

Fall 2010

## Reaching Equilibrium in Tobacco Litigation

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### Recommended Citation

James Henderson, Jr., Aaron D. Twerski, Reaching Equilibrium in Tobacco Litigation, 62 S. C. L. Rev. 67 (2010).

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## REACHING EQUILIBRIUM IN TOBACCO LITIGATION

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### I. INTRODUCTION

Several recent developments in U.S. tobacco litigation—large jury verdicts against tobacco companies from a pool of approximately 8,000 individual plaintiffs in Florida<sup>1</sup> and potentially significant economic loss class actions based

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The authors gratefully acknowledge the support of the Brooklyn Law School Research Fund and of Chadbourne & Parke LLP, who represents various tobacco companies, in facilitating this project. We also acknowledge the research assistance of Ruth DeLuca. The opinions expressed are exclusively those of the listed authors.

1. See Brief of Appellees at 11, *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010) (No. 08-16158), 2009 WL 2816556. But see *Brown v. R.J. Reynolds Tobacco Co.*, 576

on the allegedly fraudulent sale of light cigarettes pending in a number of jurisdictions<sup>2</sup>—might lead observers to believe that claims based on tobacco use are a growing area of tort law with an increasingly promising future for injured claimants. This Article argues that quite the opposite is true. To be sure, when plaintiffs first brought tort claims against tobacco companies approximately fifty years ago,<sup>3</sup> a reasonably prescient observer might have anticipated that tobacco plaintiffs would enjoy increasing success over time. Surely high-risk and deadly products like tobacco<sup>4</sup> would support a steady stream and eventually a flood of significant recoveries in an American system of strict products liability, which was undergoing rapid, pro-plaintiff expansion.<sup>5</sup> For all one might have foreseen fifty years ago, the tobacco companies' days were numbered. And yet, with only a relatively few exceptions, this has not occurred. Historically, plaintiffs have faced a lack of success as courts rejected their theories of recovery as a matter of law.<sup>6</sup> This Article briefly summarizes the history of tobacco tort litigation to

F. Supp. 2d 1328, 1334 & n.11 (M.D. Fla. 2008) (noting that “approximately 4,000 former *Engle* class members filed suit” in state court and that “[d]efendants . . . removed virtually all of [the] state court actions” to federal court (emphasis added)), *vacated*, 611 F.3d 1324 (11th Cir. 2010). See *infra* notes 139–54 and accompanying text.

2. See *infra* text accompanying notes 154–66.

3. In 1954, Ira C. Lowe filed the first case against a tobacco company. Robert L. Rabin, *A Sociolegal History of the Tobacco Tort Litigation*, 44 STAN. L. REV. 853, 857 (1992) (citing *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9673(1) (E.D. Mo. filed Mar. 10, 1954)). The plaintiff dismissed the defendants only three months after filing his action, see *Lowe*, No. 9673(3), but then refiled the case one month later. *Lowe v. R.J. Reynolds Tobacco Co.*, No. 9871(3) (E.D. Mo. filed July 6, 1954). Ultimately, however, the court dismissed the action. *Id.* Furthermore, even though Lowe's daughter subsequently filed an action to collect damages for loss of a parent, she too dismissed her action against the defendants. *Lowe v. R.J. Reynolds Tobacco Co.*, No. 10,318(2) (E.D. Mo. filed June 24, 1955). Throughout the 1950s, 100–150 filings from the first wave of tobacco litigation were also dropped. Rabin, *supra* (citing “estimate . . . from a defense lawyer who was intimately involved in the first wave of litigation” and who asked to remain anonymous). See also Marcia L. Stein, *Cigarette Products Liability Law in Transition*, 54 TENN. L. REV. 631, 631–38 (1987), for a discussion of early tobacco litigation.

4. See *Smoking-Attributable Mortality, Years of Potential Life Lost, and Productivity Losses—United States, 2000–2004*, 57 MORBIDITY & MORTALITY WKLY. REP. 1226, 1226–27 (2008) (“[D]uring 2000–2004, cigarette smoking and exposure to tobacco smoke resulted in at least 443,000 premature deaths.”). Although this data was not available fifty years ago, it was common knowledge that tobacco use was harmful to health. See Rabin, *supra* note 3, at 856.

5. See, e.g., James A. Henderson, Jr. & Theodore Eisenberg, *The Quiet Revolution in Products Liability: An Empirical Study of Legal Change*, 37 UCLA L. REV. 479, 483–88 (1990) (outlining judicial decisions in representative products liability cases from the mid-1960s to the mid-1980s).

6. Plaintiffs have lost failure-to-warn cases because the danger of cigarette smoking is a matter of common knowledge, see *Allgood v. R.J. Reynolds Tobacco Co.*, 80 F.3d 168, 172 (5th Cir. 1996), and because a company's warnings complied with The Federal Cigarette Labeling and Advertising Act, see *Roysdon v. R.J. Reynolds Tobacco Co.*, 849 F.2d 230, 235 (6th Cir. 1988). Plaintiffs have lost design cases on the grounds that tobacco is not a defective or unreasonably dangerous product as a matter of law, see *Adams v. Brown & Williamson Tobacco Corp.*, No. 93-1571-CIV-J-20, 1995 WL 17019989, at \*3 (M.D. Fla. Feb. 22, 1995) (citing *Roysdon*, 849 F.2d at 236; *Green v. Am. Tobacco Co.*, 391 F.2d 97, 106 (5th Cir. 1968), *overruled by* 409 F.2d 1166, 1166 (5th Cir. 1969) (en banc) (per curiam); *Paugh v. R.J. Reynolds Tobacco Co.*, 834 F. Supp.

date, describing its major phases, and explains why things have, on the whole, been disappointing for plaintiffs. We conclude that tobacco litigation, as a significant subset of American tort litigation, is reaching an equilibrium; it should not require more than fifteen or twenty years for tobacco litigation to arrive at the point where a relatively small but steady stream of claims produces a trickle of plaintiffs' recoveries.

