NOTES

DECERTIFICATION OF STATEWIDE TOBACCO CLASS ACTIONS

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Tobacco litigation splintered into statewide class actions after the Fifth Circuit decertified a nationwide class of "nicotine-dependent persons" in Castano v. American Tobacco Co. *In this Note, Susan Kearns analyzes "son of* Castano*" class actions as a vehicle for adjudicating individual tobacco claims. Reviewing two recent tobacco class actions, she argues that statewide class actions confront the same obstacles that required decertification of the nationwide* Castano *class. She contends that litigant autonomy, judicial efficiency, and due process considerations should preclude the certification of a "son of* Castano*" class action in state or federal court.*

INTRODUCTION

The class action battle waged against the tobacco industry seems to be losing steam as state and federal courts refuse to certify statewide classes of smokers. After the Fifth Circuit decertified a nationwide class of "all nicotine-dependent persons" in *Castano v. American Tobacco Co.*,[1] tobacco litigation splintered into single-state class actions filed in federal and state courts across the country. As federal courts expressed a growing apprehension toward nationwide mass tort class actions, smaller statewide class actions seemed to present an alternative route for efficient litigation of tobacco claims and to provide plaintiffs with a legal strategy that would surmount four decades of losses to the tobacco industry. These "son of *Castano*"[2] cases sought to remedy noncompliance with Federal Rule of Civil Procedure 23 (Rule 23) and its state counterparts by limiting the scope of the litigation and attacking the industry before multiple juries instead of in a single courtroom.

The splinters, however, are different in size and number rather than quality. Single-state classes have encountered the same obstacles

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1 84 F.3d 734, 737 (5th Cir. 1996).

2 Anthony Flint, Court Derails Class-Action Tobacco Suit, Boston Globe, May 24, 1996, at 1 (quoting Congressman Martin Meehan).

met by the *Castano* class and raised the same procedural deficiencies that the Supreme Court counseled against in *Amchem Products, Inc. v. Windsor*.[3] Attempts to mold tobacco litigation into the shape demanded by Rule 23 reveal a mismatch between the class action method of adjudication and addiction-related claims. Individual questions permeate all aspects of plaintiffs' claims—from proof of addiction and reliance on misrepresentations to assumption of risk and statute of limitations defenses.[4] Restricting a class to hundreds of thousands of smokers residing in a single state may decrease the number of individual class members, but this limitation fails to alter the balance between common and individual issues or to resolve the manageability concerns of the judiciary. This Note proposes that the very concept of a tobacco class action is an oxymoron and that such suits should not be certified by state or federal courts.

Part I of this Note presents the history of tobacco litigation and the continually evolving legal theories advanced on behalf of smokers. This Part discusses the Fifth Circuit's decision in *Castano* and the federal judiciary's reluctance to certify mass tort class actions, and argues that the rationale underlying this opposition directly rejects certification of a tobacco class action in either a state or federal court. Part II analyzes the "son of *Castano*" class actions that emerged in the aftermath of the *Castano* decertification, focusing on a federal court's decision in *Arch v. American Tobacco Co.*[5] and the *R.J. Reynolds Tobacco Co. v. Engle*[6] class action in Florida state court. Part III contends that these statewide class actions confront the same obstacles to certification that undermined the *Castano* class action. The nature of tobacco claims as unavoidably individual and potentially highly valuable thwarts efficient or fair class action adjudication where alternative avenues exist for both individuals and Congress to redress any harm caused by the tobacco industry. In this context, a class action undermines procedural fairness, litigant autonomy, judicial efficiency, and common sense.

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3 521 U.S. 591 (1997); see infra notes 38-52 and accompanying text.

4 See infra notes 150-58 and accompanying text.

5 175 F.R.D. 469 (E.D. Pa. 1997) (denying motion to certify tobacco class action).

6 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (certifying statewide tobacco class action).

I
TOBACCO LITIGATION AND CLASS ACTIONS

A. Three Waves of Tobacco

Americans smoke more than one billion cigarettes each day,[7] and an estimated 430,700 American deaths are attributed to smoking each year.[8] The "mirror images" of smoking as harmful and pleasurable have existed since the introduction of tobacco into Western society.[9] Despite a general perception of cigarettes as "less than wholesome-coffin nails," smoking permeated all strata of American society by the mid-twentieth century.[10] The emergence of health and science debates at the forefront of the cultural landscape, however, has shifted public perceptions of smoking over the last few decades: A tolerance of individual choice has evolved into a condemnation of smoking as a morally unacceptable indulgence in transient benefits in lieu of a rational consideration of potential harms.[11]

Changing views of smoking and the reassertion of scientific evidence demonstrating its harmful effects have triggered three waves of tobacco litigation distinguishable by their underlying legal theories and the obstacles confronted in the courts.[12] The third wave of to-

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[7] See Market and Trade Econ. Div., U.S. Dep't of Agric., Tobacco Situation and Outlook 3 (April 1999) (reporting that American smokers consumed estimated 470 billion cigarettes in 1998).

[8] See Centers for Disease Control and Prevention, Facts About Cigarette Mortality (May 23, 1997) <http://www.cdc.gov/od/oc/media/fact/cigmortl/html>.

[9] See Joseph R. Gusfield, The Social Symbolism of Smoking and Health, in Smoking Policy 49, 49 (Robert L. Rabin & Stephen D. Sugarman eds., 1993); see also Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996) (recognizing that risks associated with smoking have long been known to public); Roysdon v. R.J. Reynolds Tobacco Co., 849 F.2d 230, 236 (6th Cir. 1988) (same).

[10] See Gusfield, supra note 9, at 54 (noting prevalence of cigarette smoking among all classes and both sexes in late 1940s); Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 Stan. L. Rev. 853, 855 (1992) (stating that nearly half of Americans were regular smokers in 1950).

[11] See Robert E. Goodin, No Smoking 4-6 (1989) (discussing challenge presented by addictive nature of tobacco and harm caused by secondhand smoke to long-held perception of smoking as "purely private-regarding indulgence, for which people are to be scolded but not sanctioned"); Gusfield, supra note 9, at 67 (discussing public health campaign of three decades prior to 1990s and "cultural shift in the meaning of health and patterns of living" that markedly changed public perceptions of smoking); cf. Stephen Williams, The More Law, The Less Rule of Law, 2 Green Bag 2d 403, 409 (1999) ("It seems likely that those who persist in smoking regard the benefits—relaxation, better concentration, greater ease and confidence in social situations, and perhaps frivolous concerns such as a veneer of sophistication—as outweighing the well-known drawbacks.").

[12] See generally Richard L. Cupp, Jr., A Morality Play's Third Act: Revisiting Addiction, Fraud and Consumer Choice in "Third Wave" Tobacco Litigation, 46 U. Kan. L. Rev. 465 (1998) (discussing third wave of tobacco litigation); Rabin, supra note 10 (discussing context in which first two waves of tobacco litigation arose and characteristics of each wave, and predicting likelihood of third wave); Douglas N. Jacobson, Note, After *Cipol-*

bacco litigation, described in greater detail below, broke with its predecessors in the procedural strategies employed and the claims asserted against the tobacco industry. A new climate encouraged and facilitated litigation: New disclosures that tobacco companies may have known the addictive nature of nicotine and intentionally manipulated nicotine levels to addict smokers perceptibly cracked the industry's hitherto impenetrable defense armor.[13] The public's increasing skepticism toward the tobacco industry enhanced the likelihood of large jury verdicts,[14] and the experience and fees won against the asbestos

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lone v. Liggett Group, Inc.: How Wide Will the Floodgates of Cigarette Litigation Open?, 38 Am. U. L. Rev. 1021 (1989) (discussing cases of first and second waves of tobacco litigation).

Studies linking cigarette smoking to disease, published in both scientific journals and popular magazines, sparked the first wave of tobacco litigation in the 1950s; however, the industry's "no-compromise" litigation strategy and highly uncertain scientific proof of causation undermined the negligence and warranty claims asserted over the following two decades, and plaintiffs realized not a single victory in this round of litigation. See Graham E. Kelder, Jr. & Richard A. Daynard, The Role of Litigation in the Effective Control of the Sale and Use of Tobacco, 8 Stan. L. & Pol'y Rev. 63, 71 (1997) (describing "king of the mountain" strategy of tobacco industry); Rabin, supra note 10, at 857-62.

The second wave of tobacco litigation emerged in the 1980s when a federal district court upheld a $400,000 damage award to a smoker's husband. See Cipollone v. Liggett Group, Inc., 693 F. Supp. 208 (D.N.J. 1988), aff'd in part and rev'd in part, 893 F.2d 541 (3d Cir. 1990), aff'd in part and rev'd in part, 505 U.S. 504 (1992); see also C.F. Fenswick, *Cipollone v. Liggett Group, Inc.*: Supreme Court Takes Middle Ground in Cigarette Litigation, 67 Tul. L. Rev. 787, 787-88 (1993). An evolution in tort liability had transformed the court system into an increasingly plaintiff-friendly arena in which new legal theories could be tested. See, e.g., Rabin, supra note 10, at 866 (discussing transformation in products liability law from its emphasis on foreseeability and warranty claims to introduction of comparative fault and risk-utility analysis of tort claims based on strict liability); Peter H. Schuck, Mass Torts: An Institutional Evolutionist Perspective, 80 Cornell L. Rev. 941, 947 (1995) (describing rise in mass tort litigation resulting from development of tort liability in favor of plaintiffs). While the tobacco industry continued to defend every claim and to refute evidence of causation, see Kelder & Daynard, supra, at 71, it also worked within the new legal framework by persuasively presenting an assumption of risk defense based on the free choice to smoke amid the common knowledge of the dangers of smoking. See Rabin, supra note 10, at 867-71. When the Supreme Court overturned the initial *Cippollone* verdict in 1992, see *Cipollone*, 505 U.S. at 524-25, 527-29 (finding failure to warn and fraudulent misrepresentation claims generally preempted by Federal Cigarette Labeling and Advertising Act), the resources of the tobacco industry and the resonance of the free choice argument with jurors signaled an end to this wave of litigation. See William Glaberson, Smokers Forgoing Lawsuits, Dallas Morning News, Sept. 18, 1988, at 10A (discussing absence of flood of tobacco litigation predicted in wake of *Cipollone* jury verdict).

[13] See Cupp, supra note 12, at 474 (discussing plaintiff's effort to shift blame from smokers to tobacco industry); Graham E. Kelder, Jr. & Richard A. Daynard, Judicial Approaches to Tobacco Control: The Third Wave of Tobacco Litigation as a Tobacco Control Mechanism, 53 J. Soc. Issues 169, 169-70 (1997) (arguing that new evidence and procedural strategies enhance likelihood of plaintiffs' success in third wave of litigation).

[14] See Stop Smoking!, Economist, May 11, 1996, at 21 (describing growing public distrust of tobacco industry).

industry supplied ready ammunition for the plaintiffs' bar.[15] Against this backdrop, nonsmokers, state attorneys general, and classes of nicotine addicts joined individual litigants to launch a multi-pronged battle against the tobacco industry.

Three innovative forms of litigation—secondhand smoke cases, state Medicare reimbursement suits, and addiction class actions—emerged in 1994 as tobacco foes glimpsed an opportunity to reverse a forty-year losing streak in the courts.[16] The structures of these lawsuits sought to minimize the focus on individual responsibility and shift attention away from "blameworthy" smokers toward a "blameworthy" tobacco industry.[17] First, a Florida appellate court approved certification of a nationwide class of nonsmoking flight attendants exposed to secondhand smoke;[18] these class members made attractive plaintiffs because they neither chose to smoke nor voluntarily exposed themselves to environmental tobacco smoke.[19]

Second, Mississippi Attorney General Michael Moore filed an action on behalf of Mississippi to recoup Medicaid funds allegedly spent on treating tobacco-caused illnesses.[20] Moore and other state attorneys general claimed that the states suffered direct harm caused by

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[15] See Gary D. Centola & Michael A. Kotula, Tobacco Claims: Clearing the Air on Coverage, N.Y. L.J., Nov. 12, 1996, at S1 (noting that tobacco class actions "were championed by numerous experienced personal injury attorneys who made their fortunes representing injured people in suits against asbestos manufacturers and pharmaceutical manufacturers").

[16] See Philip J. Hilts, Class Action Next Tactic in Tobacco Suits, Seattle Times, Nov. 6, 1994, at A10 (noting that tobacco industry defeated smokers' claims in 400 lawsuits over 40 years).

[17] See Cupp, supra note 12, at 471-77 (arguing that addiction class actions, secondhand smoke claims, and state Medicare actions seek to redirect attention of jurors away from assumption of risk defense that led to hundreds of victories for tobacco industry). Professor Rabin characterizes tobacco litigation as "a last vestige of a perhaps idealized vision of nineteenth century tort law as an interpersonal morality play," arguing that plaintiffs' attorneys failed to recognize the persuasiveness of the assumption of risk defense and "how intensely most jurors would react to damage claims by individuals who were aware of the risks associated with smoking and nonetheless chose to continue the activity over a long time period." Rabin, supra note 10, at 871.

[18] Broin v. Philip Morris Cos., 641 So. 2d 888, 892 (Fla. Dist. Ct. App. 1994). This lawsuit settled in October 1997 for $349 million. See Ramos v. Philip Morris Cos., Nos. 98-389, 98-397, 98-418, 98-513, 98-569, 98-2237, 1999 WL 157370, at *8 (Fla. Dist. Ct. App. Mar. 24, 1999) (affirming settlement as "fair, adequate, and reasonable"); The Tobacco Wars, Economist, July 11, 1998, at 66 (noting that settlement will go to lawyers and research fund).

[19] See Cupp, supra note 12, at 475-76 (noting reduced likelihood that jurors will "assign the same moral blameworthiness to a plaintiff who endured second-hand smoke in order to make a living that they do in cases involving plaintiffs who choose to smoke for their pleasure").

