tiffs, the choice of law problems, the difficult causation issues, and inconclusive scientific
data. \textit{Id.} at 783. He noted:
\begin{quote}
All of these problems are compounded by the practical realities of having on
one side of the litigation plaintiffs who seek damages, but who have limited
resources with which to press their claims and whose plight becomes more des-
perate and depressing as time goes on, and having on the other side defendants
who strenuously contest their liability, who have ample resources for counsel
and expert witnesses to defend them, and who probably gain significantly,
although immeasurably, from every delay that they can produce.
\end{quote}
\textit{Id.} at 784. The court discussed various procedural devices available to manage the litiga-
tion. \textit{Id.} at 784-85. In deciding to follow the class action approach, the court concluded
that the technical problems with this device in the context of a mass tort could be over-
come. \textit{Id.} at 785.
\item \textsuperscript{234} 506 F. Supp. at 787. The court indicated that the conditional certification order
could be later modified in light of future developments in the case pursuant to Federal
Rules of Civil Procedure 23(c)(1) and 23(d).
\item \textsuperscript{235} \textit{Id.} at 787. The court thoroughly addressed the prerequisites of Rules 23(a) and
23(b) and concluded that certification under Rule 23(b)(3) was appropriate. \textit{Id.} at 788-791.
According to the case management plan adopted, the court also recommended separate
trials on some issues, including the government contract defense. \textit{Id.} at 785. The plaintiff
class was defined as all “persons who claim injury from exposure to Agent Orange and
their spouses, children and parents who claim direct or derivative injury therefrom.” \textit{Id.}
at 788. Additionally, the court suggested that subclasses may be created later to resolve
certain issues. \textit{Id.}
the issue of punitive damages under Rule 23(b)(1)(B). Judge Weinstein found that a Rule 23(b)(3) class action on liability and damages was appropriate because the affirmative defenses and questions of general causation were common to the class; those questions predominated over questions affecting individual members; and a class action was the superior method of adjudication given the enormous potential size of the class.

Plaintiffs had also sought certification of a mandatory class action under Rule 23(b)(1)(B). Before determining whether to certify the class under Rule 23(b)(1)(B), the court addressed two threshold questions: First, whether Rule 23(b)(1)(B) should ever be used in mass tort litigation, and second, assuming that it should, what standard should be used to determine whether there is a risk that the earlier litigants may deplete the fund.

In addressing the first question, the court cited a number of cases...
in which Rule 23 (b)(1)(B) was used in mass tort litigation and noted that although the court of appeals’ decisions in Dalkon Shield and Skywalk had decertified the classes, both courts had recognized the applicability of Rule 23(b)(1)(B) certification in mass tort litigation.241 The court distinguished Dalkon Shield on the basis that neither plaintiffs nor defendants had supported class certification.242 The court next distinguished Skywalk because the Eighth Circuit’s decision was based on the narrow grounds that the district court’s certification order violated the Anti-Injunction Act.243 Finding neither of these considerations applicable in the Agent Orange litigation, the court determined that Rule 23(b)(1)(B) may be used in the mass tort context.244

As to the second question, the determination of when the danger of fund exhaustion justified certification, the court rejected the Ninth Circuit’s standard in Dalkon Shield that certification under Rule 23(b)(1)(B) is appropriate only when “separate punitive damage claims necessarily will affect later claims.”245 The court found that the Ninth Circuit’s strict standards were at odds with the statutory language of Rule 23(b)(1) which only requires that there be a risk of impairment—not that there be a conclusive determination of that fact.246 In considering the par-


242. Id. at 21. In Dalkon Shield, the Ninth Circuit had remarked that no plaintiffs or defendants had supported the certification of the nationwide Rule 23(b)(1)(B) punitive damages class, although one of the plaintiffs for the Rule 23(b)(3) California liability class had favored certification. 693 F.2d at 849-50. However, one defendant had moved for certification of the nationwide punitive damages class at the district court after the court had conditionally certified that class. 526 F. Supp. at 895. The Ninth Circuit did not base its decision on the lack of support for class certification, but reversed on other grounds. See supra notes 195-97 and accompanying text.

243. In re “Agent Orange” Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 21. There was no possibility of violating the Anti-Injunction Act in this case because there were no state cases pending.