We should be careful not to overstate plaintiffs' declining success. In the short run—over the next five or so years—the tobacco industry's exposure to civil liability may actually increase. The recent developments noted at the outset,<sup>7</sup> while not likely to lead to a long-term resurgence, may combine to allow tobacco plaintiffs, in the short term, to do better than they have done historically. By 2020 or so, however, with choice-based defenses steadily strengthening and new claim filings trending down,<sup>8</sup> it will be obvious that an equilibrium has arrived. By its seventy-fifth anniversary, in 2030, tobacco litigation as a significant, potentially explosive subset of tort will be history. Other areas of so-called mass tort may continue to flourish based on what we refer to as the asbestos litigation claims model. But as this Article will show, the asbestos model is very different from the tobacco model in ways that explain why the former will support episodes of mass tort while the latter will not.<sup>9</sup> Recent empirical data on trends in filings, claims pending, and plaintiffs' success at trial support our conclusion that tobacco litigation's days as a significant subset of American tort litigation are over.<sup>10</sup>

Before concluding our analysis of the future of American tobacco litigation, we will consider whether tort litigation against American tobacco companies may be on the verge of expanding in foreign jurisdictions.<sup>11</sup> Even if tobacco litigation is reaching equilibrium in this country, might not a more pro-plaintiff tort litigation cycle against American tobacco companies be about to commence abroad? For reasons developed later in this Article, we doubt that such events will occur.<sup>12</sup> Tobacco-based tort claims face no brighter future elsewhere than they face in our own courts.

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228, 232 (N.D. Ohio 1993)); *Forster v. R.J. Reynolds Tobacco Co.*, No. 85-4294, 1990 WL 10008088, at \*2 (D. Minn. Feb. 13, 1990) (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965)), or because plaintiffs have been unable to establish a reasonable alternative design, *see Brown v. R.J. Reynolds Tobacco Co.*, 852 F. Supp. 8, 9–10 (E.D. La. 1994) (citing LA. REV. STAT. ANN. § 9:2800.56 (2009)), *aff'd*, 52 F.3d 524 (5th Cir. 1995).

7. *See supra* notes 1–2 and accompanying text.

8. *See infra* note 87 and accompanying text.

9. *See infra* text accompanying notes 99–14.

10. *See infra* note 87 and accompanying text.

11. *See infra* text accompanying notes 181–186.

12. *Id.*

## II. A HISTORICAL PERSPECTIVE: THREE PHASES OF TOBACCO LITIGATION

A. *A Brief Overview of the First Two Phases (Mid-1950s to Mid-1990s)*

Professor Robert Rabin has chronicled the history of American tobacco litigation in a series of perceptive academic essays published over the past two decades.<sup>13</sup> Rabin describes three distinct “waves” of litigation, with the third wave carrying up to the present.<sup>14</sup> We speak of “phases” rather than “waves,” but clearly we take our inspiration from Rabin. The initial phase of tobacco litigation, which commenced in the mid-1950s and covered the decade of the 1960s, coincided with the rapid rise of strict liability in tort for harm caused by defects in commercially distributed products.<sup>15</sup> Reflecting the reality that the then-emerging rule of strict products liability applied primarily to harm caused by manufacturing defects,<sup>16</sup> the early tobacco claims were based on allegations that cigarettes were inherently and unreasonably dangerous, breaching the implied warranty of merchantability;<sup>17</sup> that the tobacco company defendants were negligent in failing to warn that cigarettes could cause cancer;<sup>18</sup> or that the companies had misrepresented cigarettes as safe.<sup>19</sup> Plaintiffs in these early actions faced formidable obstacles. Even if general causation—that cigarettes generically contribute to causing lung cancer and other respiratory illnesses—

13. See Robert L. Rabin, *Institutional and Historical Perspectives on Tobacco Tort Liability*, in SMOKING POLICY: LAW, POLITICS, AND CULTURE 110, 110–25 (Robert L. Rabin & Stephen D. Sugarman eds., 1993); Rabin, *supra* note 3, at 855–76; Robert L. Rabin, *The Third Wave of Tobacco Tort Litigation*, in REGULATING TOBACCO 176, 176–97 (Robert L. Rabin & Stephen D. Sugarman eds., 2001) [hereinafter Rabin, *The Third Wave*]; Robert L. Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, 41 LOY. L.A. L. REV. 1721, 1732–44 (2008); Robert L. Rabin, *The Tobacco Litigation: A Tentative Assessment*, 51 DEPAUL L. REV. 331, 332–47 (2001).

14. See Rabin, *The Third Wave*, *supra* note 13, at 176–79.

15. See Robert L. Rabin, *Tort Law in Transition: Tracing the Patterns of Sociolegal Change*, 23 VAL. U. L. REV. 1, 9 (1988) (citing RESTATEMENT (SECOND) OF TORTS § 402A (1965); *Greenman v. Yuba Power Prods., Inc.*, 377 P.2d 897, 900 (Cal. 1962)).

16. See George L. Priest, *Strict Products Liability: The Original Intent*, 10 CARDOZO L. REV. 2301, 2303 (1989) (arguing that the drafters of the Restatement (*Second*) of Torts, § 402A intended strict liability to apply to manufacturing defects only). *But see* Michael D. Green, *The Unappreciated Congruity of the Second and Third Torts Restatements on Design Defects*, 74 BROOK. L. REV. 807, 836 (2009) (arguing that Section 402A applies not only to manufacturing defects, but also to “easy cases in which products failed in performing at a minimal level of safety”).

17. See, e.g., *Ross v. Philip Morris & Co.*, 328 F.2d 3, 5–6 (8th Cir. 1964) (affirming a verdict for the defendant in an implied warranty of merchantability claim where the jury was instructed to find for the defendant if the defendant could not have foreseen the “harmful effects” of the smoking).

18. See, e.g., *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 299 (3d Cir. 1961) (discussing the plaintiff’s argument that the defendant failed to warn that cigarettes contained carcinogens).