[20] See Complaint, Moore ex rel. Mississippi v. American Tobacco Co., No. 94-1429 (Miss. Ch. Ct. filed May 23, 1994).

the tobacco industry when they incurred costs treating injured smokers.[21] By advancing a claim on behalf of the state in its own right, rather than asserting a theory of subrogation, the states sought to avoid liability rules requiring proof of harm to individual smokers.[22] Uncertainty for both sides over the legal merit of the states' claims and the unpredictable size of potential damage awards resulted in a $206 billion deal in November 1998 between the states and the tobacco industry.[23]

This Note focuses on the third form of litigation—addiction class actions—initiated when plaintiffs filed a motion in a Louisiana district court to certify a nationwide class of nicotine dependent persons.[24] A liability theory centered on the novel injury of addiction,[25] perhaps the key innovation of the third wave, emerged for the first time in *Castano v. American Tobacco Co.*[26] Asserting traditional causes of

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21 See Michael C. Moore & Charles J. Mikhail, A New Attack on Smoking, 111 Pub. Health Rep. 192, 197-98 (1996) (arguing that state acts in its own right as innocent party to recover Medicare expenses and is entitled to restitution for benefits conferred on industry by providing health care to injured smokers).

22 But see States Face Struggle to Get Medical Reimbursements from Big Tobacco, Dow Jones Online News, June 5, 1998, available in Westlaw, DJONLINEN file (discussing court rulings in Iowa, Maryland, and Washington that required states to prove damages on case-by-case basis and rejected argument that states suffered losses directly from tobacco industry).

23 See Milo Geyelin, Top Tobacco Firms Agree to Pay States up to $206 Billion in 25-Year Settlement, Wall St. J., Nov. 16, 1998, at A3 (reporting also that Mississippi, Florida, Texas, and Minnesota had already settled lawsuits against tobacco industry for additional $40 billion); Daniel Wise, Uncertainties in the Law Seen as Spur to Tobacco Settlement, N.Y. L.J., Nov. 23, 1998, at 1 (noting lack of guidance resulting from conflicting rulings in state courts). Unlike the settlement proposed in June 1997 and thwarted by Congress in June 1998, this deal resolves only the lawsuits brought on behalf of the states and does not affect class action lawsuits or limit individual lawsuits. See Myron Levin et al., Accord Ends Key Phase in Ongoing Tobacco War, L.A. Times, Nov. 17, 1998, at A1 (noting that November 1998 deal does not impact status of 125 pending class actions filed on behalf of allegedly addicted smokers, union health-care funds, or insurance providers); The Tobacco Wars, supra note 18, at 66 (reporting collapse of June 1997 settlement after Congress omitted class action protection and raised industry's cost to $516 billion from $368.5 billion).

24 Castano v. American Tobacco Co., 160 F.R.D. 544 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

25 A claim can be considered novel if it is "based either on a new theory of liability or on a conventional liability theory applied to a new situation." Recent Case, *Castano v. American Tobacco Co.*, 110 Harv. L. Rev. 977, 980 (1997) (citations omitted) (arguing that "addiction-as-injury" claim met neither definition of novelty since it merely asserted conventional claim of fraudulent failure to disclose material information). But see Arch v. American Tobacco Co., 175 F.R.D. 469, 494 (E.D. Pa. 1997) (describing *Castano* as applying old causes of action to new situation); T. Dean Malone, Comment, *Castano v. American Tobacco Co.* and Beyond, 49 Baylor L. Rev. 817, 843 (1997) (arguing that *Castano* involved traditional causes of action and "novel" injury).

26 160 F.R.D. 544.

action,[27] plaintiffs claimed that defendants fraudulently concealed the addictive nature of nicotine and intentionally manipulated nicotine levels to addict smokers.[28]

The strategic importance of this argument must not be underestimated. By refuting the notion that smokers voluntarily choose to smoke and presenting evidence of defendants' misconduct, plaintiffs sought to alter the balance of the "morality play" performed in tobacco litigation.[29] The "addiction-as-injury" claim directly attacked the assumption of risk defense that had shielded the tobacco industry for decades at the same time that it increased the potential number of litigants to all smokers alleging addiction.[30] When the district court certified the *Castano* class, it proposed transforming tobacco litigation from the seventy-five individual lawsuits then pending against the industry[31] to tens of millions of claimants alleging a novel theory of liability before a single jury. *Castano* threatened to create a mass tort class action unprecedented in scope and magnitude.[32]

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[27] See id. (alleging causes of action that include fraud, negligent misrepresentation, breach of warranties, and strict product liability). For a description of addiction-based claims underlying the third wave litigation, see Kelder & Daynard, supra note 12, at 80-82.

[28] See *Castano*, 160 F.R.D. at 548.

[29] See Rabin, supra note 10, at 871; see also Cupp, supra note 12, at 506 (arguing that tobacco litigation should be characterized as "dark tragedy" and that new evidence of fraud and addiction changes evaluations of "characters" in "judicial theater"). In his article on third wave tobacco litigation, Cupp argues that the flexibility of the assumption of risk defense invites considerations of morality and blameworthiness in tobacco litigation. See id. at 481. Evidence of addiction and fraud that diminishes the voluntariness of the smoker's decision to smoke and appreciation of the danger must be juxtaposed against the smoker's initial decision to engage in an "open and obvious" danger, a reluctance to remove individual responsibility, and the vagaries of nicotine "addiction." See id. at 499-506. Rather than exonerating smokers, Cupp contends, jurors would be more likely to divide culpability between smokers and tobacco companies:

> Even if the intense and seemingly universal criticism bombarding the tobacco industry in the 1990s alters many jurors' perceptions of appropriate moral balancing, they will of course still fault smokers for choosing to smoke. However, their heightened moral outrage against tobacco manufacturers may render their condemnation of smokers less harsh.

Id. at 500.

[30] See *Castano*, 160 F.R.D. at 550 (noting plaintiffs estimate that 50 million Americans smoke and that class may have tens of millions of members).

[31] See Barry F. McNeil & Beth L. Fancsali, Mass Torts and Class Actions: Facing Increased Scrutiny, 167 F.R.D. 483, 495 (1996) (presented to the 1996 Judicial Conference of the Fifth Circuit) (noting that "de minimus fraction" of members of putative *Castano* class had filed claims before certification).

[32] Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996) (characterizing *Castano* class as possibly "largest class action ever attempted in federal court").

B. Tobacco as a Mass Tort Class Action

Rule 23[33] represents an effort "to strike a sensible balance between the benefits and costs of collective resolution."[34] The Rule 23 prerequisites to a class action must be "'rigorous[ly]'" analyzed[35] and a class must fit "'within [its] framework'"[36] in order to preserve the delicate balance struck among the interests of individual litigant autonomy, judicial efficiency, and due process rights of litigants.[37] An overly liberal construction of Rule 23 in a mass tort class action risks upsetting this balance, and it is this result that the Supreme Court cautioned against when it decertified a nationwide settlement class action in *Amchem*.[38]

The *Amchem* decision arose in the context of a proposed global resolution of the "asbestos litigation crisis."[39] In thousands of cases, plaintiffs alleged injury caused by occupational exposure to asbestos and asserted legal theories including negligent failure to warn, strict liability, and enhanced risk of disease.[40] After pending asbestos ac-

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[33] Rule 23 requires all class actions to meet the following criteria:

> (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

Fed. R. Civ. P. 23(a). A (b)(3) class action, the type of action at issue in the tobacco cases under discussion, can be certified by a court

> if the prerequisites of subdivision (a) are satisfied, and in addition: . . . the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

Fed. R. Civ. P. 23(b)(3). Most states have adopted Rule 23 almost verbatim. See, e.g., Fla. R. Civ. P. 1.220(a), (b)(3); N.Y. C.P.L.R. §§ 901-902 (McKinney 1998); Tex. R. Civ. P. 42(b)(4).

[34] John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 Cornell L. Rev. 990, 996 (1995).

[35] *Castano*, 84 F.3d at 740 (citing General Tel. Co. v. Falcon, 457 U.S. 147, 161 (1982)).

[36] Id. at 740 (citing Gulf Oil Co. v. Bernard, 452 U.S. 89, 100 (1981)).

[37] Cf. William W. Schwarzer, Structuring Multiclaim Litigation: Should Rule 23 Be Revised?, 94 Mich. L. Rev. 1250, 1258 (1996) ("A class-action rule is not simply a rule of the road; it is a means for allocating power and responsibility among the participants in the litigation—imposing a system of checks and balances.").

[38] See Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 621 (1997); see also The Supreme Court, 1996 Term—Leading Cases, 111 Harv. L. Rev. 349 (1997) (defending Court's rationale in *Amchem*); S. Charles Neill, Comment, The Tower of Babel Revisited: The U.S. Supreme Court Decertifies One of the Largest Mass Tort Classes in History, 37 Washburn L.J. 793, 799-800 (1998).

[39] Georgine v. Amchem Prods., Inc., 83 F.3d 610, 618-19 (3d Cir. 1996) (describing flood of litigation arising from asbestos related injuries), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

[40] See id. at 619-20.

tions were consolidated in order to facilitate resolution, plaintiff attorneys' and defendant manufacturers' steering committees proposed to settle all future asbestos claims by class action while privately settling pending "inventory" claims.[41] The parties submitted on the same day a complaint, answer, motion to certify a settlement class action, and a proposed settlement that resolved the claims of class members based on specified payment methods and qualifying disease categories.[42] Although the district court approved the certification, the Third Circuit decertified the class and the Supreme Court affirmed.[43]

The decertification of the *Amchem* class—despite the ongoing flood of asbestos litigation[44]—signaled the Court's determination to limit class actions. While the Court found that settlement classes need not meet the manageability requirement, it demanded "undiluted, even heightened, attention" to the other elements of Rule 23 and found that the *Amchem* class failed both the predominance and adequacy of representation prongs of 23(b)(3).[45]

The Court's analysis of the adequacy of representation was heavily influenced by aspects of the *Amchem* settlement[46] and need not concern us here. More significant for present purposes is the Court's analysis of predominance. The Court determined that an "overarching dispute about the health consequences" of exposure to a dangerous product does not establish predominance in light of significant questions peculiar to individual members of the class:

> "Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some class members suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis, or from mesothelioma . . . . Each

41 See *Amchem*, 521 U.S. at 597-99 (emphasizing that class action included only claims not pending at time of consolidation). "Inventory" claims refer to those asbestos-related claims already filed by the Plaintiffs' Steering Committee on behalf of claimants. See id. at 600-01.

42 See *Georgine*, 83 F.3d at 620-21. The settlement provided no compensation for exposure-only plaintiffs and restricted payments available to "future" plaintiffs who later sustained physical injury. See *Amchem*, 521 U.S. at 606 (noting objectors' contention that settlement's failure to adjust monetary awards for inflation or scientific advancements disadvantaged class members with no currently compensable injury); *Georgine*, 83 F.3d at 620, 630-31 (finding that "most salient conflict in this class action is between the presently injured and future[ ] plaintiffs").

43 See *Amchem*, 521 U.S. at 596.

44 See id. at 631 (Breyer, J., dissenting) (noting that asbestos lawsuits comprised six percent of all civil cases filed in federal court).

45 See id. at 620, 625, 627-28.

46 See id. at 626 (noting disparity in settlement's treatment of currently injured and exposure-only plaintiffs).

> has a different history of cigarette smoking, a factor that complicates the causation inquiry."[47]

Common exposure to asbestos could not overcome the "sprawling" nature of the class and the great disparities among class members arising from the individual nature of the harm caused by exposure.[48] The district court failed to "follow the counsel of caution" necessary in mass tort cases where "individual stakes are high and disparities among class members great."[49]

Writing for the Court, Justice Ginsburg observed the "adventuresome" practice created by Rule 23(b)(3) in 1966 and the even more "adventuresome" role thrust on Rule 23 as a vehicle to "cop[e] with claims too numerous to secure their 'just, speedy, and inexpensive determination' one by one."[50] The Court underscored the need to adhere to the requirements of Rule 23 and warned against a construction that departs from the balance embodied in its requirements: "[T]he rulemakers' prescriptions for class actions may be endangered by 'those who embrace [Rule 23] too enthusiastically just as [they are by] those who approach [the Rule] with distaste.'"[51] Although the "adventuresome" form of class action addressed in *Amchem* was a nationwide settlement class action, the Court focused on predominance without regard to whether the certification was for a settlement or a litigation class.[52] Its decision thus reaches beyond the context of settlement class actions and extends more broadly to interpretations of Rule 23 in mass tort class actions.

Amchem's insistence on adherence to Rule 23 implicitly approved the courts of appeals' refusal to flex the requirements of Rule 23 to facilitate certification of mass tort class actions. One year prior to *Amchem*, the Fifth Circuit had decertified the *Castano* nationwide tobacco class action. Just as the Supreme Court would rein in the trial court's certification enthusiasm in *Amchem*, the Fifth Circuit criticized

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47 Id. at 624 (quoting *Georgine*, 83 F.3d at 626).

48 Id.

49 Id. at 625.

50 Id. at 614, 617-18 (quoting Fed. R. Civ. P. 1).

51 Id. at 629 (quoting Charles Alan Wright, Law of Federal Courts 508 (5th ed. 1994) (alteration in original)); see also id. at 613 ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure 'shall not abridge, enlarge or modify any substantive right.'" (quoting 28 U.S.C. § 2072(b) (1994))); Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 (5th Cir. 1998) (observing that "'this court has no power to define differently the substantive right of individual plaintiffs as compared to class plaintiffs'" (quoting Alabama v. Blue Bird Body Co., 573 F.2d 309, 318 (5th Cir. 1978))).