244. Id.

245. Id. The court added that strict adherence to the Ninth Circuit certainty standard would mean the elimination of Rule 23(b)(1)(B) certification for mass torts or require a pretrial determination on the merits, a practice which the Supreme Court disapproved of in Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 177-78 (1974).

ticular facts of the litigation before it, the court enunciated the proper standard in determining whether a limited fund exists under Rule 23(b)(1)(B): "[W]hether there is substantial probability—that is less than a preponderance but more than a mere possibility—that if damages are awarded, the claims of earlier litigants would exhaust the defendants' assets."247

To decide whether a substantial probability of exhaustion of a limited fund did exist, a special master had been directed to conduct a limited evidentiary hearing.248 The master reviewed defendants' net worth and the nature and extent of damages in the pending cases.249 Based on the available information, the master found that the evidence did not support the view that provable claims would exhaust the defendants' assets.250 On this basis, the court refused to certify a class for compensatory damages.251 As to punitive damages, the court concluded that if punitive damages were added to the potential compensatory damages, the defendants' assets may well be exhausted.252 This did not end the court's inquiry into class certification for the punitive damages claims, however.

The court properly concluded that the issue as to a limited fund for punitive damages claims should not be determined merely by ascertaining whether the defendants have the financial capability to satisfy all claims.253 Rather, a court must consider the issue of a limited fund in relation to the rationale

247. Id. at 23.
248. Id. at 24.
249. Id. at 24-25. The master found that the combined net assets of the defendants were approximately $9 to $16 billion. Based on the information available, he estimated that there might be 40,000 to 50,000 claims.
250. Id. at 25.
251. Id. at 26. Judge Weinstein rejected plaintiffs' contention that compensatory damages would exceed the net worth of the defendants.
252. Id.
253. Id. at 27-28. The court observed that there may be a policy against substantial punitive damages awarded under the particular facts of this case. Id. at 26. A large award of punitive damages might discourage government contractors from bidding on future defense contracts. Id. The court noted that awarding punitive damages might seriously impair the government's ability to formulate policy and make judgments pursuant to its war powers. Id. (citing Sanner v. Ford Motor Co., 144 N.J. Super. 1, 364 A.2d 43 (1976), aff'd, 154 N.J. Super. 407, 381 A.2d 805 (1977), appeal denied, 75 N.J. 616, 384 A.2d 846 (1978)). A large punitive damages award would unfairly punish the defendants if the government knew of the dangers posed by exposure to asbestos and yet avoided all liability. Id. at 27. See supra note 232. Notwithstanding this argument against punitive damages, Judge Weinstein concluded that there was a substantial probability that
underlying the imposition of punitive damages.\footnote{254} Considering that the purpose of punitive damages is to punish defendants and not to compensate plaintiffs, the court noted that if a single plaintiff recovers punitive damages, that may represent a finding by the jury that the defendant was sufficiently punished for the wrongful conduct.\footnote{255} Therefore, public policy or due process considerations may limit the number of times a defendant may be punished for the same transaction.\footnote{256} Moreover, future claims for punitive damages may be reduced by the admission of evidence of prior awards because the injured party is seeking additional punishment for the same misconduct.\footnote{257} Therefore, the amount of punitive damages assessed against a defendant may be limited by the goals underlying punitive damages.

The court enunciated a two-part analysis of the probable risk standard to determine whether a limited fund exists which would justify a Rule 23(b)(1)(B) class action. First, the court must decide whether there is a substantial probability that earlier claimants would exhaust defendants' assets.\footnote{258} Second, as a matter of policy or due process, the court should decide whether there is a substantial probability that limited punitive damages would be awarded.\footnote{259} This second prong emphasizes the fairness to plaintiffs and defendants in awarding punitive damages in the mass tort context.\footnote{260} In regard to the second prong of the analysis, the court concluded that there was a substantial probability that "adjudication with respect to individual members of the class...would as a practical matter be dispositive of the interests of the other members not parties to the adjudication."\footnote{261} Accordingly, a punitive damages class

\textit{limited punitive damages might be allowed and that it would be equitable to share this portion of a possible award among all plaintiffs who ultimately recovered compensatory damages. In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 27.}

\footnote{254. In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 27-28.}

\footnote{255. Id.}

\footnote{256. Id. at 28.}

\footnote{257. Id.}

\footnote{258. Id. at 23. The court followed the reasoning of Dalkon Shield, \textit{supra} note 4, 526 F. Supp. at 897-98, although it articulated the "substantial probability test," in part to protect a large group of war veterans. \textit{In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381, Memorandum and Pretrial Order No. 72, at 22-23.}}

\footnote{259. Id. at 26-28.}

\footnote{260. Id.}

\footnote{261. Id. at 28.}
was certified under Rule 23 (b)(1)(B).  