19. See, e.g., *Cooper v. R.J. Reynolds Tobacco Co.*, 158 F. Supp. 22, 24 (D. Mass. 1957) (analyzing the plaintiff’s argument that the defendant misrepresented that cigarettes were safe).

could be established,<sup>20</sup> specific causation—that smoking had caused a particular plaintiff’s injuries—was difficult to prove.<sup>21</sup> And it was not clear that the tobacco companies were negligent in the 1930s and 1940s in failing to discover the dangers of smoking. Moreover, given that it was widely suspected in the Second World War era that smoking was to some extent harmful,<sup>22</sup> it seemed to follow that plaintiffs who smoked did so knowingly and, in effect, had themselves mostly (or entirely) to blame.<sup>23</sup>

Two further factors, one theoretical and one practical, combined to make tobacco claims in this first phase difficult to prosecute successfully. First, the founders of the emerging strict products liability rule decided against deeming a product defective based on inherent, unavoidable risks of injury, even if those risks might be very great.<sup>24</sup> The official comments to Section 402A of the Restatement Second of Torts, promulgated in 1965, explicitly judged unadulterated tobacco, along with butter and whiskey, nondefective when properly marketed.<sup>25</sup> And second, tobacco companies uniformly and steadfastly refused even to consider settling any tort claims brought against them.<sup>26</sup> This “no settlement” stance meant that, to have any chance of recovery, every tobacco claim had to go to trial and survive appellate review—an expensive, risky proposition for plaintiffs’ lawyers and their clients.<sup>27</sup> Not surprisingly, relatively

20. Rabin, *The Third Wave*, *supra* note 13, at 197 (noting that tobacco defendants contested the proof of the general causal link between smoking and tobacco-related diseases in the earlier era of tobacco litigation, but now have abandoned this defense).

21. *Id.* Specific causation is still heavily litigated, requiring a plaintiff to procure a whole litany of experts to support the claim that smoking caused that particular plaintiff’s disease. *Id.*

22. See Rabin, *supra* note 3, at 855–56.

23. See *id.* at 863 (citing *Pritchard*, 295 F.2d at 302 (Goodrich, J., concurring)).

24. See *id.* (citing RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965); 38 A.L.I. PROC. 87–88 (1961)).

25. RESTATEMENT (SECOND) OF TORTS § 402A cmt. i (1965) provides:

*Unreasonably dangerous.* The rule stated in this Section applies only where the defective condition of the product makes it unreasonably dangerous to the user or consumer. Many products cannot possibly be made entirely safe for all consumption, and any food or drug necessarily involves some risk of harm, if only from over-consumption. Ordinary sugar is a deadly poison to diabetics, and castor oil found use under Mussolini as an instrument of torture. That is not what is meant by “unreasonably dangerous” in this Section. The article sold must be dangerous to an extent beyond that which would be contemplated by the ordinary consumer who purchases it, with the ordinary knowledge common to the community as to its characteristics. Good whiskey is not unreasonably dangerous merely because it will make some people drunk, and is especially dangerous to alcoholics; but bad whiskey, containing a dangerous amount of fusel oil, is unreasonably dangerous. Good tobacco is not unreasonably dangerous merely because the effects of smoking may be harmful; but tobacco containing something like marijuana may be unreasonably dangerous. Good butter is not unreasonably dangerous merely because, if such be the case, it deposits cholesterol in the arteries and leads to heart attacks; but bad butter, contaminated with poisonous fish oil, is unreasonably dangerous.

26. Rabin, *supra* note 3, at 857.

27. *Id.* at 858.

few claims were filed in this first phase of tobacco litigation, and the tobacco industry did not lose a single case.<sup>28</sup>

Given the discouraging results of the first phase as viewed from a plaintiff's perspective, twenty years would pass before the second phase of tobacco litigation began in the late 1980s.<sup>29</sup> By that time, a growing cadre of plaintiffs' trial lawyers had emerged.<sup>30</sup> Doctrinally, a smattering of appellate decisions had generated expectations that American courts might, after all, allow claims asserting liability for inherent, unavoidable product-related risks<sup>31</sup> and for failing to warn of risks about which the tobacco industry should have known had it undertaken adequate testing regarding the carcinogenic properties of cigarettes.<sup>32</sup> Mounting evidence that nicotine was addictive seemed to offset the notion that habitual smokers had only themselves to blame.<sup>33</sup> And the Federal Cigarette Labeling and Advertising Act,<sup>34</sup> together with its related administrative hearings and publicity, strongly reinforced the impressions, which developed from the 1964 Surgeon General's Report<sup>35</sup> and subsequent federal labeling legislation,<sup>36</sup>

28. *Id.* at 859.

29. *Id.* at 854.

30. *Id.* at 866. Professor Rabin observed that in 1985, the Tobacco Products Liability Project, headed by Professor Richard Daynard, began publishing "the *Tobacco Products Liability Reporter*, held annual conferences, [and] established a communications network among tobacco plaintiffs' lawyers." *Id.* at 866 n.80.

31. *See, e.g.*, *Halphen v. Johns-Manville Sales Corp.*, 484 So. 2d 110, 115–16 (La. 1986) (holding that if a product is "unreasonably dangerous per se," whether because of a design, manufacturing, or other defect, the manufacturer can be held liable for resulting injuries despite its lack of knowledge of the danger), *superseded by statute*, LA. REV. STAT. ANN. § 9:2800.56 (2009) ("A product is unreasonably dangerous in design if, at the time the product left its manufacturer's control: (1) [t]here existed an alternative design for the product that was capable of preventing the claimants damage . . ."); *Kelley v. R.G. Indus., Inc.*, 497 A.2d 1143, 1159 (Md. 1985) (holding that a victim shot by a "Saturday Night Special" handgun could recover against the manufacturer even though a gun is not unreasonably dangerous), *superseded by statute*, MD. CODE ANN., public safety § 5-402(b)(1) (LexisNexis 2003) ("A person is not strictly liable for damages for injuries to another that result from the criminal use of a firearm by a third person."); *O'Brien v. Muskin Corp.*, 463 A.2d 298, 305 (N.J. 1983) (citing *Michalko v. Cooke Color & Chem. Corp.*, 451 A.2d 179, 184 (N.J. 1982) (imposing liability on the manufacturer of an above-ground swimming pool even though no safer alternative design was available for the defective part), *superseded by statute*, N.J. STAT ANN. § 2A:58C-3 (a)(1) (West 2000) ("[A product is not defective in design if] there was not a practical and technically feasible alternative design that would have prevented the harm without substantially impairing the reasonably anticipated or intended function of the product . . .").