52 The Supreme Court explicitly found that the predominance "inquiry trains on the legal or factual questions that qualify each class member's case as a genuine controversy, questions that preexist any settlement." *Amchem*, 521 U.S. at 623.

the decision to journey down an "adventuresome" path in class action procedure and the lack of rigor in the lower court's certification analysis.[53] Embarking on "a task unparalleled in scope," the *Castano* district court had certified a class of "all nicotine-dependent persons" who had purchased and smoked cigarettes from defendant tobacco companies[54] and declared its intent to avoid "the specter of thousands, if not millions, of similar [liability] trials proceeding in thousands of courtrooms around the nation."[55] Never before tested in any federal or state court, the injury of addiction lay at the center of plaintiffs' allegations and the action certified by the district court.[56] The creation of millions of novel claims under the guise of a single action purported, however, to rest on grounds of efficiency.

This judicial creation of a mass tort prompted the Fifth Circuit not only to decertify the *Castano* class but also to suggest that the certification of an "immature" mass tort would never be appropriate.[57] Expressing a high degree of skepticism toward mass tort class actions in general, the court stated its "specific concern . . . that a mass tort cannot be properly certified without a prior track record of trials from which the district court can draw the information necessary to make the predominance and superiority analysis required by [R]ule 23."[58]

The novelty of "addiction-as-injury" claims provides no guidance in determining the role common issues will play in every trial; without knowing which issues will be "significant" in the litigation, a court cannot make a nonspeculative determination that common issues will predominate over individual questions.[59] The Fifth Circuit criticized

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[53] See Castano v. American Tobacco Co., 84 F.3d 734, 737 (5th Cir. 1996).

[54] See id. at 736. The district court certified for trial the core liability and punitive damages issues. See id. It defined the core liability issues as common factual issues of defendants' knowledge that nicotine was addictive, their failure to inform smokers of that knowledge, and any of their actions taken to addict smokers. See id. at 739. On the other hand, it declined to certify the issues that it declared to be overwhelmed by individual circumstances: injury-in-fact, proximate cause, reliance, affirmative defenses, and compensatory damages. See id. at 740.

[55] Castano v. American Tobacco Co., 160 F.R.D. 544, 555-56, 560 (E.D. La. 1995) (noting potential class of tens of millions of smokers), rev'd, 84 F.3d 734 (5th Cir. 1996).

[56] See *Castano*, 84 F.3d at 737.

[57] Id. at 747. Professor Francis McGovern defines a "mature mass tort" as one "where there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in the plaintiffs' contentions." Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. Rev. 659, 659 (1989).

[58] *Castano*, 84 F.3d at 746-47 (expressing concern that certification coerces settlement and increases number of nonmeritorious claims).

[59] See id. at 749 ("Determining whether the common issues are a 'significant' part of each individual case has an abstract quality to it when no court in this country has ever tried an injury-as-addiction claim.").

the district court's "guess" that plaintiffs' reliance on defendants' misrepresentations might be inferred, suggesting instead that a prior track record of trials would determine whether reliance would be an individual or common issue.[60] The immaturity of the addiction claim also allows only an "abstract" determination of the superiority of class action adjudication, a speculative approach that poses greater risks of judicial inefficiency and unfairness to litigants.[61]

The Fifth Circuit also rejected the substitution of speculation for a thorough analysis of how variations in state law altered the balance between individual and common issues in a multistate class action.[62] Without knowing the substantive law that applies in the case, a judge cannot conduct a superiority or predominance inquiry.[63] Moreover, the court found individual lawsuits superior to class certification: A merely "theoretical" judicial crisis[64] and the "positive value"[65] of tobacco claims favored individual litigation, and the complexity of the choice of law inquiry and Seventh Amendment concerns countenanced against class certification.[66]

The *Castano* decertification signaled an end to the federal judiciary's endorsement of nationwide mass tort class actions,[67] as the Fifth

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60 Id.

61 Id. at 747-49.

62 Id. at 741-44.

63 See id.

64 Id. at 747-48, 748 n.26 (contending that number of potential class members does not indicate number of plaintiffs who actually will file individual lawsuits).

65 A "positive value" claim is one practicably litigated by an individual plaintiff. See, e.g., Georgine v. Amchem Prods., 83 F.3d 610, 633 (3d Cir. 1996) (recognizing that individual plaintiffs have strong interests in controlling litigation of claims involving personal injury or death), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). A "negative value" claim is one not feasibly litigated as an individual lawsuit because its economic value is small compared to the costs of litigation. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class action may permit plaintiffs whose claims averaged $100 per member to have their day in court); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1299 (7th Cir. 1995) (characterizing as most compelling cases for class certification those involving "individual suits [that] are infeasible because the claim of each member is tiny relative to the expense of litigation"). The negative or positive value of claims reflects the relative importance of litigant autonomy and the feasibility of individual litigation. See Fed. R. Civ. P. 23 advisory committee's notes.

66 See Castano v. American Tobacco Co., 84 F.3d 734, 747-51 (5th Cir. 1996); see also *Rhone-Poulenc*, 51 F.3d at 1299 (expressing "concern with forcing these defendants to stake their companies on the outcome of a single jury trial . . . when it is entirely feasible to allow a final, authoritative determination of their liability . . . to emerge from a decentralized process of multiple trials").

67 See, e.g., In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145 (2d Cir. 1987) (affirming certification of class of veterans exposed to Agent Orange in Vietnam); In re School Asbestos Litig., 789 F.2d 996 (3d Cir. 1986) (affirming certification of asbestos class action for property damages); Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (affirming certification of asbestos "mass tort" class action); see also infra note 71.

Circuit and other courts of appeals began to question the efficiency and fairness arguments advanced in favor of class certification. A historical aversion to mass tort class actions had shifted in the mid- to late-1980s in response to the emerging "crisis" of mass torts.[68] The sheer volume of claims is the "primary defining characteristic of a mass tort litigation,"[69] and it is this volume that undergirded the perception that a rising tide of litigation threatened to flood the judicial system in the 1980s.[70] Emphasizing the threat to the docket posed by mass filings of claims, federal courts moved away from their earlier insistence on preserving individual autonomy in litigation.[71] But as district courts, including the *Castano* court, certified nationwide classes increasingly incongruous with the requirements of Rule 23, federal appellate courts reasserted their opposition to a liberalized certification process and sought to enforce compliance with Rule 23.[72]

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[68] Siliciano, supra note 34, at 990. The development of mass tort litigation over the past three decades and the procedural and substantive innovations accompanying this evolution have been extensively documented. See, e.g., Deborah R. Hensler & Mark A. Peterson, Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis, 59 Brook. L. Rev. 961, 1013-30 (1993) (discussing explosion of mass injury litigation in 1980s); Judith Resnik, From 'Cases' to 'Litigation,' Law & Contemp. Probs., Summer 1991, at 5, 6-45 (1991) (chronicling development in, and changing perceptions towards, aggregative procedures in mass tort litigation); Schuck, supra note 12, at 947-63 (describing emergence of mass tort legal regime and accompanying efforts to manage new tort system).

[69] Hensler & Peterson, supra note 68, at 965 (asserting that visibility of mass torts and burdens on judiciary result from numerosity of claims).

[70] See John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 Colum. L. Rev. 1343, 1350 n.23 (suggesting that mass tort litigation crisis may be one of "mind-numbing boredom" and that "there remains some basis for skepticism about this constantly reiterated claim that courts are about to be overwhelmed by mass torts"); Siliciano, supra note 34, at 992-95 (asserting that mass torts differ only in volume rather than substance from "pedestrian" torts).

[71] See Coffee, supra note 70, at 1356-58 (reviewing evolution in judicial attitude toward mass tort class action, from initial skepticism to "breakthrough" in mid- to late-1980s); McNeil & Fancsali, supra note 31, at 487-89 (noting historical disfavor of mass tort class action and efficiency rationale underlying its adoption in 1980s); Georgine M. Vairo, *Georgine*, the Dalkon Shield Claimants Trust, and the Rhetoric of Mass Tort Claims Resolution, 31 Loy. L.A. L. Rev. 79, 80-110 (1997) (discussing changing judicial reception of class actions in mass tort context).

[72] See Richard A. Nagareda, In the Aftermath of the Mass Tort Class Action, 85 Geo. L.J. 295, 302 (1996) (asserting that recent appellate court decisions to decertify nationwide class actions, based upon reasons of impracticability and unfairness, "[t]aken together, . . . sharply undercut the legal support for the class action as a vehicle for pathbreaking litigation"); see also Valentino v. Carter-Wallace, Inc., 97 F.3d 1227 (9th Cir. 1996) (decertifying nationwide class action against manufacturer of epilepsy drug); Castano v. American Tobacco Co., 84 F.3d 737 (5th Cir. 1996); In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996) (decertifying nationwide class action against penile prosthesis manufacturer); In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293 (7th Cir. 1995) (decertifying nationwide class action against manufacturers of antihemophiliac factor concentrate).

The federal experimentation with nationwide mass tort class actions highlighted the negative effects of distorting class actions beyond recognition of Rule 23 and disproved the efficiency and fairness rationales that encouraged certifications in state and federal courts. First, class certifications often created the flood of claims feared by the judiciary, rather than containing or efficiently advancing claim resolution. Dire warnings that denial of certification leads to thousands or millions of individual lawsuits appear superficially plausible but lack support in either practice or concept: While hundreds of individual tobacco or hemophiliac claims certainly clog the dockets of the courts, the size of this burden seems minuscule when compared to the thousands or millions of individual minitrials that result from class certification.[73]

Rather than serving as a tool for clearing crowded dockets, class certification thus *creates* or exacerbates mass torts by enhancing the elasticity[74] of the tort and encouraging the addition of weaker claims that dilute the strength of the class.[75] When the judiciary signaled that it would provide a single forum to resolve similar claims, it prompted the specialized plaintiffs' bar to expand its inventory of claims "to include claimants with questionable losses or grounds for liability" in order to increase potential awards.[76] Without the cloak of a class ac-

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[73] Compare *Castano*, 84 F.3d at 748 (noting promise of plaintiffs' counsel to "inundate" judicial system with individual claims upon decertification of class of tens of millions of smokers), and Recent Case, *In re Rhone-Poulenc Rorer, Inc.*, 109 Harv. L. Rev. 870, 874 (1996) (arguing that decertification of hemophiliac class in *Rhone-Poulenc* leaves appellate courts with "unenviable choice: grant mandamus and burden the system with thousands of individual trials, or allow certification and bluntly endorse the expedient resolution of most class claims, regardless of their relative merit"), with McNeil & Fancsali, supra note 31, at 495-96 & n.73 (noting that only about 800 of potential 10,000 class members filed individual claims following decertification of *Rhone-Poulenc*), and Alix M. Freedman & Suein L. Hwang, Burning Questions: Tobacco Pact's Limits—and Its Loopholes—Presage Fierce Debate, Wall St. J., June 23, 1997, at A1 (stating that 600 individual liability suits were then pending against tobacco industry).

[74] See Francis E. McGovern, An Analysis of Mass Torts for Judges, 73 Tex. L. Rev. 1821, 1827 n.26 (1995). McGovern defines the elasticity of a tort as its capacity to expand to encompass more plaintiffs and damages, and the extent to which the "number of cases that are filed (demand) rises as the transaction costs associated with each case (price) are reduced and the number of judicial case resolutions increase (supply)." Id.

[75] See McNeil & Fancsali, supra note 31, at 492-97 (detailing dramatic increases in numbers of claimants following certification, including: almost 200,000 additional claims filed after certification of limited fund class action in Dalkon Shield litigation; over 400 claims pending before certification of 10,000 member class in hemophilia litigation; 7,000 claims in breast implant litigation increased to 400,000 after certification; and only 75 tobacco lawsuits pending before certification of class of tens of millions of nicotine dependent smokers); see also McGovern, supra note 74, at 1840 ("If you build a super-highway, there will be a traffic jam.").

[76] Hensler & Peterson, supra note 68, at 1032; see also McGovern, supra note 74, at 1831 (describing "[n]ew breed plaintiffs' lawyers" who seek to maximize aggregation of

tion, claims lacking the validity to stand on their own would not attract sufficient attention from the plaintiffs' bar. While a class action may also increase the number of legitimate claimants who would otherwise lack the proper resources, information, or incentives to litigate, the likelihood that this form of adjudication provides the only available access to the courts decreases as the potential claim value and number of claimants increase.[77]

Second, the judiciary exhibited discomfort with the coercive effects of class certification. While the prospect of going to trial prompts settlement in more than ninety-five percent of civil suits actually filed by individual litigants, the certification of a mass tort class action induces a comprehensive settlement nearly every time regardless of the merits.[78] The pressure to settle skyrockets because corporate defendants typically are not at liberty to "bet the business" on a trial regardless of the merits of the case.[79] Sheila Birnbaum, a defense attorney, argues that certification tips the scale in favor of plaintiffs and introduces too many uncertainties for defendants to wager on a single jury:

> Faced with a large number of individual cases, the defendant may seek to quantify its litigation risk by evaluating the cases individually .... Once a trial class is certified, however, the defendant must evaluate its litigation risk in the aggregate, taking into account the

claims to increase total number and value of cases); Francis E. McGovern, Looking to the Future of Mass Torts: A Comment on Schuck and Siliciano, 80 Cornell L. Rev. 1022, 1022-25 (1995) (comparing "underclaiming" in ordinary tort filings to "overclaiming" in mass torts and suggesting that more than 100% of "genuinely actionable claims" are pursued in mature mass torts).

77 See Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *12 (D.C. Sup. Ct. Aug. 18, 1997) (finding efficiency and fairness rationales for certification not persuasive and noting that "there does not appear to be any shortage of attorneys willing to undertake tobacco litigation"), reconsidered and aff'd (July 23, 1999).

78 See Schuck, supra note 12, at 958 & nn.84-85. The *Castano* court suggested that the number of potential plaintiffs does not reflect the actual number of individual cases that would be filed, because individual plaintiffs opt out of the tort system based on superior knowledge of personal fault or to pursue other avenues of relief. See *Castano*, 84 F.3d at 748 & n.26; see also McGovern, supra note 74, at 1823 & n.8 (arguing that only 10-20% of injured persons actually file claims).