Defendants petitioned the Court of Appeals for the Second Circuit for a writ of mandamus directing the district court to vacate the class certification order. Although the Second Circuit expressed reservations about the appropriateness of the Rule 23(b)(3) class action as to the existence of a common issue of general causation and the difficult choice of law problems, it denied defendants' petition. Defendants then petitioned the United States Supreme Court for a writ of certiorari which also was denied. Neither petition addressed the issue of the Rule 23(b)(1)(B) class certification for punitive damages. On the eve of litigation, the court announced a $250 million settlement of the Agent Orange litigation. Following
preliminary fairness hearings, the court will determine if the proposed settlement should be finally approved.\textsuperscript{270}

ANALYSIS

The Limited Fund Class Action Approach for Punitive Damages in Mass Tort Litigation

Rule 23(b)(1)(B) permits class certification when multiple adjudications would prevent or greatly impede the ability of potential class members to protect their interests. The language of Rule 23(b)(1)(B) emphasizes practical considerations and expressly authorizes class adjudication where:

(1) The prosecution of separate actions by or against individual members of the class would create a risk of

\[\ldots\]

(B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.\textsuperscript{271}

The language of Rule 23(b)(1)(B) does not specifically require the existence of a limited fund. However, the Advisory Committee’s Note to the 1966 amendment of Rule 23 suggests that a case in which there are multiple claimants to a limited fund clearly satisfies the prerequisites of Rule 23(b)(1)(B).\textsuperscript{272} Moreover, courts and commentators have referred to the limited fund situation as the “paradigm” Rule 23(b)(1)(B) action.\textsuperscript{273} The existence of a limited fund poses the risk that earlier litigants will deplete the fund, leaving nothing for late comers.\textsuperscript{274}

\begin{itemize}
  \item \textsuperscript{270} See MANUAL FOR COMPLEX LITIGATION, supra note 218, § 1.46.
  \item \textsuperscript{271} Fed. R. Civ. P. 23(b)(1)(B).
  \item \textsuperscript{272} Advisory Comm. Note, 39 F.R.D. 69 (1966). The Note provides in pertinent part:
    In various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the law suit. This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims.
  \item \textsuperscript{274} A. MILLER, supra note 15, at 45.
\end{itemize}
Although the Ninth Circuit in *Dalkon Shield* disagreed with the trial court's application of a probable risk of depletion standard to determine exhaustion of a limited fund, a standard which was also utilized in *Agent Orange*, neither the language of Rule 23(b)(1)(B) nor the Advisory Committee's Note require the certainty standard mandated by the Ninth Circuit.\(^{275}\) First, Rule 23(b)(1)(B) states that this action is appropriate if individual adjudications "would create a risk"\(^{276}\) of impairing the interests of non-parties. Second, the Advisory Committee's Note recommends that Rule 23(b)(1)(B) certification is proper where adjudications as to members of the class "will necessarily or probably affect"\(^{277}\) the interests of potential class members. Therefore, the risk of impairment of interests\(^{278}\) or the probability of fund depletion\(^{279}\) is the correct standard to measure the exhaustion of a limited fund.