32. *Pritchard v. Liggett & Myers Tobacco Co.*, 295 F.2d 292, 300 (3d Cir. 1961) (finding that there was sufficient proof to raise a jury issue as to whether the defendants should have known about the risks attendant to smoking by undertaking additional tests as to the carcinogenic properties of cigarettes); *Cf. Green v. Am. Tobacco Co.*, 154 So. 2d 169, 170–71 (Fla. 1963) (holding that an implied warranty of fitness imposes absolute liability for cigarettes that cause cancer even though the manufacturer could not have known that users of the cigarettes would be in danger of contracting cancer).

33. *See* Rabin, *supra* note 3, at 871.

34. 15 U.S.C. §§ 1331–1340 (2006).

35. U.S. PUB. HEALTH SERV., NO. 1103, SMOKING AND HEALTH: REPORT OF THE ADVISORY COMMITTEE TO THE SURGEON GENERAL OF THE PUBLIC HEALTH SERVICE (1964).

that cigarettes really are quite dangerous. Consequently, the late 1980s showed a significant increase in tobacco claims filed.<sup>37</sup>

Even more interesting than the reasons why this second phase of American tobacco litigation began in the mid-to-late 1980s are the reasons for its fairly rapid demise in the early 1990s. First, the earlier expectations that courts would embrace strict liability for inherent, unavoidable product risks—what we have termed “category liability” in other contexts<sup>38</sup>—quickly dissipated in the same jurisdictions that spawned them,<sup>39</sup> and it became clear that tobacco companies would be liable in tort only if the plaintiffs could show a failure to warn consumers adequately of the hidden dangers presented by their products.<sup>40</sup> Then, in 1992, the United States Supreme Court held that the federal labeling statutes preempted all post-1969 failure-to-warn tort claims based on state law.<sup>41</sup> The Court held that the statutes did not preempt fraud and express warranty claims,<sup>42</sup> but fraud and express warranty were difficult to establish in the early 1990s.<sup>43</sup> Given these developments, it became fairly obvious that tobacco claims were very different from, and less attractive to plaintiffs’ lawyers than, other

36. See, e.g., Public Health Cigarette Smoking Act of 1969, Pub. L. No. 91-222, § 4, 84 Stat. 87, 88 (1970) (codified as amended at 15 U.S.C. § 1333(a) (2006)) (requiring a warning label to “be located in a conspicuous place on every cigarette package”).

37. Professor Rabin’s best estimate is that 175–200 cases were filed from 1983 to 1991. See Rabin, *supra* 3, at 867 n.88.

38. See James A. Henderson, Jr. & Aaron D. Twerski, *Closing the American Products Liability Frontier: The Rejection of Liability Without Defect*, 66 N.Y.U. L. REV. 1263, 1298–1300 (1991).

39. See *supra* note 31. Courts have also recently rejected category liability. See, e.g., Parish v. Jumping, Inc., 719 N.W.2d 540, 544–45 (Iowa 2006) (citing RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. d (1998)) (rejecting category liability for trampolines despite their inherent dangers that cause injuries); Adamo v. Brown & Williamson Tobacco Corp., 900 N.E.2d 966, 969 (N.Y. 2008) (“[P]laintiffs failed to show that light cigarettes are equivalent . . . to regular ones . . . . To hold, as plaintiffs ask, that every sale of regular cigarettes exposes the manufacturer to tort liability would amount to a judicial ban on the product.”).

40. It has long been the rule that a product seller has no duty to warn about open and obvious dangers. See, e.g., Jamieson v. Woodward & Lothrop, 247 F.2d 23, 29–30 (D.C. Cir. 1957) (holding that the manufacturer had no duty to warn that an elastic rubber exercise rope could rebound and cause injury to users). The rule continues to the present day. See, e.g., Abney v. Crosman Corp., 919 So. 2d 289, 295–96 (Ala. 2005) (holding that the manufacturer owed no duty to warn because the risks of injury or death from an air gun are open and obvious); Roland v. DaimlerChrysler Corp., 33 S.W.3d 468, 469–71 (Tex. App. 2000) (citing Caterpillar, Inc. v. Shears, 911 S.W.2d 379, 382 (Tex. 1995)) (holding that the manufacturer of a pickup truck had no duty to warn that there were dangers associated with riding in an open truck bed); see also RESTATEMENT (THIRD) OF TORTS: PROD. LIAB. § 2 cmt. j (1998) (“[A] product seller is not subject to liability for failing to warn or instruct regarding risks . . . that should be obvious to, . . . foreseeable product users.”).

41. Cipollone v. Liggett Grp., Inc., 505 U.S. 504, 524, 530–31 (1992).

42. *Id.* at 526–27, 529–31; see also Altria Grp., Inc. v. Good, 129 S. Ct. 538, 546, 551 (2008) (holding that the Federal Cigarette Labeling and Advertising Act does not preempt light cigarette claims because plaintiffs can pursue common law fraud claims to determine whether the statements are “inherently false” or merely create a misleading impression of greater safety).