79 See Sheila Birnbaum, Class Certification—The Exception, Not the Rule, 41 N.Y.L. Sch. L. Rev. 347, 350-51 (1997) (claiming that "procedural device" of class action serves as "mighty sword that can affect the substantive outcome of the litigation without regard to the 'merits' of the claims"); McNeil & Fancsali, supra note 31, at 489-90 (arguing that class certification of mass torts predetermines outcome by forcing defendants to settle, regardless of improbability of adverse verdict, in order to avoid huge risks of litigating single trial).

> fact that it may face at trial only the strongest representative class members selected by class counsel.[80]

Not only does certification coerce settlement by defendants, but the race to the courtroom also risks undervaluing claims where fee awards provide incentives to plaintiffs' counsel to settle even before they comprehend the full value of claims or the number of claimants.[81] The coercive impact of certification undermines fairness as a justification for class actions, when the feasibility—and existence—of individual lawsuits negates the contention that class action adjudication offers the only means to judicial resolution of plaintiffs' claims.

These two risks, that certification will create litigation and coerce settlement without regard to the merits of the claims, underlie the battle waged by tobacco defendants against class certification. Although tobacco is commonly referred to as a mass tort, the comparatively low number of individual claims[82] and their uncertain value indicates that tobacco should only be considered a *potential* mass tort until plaintiffs have reversed, at least to some degree, consistently adverse verdicts in individual cases.[83]

While Professor Coffee emphasizes the cyclical nature of mass tort litigation,[84] the underlying premise of the mass tort definition is that the cycle has advanced at least to a point where a significant number of valuable claims exist. First, the interdependent nature of

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[80] Birnbaum, supra note 79, at 350; see also In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (distinguishing defendant's ability to assess liability risks when defending 300 individual lawsuits from likely result of "blackmail settlement" when faced with potential liability of $25 billion to thousands of class members).

[81] See Coffee, supra note 70, at 1404-10 (describing "disaster" resulting from certification of "immature" breast implant litigation).

[82] Compare Ortiz v. Fibreboard Corp., 119 S. Ct. 2295, 2324 (1999) (Breyer, J., dissenting) (stating that nearly 80,000 asbestos cases have been filed in federal courts alone in the past decade), with Freedman & Hwang, supra note 73, at A1 (stating that 600 individual liability suits were then pending against tobacco industry).

[83] A potential mass tort has a track record of verdicts unfavorable to plaintiffs, unlike an immature mass tort, which lacks a track record, or a mature mass tort, which has a track record favorable to plaintiffs. The evolution of a potential mass tort into a mass tort requires the development of a legally cognizable liability theory in addition to a track record of verdicts based on that theory.

[84] See Coffee, supra note 70, at 1358. Professor Coffee has distinguished mass tort litigation by identifying four particular characteristics:

> (1) a predictable evolutionary cycle during which the value and volume of individual claims starts low and then spirals upward; (2) high case interdependency so that litigated outcomes in any mass tort area quickly impact on the settlement value of other pending cases in that same field; (3) a highly concentrated plaintiffs' bar, in which individual practitioners control exceptionally large inventories of cases . . . ; and (4) a capacity to place logistical pressure on individual courts that is simply unequalled by any other form of civil litigation.

Id. at 1358-59.

mass tort claims presumes the existence of a significant number of pending claims: While an adverse judgment negatively affects pending claims and a favorable judgment increases the value of pending claims,[85] only the favorable judgment would advance mass tort litigation by encouraging other plaintiffs to initiate lawsuits. If a significant number of pending claims do not already exist, an adverse judgment likely thwarts the filing of similar individual claims and thus the initial development of a mass tort.[86] Second, a significant number of valuable claims is ordinarily a prerequisite to attracting the interest of the plaintiffs' bar and to achieving the capacity to impose a significant burden on the judiciary.[87]

Several characteristics, beyond the industry's "no-compromise" strategy, distinguish tobacco lawsuits and provide some explanation for the industry's historically favorable record and the absence of a mass tort evolution over the course of tobacco litigation.[88] First, the continued sale of cigarettes as a legal, marketable product contrasts with the typical removal of the cause of a mass tort from the market soon after its associated dangers become widely known.[89] The widespread, long-term public knowledge of the dangers and addictiveness of tobacco distinguishes cigarettes from products for which manufacturers controlled the only available information on health hazards and future litigants were unknowingly exposed to harm.[90] Moreover, the consumption of cigarettes as a "luxury" good distinguishes tobacco from products like asbestos and pharmaceuticals that were manufactured for their utility.[91]

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[85] See Hensler & Peterson, supra note 68, at 967.

[86] See id. at 1040 (arguing that jury verdict awarding zero dollars to plaintiff alleging injury caused by smoking signaled "unlikelihood that suits by smokers would ever be transformed into mass litigation"). Note, however, that the certification of a class action would create the mass number of claims necessary to attract the attention of the plaintiffs' bar.

[87] See id. at 968 (arguing that "[n]o claim in a mass tort litigation will have value until plaintiffs are able to establish causation, liability and damages for at least a few representative claims"). Note again, however, that the certification of a class action can create valuable claims by its coercive effect on defendants.

[88] Mass torts can be defined generally as "cases in which many individuals are physically injured, either by a single event or by use of or exposure to a given product or environmental hazard." Resnik, supra note 68, at 9. This definition presumes the existence of a legally cognizable injury.

[89] See, e.g., Nagareda, supra note 72, at 334 (noting FDA implementation of "near-ban" on silicone breast implants); Neill, supra note 38, at 799 (noting end of asbestos use in 1970s).

[90] Cf. Richard A. Nagareda, Outrageous Fortune and the Criminalization of Mass Torts, 96 Mich. L. Rev. 1121, 1163 (1998) (citing one economist's suggestion that consumers overestimate risks associated with smoking in light of long history of knowledge of harms of smoking).

[91] See Jill Hodges, Tobacco Tenacious in the Courtroom, Star Trib. (Minneapolis, Minn.), Sept. 15, 1996, at A19.

These attributes call into question the "victim" status of the smoker and factor the "benefit" obtained from smoking into a litigation calculus that is absent from litigation involving products like Agent Orange and asbestos focused solely on manufacturer wrongdoing and harm. Tobacco companies continue to defend individual lawsuits successfully, including those brought by well-financed plaintiffs' counsel, in part because the persuasiveness of the assumption of risk defense continues to thwart smokers' injury claims.[92] While new legal strategies and claims seek to adjust this picture, hundreds of individual smokers' lawsuits have not yet multiplied into a tobacco mass tort litigation despite the *Castano* district court's push in that direction and plaintiffs' efforts to certify "son of *Castano*" class actions.[93]

II
STATEWIDE TOBACCO CLASS ACTIONS: AN ANSWER TO *CASTANO*?

When the Fifth Circuit determined that "[t]he collective wisdom of individual juries is necessary before this court commits the fate of an entire industry or, indeed, the fate of a class of millions, to a single jury," the court anticipated that the *Castano* decertification would

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[92] See, e.g., Brown & Williamson Tobacco Corp. v. Carter, 723 So. 2d 833 (Fla. Dist. Ct. App. 1998) (reversing $750,000 jury award to former smoker); Ann Davis, Appeals Court in Florida Throws Out $1 Million Brown & Williamson Verdict, Wall St. J., Feb. 2, 1999, at B8 (reporting Florida appellate court's reversal of $1,000,000 jury award to individual smoker Maddox); Milo Geyelin, Brown & Williamson Wins Suit in Smoking Case, Wall St. J., May 14, 1999, at B7 [hereinafter Brown & Williamson Wins] (reporting defense verdict in individual smoker Steele's lawsuit in Missouri district court); Milo Geyelin, Reynolds Wins Ex-Smoker's Cancer Suit, Wall St. J., Nov. 3, 1997, at B12 (reporting defense verdict in former smoker Karbiwnyk's lawsuit in Florida state court); Milo Geyelin, Tobacco Firms Get a Victory in Tennessee Case, Wall St. J., May 11, 1999, at B5 (reporting defense verdicts in three consolidated smokers' lawsuits in Tennessee state court); Milo Geyelin, Tobacco Firms Win a Verdict in Cancer Case, Wall St. J., July 12, 1999, at A24 (reporting defense verdict in individual smoker Gilboy's lawsuit in Louisiana state court). But cf. Milo Geyelin, Jury Awards $50 Million to Ex-Smoker, Wall St. J., Feb. 11, 1999, at A3 (reporting jury award of $51.5 million, including $50 million in punitive damages, to former smoker Henley in California state court) [hereinafter Jury Awards]; Milo Geyelin, Philip Morris Hit with Record Damages, Wall St. J., Mar. 31, 1999, at A3 (reporting jury award of $80.3 million, including $79.5 million in punitive damages, to former smoker Williams in Oregon state court) [hereinafter Philip Morris Hit]. These two awards, in California and Oregon state courts, were both reduced by the trial judge, and appeals are pending. See Henley v. Philip Morris Inc., No. 995172, 1999 WL 221076 (Cal. Super. Ct. Apr. 6, 1999) (unpublished decision) (reducing jury award for punitive damages from $50 million to $25 million); Brown & Williamson Wins, supra, at B7 (reporting that Oregon trial judge reduced punitive damage award from $79.5 million to $32 million in Williams case).

[93] See supra note 92 (citing recent verdicts for defense in individual smokers' lawsuits). But cf. supra note 23 and accompanying text (discussing tobacco companies' settlement with state attorneys general).

lead to individual litigation.[94] The notion that plaintiffs would resign themselves to "'traditional ways of proceeding'"[95] in order to test the viability of individual claims failed to appeal to the consortium of attorneys that had invested millions of dollars in the litigation.[96] Reliance on individual lawsuits threatened an unfavorable end to the third wave of tobacco litigation,[97] and individual claims also lacked the allure of a potential damage award or settlement in the billions. Plaintiffs' counsel thus shifted their sights to what were quickly labeled "son of *Castano*" class actions as an alternative adjudicatory method.[98] Richard Daynard predicted that the aftermath of the Castano decertification would resemble the familiar scene from the *Sorcerer's Apprentice*: Just as the "sorcerer's apprentice was eventually confronted by scores of brooms[,] . . . . [t]he tobacco industry can expect to be confronted by scores of statewide class actions in state courts."[99] Professor Coffee also suggested the consequences of decertification when he said "it's going to go from one global war to 50 local wars."[100]

Following the *Castano* decertification, the battleground opened up from a single courtroom in Louisiana to state and federal courts across the nation as plaintiffs sought certification of statewide tobacco classes.[101] However, courts have not been receptive to certification: All federal courts[102] and most state courts[103] have found a tobacco

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94 Castano v. American Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996).

95 Id. (quoting In re Fibreboard Corp., 893 F.2d 706, 710 (5th Cir. 1990)).

96 See Kelder & Daynard, supra note 12, at 86 (reporting that most of more than sixty plaintiffs' law firms pledged $100,000 per year to finance *Castano* litigation).

97 See Nagareda, supra note 72, at 302-03 (arguing that appellate court decertifications would encourage individual litigation which would end process in some areas where adverse verdicts would discourage plaintiffs and contingent fee attorneys from taking on risks of further litigation).

98 See Flint, supra note 2, at 1.

99 Tobacco on Trial (visited Aug. 28, 1999) <http://www.tobacco.neu.edu/tot/1996YIR/III-class.html> (quoting Professor Richard Daynard).

100 Milo Geyelin & Suein L. Hwang, Appeals Court Throws Out Tobacco Class-Action Suit, Wall St. J., May 24, 1996, at A3.

101 Certification motions are pending or have been decided in the following jurisdictions: Alabama, Arkansas, California, the District of Columbia, Florida, Georgia, Hawaii, Illinois, Indiana, Iowa, Kansas, Louisiana, Maryland, Michigan, Minnesota, Missouri, Nevada, New Jersey, New Mexico, New York, Ohio, Oklahoma, Pennsylvania, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, West Virginia, and Wisconsin. See Morgan Stanley/Dean Witter, Tobacco Event Timeline: November Update, Oct. 30, 1998, at 4 (on file with the *New York University Law Review*).

102 See, e.g., Insolia v. Philip Morris Inc., 186 F.R.D. 535 (W.D. Wisc. 1998) (denying certification to class of Wisconsin smokers with lung cancer); Emig v. American Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998) (denying certification to class of Kansas smokers alleging addiction); Barreras Ruiz v. American Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998) (denying certification to class of nicotine dependent Puerto Rican smokers); Arch v. American Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997) (denying certification to class of

class action inconsistent with Rule 23 or its state counterparts. Three state courts remain the exception—Florida,[104] Louisiana,[105] and Maryland.[106] While an appeal in Maryland is still pending,[107] the Louisiana and Florida Supreme Courts have up to this date declined to review the lower court's certification.[108]

These cases involved distinct class definitions and disparate claims arising under laws of different states. However, both state and federal actions generally featured the addictiveness of nicotine as a principal issue in the litigation, inquired into the interplay of common and individual questions in tobacco claims, and questioned the superiority of litigating individual claims as class actions. The following sec-

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Pennsylvania smokers alleging addiction); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (denying certification to class of Missouri residents alleging personal injury caused by smoking); Tijerina v. Phillip Morris Inc., No. Civ.A. 2:95-CV-120-J, 1996 WL 885617 (N.D. Tex. Oct. 8, 1996) (denying certification to class of Texas residents alleging injury by cigarette filters and chemicals); see also Barnes v. American Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (denying certification to 23(b)(2) class of Pennsylvanian smokers seeking medical monitoring), cert. denied, 119 S. Ct. 1760 (1999); Clay v. American Tobacco Co., Inc., No. 97-cv-4167-JPG, (S.D. Ill. June 29, 1999) (denying certification to nationwide class of all persons in United States who purchased and smoked cigarettes as children); Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (withdrawing preliminary certification of nationwide settlement class).