Judge Williams in *Dalkon Shield* and Judge Weinstein in *Agent Orange* explained that a limited fund may be created in two ways. First, a limited fund may be created because a defendant has finite assets.\(^{280}\) A defendant risks the depletion of these assets when faced with the specter of multiple punitive damages awards. The threat of a defendant's bankruptcy constitutes the probable risk that this limited fund will be exhausted.\(^{281}\) Courts must engage in preliminary findings of fact to determine the

\(^{275}\) In *Dalkon Shield*, the district court stated that a limited fund was potentially exhaustable if individual actions "may affect" the claims of others. *Dalkon Shield*, supra note 4, 526 F. Supp. at 897, 897. The district court in *In re "Agent Orange" Prod. Liab. Litig.*, concluded that the danger of fund exhaustion which would justify class certification was whether there is a "substantial probability" that claims of earlier litigants would exhaust the fund. *In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381*, Memorandum and Pretrial Order No. 72, at 23. Although these standards are not identical, they would seem to be consistent with the language of the Advisory Committee's Note which recommends that a class should be certified if interest of potential class members "will necessarily or probably" be affected by adjudication of the class claims. Advisory Comm. Note, 39 F.R.D. 69, 101 (1966). See Williams, 98 F.R.D. at 334.


\(^{278}\) *Dalkon Shield*, supra note 4, 526 F. Supp. at 897. See *In re Federal Skywalk Cases*, 680 F.2d at 1187 n.9 (Heaney, J., dissenting).

\(^{279}\) *In re "Agent Orange" Prod. Liab. Litig., M.D.L. No. 381*, Memorandum and Pretrial Order No. 72, at 23.

\(^{280}\) *Id.; Dalkon Shield*, supra note 4, 526 F. Supp. at 897. *Cf. In re "Agent Orange" Prods. Liab. Litig.*, 506 F. Supp. at 789-90 (indicating the aggregate claims of the potential class exceed the assets of the defendants).

\(^{281}\) *Dalkon Shield*, supra note 4, 526 F. Supp. at 897.
existence of defendant's limited assets and to measure the risk of exhaustion. 282

The second approach used to demonstrate the existence of a limited fund is the restraint on punishing the defendant imposed or implied by law. Some jurisdictions may limit the number of times a defendant can be punished by an award of punitive damages for the same act. 283 Other jurisdictions may decide as a matter of policy or constitutional due process that a defendant may not be subjected to repeated punishment. 284 This implied restriction on punitive damages based on fairness to the defendant creates a limited fund equally as finite as defendant's assets.

The standard to determine the exhaustion of the legally limited fund is whether there is a substantial probability that limited punitive damages will be allowed. 285 In most mass torts, regardless of defendant's assets, this substantial probability exists. Pursuant to the punishment and deterrent goals of punitive damages, there may well be a determination that the imposition of only a certain amount of punitive damages is justified. 286 In any mass tort case where there is a substantial probability of awarding multiple punitive damages, a substantial probability exists that defendant's liability for punitive damages will be limited and the legally created fund depleted. According to this rationale, a Rule 23(b)(1)(B) class action is appropriate for all mass torts involving multiple punitive damages claims because of the existence of a limited fund implied by law and the substantial probability of its exhaustion.

This same conclusion is reached by interpreting the statutory language of Rule 23(b)(1)(B). If individual members of the class received punitive damages awards, this adjudication would practically dispose of the interests of others, not parties to the litigation. 287 Without a class action, later plaintiffs' interest in seeking

282. E.g., In re “Agent Orange” Prod. Liab. Litig., MDL No. 381, Memorandum and Pretrial Order No. 72, at 24-26; Dalkon Shield, supra note 4, 526 F. Supp. at 897; Coburn v. 4-R Corp., 77 F.R.D. 43, 45 (E.D. Ky. 1977).
283. See supra note 191 and accompanying text. See also In re Federal Skywalk Cases, 680 F.2d at 1187 (Heaney, J., dissenting).
284. See supra note 70. Cf. Dalkon Shield, supra note 190, 693 F.2d at 850.
286. Id. at 27-28. See also Dalkon Shield, supra note 4, 526 F. Supp. at 899.
287. Dalkon Shield, supra note 4, 526 F. Supp at 897-98. See Williams, 98 F.R.D. at 333; Note, Class Actions, supra note 18, at 1797.
punitive damages will be impaired or impeded by prior awards. The consequent risk of impairment of interests satisfies the requirements of Rule 23(b)(1)(B). Whether the basis is the presence of a limited fund and the substantial probability of its exhaustion or the risk of impairment of interests of potential class members, punitive damages in mass tort cases meet the Rule 23(b)(1)(B) prerequisites for class certification.