43. See Rabin, *The Third Wave*, *supra* note 13, at 178.



mass tort claims.<sup>44</sup> Given the tobacco industry's "no settlement" posture,<sup>45</sup> all tobacco claims not withdrawn or dismissed went to trial. Companies' willingness to go to trial reflected strong defenses based on awareness of risk and absence of product defect; all trial verdicts were in defendants' favor.<sup>46</sup>

*B. The Third Phase (Mid-1990s to Present)*

Three significant developments related to tobacco litigation combined in the mid-1990s to spark a resurgence of activity by plaintiffs. The first, exogenous to the tort system, involved the discovery and publication of highly embarrassing and damaging documents obtained from tobacco company files during the course of congressional hearings in the mid-1990s, allegedly showing fraudulent suppression of facts regarding both the risks of tobacco use and the addictiveness of nicotine.<sup>47</sup> Because fraud claims are an exception to the Supreme Court's ruling that failure-to-warn claims are preempted by federal law,<sup>48</sup> revelation of the damaging industry secrets made claims of fraudulent marketing, with the implications of possible punitive damages, more plausible.<sup>49</sup> And it became easier for plaintiffs to argue that they did not have themselves to blame when, for the first time, they could allege that the addictiveness of smoking made it impossible for them to quit despite their desire to do so.<sup>50</sup>

The second development that helps to explain the upsurge in tobacco litigation in the mid-1990s—this one endogenous to the tort system—was procedural rather than substantive. Judges and trial lawyers cooperated in the 1980s and 1990s to recognize and develop a number of claims-aggregation

44. *See id.*

45. Rabin, *supra* note 3, at 857–58.

46. *Id.* at 874 (“[A]fter thirty-five years of litigation, the tobacco industry could still maintain the notable claim that it had not paid out a cent in tort awards.”).

47. Rabin, *The Third Wave*, *supra* note 13, at 183–85 (recounting the revelation of internal tobacco company documents to the press and to Congressman Henry Waxman’s committee at congressional hearings on tobacco, which triggered “a wave of revulsion against the industry in the public and political spheres”).

48. *Cipollone v. Liggett Grp., Inc.*, 505 U.S. 504, 524, 530–31 (1992).

49. Rabin, *The Third Wave*, *supra* note 13, at 185.

50. *See, e.g.,* *Burton v. R.J. Reynolds Tobacco Co.*, 884 F. Supp. 1515, 1525–26 (D. Kan. 1995) (rejecting the defendants’ summary judgment argument that the risks of smoking were common knowledge and noting that the defendants “purposefully manipulated their products to increase” addictiveness); *Rogers v. R.J. Reynolds Tobacco Co.*, 557 N.E.2d 1045, 1055 (Ind. Ct. App. 1990) (“[A] question of fact exists concerning the state of consumer expectations with reference to the strict liability claim that [the d]efendants failed to warn of the addictive qualities of their cigarettes . . . . A question of fact also remains concerning the allegations . . . that the products are defective because [the d]efendants failed to expeditiously explore design alternatives which would make their products less addictive and whether that defect, if proven, rendered the products more dangerous than an ordinary consumer would contemplate.”). *But see* *Chamberlain v. Am. Tobacco Co.*, 70 F. Supp. 2d 788, 799 (N.D. Ohio 1999) (finding that the addictive nature of cigarettes became a matter of common knowledge after the release of the 1988 Surgeon General’s Report).

procedural approaches—such as class actions, consolidations, and multi-district litigation—that were proving to be respectable and effective in other areas of mass tort.<sup>51</sup> Although some of these approaches arguably went so far as to involve attempts to recognize amorphous new substantive grounds for recovery that at least one critic argued was inherently unprincipled and unlawful,<sup>52</sup> by the early 1990s procedural claims-aggregation techniques had become fairly common and widely relied on.<sup>53</sup>

The third development that helps to explain why plaintiffs filed a greater number of tobacco claims in the mid-1990s than earlier is, like the second development, endogenous to the tort system, but substantive rather than procedural. Quite simply, resourceful plaintiffs' lawyers devised new legal grounds for recovery that extended beyond the traditional claims based on personal injury suffered by smokers. Plaintiffs continued to file personal injury claims, but their litigation agendas broadened considerably. As data became increasingly available regarding the effects of second-hand smoke on non-smoking bystanders, plaintiffs began to bring claims—often as class actions—to recover for the negative health effects of exposure to second-hand smoke.<sup>54</sup> Plaintiffs also brought actions to recover for pure economic losses allegedly caused by smoking.<sup>55</sup> Entities that claimed to have paid large sums to provide

51. See, e.g., *In re Silicone Gel Breast Implants Prods. Liab. Litig.*, 793 F. Supp. 1098, 1101 (J.P.M.L. 1992) (transferring consolidated actions against the manufacturer to the Northern District of Alabama); *In re Asbestos Prods. Liab. Litig.* (No. VI), 771 F. Supp. 415, 424 (J.P.M.L. 1991) (transferring over 26,000 asbestos cases under 28 U.S.C. § 1407 to Judge Charles R. Weiner in the Eastern District of Pennsylvania). For a discussion of a very early successful attempt to manage mass tort litigation, see Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 121–41 (1968). Mass tort litigation received even greater respectability when Judge Jack Weinstein certified a class of 2.4 million veterans claiming to suffer injuries from exposure to “Agent Orange” during the Vietnam conflict. PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* 45, 124–26 (1986).

52. James A. Henderson, Jr., *The Lawlessness of Aggregative Torts*, 34 HOFSTRA L. REV. 329, 337–41 (2005).

53. See, e.g., *Castano v. Am. Tobacco Co.*, 160 F.R.D. 544, 560–61 (E.D. La. 1995) (certifying a class of cigarette smokers who were diagnosed by a physician as “nicotine-dependant”), *rev’d*, 84 F.3d 734, 752 (5th Cir. 1996) (decertifying class certification because the district court had abused its discretion by deciding that class questions predominated over individual questions). Since the reversal of *Castano*, courts have unanimously refused class certification for individual smoker claims. See *infra* note 72. Nonetheless, in the pre-*Castano* period, there was good reason to believe that class certification might actually occur, which encouraged lawyers representing tobacco claimants to file claims. See Rabin, *The Third Wave*, *supra* note 13, at 180–83. Even after *Castano*, plaintiffs brought their class actions in state courts. See, e.g., *Chamberlain*, 70 F. Supp. 2d at 791 n.1.

54. See, e.g., *Broin v. Philip Morris Cos.*, 641 So. 2d 888, 889 (Fla. Dist. Ct. App. 1994) (certifying a class action brought by thirty non-smoking flight attendants seeking damages from inhaling second-hand smoke). In *Broin*, the litigants ultimately settled the case “four months into trial” for \$349 million. Brian H. Barr, Engle v. R.J. Reynolds: *The Improper Assessment of Punitive Damages for an Entire Class of Injured Smokers*, 28 FLA. ST. U. L. REV. 787, 805 (2001).