103 See, e.g., Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) (denying certification to class of D.C. residents alleging nicotine dependence or injury caused by smoking cigarettes), reconsidered and aff'd, No. 96-5070 (D.C. Super. Ct. July 23, 1999); Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593 (App. Div. 1998) (denying certification of five consolidated class actions), motion for leave to appeal granted, 681 N.Y.S.2d 593 (App. Div. Oct. 27, 1998) (mem.), available in Westlaw, NY-CS database; Geiger v. American Tobacco Co., N.Y. L.J., July 9, 1999, at 33 (N.Y. Sup. Ct. July 8, 1999) (denying certification to class of New York smokers with lung or throat cancer); Cosentino v. Philip Morris Inc., No. MID-L-5135-97 (N.J. Super. Ct. Oct. 22, 1998) (denying certification of five consolidated tobacco class actions), reconsidered and aff'd, N.J. Super. Ct. Feb. 11, 1999, cited in Heather MacGregor, Tobacco Plaintiffs Lose Class Bid, Failing Commonality Test, 154 N.J. L.J. 345 (Nov. 2, 1998).

104 See R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996) (certifying class of Florida citizens and residents alleging physical injury caused by nicotine addiction), review denied, 682 So. 2d 1100 (Fla. 1996).

105 See Scott v. American Tobacco Co., 725 So. 2d 10 (La. Ct. App. 1998) (affirming certification of medical monitoring class of Louisiana residents), writ denied, 731 So. 2d 189 (La. 1999).

106 See Richardson v. Philip Morris, Inc., No. 96145050/CE212596 (Md. Cir. Ct. Jan. 28, 1998) (certifying classes of Maryland residents suffering injury from smoking and nicotine dependent Maryland residents seeking medical monitoring).

107 See Gary Black, Engle #1: Opening Arguments Begin (Oct. 20, 1998) <http://www.tobacco.org/News/blackf/engle/981020engle.html>.

108 See R.J. Reynolds Tobacco Co. v. Engle, 682 So. 2d 1100 (Fla. 1996) (denying review); Scott v. American Tobacco Co., 731 So. 2d 189 (La. 1999) (denying review); see also Black, supra note 107 (arguing that Florida Supreme Court will ultimately review and decertify *Engle* before Phase III of trial, because (1) ultimate disintegration of class into individual trials would unduly burden Florida court system, and (2) refusal to decertify action would encourage plaintiffs' bar to file personal injury class actions in Florida).

tions analyze two of these decisions in greater detail: a Florida state appellate court's certification in *R.J. Reynolds Tobacco Co. v. Engle* and a Pennsylvania federal district court's denial of certification in *Arch v. American Tobacco Co*. *Engle* and *Arch* represent the general nature of the statewide tobacco class actions filed and the differing decisions handed down. As they also represent the strongest judicial affirmation and rejection of single-state tobacco class actions, they provide a vehicle for analyzing whether or not tobacco class actions belong in the courts.

A. A Statewide Tobacco Class Action in State Court

The *Engle* case distinguishes itself as the only class action to go to trial against the tobacco industry so far.[109] Originating in the Florida state courts, the class initially consisted of "all United States citizens and residents" alleging physical injury "caused by their addiction to cigarettes that contain nicotine"[110] and sought two hundred billion dollars in compensation.[111] While class actions in Florida are governed by Florida Rule of Civil Procedure 1.220, this rule is modeled after Rule 23,[112] and Florida courts look to federal class action decisions as "persuasive authority" to interpret their own rule.[113] The concerns that guided the *Castano* and *Amchem* decisions—including manageability and individual factual disparities—should apply equally in the state courts.

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109 Only one other class action has proceeded to trial or settlement against the tobacco industry, and it also originated in the same Florida state court. See Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994) (reversing trial court and remanding for certification of class of all nonsmoking flight attendants allegedly suffering injury caused by exposure to secondhand smoke). The *Broin* appellate court found that the complaint sufficiently alleged the basic requirements for a class action under Fla. R. Civ. P. 1.220(a), which is modeled after Rule 23(a), see id. at 888-92, yet ignored the further requirement of Fla. R. Civ. P. 1.220(b)(3), which like Rule 23(b)(3) requires a predominance and superiority inquiry, see McFadden v. Staley, 687 So. 2d 357, 358 (Fla. Dist. Ct. App. 1997) (finding that in addition to 1.220(a) requirements, court must determine predominance and superiority). This case eventually settled for $47 million. See supra note 18.

110 See R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 40 (Fla. Dist. Ct. App.) (quoting trial court's order that certified following class: "All United States citizens and residents, and their survivors, who have suffered, presently suffer or have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine."), review denied, 682 So. 2d 1100 (Fla. 1996).

111 See Hilts, supra note 16, at A10 (stating that *Engle* plaintiffs asked for "unprecedented amount in a tobacco suit"). The plaintiffs alleged claims including the following: strict liability in tort, fraud and misrepresentation, conspiracy to commit fraud and misrepresentation, breach of implied and express warranties, negligence, and intentional infliction of mental distress. See *Engle*, 672 So. 2d at 40.

112 See Fla. R. Civ. P. 1.220(a), (b)(3); *Broin*, 641 So. 2d at 889 & n.1 (noting that Fla. R. Civ. P. 1.220 is "patterned" after Rule 23).

113 *Broin*, 641 So. 2d at 889 & n.1.

A Florida appellate court reviewed and upheld the lower court's certification decision early in 1996, before the Fifth Circuit's decertification of *Castano* or the Supreme Court's *Amchem* decision. Rejecting defendants' arguments that the *Engle* class satisfied neither the predominance nor superiority requirements, the court limited its discussion and analysis to the following statement without citation: "Although certain individual issues will have to be tried as to each class member, principally the issue of damages, the basic issues of liability common to all members of the class will clearly predominate over the individual issues."[114] The court acknowledged the need for individual hearings for each class member and the "herculean task" to be imposed on the Florida judicial system.[115] Rather than dismantle the entire class, however, the court decided that limiting the class to "[a]ll Florida citizens and residents" solved any manageability concerns by drastically reducing the number of class members.[116]

Returning to the lower court as modified,[117] the *Engle* trial began in October 1998 after more than three months of jury selection,[118] and, after one year and a day, jurors returned Phase I findings on July 7, 1999.[119] The six-person jury determined, inter alia, that cigarettes cause lung cancer, heart disease, and other illnesses, that smoking is "addictive or dependence producing," and that plaintiffs are entitled to punitive damages.[120] The current trial plan calls for the case to proceed in two more phases. While Phase I addressed common issues of liability and causation, the individual claims of the class representatives are to be tried in Phase II,[121] when the same jury will consider individual issues such as assumption of risk and each claimant's smok-

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114 *Engle*, 672 So. 2d at 41.

115 Id.

116 Id. at 42.

117 The certifying judge later professed "substantial reservations regarding the class action," stating in early 1998 that "the case may be unmanageable." Milo Geyelin, Trial to Begin in Florida Smokers' Suit, Wall St. J., July 6, 1998, at A19 (quoting certifying judge). He asked the appeals court to review the certification decision, but it declined. See id.

118 See Milo Geyelin, In Florida, a Vast Tobacco Case Looms, Wall St. J., Oct. 1, 1998, at B1 (reporting that difficulties arose in jury selection because "the case . . . is so huge that it has been hard to find jurors not connected to it, let alone those who say they can be fair to both sides"). Out of more than 940 prospective jurors who filled out 32-page questionnaires, "[m]ore than 800 of them were disqualified, mostly because they could [have been] class members." Id.

119 See Milo Geyelin, 'Class' Trial Finds Tobacco Firms Liable, Wall St. J., July 8, 1999, at A3.

120 See id.; see also Jury Verdict Form for Phase 1, Engle v. R.J. Reynolds Tobacco Co. (Fla. Super. Ct. July 7, 1999) (No. 94-08273 CA-22) (on file with the *New York University Law Review*).

121 See Tobacco Industry Seeks to Oust Florida Judge for Possible Conflict, Dow Jones Bus. News, Aug. 3, 1999, available in Westlaw, DJBN database.

ing history.[122] In Phase II the jury also will be permitted to award punitive damages as "a single lump sum," rather than considering both compensatory and punitive damage claims on an individual basis.[123] The tobacco industry cannot appeal the Phase I findings until the jury returns a verdict in Phase II.[124] Phase III currently provides that separate juries will consider the individual issues and damages for the absent class members.[125] How Phase III trials would be managed remains a matter of speculation.[126] Estimates of the size of the *Engle* class range from one hundred thousand to one million members,[127] and it is uncertain how the action will fare if it reaches that stage without being decertified by the Florida Supreme Court.[128]

B. A Statewide Class Action in Federal Court

A federal district court in Pennsylvania found in *Arch v. American Tobacco Co.* that similar manageability concerns posed insur-

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122 See Geyelin, supra note 119, at A3.

123 See Lump Sum Award Is Allowed in a Smoking Liability Case, N.Y. Times, Oct. 21, 1999, at A23 (reporting three-judge appellate panel's decision issued after oral arguments heard same day). On October 20, 1999, the Florida appellate court reversed its earlier order requiring "that damage claims . . . be considered case by case." Id.; see also Milo Geyelin, Florida Court Lessens Punitive Impact Tobacco Companies Will Have to Face, Wall St. J., Sept. 7, 1999, at B8 (reporting appellate court's initial reversal of trial court's plan to permit consideration of punitive damages for entire class in Phase II). However, the appellate court's "two-sentence ruling . . . [does not] address the underlying legal dispute over whether punitive damages can still be awarded in a lump sum . . . [and] put off any resolution until the next phase of the trial . . . is over." Milo Geyelin, Tobacco Firms Suffer Setback as Court Revives Prospect of Big Damage Award, Wall St. J., Oct. 21, 1999, at B19. The trial court's plan allows the jury to set a dollar amount of punitive damages, rather than a punitive damage multiplier, in Phase II. See Associated Industries of Florida Files Amicus Curiae Brief in Tobacco Class Action, PR Newswire, Aug. 18, 1999, available in Westlaw, PRWIREPLUS database. If not reviewed, this plan may allow the jury to set a punitive damage amount before the size of either the class or actual damages is determined. See id.

124 See Tobacco Firms Win a Victory in an Appeal, N.Y. Times, Sept. 4, 1999, at A10 (noting that "industry will have an opportunity to wipe out the whole case by appealing once one damage award is set").

125 See Geyelin, supra note 118, at B1 (reporting that "series of minitrials" would comprise Phase III).

126 See Geyelin, supra note 119, at A3 (noting that judge has not yet devised plan to handle Phase III of *Engle*).

127 See Geyelin, supra note 117, at A19 (noting plaintiffs' estimate that class consisted of 40,000 to 1,000,000 members); The Tobacco Wars, supra note 18, at 66 (estimating 100,000 to 200,000 class members).

128 The fate of the *Engle* case remains highly uncertain; it is unclear whether the class will eventually be decertified or whether juries will find the tobacco companies liable for individual damages. See, e.g., Henry Weinstein & Myron Levin, Cigarette Makers Liable in Florida Class-Action Case, L.A. Times, July 8, 1999 (reporting tobacco analysts' speculation that Florida Supreme Court will decertify class and noting obstacles presented in Phase II to findings of individual liability).

mountable difficulties when it refused to certify an addiction class of "[a]ll current residents of Pennsylvania who are cigarette smokers as of December 1, 1996, and who began smoking before age 19, while they were residents of Pennsylvania."[129] As the presiding judge observed, *Arch* "follow[ed] hard and fast on the heels of [*Castano*]."[130] *Arch* typifies the statewide class actions that sprang from the *Castano* decertification: The case revolved around the novel claim of addiction, and plaintiffs alleged that defendants fraudulently concealed knowledge of the addictive nature of nicotine and manipulated the level of nicotine in cigarettes to addict smokers.[131] The more narrowly tailored class differed, however, from the all-encompassing nationwide class by restrictions imposed on class composition that downplayed the assumption of risk defense, delineated the class more clearly, and attempted to reduce choice of law problems.[132]

Beginning with "numerosity" and ending with "superiority," the *Arch* court systematically analyzed the compliance of tobacco claims with the requirements established by Rule 23 for class certification. The following sections examine the correspondence between a "son of *Castano*" class action and each element of Rule 23 within the framework of the *Arch* decision.

1. Rule 23(a) Prerequisites

Rule 23(a) requires that all class actions meet the following four criteria: numerosity, commonality, typicality, and adequacy of representation.[133] A dispute rarely arises over the requisite numerosity of a tobacco class.[134] Estimated at more than one million members, the

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129 Arch v. American Tobacco Co., 175 F.R.D. 469, 475 (E.D. Pa. 1997).

130 Id. at 474.

131 See id. at 474-75.

132 Not only was the class restricted to Pennsylvania residents, but the age limit and the addiction claims together focused attention on the purported *involuntariness* of the decision to smoke when made at an age too young to appreciate the full consequences of the choice and without full knowledge of the addictiveness of nicotine. See Cupp, supra note 12. The tobacco industry, however, continues to rebut these arguments by pointing to prevalent knowledge of nicotine addiction and evidence that teenagers recognize the dangers of smoking, including the addictive quality of cigarettes. See Gary Black, Engle # 2 (Oct. 21, 1998) <http://www.tobacco.org/News/blackf/engle/981021engle.html> (citing defendant's references to knowledge of long-term dangers and addictiveness of smoking); Gary Black, Engle #3 (Oct. 23, 1998) <http://www.tobacco.org/News/blackf/engle/981023engle.html> (citing defendant's reliance on 1979 report of study finding that 84% of teenagers believed smoking was addictive).

133 See supra note 33. As the principal controversy in tobacco class actions focuses on the predominance and superiority requirements of Rule 23(b)(3), this discussion of Rule 23(a) requirements will be limited in scope.