An additional reason to certify a Rule 23(b)(1)(B) class action for punitive damages in multiple tort litigation is to advance the practical objectives of class actions: judicial economy and fairness. A class action would adjudicate the interests of plaintiffs in one action, thereby resolving the "first comer" problems. A court could proportionately distribute the punitive damages among class members. Class certification on the issue of punitive damages would additionally alleviate the threat of bankruptcy experienced by defendants.

In addition to the presence of a limited fund, these pragmatic considerations also apparently prompted the district court in *Dalkon Shield* to certify the Rule 23(b)(1)(B) class for punitive damages. The court stated that individual adjudications would "result in a tedium of repetition lasting well into the next century" and that "the class action is the best available device to protect the interests of all parties." Utilizing the Rule 23(b)(1)(B) class action for punitive damages in the mass tort context furthers the practical goals of class actions and makes the civil procedure system more responsive to the needs of contemporary society. It allows the courts to

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290. Dalkon Shield, *supra* note 4, 526 F. Supp. at 897; Williams, 98 F.R.D. at 333. See *supra* note 73 and accompanying text.


be innovative and flexible in their approach to accomplishing the punishment and deterrent goals of punitive damages by avoiding both overkill and relitigation.296

**Future Use of the Class Action for Punitive Damages in Mass Tort Cases**

In search of an equitable solution to the difficult question of how to properly award punitive damages in mass tort cases, three experienced federal district judges applied the class action device. The first two cases were reversed; the third resulted in a settlement. The future of this remedy in federal court is therefore uncertain. The innovative trial judges in *Dalkon Shield* and *Skywalk* are not particularly optimistic.

Judge Williams, who decided *Dalkon Shield* at the trial level, cautions that mass tort class actions may be: “Going, going, gone!”297 due to the Ninth Circuit’s novel and restrictive interpretation of the limited fund provision of Rule 23(b)(1)(B) and its misunderstanding of the terms of his order and the applicable law.298 He sees as a source of optimism, however, the willingness of other courts to continue to certify classes in mass tort cases and the growing impetus for class actions despite appellate setbacks.299

In *Skywalk* on remand, Judge Wright certified a Rule 23(b)(3)300 class providing an opt out provision in deference to the Eighth Circuit’s concern that a mandatory class interferes (in the form of an injunction) with the rights of litigants to pursue state court claims.301 Because state claims could be simultaneously litigated, a Rule 23(b)(3) voluntary class action would not violate the Anti-
Injunction Act. The class claims were subsequently settled in companion settlements in state and federal courts, which had the combined effect of a mandatory class because virtually all class members were included in the settlement. In a recent publication, Judge Wright persists in his opinion that only a mandatory Rule 23(b)(1)(B) class action can insure equity to all parties. He predicts, however, that because of the Eighth Circuit's interpretation of the Anti-Injunction Act, state courts will be forced to shoulder the full responsibility for future mass tort litigation. While it is easy to sympathize with the frustrations of Judges Williams and Wright, it is also apparent, as Judge Williams points out, that trial judges will continue to dare to be innovative. Perhaps too, lessons will be learned as federal and state courts all over the country grapple with Dalkon Shield and other mass products liability cases.

If the Anti-Injunction Act prevents exclusive management of a class action by a federal court, companion orders can be entered in state and federal court in the same manner as settlements were achieved in the Skywalk cases. Federal courts may find state courts receptive to shared management responsibility of class actions. Some state courts are more experienced in mass tort litigation than the federal courts and equally as innovative. For example, in Froud v. Celotex Corp., the Illinois Appellate Court affirmed a lower court's ruling in an asbestos case that punitive damages were available under the Illinois Survival Act. This holding was subsequently reversed by the Illinois Supreme Court based on its interpretation of the Act. Al-