55. See, e.g., *Aspinall v. Philip Morris Cos.*, 813 N.E.2d 476, 485–86, 492 (Mass. 2004) (affirming certification of a class seeking economic damages for deceptive conduct in trade).

medical care and treatments for injured smokers, including commercial insurers and government health agencies, sought to recover from tobacco companies their out-of-pocket expenditures on behalf of injured smokers.<sup>56</sup> And perhaps most imaginatively of all, plaintiffs brought class actions under the authority of consumer protection statutes against a host of product sellers in a number of states to recover monetary expenditures for so-called light cigarettes that the tobacco industry allegedly fraudulently advertised as being safer than ordinary cigarettes.<sup>57</sup>

Combining these just-described circumstances—factual revelations of industry misconduct,<sup>58</sup> procedural claims-aggregation techniques,<sup>59</sup> and innovative substantive theories of recovery<sup>60</sup>—with the increasing specter of huge punitive damages awards becoming commonplace,<sup>61</sup> by the end of the 1990s and the early 2000s one might reasonably have predicted that tobacco litigation had, at last, turned in plaintiffs' favor with a vengeance. The following section explains why, ten years later, this Article can speak with confidence of tobacco litigation reaching an essentially pro-industry equilibrium.

### III. WHY THE NEXT TWENTY YEARS WILL WITNESS TOBACCO LITIGATION REACH EQUILIBRIUM

Consistent with the foregoing overview of the third phase of tobacco litigation, the claims currently pending against the tobacco industry may be grouped within five major categories: (1) claims by individuals for personal injuries allegedly caused by tobacco use;<sup>62</sup> (2) third-party payer claims by insurers and government agencies based on payments of benefits to those allegedly injured by tobacco use;<sup>63</sup> (3) class actions representing procedural aggregations of individual personal injury claims;<sup>64</sup> (4) class actions to recover economic losses incurred by consumers who purchased light cigarettes;<sup>65</sup> and (5) class actions to recover the costs of medical monitoring and smoking cessation programs.<sup>66</sup> We will first consider two of these categories that, on any fair assessment, are no longer viable and will play no significant role in future litigation. We will then consider three categories that have some life remaining,

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56. See *infra* notes 67–70 and accompanying text.

57. See cases cited *infra* note 160.

58. See *supra* note 47 and accompanying text.

59. See *supra* notes 51–53 and accompanying text.

60. See *supra* notes 55–57 and accompanying text.

61. See Clifford E. Douglas, Ronald M. Davis & John K. Beasley, *Epidemiology of the Third Wave of Tobacco Litigation in the United States, 1994–2005*, 15 TOBACCO CONTROL (Supp. 4) iv9, iv12 tbl.2 (2006).

62. See *infra* Part III.B.1.

63. See *infra* notes 67–76 and accompanying text.

64. See *infra* notes 79–82 and accompanying text.

65. See *infra* Part III.B.2.

66. See *infra* Part III.B.3.

but only in the shorter run or as part of an eventual equilibrium of predictable, non-industry-threatening plaintiffs' recoveries.

*A. Categories of Tobacco Litigation that Are No Longer Viable: Third-Party Payor Claims and Class Actions Based on Individual Personal Injuries*

Third-party payor claims brought by insurance companies and other non-governmental entities are a dead issue. A variety of state and federal courts have dismissed virtually every such claim on grounds of remoteness.<sup>67</sup> By contrast,

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67. See, e.g., *Perry v. Am. Tobacco Co.*, 324 F.3d 845, 849 (6th Cir. 2003) (affirming the dismissal of claims by individual subscribers of health insurance, who sought to represent a putative class of subscribers seeking reimbursement of higher premiums, based on other circuit court decisions that "such claims must fail because the alleged injuries are too remote"); *Serv. Emps. Int'l Union Health & Welfare Fund v. Philip Morris, Inc.*, 249 F.3d 1068, 1070–71, 1076 (D.C. Cir. 2001) (finding that the injuries alleged by the Republic of Guatemala for health care costs it incurred when treating its citizens' smoking-related illnesses were "too remote, contingent, derivative, and indirect to survive" (quoting *In re Tobacco/Governmental Health Care Costs Litig.*, 83 F. Supp. 2d 125, 130 (D.D.C. 1999)) (internal quotation marks omitted)); *Lyons v. Philip Morris, Inc.*, 225 F.3d 909, 911, 914–15 (8th Cir. 2000) (affirming dismissal of antitrust and RICO claims brought by trustees of multi-employer health plans as too indirect); *United Food & Commercial Workers Union, Emp'rs Health & Welfare Fund v. Philip Morris, Inc.*, 223 F.3d 1271, 1272–75 (11th Cir. 2000) ("[A] health-care provider has no direct cause of action in tort against one who injures the provider's beneficiary, imposing increased costs upon the provider."); *Tex. Carpenters Health Benefit Fund v. Philip Morris, Inc.*, 199 F.3d 788, 789–90 (5th Cir. 2000) (dismissing, on grounds of remoteness, an action brought by union trust funds seeking to recover costs incurred by treating tobacco-related illnesses); *Local 734 Health & Welfare Trust Fund v. Philip Morris, Inc.*, 196 F.3d 818, 825 (7th Cir. 1999) ("The injury for which the plaintiffs seek compensation is remote indeed, the chain of causation long, [and] the risk of double recovery palpable because smokers can file their own . . . suits . . ."); *Or. Laborers-Emp'rs Health & Welfare Trust Fund v. Philip Morris, Inc.*, 185 F.3d 957, 964 (9th Cir. 1999) (affirming the dismissal of a benefit plans' claim for tobacco-related medical expenses as too remote); *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.*, 191 F.3d 229, 244 (2d Cir. 1999) ("[T]he economic injuries alleged in [the] plaintiffs' complaint are purely derivative of the physical injuries suffered by plan participants and therefore too remote as a matter of law for them to have standing to sue defendants."); *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.*, 171 F.3d 912, 921 (3d Cir. 1999) ("[T]he key problem with [the] plaintiffs' complaint is the remoteness of their alleged injury from the defendants' alleged wrongdoing. Remoteness is an aspect of the proximate cause analysis, in that an injury that is too remote from its casual agent fails to satisfy tort law's proximate cause requirement . . .").