134 See *Arch*, 175 F.R.D. at 476 (noting that defendants do not dispute that proposed class meets numerosity requirement); see also Small v. Lorillard Tobacco Co., 679 N.Y.S.2d

magnitude of the *Arch* class clearly met the numerosity requirement.[135] While the vast size of a tobacco class facilitates compliance with the numerosity requirement, it also questions the practicability, or mere possibility, of a statewide or nationwide tobacco class action.[136]

The commonality requirement also sets a very "low threshold" for compliance, and performs little work compared to the predominance standard of a (b)(3) class action.[137] Class members need only share in common a single question of fact or law,[138] such as whether the tobacco companies engaged in a "common course of conduct" towards plaintiffs,[139] or whether members can allege an addiction-as-injury claim as a matter of law.[140]

The typicality requirement generally requires that a representative's claims "arise[ ] from the same event or practice or course of conduct that gives rise to the claims of other class members, and [that] his or her claims are based on the same legal theory."[141] Tobacco companies argued that significant factual differences exist among class members in the areas of exposure and causation, yet the *Arch* court found that such disparities did not preclude plaintiffs' assertion of legal theories that would fairly represent the interests of absentee members.[142]

593, 598 (App. Div. 1998) (same), motion for leave to appeal granted, 681 N.Y.S.2d 593 (App. Div. Oct. 27, 1998) (mem.), available in Westlaw, NY-CS database.

135 See *Arch*, 175 F.R.D. at 476 & n.4 (citing plaintiffs' estimate of class size at more than one million persons, and defendants' estimate at 2.8 million members); see also Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 94 (W.D. Mo. 1997) (finding numerosity requirement met by more than two thousand members); *Small*, 679 N.Y.S.2d at 598 (finding numerosity requirement met by class of at least one million members).

136 See William W. Schwarzer, Settlement of Mass Tort Class Actions: Order out of Chaos, 80 Cornell L. Rev. 837, 839 (1995) (noting that "there are practical limits to how many separate claims supported by different evidence can be given to a single jury to decide").

137 *Arch*, 175 F.R.D. at 476. The element of commonality is "subsumed under, or superseded by," the (b)(3) predominance requirement. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997).

138 See *Arch*, 175 F.R.D. at 476; see also In re American Med. Sys., Inc., 75 F.3d 1069, 1080-82 (6th Cir. 1996).

139 *Arch*, 175 F.R.D. at 475, 477.

140 See Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *4 (D.C. Super. Ct. Aug. 18, 1997), reconsidered and aff'd, No. 96-5070 (D.C. Super. Ct. July 23, 1999).

141 *American Med. Sys.*, 75 F.3d at 1082 (quoting 1 Herbert B. Newberg & Alba Conte, Newberg on Class Actions, § 3-13, at 3-76 (3d ed. 1992)).

142 See *Arch*, 175 F.R.D. at 478-79 (rejecting defendants' argument that finding of commonality was precluded by differences in brands and styles of cigarettes smoked, variations in volume and duration of cigarette smoking, and claims alleging harm caused by numerous toxic substances). Other courts accordingly have found claims atypical when factual distinctions in the representatives' claims undermined certain elements of the cause of action and thus the ability to assert legal theories adequately on behalf of absentee class

The adequacy of representation requirement inquires into both the competence of class counsel and the existence of any conflicts of interest between class representatives and absentee members.[143] The quality of attorney representation has not been questioned; indeed, the litigation has been characterized as a "Goliath versus Goliath" situation.[144] Defendants argued in *Arch* that named plaintiffs had waived damage claims of class members for actual injury by abandoning certain legal theories and thus could not adequately represent absentee members.[145] While the court agreed that "named plaintiffs who would intentionally waive or abandon potential claims of absentee plaintiffs have interests antagonistic to those of the class," it also found that Pennsylvania law did not preclude class members from bringing future lawsuits for subsequent compensable injury.[146] Where state law precludes "splitting" claims, however, courts have found that tailoring claims to achieve the "'cosmetic' benefit" of Rule 23 compliance may demonstrate that the class representatives do not adequately protect interests of the absentee members.[147]

While the *Arch* court believed that it is possible for a tobacco class action to meet the requirements of Rule 23(a), it also emphasized that the class representative must be carefully chosen to support the legal theories advanced and the claims asserted cannot be superficially restricted merely to make the class action feasible. These qualifications, however, highlight the myriad factual differences and individualized issues inherent in addiction class actions, flashing warning signals in an analysis of the 23(a) requirements and raising red flags in the predominance and superiority inquiry under 23(b)(3).

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members. See, e.g., Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 601 (App. Div. 1998) (finding plaintiffs' claims atypical where plaintiffs had not relied on or seen misrepresentations on which action was based), motion for leave to appeal granted, 681 N.Y.S.2d 593 (App. Div. Oct. 27, 1998) (mem.), available in Westlaw, NY-CS database.

143 See Barnes v. American Tobacco Co., 161 F.3d 127, 141 (3d Cir. 1998), cert. denied, 119 S. Ct. 1760 (1999).

144 See *Arch*, 175 F.R.D. at 496 n.28 (rejecting plaintiffs' description of tobacco litigation as "David versus Goliath," and recognizing significant financial investment of sixty plaintiffs' law firms in tobacco litigation).

145 See id. at 479-80.

146 See id. at 480.

147 See *Small*, 679 N.Y.S.2d at 601-02 (finding that limitation on claims demonstrated inadequacy of representation). Under New York law, all claims arising out of the same transactions are barred once a final judgment is rendered. See id. at 601. "[R]epresentatives who 'tailor[ ] the class claims in an effort to improve the possibility of demonstrating commonality' obtain[ ] this 'essentially cosmetic' benefit only by 'presenting putative class members with significant risks of being told later that they had impermissibly split a single cause of action.'" Id. at 602 (quoting Feinstein v. Firestone Tire & Rubber Co., 535 F. Supp. 595, 606-07 (S.D.N.Y. 1982)).

2. Rule 23(b)(3) Prerequisites

Requiring the strict adherence to Rule 23 advocated by both the Third and Fifth Circuits,[148] the *Arch* court anticipated the Supreme Court's warning in *Amchem* that courts must heed "the counsel of caution" in certification decisions.[149] The court determined that individual questions "overwhelm[ed]" common issues of law and fact, rendering the tobacco class action irreconcilable with the predominance element of Rule 23.[150] Analyzing plaintiffs' claims and defendants' affirmative defenses, it concluded that individual issues were inextricably intertwined with common questions and thus resolution of the common issues would not significantly advance the litigation.

Plaintiffs argued that tobacco litigation should focus on the "common course of conduct" of tobacco companies to manipulate nicotine levels and to addict smokers.[151] More specifically, defendants allegedly "engaged in intentional, reckless conduct to control and manipulate nicotine levels, in order deliberately to addict smokers, particularly young people, and to intentionally, recklessly, or negligently expose people to hazardous substances."[152] However, the court found that plaintiffs' claims revolved around an "inherently individual inquiry" into addiction and raised significant factual disparities for each class member.[153] Rejecting the contention that addiction could be determined on a classwide basis and by questionnaire, the court determined that defendants must be entitled to examine each individual smoker's smoking history and diagnosis.[154]

While plaintiffs' focus and reliance on addiction alone precluded certification under Rule 23(b)(3),[155] other individual issues such as

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148 See Castano v. American Tobacco Co., 84 F.3d 734, 740 (5th Cir. 1996); Georgine v. Amchem Prods., Inc., 83 F.3d 610, 634-35 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

149 See *Amchem*, 521 U.S. at 625.

150 *Arch*, 175 F.R.D. at 486.

151 See *Arch*, 175 F.R.D. at 475, 485-86; see also *Amchem*, 521 U.S. at 623-24 ("Even if Rule 23(a)'s commonality requirement may be satisfied by . . . [common exposure to asbestos products manufactured by defendants], the predominance criterion is far more demanding.").

152 *Arch*, 175 F.R.D. at 485-86 (quoting plaintiff's motion for class certification).

153 See id. at 487-88; see also Barnes v. American Tobacco Co., 161 F.3d 127, 145-46 (3d Cir. 1998) (finding addiction to be integral element of plaintiffs' medical monitoring claim), cert. denied, 119 S. Ct. 1760 (1999).

154 See *Arch*, 175 F.R.D. at 488. Moreover, the court calculated the time necessary to conduct a trial of the case at 250 years. See id. at 488 & n.19. ("If the examination necessary for the jury to decide each of these individual issues [of addiction] took only one hour per person, and if this class is composed of one million people, then the 'trial' of this case would take (with testimony being heard 8 hours a day, 50 weeks per year) approximately 250 years.").

155 See id. at 487-88.

causation and defenses (not to mention damages) underscored the lack of predominance and the individual nature of the addiction question. Each smoker's product liability and negligence claims require specific proof that cigarettes caused addiction to that individual and together would necessitate cross-examination of one million class members.[156] The assumption of risk defense also hinges on "'facts peculiar to each plaintiff's case'"[157]—his knowledge of the addictiveness and dangers of tobacco and his decision to smoke in light of that knowledge. Additionally, Pennsylvania law requires an individual assessment of when each class member knew or should have known of her injuries in order to apply a two-year statute of limitations.[158]

The *Arch* court also found no superiority when plaintiffs failed to propose an effective management solution.[159] A proposed plan to determine common liability and damages in the first phase potentially infringed defendants' due process rights by its common determination of damages (through statistical evidence) rather than an individualized calculation of claimants' injuries.[160] The plan also risked violating defendants' right to a jury trial since the common questions in tobacco litigation are infused with individual issues and a single jury could not possibly hear thousands, hundreds of thousands, or millions of claims.[161] Individual issues like comparative negligence would be determined by a second jury; a comparison of the conduct of plaintiffs and defendants, however, practically—and impermissibly—would entail a reexamination of the first jury's "general liability" findings.[162]

The *Arch* court determined that plaintiffs alleged nearly the same "novel" addiction theory of liability advanced in *Castano*—that the

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156 See id.; see also Small v. Lorillard Tobacco Co., 679 N.Y.S.2d 593, 599-600 (App. Div. 1998) (finding that deceptive business practices claims turn on individual issue of addiction, and that false advertising and fraud claims require individual proof of reliance), motion for leave to appeal granted, 681 N.Y.S.2d 593 (App. Div. Oct. 27, 1998) (mem.), available in Westlaw, NY-CS database.

157 *Arch*, 175 F.R.D. at 490 (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 628 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997)).

158 See id. at 491.

159 See id. at 492-94.

160 See id. at 492-93; see also infra Part III.D (discussing potential violation of defendants' due process rights).

161 See *Arch*, 175 F.R.D. at 493; cf. Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 96-97 (W.D. Mo. 1997) (finding that Missouri law requires that punitive damages be determined by same jury that determines liability and bear relationship to actual damages warranted, which would require one jury to hear claims of more than two thousand class members).

162 See *Arch*, 175 F.R.D. at 494 (citing Castano v. American Tobacco Co., 84 F.3d 734, 751 (5th Cir. 1996)); see also In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (finding plan to divide issues like negligence and comparative negligence to be "looming infringement of Seventh Amendment rights").

tobacco companies' conduct caused their addiction and exposed them to a heightened risk of developing smoking-related diseases.[163] Adopting the maturity theory of *Castano*, the court found that the absence of "a prior track record of trials" in addiction cases rendered "it practically impossible to draw information necessary to make the superiority analysis."[164]

The *Arch* court found no other rationale set forth by plaintiffs to support certification. More than a year after plaintiffs' dire prediction in *Castano*, it rejected an allusion to a judicial crisis as "pure speculation":[165] While individual tobacco claims are not flooding the judiciary, a class action would create hundreds of thousands of claims that would likely disintegrate into "individual mini-trials."[166]

III
DECERTIFICATION OF STATEWIDE TOBACCO CLASS ACTIONS

The deficiencies of a nationwide tobacco class, first described in *Castano*, pervade single-state class actions because the inherently individual nature of the claims remains and the magnitude of the class still attains unmanageable heights.[167] The immaturity of the addiction theory of liability continues to thwart plaintiffs' ability to demonstrate compliance with Rule 23 or its state counterparts; the choice of law inquiry impedes aggregative adjudication of addiction-as-injury claims; and the due process rights of defendants are implicated by trial management techniques encouraged by the magnitude of tobacco class actions. These features precluded certification of *Castano* and should prevent certification of all "son of *Castano*" class actions.

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163 See *Arch*, 175 F.R.D. at 494 (noting that at time of *Castano* suit nicotine addiction theory of liability had not been tested in any United States court).

164 Id. But see id. at 495 n.27 (rejecting Castano as persuasive authority "[t]o the extent that [it] concludes that a finding of superiority can never be reached when the case implicates an immature tort," and arguing that in some cases plaintiffs could establish superiority by analogy to similar cases).

165 Id. at 495.

166 Id. at 495-96.

167 Cf. Samuel Issacharoff, Class Action Conflicts, 30 U.C. Davis L. Rev. 805, 831-32 (1997) (arguing that "upstream" liability cases may be manageable as class actions, while "downstream" harm cases may not be). Professor Issacharoff characterizes cases as upstream where the alleged harm is a "uniform course of conduct by the defendant, from which everything else follows," and "only a few critical facts . . . dominate the whole case"; he defines cases as downstream where it is necessary to "find fact after fact with regard to each individual plaintiff." Id. Plaintiffs' focus on tobacco companies' "common course of conduct" attempts to fit the case into the former class, but pervasive individual issues and the absence of any determinative facts characterize tobacco cases as "downstream."

A. Predominance and Superiority

The predominance and superiority elements of Rule 23(b)(3) impose significant obstacles to certification of a "son of *Castano*" class action, because limiting the scope of the class to residents of a single state neither alters the balance of individual questions to common issues, nor renders mass adjudication a feasible or preferable mode of tobacco litigation. The predominance and superiority analyses in a statewide tobacco class action should be guided by both the Third Circuit's decision in *Georgine v. Amchem Products, Inc.*,[168] and the Fifth Circuit's decision in *Castano*. While *Georgine* can be distinguished as an asbestos settlement class, and *Georgine* and *Castano* both as nationwide classes, they can be relied on more generally as mass tort cases.[169] These decisions provide guidance—persuasive if not binding—beyond their immediate context to both state and federal courts. The *Arch* court recognized the broader application of their predominance analyses as well as the reemergence of the same manageability concerns highlighted by both appellate courts.