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303. Id.
304. Wright & Colussi, supra note 119, at 142-43. Judge Wright suggests that only a mandatory class action would effectively manage the joint litigation to guarantee the collective best interests of all the litigants. Id. at 144-47.
305. Id. at 143.
307. 107 Ill. App. 3d at 658, 437 N.E.2d at 913. In Froud, the administrators of the estates of three deceased asbestos workers sought recovery for punitive damages for injuries allegedly caused by exposure to asbestos products manufactured and sold by twenty-four companies. Id. at 656-57, 437 N.E.2d at 911-12. Recovery was sought under the Illinois Survival Act. ILL. REV. STAT. ch. 110½, § 27-6 (1983).
308. Froud v. Celotex Corp., 98 Ill. 2d 324, 456 N.E.2d 1316 (1983) (holding that com-
though *Froud* was not a class action, the defendant, fearing numerous punitive damages claims in asbestos cases, had raised the issue of the propriety of awarding punitive damages in the context of mass tort litigation. The subsequent comments of the appellate court and its suggestions as to how to best deal with punitive damages, when available in a mass tort case, evidences the same willingness to be innovative exhibited in the *Dalkon Shield, Skywalk* and *Agent Orange* cases.\(^{309}\)

The appellate court decision, written by Justice Francis Lorenz, cited the district court opinion in *Dalkon Shield* to show that courts can protect defendants in punitive mass tort cases from "execution by punitive damages without granting them immunity from such damages."\(^{310}\) A concurring opinion by Justice John J. Sullivan, a prominent trial lawyer before his ascension to the bench, expresses his enthusiasm for utilizing the *Dalkon Shield* concept of a separate trial "to award a single sum as punitive damages for all plaintiffs, past and potential, with a percentage to each based upon the compensatory damages accrued."\(^{311}\) Certainly other state courts will be of the same mind. Both federal and state courts should recognize that the class action is a method which should be used to equitably award punitive damages in mass tort cases.

**CONCLUSION**

The resolution of the punitive damages issue through the use of the 23(b)(1)(B) class action device as proposed by Judges Williams, Wright, and Weinstein would eliminate many of the problems generated by application of the punitive damages doctrine in the mass tort context. It provides the mechanism by which all punitive damages claims can be adjudicated in one forum by a single action, which Judge Friendly foresaw as the solution to the mass tort punitive damages problem in his prophetic footnote in *Roginsky*.\(^{312}\) A class action on the issue of punitive damages will enable one court to determine the appropriate measure of punishment which should be imposed on the defendant for his

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\(^{309}\) See supra note 65.


\(^{311}\) Id. (Sullivan, J., dissenting).

\(^{312}\) See supra note 95.
conduct. In that proceeding, factors relevant to the issue of punitive damages such as the nature of the defendant’s conduct and the extent of the defendant’s wealth can be considered. The court can then arrive at a total amount of punitive damages which, in light of all the circumstances, will adequately punish the defendant for his misconduct and deter the defendant and others from similar conduct in the future. In this manner, the objectives of punitive damages will be served.

Classwide adjudication will eliminate the danger of overkill which is present with separate punitive damages judgments. The court will be aware of the defendant’s total wealth and can achieve the goal of punishing the defendant without destroying him financially. Accordingly, the constitutional due process problems raised by repeated punishment for the same conduct will be avoided.

Just as the defendant will benefit from classwide adjudication of punitive damages, plaintiffs will also benefit. They will no longer have to worry about beating other plaintiffs to the courthouse in order to recover punitive damages. A class action adjudication on punitive damages liability will result in a single award which can then be divided on a pro rata basis among the entire class of claimants. In addition, attorneys who represent more than one plaintiff will not have to decide which plaintiff’s claim to pursue first.

The class action procedure is far superior to any of the available traditional methods for controlling the amount of punitive damages in mass tort cases. Remittitur and jury instructions may be inadequate in mass tort litigation because neither judges nor juries can predict the outcome of all pending cases. In contrast, a mandatory class action device will make such attempted predictions unnecessary.

Finally, the class action device enables courts to make the civil procedure system more responsive to the needs of contemporary society. Because many people come into contact with defective products or suffer injuries as a result of disasters and catastrophic accidents, their common interest in an equitable resolution of their claims require the courts to effectively meet their needs. Modern corporate defendants who are subject to potential financial devastation resulting from multiple punitive damages awards also need the courts to fairly respond to their interests. A proper interpretation of Rule 23(b)(1)(B), the “limited fund” class action approach, will afford federal courts sufficient flexibility to accom-
plish efficient adjudication of punitive damages claims. Similar application of state court class action devices will also advance the interests of plaintiffs and defendants. The class action, therefore, provides the procedural vehicle which can alleviate the problems created by punitive damages in mass tort cases.