Only three health-care cost recoupment suits have survived pre-trial motions. See *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris, Inc.*, 178 F. Supp. 2d 198 (E.D.N.Y. 2001), *rev'd sub nom.* *Empire Healthchoice, Inc. v. Philip Morris USA, Inc.*, 393 F.3d 312 (2d Cir. 2004); *City of St. Louis v. Am. Tobacco Co.*, 70 F. Supp. 2d 1008 (E.D. Mo. 1999); *Iron Workers Local Union No. 17 Ins. Fund v. Philip Morris, Inc.*, 35 F. Supp. 2d 582 (N.D. Ohio 1999).

Courts have also ruled that damages are too speculative. See, e.g., *Laborers Local 17 Health & Benefit Fund*, 191 F.3d at 239–40 ("[T]he damage claims [in recoupment actions] are incredibly speculative. It will be virtually impossible for plaintiffs to prove with any certainty: (1) the effect any smoking cessation programs or incentives would have had on the number of smokers among the plan beneficiaries; (2) the countereffect that the tobacco companies' direct fraud would have had on

third-party payor claims brought by various states to recoup healthcare benefits provided to citizens injured by tobacco use have fared better. Indeed, the tobacco industry settled all of these state claims in 1998 for more than two hundred billion dollars in a Master Settlement Agreement (MSA).<sup>68</sup> The terms of the MSA are complex and include modifications of industry behavior over time;<sup>69</sup> the important point here is that the MSA presumably shuts off any serious litigation of this sort by the states in the future.<sup>70</sup> The Department of Justice brought a somewhat analogous action in federal district court against the tobacco industry under the Racketeer Influenced and Corrupt Organizations (RICO) statute,<sup>71</sup> seeking a variety of injunctive remedies as well as disgorgement of past profits derived from the fraudulent marketing of tobacco products.<sup>72</sup> In an interlocutory appeal, the D.C. Circuit held that plaintiffs may

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the smokers, despite the best efforts of the Funds; and (3) other reasons why individual smokers would continue smoking, even after having been informed of the dangers of smoking and having been offered smoking cessation programs.”).

Additionally, courts have noted that allowing plaintiffs to recover in these types of cases would be inequitable. *See, e.g., Local 734 Health & Welfare Trust Fund*, 196 F.3d at 823–24 (“Everyone dies eventually, usually after illness. An insurer must cover these costs even if the cause is natural. To determine damages, therefore, it is essential to compare the costs the insurers actually incurred against the costs they would have incurred had cigarettes been safer. Is death from lung cancer at age 60 more costly to an insurer than the same person’s death from a different kind of cancer later in life? The longer an insured lives in good health, the more reserves an insurer accumulates to cover eventual illness; it is necessary to consider both the income and the expenditure sides of the insurer’s balance sheet. The income side of the balance sheet includes higher premiums paid by smokers (or employers on smokers’ behalf). Having collected extra money from the smokers . . . to cover the eventual illness, an insurer can’t turn around and collect from the tobacco manufacturer for the same outlay.”).

68. *See Master Settlement Agreement*, NAT’L ASS’N OF ATTORNEYS GEN., <http://www.naag.org/backpages/naag/tobacco/msa/msa-pdf/> [hereinafter MSA]. The cigarette industry settled with Mississippi, Florida, Texas, and Minnesota for a total of \$36.8 billion in 1997. W. Kip Viscusi & Joni Hersch, *Tobacco Regulation Through Litigation: The Master Settlement Agreement* 8 (Nat’l Bureau of Econ. Research, Working Paper No. 15422, 2009), available at [http://www.nber.org/papers/w15422.pdf?new\\_window=1](http://www.nber.org/papers/w15422.pdf?new_window=1). The remaining 46 states settled with the cigarette industry with the Master Settlement Agreement for a total of \$206 billion in 1998. *Id.* at 8–9.

The Master Settlement Agreement (MSA) represents a rare and notable exception to the industry’s “no settlement” stance. *See supra* note 26 and accompanying text. This instance, and the industry’s settlement of a class action involving second-hand smoke claims, *see supra* sources cited note 54, represent the only instances where the tobacco industry was willing to settle rather than go to trial. Had the states taken their claim for medical reimbursement to trial, the case would have been the subject of considerable legal debate. Although the reasons for the settlement by the tobacco industry are beyond the scope of this paper, some scholars view the MSA essentially as a privately-agreed-upon excise tax between the states and the tobacco companies. *See Viscusi & Hersch, supra*, at 68.

69. *See MSA, supra* note 68, at 18–36.

70. *See id.* at 110–20.

71. 18 U.S.C. §§ 1961–1968 (2006).

72. *United States v. Philip Morris USA, Inc.*, 321 F. Supp. 2d 72, 73–74 (D.D.C. 2004) (citing 18 U.S.C. §§ 1961–1968 (2006)), *rev’d*, 396 F.3d 1190 (D.C. Cir. 2005).

not recover money damages based on disgorgement of profits under RICO.<sup>73</sup> On remand, the federal district court granted a variety of equitable and injunctive remedies,<sup>74</sup> accompanied by an opinion excoriating the tobacco industry for its past behavior.<sup>75</sup> On June 28, 2010, the United States Supreme Court denied the certiorari petition of both parties,<sup>76</sup> thus putting to rest the issue of whether the federal government will recover money damages from the tobacco industry in the future.

Regarding class actions based on individual tobacco-related personal injuries over the past decade, American courts have rejected class actions in tort generally.<sup>77</sup> In most cases, the inherent individuality of personal injury tort claims—the elements of defendant’s breach, damages, and specific causation, including reliance in fraud actions—are not sufficiently common to members of the proposed class to support class certification under Rule 23 of the Federal Rules of Civil Procedure.<sup>78</sup> Even if some state courts might be willing to apply their own class action rules more favorably to plaintiffs, a relatively recent federal statute—the Class Action Fairness Act (CAFA)<sup>79</sup>—allows defendants to

73. *United States v. Philip Morris USA, Inc.*, 396 F.3d 1190, 1192 (D.C. Cir. 2005).