The vagueness of an addiction injury and the vast size of addiction class actions magnify the significance of the individualized inquiry required by the factual disparities in class members' claims. The Third Circuit had stressed the impact of factual differences among the claimants in *Georgine*:

> [F]actual differences translate into significant legal differences. Differences in amount of exposure and nexus between exposure and injury lead to disparate applications of legal rules, including matters of causation, comparative fault, and the types of damages available to each plaintiff.[170]

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168 83 F.3d 610 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

169 See *Arch*, 175 F.R.D. at 486 (relying on both *Georgine* and *Castano* as indicative of "weight of authority in mass tort cases" directly applicable to certification of class before it). The *Arch* court rejected plaintiffs' contention that two Florida appellate decisions, *Broin* and *Engle*, should guide its decision:

> First, the cases are factually and legally distinguishable .... [*Broin* involved a secondhand smoke class action, while *Engle* involved a class of Florida residents alleging physical injury caused by nicotine addiction.] Second, both opinions are devoid of a thorough analysis of the requirements which must be satisfied before a class is certified.

Id. at 485 n.12.

170 *Georgine*, 83 F.3d at 627; see also *Amchem*, 521 U.S. at 624 (citing *Georgine*); Castano v. American Tobacco Co., 84 F.3d 734, 742 n.15 (5th Cir. 1996) (same); *Arch*, 175 F.R.D. at 486 (same).

The ambiguity in defining an "addiction" to nicotine[171] similarly clouds an examination of each class member's smoking background and circumstances and encourages challenge by defendants entitled to offer their own expert testimony.[172]

Even if the addiction determination were straightforward, the size of addiction class actions multiplies the import of such an inquiry. It is at this point that the tendency of class actions to generate claims becomes important.[173] For while individualized litigation conceivably would require the same amount of time in toto, the fact remains that the number of individual claims pulled into court by the class vastly exceeds the number that would otherwise be brought.[174] Against this background we can begin to understand the monumental difficulties a court faces.

The "common" issues in tobacco litigation, such as the defendants' knowledge of the addictiveness of nicotine and their misrepresentations of that knowledge, fail to advance progress significantly towards a finding of legal liability. While plaintiffs concentrate on defendants' conduct in manufacturing and marketing cigarettes, the actual claims asserted require a focus on individual elements.[175] For example, the tobacco companies' liability does not turn on a finding of general causation:[176] Plaintiffs do not allege that cigarettes *always* cause addiction (unlike, for example, asbestos and asbestosis).[177] The terms "general causation" or "common course of conduct" disguise highly individualized inquiries, including class members' reliance on misrepresentations or addiction to nicotine.[178] Factual disparities in

171 See Nagareda, supra note 90, at 1160 (noting controversy over using medical term "addiction" with nicotine).

172 See *Arch*, 175 F.R.D. at 488.

173 See supra notes 74-76 and accompanying text.

174 See supra notes 74-76 and accompanying text.

175 The court in *Reed v. Philip Morris Inc.*, for example, delineated the significance of individual elements in every claim asserted by plaintiffs: actual injury as an element of civil conspiracy and negligence claims; causation as an element of negligence, strict liability, and intentional infliction of emotional distress; involuntariness as an element of medical monitoring claims; reliance as an element of fraud claims; and affirmative defenses. See No. 96-5070, slip op. at 30-34 & nn.11-17 (D.C. Super. Ct. July 29, 1999).

176 See id. at 488-89 ("The resolution of this 'general causation question' [of whether cigarettes are addictive] would accomplish nothing for any of the individual plaintiffs."); see also Barnes v. American Tobacco Co., 161 F.3d 127, 145 (3d Cir. 1998) (finding that causation "depends on whether each individual actually is addicted"), cert. denied, 119 S. Ct. 1760 (1999); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 96 (W.D. Mo. 1997) (finding common resolution of causation unhelpful in determining liability).

177 See *Arch*, 175 F.R.D. at 488-89.

178 Cf. Cimino v. Raymark Indus., Inc., 151 F.3d 297, 312 n.30 (5th Cir. 1998) ("'While a case may present a common question of violation, the issues of injury and damage remain critical issues in such a case and are always strictly individualized.'" (quoting Windham v. American Brands, Inc., 565 F.2d 59, 66 (4th Cir. 1977))). Unlike the typical mass tort in

plaintiffs' smoking histories and backgrounds result in thousands of different responses to these inquiries, by either nationwide or statewide tobacco class members, that undermine the cohesiveness of the class and preclude an efficient or manageable litigation process "superior" to alternative forms of adjudication.

A "son of *Castano*" class action "independently fails the superiority requirement," because it suffers from the same manageability and fairness problems that doomed its nationwide counterpart.[179] Two strong rationales for certification, efficiency and the negative value of claims, actually discourage rather than encourage certification of tobacco class actions.[180] The potentially high value of tobacco claims and the existence of individual lawsuits illustrate the practicability of individual adjudication.[181] Courts should heighten protection of litigant autonomy rather than encourage class certifications that tend to increase the number of nonmeritorious claims and dilute the average value of individual claims.[182] The positive value and mass number of claims created by tobacco class actions refute fairness or efficiency motives for certification of tobacco class actions, statewide or nationwide. The existence of alternative adjudicatory options highlights the obstacles confronting attempts to certify a "son of *Castano*" class action that satisfies the superiority and predominance elements of Rule 23(b)(3) and does not abrogate the rights of the parties.

B. Maturity

The novelty of the addiction theory of liability that lies at the heart of the third wave prompted the Fifth Circuit to articulate a maturity "requirement" for certification of mass tort class actions in *Castano*. That court has been criticized for judicially amending Rule 23 by adding a "strict tort 'maturity' test" to its requirements.[183] This

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which defendant manufacturers control access to information on the allegedly defective product, "tobacco wars have taken place amidst a wealth of independent information," see Nagareda, supra note 90, at 1159-60, thus increasing the focus on whether individual smokers relied on defendants' misrepresentations.

179 See *Arch*, 175 F.R.D. at 492.

180 See Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *12 (D.C. Super. Ct. Aug. 18, 1997) (finding that denial of certification will neither result in flood of litigation nor prevent individual litigation), reconsidered and aff'd, No. 96-5070 (D.C. Super. Ct. July 23, 1999).

181 See Jury Awards, supra note 92 (discussing multimillion dollar jury award in recent individual tobacco lawsuit in California); Philip Morris Hit, supra note 92 (same in Oregon).

182 See supra notes 73-81 and accompanying text.

183 See Recent Case, supra note 73, at 979-82; see also Robert T. Krebs, Note, Castano v. American Tobacco Co.: Class Treatment of Mass Torts Is Going Up in Smoke, 24 N. Ky. L. Rev. 673, 694 (1997) (arguing that Fifth Circuit rewrote Rule 23 by "importing" maturity

analysis misconstrues the purpose underlying the court's maturity discussion. Rather than looking to maturity as an additional prerequisite to certification, the Fifth Circuit insisted that plaintiffs meet their burden of demonstrating compliance with Rule 23.

The analysis of any case for satisfaction of the class action requirements necessarily calls for an exercise of judgment by the court. Although *Castano* referred to the immaturity of the claim as impeding the predominance inquiry, its discussion appropriately recognized that it is the "novelty" of these immature claims that obstructs an analysis of how a trial would be conducted and which issues would be significant.[184] Speculation on the action's manageability and effect on the judicial system also does not constitute a "rigorous" superiority analysis. While a court may be equipped to compare alternative forms of litigation at a mature stage of litigation, "where little or no new evidence will be developed, significant appellate review of any novel legal issues has been concluded, and at least one full cycle of trial strategies has been exhausted,"[185] an immature tort alleging a novel injury presents little basis for understanding how a class action would be conducted in comparison to other methods of adjudication.

This understanding of the role of immaturity, as impeding an informed Rule 23 determination rather than adding an additional element to Rule 23, explains the court's support for certification of negative value claims.[186] Although a negative value suit likely may lack a "prior track record" from which to determine whether a class action is a "superior" form of litigation, its very definition resolves the superiority inquiry—no alternative forms of litigation exist.[187] Rather than adding a maturity requirement per se, the Fifth Circuit relied on the absence of ordinary justifications for certification and an examination of the nonspeculative factors supporting individual resolution to inform its decertification decision. The court further noted plaintiffs' inability to predict even the path that a class action would take, let

into analysis); R. Brent Walton, Recent Development, *Castano v. American Tobacco Company*, 71 Tul. L. Rev. 635, 648-50 (1996) (suggesting that certification of immature tort may actually be superior because class action eases burden of litigating mass number of claims in courts).

184 See Castano v. American Tobacco Co., 84 F.3d 734, 749 (5th Cir. 1996).

185 McGovern, supra note 57, at 659; see also supra note 57 (defining "mature mass tort").

186 See *Castano*, 84 F.3d at 749.

187 See supra note 65 (defining negative and positive value claims). However, if a negative value suit also presents a novel claim that precludes a finding that common issues predominate, then a failure to comply with Rule 23 likely will result in no litigation.

alone whether or not certification was the superior method of adjudication.[188]

The novelty of the claim and the lack of a track record from which to elicit the requisite information thwarted plaintiffs' efforts to demonstrate predominance and superiority in *Castano* just as they preclude certification of "son of *Castano*" classes. The nature of the claims asserted in a "son of *Castano*" action replicates that of the *Castano* claims. By responding to the *Castano* decertification with "son of *Castano*" class actions, plaintiffs disregarded the Fifth Circuit's concern that a "prior track record" of individual lawsuits be established as a basis for a certification decision—a concern shared equally by the courts to which the plaintiffs' attorneys shifted.[189] Individual litigation remains the superior mode of adjudication when a court is called upon to decide a "son of *Castano*" certification motion before a single addiction claim has been litigated in the state.[190]

C. *Choice of Law*

A potential difference exists between the *Castano* class action and a "son of *Castano*" class action in the choice of law inquiry. Choice of law factors into both the predominance and superiority determinations required for class certification. Laws of different states vary, whether by nuances or in toto,[191] and a court must identify the applicable substantive law in order to make an informed decision on whether or not common issues predominate over individual questions.[192] The Fifth Circuit determined in *Castano* that the complexity of a choice of law inquiry requiring an analysis of the tort laws of fifty

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188 *Castano*, 84 F.3d at 749 (highlighting plaintiffs' own admission that they lacked "learning [curve] . . . necessary to say . . . how this case can be tried and that [it] will not run afoul of the teachings of the [court]").

189 See, e.g., Reed v. Philip Morris Inc., No. 96-5070, slip op. at 38 (D.C. Super. Ct. July 29, 1999) (finding that tobacco case "remains an immature tort with manageability problems abounding"); Geiger v. American Tobacco Co., N.Y. L.J., July 9, 1999, at 33 (N.Y. Sup. Ct. July 8, 1999) ("[O]bviously the merits of this immature mass tort should first be adequately tested on an individual basis before the commencement of an enormous class action.").

190 See Emig v. American Tobacco Co., 184 F.R.D. 379, 394 (D. Kan. 1998) ("The court balks at the prospect of binding such a large and diverse class of Kansans to decisions of one court and one jury when such novel issues have never been presented to a court in any individual litigation within the state."); Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *3 (D.C. Super. Ct. Aug. 18, 1997) (noting absence of other tobacco personal injury cases in District of Columbia Superior Court), reconsidered and aff'd (July 23, 1999).

191 Compare In re Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1300 (7th Cir. 1995) (emphasizing importance of slight variations in state negligence law), with *Castano*, 84 F.3d at 743 n.15 (noting that some states do not recognize claims of strict liability or negligent infliction of emotional distress at all while other states do recognize these causes of action).

192 See *Castano*, 84 F.3d at 741.

states demonstrated that a nationwide class action was not superior to individual adjudication.[193]

The *Arch* court's analysis lacked any choice of law discussion, implying that Pennsylvania law would apply to the claims of all class members.[194] This decision suggests that carefully designed class definitions might avoid the specter of applying multiple state laws to class members' claims. Other courts, however, have found that the laws of multiple states may even apply to a class including all residents of a single state alleging addiction to nicotine.[195]

Unlike cases involving classes of all current residents of a single state, the *Arch* plaintiffs restricted the proposed class to Pennsylvania residents who began smoking as minor residents of Pennsylvania.[196] Even under an interest analysis approach,[197] Pennsylvania law may not apply to the claims of all residents who smoked their first cigarette

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193 Id. at 749-50 (finding determination of state law variations on eight different liability theories not impossible task but one that made individual litigation more attractive than class action).

194 See Arch v. American Tobacco Co., 175 F.R.D. 469, 481, 491 (E.D. Pa. 1997) (citing, inter alia, Pennsylvania's recognition of cause of action for medical monitoring, Pennsylvania's statute of limitations, and Pennsylvania's recognition of assumption of risk defense).

195 See, e.g., Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 95-96 (W.D. Mo. 1997); *Reed*, 1997 WL 538921, at *14-*15; Geiger v. American Tobacco Co., N.Y. L.J., July 9, 1999, at 33 (N.Y. Sup. Ct. July 8, 1999). In *Reed*, a D.C. trial court determined that interest analysis mandated consideration of other states' interests in plaintiffs' claims, because the "transient" character of the D.C. population made it likely that smokers' histories traversed state lines and that different laws would be applied to the case. See *Reed*, 1997 WL 538921, at *14. The court agreed with plaintiffs that D.C. law would apply in most cases because D.C. incurred a substantial interest when its residents suffered from and sought treatment for nicotine dependence, but it found individualized inquiries necessary because some class members likely began to smoke, learned of the harmful effects of tobacco, tried to quit, and discovered their own smoking-related injuries in different states. See id. at *14-*15. Similarly, a Missouri district court recognized in *Smith* that the "significant relationship" test, see 1 Restatement (Second) of Conflict of Laws § 145 (1971), required an individualized inquiry into each plaintiff's smoking history to determine which state had the closest relationship to the parties and issues involved. See *Smith*, 174 F.R.D. at 95. The court determined that Missouri law clearly would apply to a lifelong Missouri resident, while it clearly would not apply to a resident who quit smoking before moving to Missouri. See id. at 95; cf. In re Benedictin Litig., 857 F.2d 290, 305 (6th Cir. 1988) (rejecting plaintiffs' argument that domiciliary law should apply where "state of domicile at the time of suit may bear little or no relation to where a mother may have taken a morning sickness drug years before").

196 See *Arch*, 175 F.R.D. at 475.

197 See Allstate Ins. Co. v. McFadden, 595 A.2d 1277, 1279 (Pa. Super. Ct. 1991) (stating that Pennsylvania follows combined government interest analysis and significant relationship approach to choice of law); Giovanetti v. Johns-Manville Corp., 539 A.2d 871, 873 (Pa. Super. Ct. 1988) (same). "Under the Pennsylvania choice of law standard, the state having the most interest in the problem, and which is most intimately concerned with the outcome, is the forum whose law should apply." *McFadden*, 595 A.2d at 541. But cf. Larry Kramer, Choice of Law in Complex Litigation, 71 N.Y.U. L. Rev. 547 (1996) (suggesting

in Pennsylvania.[198] Each smoker's claim rests on a distinct smoking history that may implicate the interests of other states, including where a smoker learned of the dangers of tobacco, where he heard or saw defendants' alleged misrepresentations, where he tried to stop smoking or received advice to quit, and where he was diagnosed with a smoking-related disease or as nicotine dependent.[199]

The fundamental difficulty in determining the applicable law lies in the nature of the addiction claim. Unlike exposure to asbestos in the workplace or ingestion of pharmaceuticals,[200] the place where addiction occurs is inherently ambiguous and dependent on the proposed definition of addiction.[201] While the same law likely would apply to most of the claimants in a single-state class action, it might not apply to many of the plaintiffs whose exposure and history of smoking occurred outside the state.

Analyzing the content of states' substantive laws and resolving conflicts "is far from impossible,"[202] however, even though the magnitude of an addiction class action increases the burden of conducting an individualized analysis to determine which state's laws apply to each class member's claims.[203] A court can determine the dominant factor under its choice of law approach, such as the place where addiction occurs, and then either impose restrictions on the composition of the

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that judges distort choice of law analysis to find single state's law applicable to complex litigation).

198 This class encompasses, for example, the teenager who begins smoking in Pennsylvania, leaves the state for 20 years, seeks health treatment and is diagnosed as nicotine dependent elsewhere, but then returns to Pennsylvania before the suit is filed.

199 For instance, the *Castano* class definition of nicotine dependent persons focused on the medical advice received by plaintiffs as determining the "injury": The class included "all cigarette smokers who have been diagnosed by a medical practitioner as nicotine-dependent" or "all regular cigarette smokers who were or have been advised by a medical practitioner that smoking has had or will have adverse health consequences who thereafter do not or have not quit smoking." Castano v. American Tobacco Co., 160 F.R.D. 544, 561 (E.D. La. 1995), rev'd, 84 F.3d 734 (5th Cir. 1996).

200 Cf. *Benedictin*, 857 F.2d at 305 (finding more significant relationship with state of manufacture of product than with state where plaintiff lives or with state where plaintiff ingested Benedictin).

201 See Emig v. American Tobacco Co., 184 F.R.D. 379, 393-94 (D. Kan. 1998) (finding that limitation of class to residents whose addiction occurred in Kansas required examination of each potential plaintiff's smoking history to determine where he became addicted to cigarettes). Under Kansas's *lex loci delicti* approach to choice of law, the law of the state where the tort occurs governs. See id.; Gregory E. Smith, Choice of Law in the United States, 38 Hastings L.J. 1041, 1075-76 (1987) (noting that Kansas adheres to place of injury rule).

202 Kramer, supra note 197, at 584.

203 Cf. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996), aff'd sub nom. Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997).

class that limit the necessary inquiry,[204] or determine the place of addiction for all plaintiffs by conducting individualized inquiries that inevitably would be made anyway. The choice of law problem thus poses less of an obstacle in statewide class actions, although the discrepancies in the applicable law magnify manageability concerns and accentuate the factual differences that already undermine the cohesiveness of a tobacco class.[205]

D. Due Process

The certification of a tobacco class action raises significant concerns over whether the trial of such an action could ever be managed in compliance with fundamental notions of due process. The magnitude of any tobacco class action may encourage innovative management techniques like sampling or other general extrapolations of liability and damages.[206] For example, the plaintiffs in *Arch* sought to resolve the court's manageability concerns by proposing the use of questionnaires to prove causation and addiction;[207] however, the court suggested that such a plan, "without cross-examination or rebuttal evidence[,] . . . would violate defendants' due process rights."[208] The threat posed by such "shortcuts" to the constitutional rights of litigants reveals not only their own deficiencies but also underscores the impracticability of litigating tobacco claims as class actions and the risks involved in speculating on the future course of such litigation.[209]

A jury verdict for the plaintiffs in Phase I of the *Engle* class action moves the case forward without an established plan to try the individual claims of an estimated one hundred thousand to one million as yet unidentified class members.[210] No precedent exists for conducting a Phase III trial for individual claims of all absent class

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204 See, e.g., Arch v. American Tobacco Co., 175 F.R.D. 469, 475 (E.D. Pa. 1997) (defining class).

205 See Castano v. American Tobacco Co., 84 F.3d 734, 742-43 n.15 (5th Cir. 1996) (finding "it difficult to fathom how common issues could predominate" where "[v]ariations in state law magnify the [substantial factual] differences").

206 See Cimino v. Raymark Indus., Inc., 151 F.3d 297, 311-13 (5th Cir. 1998) (finding that extrapolation of damages from sample cases violated defendants' due process rights, Seventh Amendment right to jury determination of each individual class member's actual damages, and Texas substantive law).

207 See *Arch*, 175 F.R.D. at 488.

208 Id. at 489 n.21.

209 Cf. Hilao v. Estate of Marcos, 103 F.3d 767, 788 (9th Cir. 1996) (Rymer, J., concurring in part and dissenting in part) ("If due process in the form of a real prove-up of causation and damages cannot be accomplished because the class is too big or to do so would take too long, then . . . the class is unmanageable and should not have been certified in the first place.").

210 See supra note 127 and accompanying text.

members.[211] Trial of one hundred thousand individual claims would take one hundred state courts twenty years to complete if each trial lasted only one week.[212] The difficulty and time projected for resolution of the "mini-trials" into which a tobacco class would dissolve emphasizes the nonmanageability of the class action and thus encourages judicial experimentation with aggregative procedures that potentially threaten defendants' due process rights.

"'[D]ue process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances."[213] The Supreme Court has established a three-part inquiry to determine what process is due when state action is invoked in a dispute between private parties:

> [F]irst, consideration of the private interest that will be affected by the [state action]; second, an examination of the risk of erroneous deprivation through the procedures under attack and the probable value of additional or alternative safeguards; and third, . . . principal attention to the interest of the party seeking the [state action], with, nonetheless, due regard for any ancillary interest the government may have in providing the procedure or forgoing the added burden of providing greater protections.[214]

The Ninth Circuit applied this inquiry in *Hilao v. Estate of Marcos*[215] and upheld the use of questionnaires, statistical extrapolation, and other techniques of inferential sampling to determine the validity of opt-in class claims.[216] According to the Court's analysis, the Due Process Clause does not at all times require a direct and individualized assessment of liability.

Although this decision has at times been read as approving the general use of random sampling procedures in a mass tort class ac-

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211 See Black, supra note 107; see also *Cimino*, 151 F.3d at 319-21 (rejecting third phase of asbestos class action as violation of Texas substantive law and defendant's Seventh Amendment and due process rights, and finding defendant entitled to individual determinations of (1) causation for 160 "sample" cases and (2) individual damages for 2128 "extrapolation" cases).

212 See Black, supra note 107; cf. *Arch*, 175 F.R.D. at 488 n.19 (estimating that trial of tobacco class action would take 250 years if jury examination of individual issues lasted only one hour for each of one million class members).

213 Cafeteria & Restaurant Workers v. McElroy, 367 U.S. 886, 895 (1961) (quoting Anti-Fascist Comm. v. McGrath, 341 U.S. 123, 162-63 (Frankfurter, J., concurring)).

214 Connecticut v. Doehr, 501 U.S. 1, 11 (1991) (adapting due process inquiry articulated in Mathews v. Eldridge, 424 U.S. 319, 335 (1976), to dispute between private parties that invokes state procedure).

215 103 F.3d 767 (9th Cir. 1996).

216 See id. at 786-87. In *Hilao*, Philippine nationals brought a class action against the Marcos estate seeking damages under the Alien Tort Claims Act for human rights violations. See id. at 771-72.

tion,[217] its context suggests a narrower reading.[218] A divided panel narrowed the issue to avoid addressing the propriety of statistical sampling to compute damages,[219] and characterized the interests at stake in light of prior findings that a group of valid claimants existed who would face "insurmountable practical hurdles" to individual adjudication.[220]

Tobacco companies, on the other hand, defend against individual smokers whose choice to smoke and knowledge of the dangers of smoking emphasize the importance of individualized liability and damage determinations.[221] No "insurmountable practical hurdles" preclude individual adjudication. Nor does a set of claimants exist to whom the tobacco industry has already been found liable. Smokers alleging "positive value" addiction claims do not face the same bar to individual resolution that the Ninth Circuit found confronted the ten thousand opt-in plaintiffs in *Hilao*.[222] The "theoretical" judicial crisis alleged by plaintiffs to support certification in *Castano* has not materialized, so that the judiciary does not bear the heavy burden of adjudicating thousands of individual addiction claims.[223]

This analysis suggests that no overwhelming state interest exists to override the requirement that plaintiffs must establish every element of their claims by the introduction of individualized evidence. Under these circumstances, any non-individual determination of causation or damages, including inferential sampling or the use of ques-

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217 See In re Chevron U.S.A., Inc., 109 F.3d 1016, 1020 (5th Cir. 1997) (suggesting that Ninth Circuit recognizes use of statistical sampling as "an acceptable due process solution to the troublesome area of mass tort litigation" where appropriate level of representativeness has been used (quoting In re Estate of Marcos Human Rights Litig., 910 F. Supp. 1460, 1467 (D. Haw. 1995), aff'd sub nom. Hilao v. Estate of Marcos, 103 F.3d 767)).

218 See Cimino v. Raymark Indus., Inc., 151 F.3d 297, 319 (5th Cir. 1998) (distinguishing *Hilao* as suit under Alien Tort Claims Act and agreeing with *Hilao* dissent that "'individual causation and individual damages must still be proved individually'" (quoting *Hilao*, 103 F.3d at 788 (Rymer, J., concurring in part and dissenting in part))).

219 See *Hilao*, 103 F.3d at 784-86 & nn.11-12 (limiting defendant's challenge to statistical sampling method used to determine claim validity rather than to propriety of using statistical sampling as method to compute damages and characterizing defendant's interest as total amount of damages awarded rather than specific interest in identities of plaintiffs to whom damages were awarded).

220 See id. at 786. A jury had already determined that the defendant was liable to the people tortured, see id. at 785, and the evidence suggested that this group consisted of ten thousand members, see id. at 787 (Rymer, J., concurring in part and dissenting in part).

221 Cf. Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1200 (6th Cir. 1988) ("Although many common issues of fact and law will be capable of resolution on a group basis, individual particularized damages still must be proved on an individual basis.").

222 See *Hilao*, 103 F.3d at 786-87 (finding substantial judicial interest in not burdening district court with individual determinations of 9541 facially valid claims).

223 See Castano v. American Tobacco Co., 84 F.3d 734, 747 (5th Cir. 1996) (noting that "[n]ot every mass tort is asbestos").

tionnaires to determine addiction, likely violates the due process rights of defendant tobacco companies. Without the availability of these aggregative procedures, an addiction class action would break down into individual trials to resolve the significant issues peculiar to individual claimants, including addiction, causation, damages, and affirmative defenses. The "son of *Castano*" class action thus splinters into thousands or millions of individual minitrials, a result not within the design or purpose of Rule 23.[224]

CONCLUSION

The "son of *Castano*" class action does not provide a magical panacea for tobacco litigation. Defeats in individual litigation cannot be rectified by loosening the reins of a procedural rule. The feasibility of individual trials and the emergence of a "Goliath versus Goliath" courtroom battle in tobacco litigation rebuts any notion that vindication of tobacco claimants' rights depends on class action adjudication. As one court noted, the absence of jury verdicts favoring plaintiffs in nicotine lawsuits may merely indicate "that juries are not willing to relieve plaintiffs from the responsibility of their own actions and the consequences of choices they made, despite allegations of conspiracy and misrepresentation."[225] If the attempt to shift the substantive nature of the claims against the tobacco industry (to focus on addiction and "blameworthy" tobacco companies)[226] proves illusory in individual litigation, the courts should not modify class action procedural rules and safeguards to transform the judicial system into a "vehicle for moral condemnation of defendants, wholly apart from the causation of harm to tort plaintiffs."[227]

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224 See Arch v. American Tobacco Co., 175 F.R.D. 469, 495 (E.D. Pa. 1997) (noting likely "diminution of judicial resources, and thus a reduction in judicial efficiency" where class action dissolves into "thousands of individual mini-trials").

225 Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *12 (D.C. Super. Ct. Aug. 18, 1997).

226 See Nagareda, supra note 90, at 1164 ("No matter how blameworthy one might consider Big Tobacco, it ultimately may well have failed to convince people that smoking is safe and nonaddictive, because nothing less than the entire history of tobacco in Western civilization was saying, loudly and clearly, that it was lying.").

227 Id. at 1124-25 (arguing that "moral condemnation should take place not through the vehicle of tort litigation but, if at all, through democratic deliberation in the political process").