74. *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 919–45 (D.D.C. 2006), *aff’d in part and vacated in part*, 566 F.3d 1095, 1150 (D.C. Cir. 2009).

75. *Id.* at 852–86.

76. *Philip Morris USA, Inc. v. United States*, 130 S. Ct. 3501 (2010); *United States v. Philip Morris USA, Inc.*, 130 S. Ct. 3501 (2010).

77. The leading case rejecting class certification of cigarette litigation is *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996). Many federal and state courts followed suit. *See, e.g.*, *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 143 (3d Cir. 1998) (citing *Barnes v. Am. Tobacco Co.*, 176 F.R.D. 479, 500 (E.D. Pa. 1997)) (holding that the issues specific to individuals—nicotine addiction, causation, the need for medical monitoring, contributory and comparative negligence, and the statute of limitations—precluded class certification); *Estate of Mahoney v. R.J. Reynolds Tobacco Co.*, 204 F.R.D. 150, 154–55 (S.D. Iowa 2001) (“[T]he differences among the plaintiffs and the proposed class members are not merely factual differences regarding the circumstances of how their claims initiated[;] they impact the very legal theories on which the class can proceed.” (quoting *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at \*5 (N.D. Ill. Mar. 20, 2001) (internal quotation marks omitted))); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 264–65 (D. Nev. 2001) (denying motion for class certification because the plaintiffs failed to satisfy the commonality, typicality, and adequacy of representation requirements); *Philip Morris, Inc. v. Angeletti*, 752 A.2d 200, 205 (Md. 2000) (vacating class certification order); *Small v. Lorillard Tobacco Co.*, 679 N.Y.S.2d 593, 598–601 (N.Y. App. Div. 1998) (holding class certification was not appropriate because individual issues predominated, and because the typicality and adequacy of representation requirements were not met), *aff’d*, 720 N.E.2d 892, 894 (N.Y. 1999); *see also Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1258, 1267–71 (Fla. 2006) (per curiam) (“We conclude that continued class action treatment for Phase III of the trial plan is not feasible because individualized issues such as legal causation, comparative fault, and damages predominate.”). For a discussion of the impact of *Engle* on class members whose claims were before the trial court in Phase I of the litigation, see *infra* text accompanying notes 131–51.

78. *See* cases cited *supra* note 77.

79. Class Action Fairness Act of 2005, Pub. L. No. 109–2, 119 Stat. 4 (2005) (codified as amended in scattered sections of 28 U.S.C.).

remove large class actions from state court to federal court,<sup>80</sup> where, under Rule 23, federal judges will presumably refuse to certify.<sup>81</sup> The tobacco industry's recent success rate in getting class actions decertified based on individual personal injuries<sup>82</sup> supports our prediction that these class actions will play no significant role in future tobacco litigation.

*B. Categories of Tobacco Claims that Retain Some Vitality: Individual (Non-Class) Personal Injury Claims, Light Cigarettes Claims, and Claims for Medical Monitoring and Smoking Cessation Programs*

*1. Individual (Non-Class) Personal Injury Claims*

Regarding individual personal injury claims, were it not for a significant cluster of cases (numbering in the thousands) remaining to be tried in Florida courts in the aftermath of an aborted class action,<sup>83</sup> and a smaller cluster of cases consolidated in West Virginia,<sup>84</sup> we would unhesitatingly predict that individual claims will not play an important role in future tobacco litigation. We will return to consider the Florida cases in a moment.<sup>85</sup> Putting them to one side, defendants have won close to half of tobacco claims that were tried to verdict

80. The Class Action Fairness Act (CAFA) vests the federal courts with original jurisdiction over any civil action with over 100 claimants when the amount in controversy exceeds \$5 million and the action is between citizens of different states. 28 U.S.C. § 1332(d) (2006). CAFA abolishes the complete diversity rule for class actions and eliminates the need to determine whether the individuals have met the jurisdictional amount of \$75,000. *Id.* Thus, when such actions are commenced in state courts, any one of the defendants can remove the action to federal court based on CAFA. 28 U.S.C. § 1453 (2006). For a full airing of the issues raised by CAFA, see Edward F. Sherman, *Class Actions After the Class Action Fairness Act of 2005*, 80 TUL. L. REV. 1593 (2006); Georgene M. Vairo, *Foreward: Developments in the Law: The Class Action Fairness Act of 2005*, 39 LOY. L.A. L. REV. 979 (2006).

81. See cases cited *infra* note 159.

82. See cases cited *supra* note 77.

83. See *infra* notes 130–60 and accompanying text.

84. See Altria Grp., Inc., Annual Report (Form 10-K) 18–19 (Feb. 24, 2010) (revealing that there are 711 civil actions in West Virginia that are proposed to be tried in a single proceeding). In its opinion *In re Tobacco Litigation*, 624 S.E.2d 738 (W. Va. 2005), the Supreme Court of Appeals of West Virginia upheld a trial plan that would allow a Phase I trial on liability and a Phase II trial on punitive damages in which the trial court would apply a multiplier for punitive damages. *Id.* at 743–44. The authors are highly skeptical that punitive damages can be set before individual compensatory damages are assessed. Our reading of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), would not allow a finding of punitive damages without a prior finding of compensatory damages for a plaintiff. Our opinion is bolstered by the subsequent decision of the United States Supreme Court in *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), where the Court emphasized that while the reasonableness of punitive damages can be considered in the context of the potential harm the defendant could have caused, the potential harm must be “harm potentially caused the plaintiff.” *Id.* at 1063. For a more in-depth discussion of these Supreme Court cases, see *infra* notes 123–37 and accompanying text.

85. See *infra* text accompanying notes 130–60.

between 1994 and 2005.<sup>86</sup> Undoubtedly reflecting these trends in outcome, filings of individual claims over the same period have trended steadily downward.<sup>87</sup> Why has the pursuit of individual personal injury claims against tobacco companies become relatively unattractive to plaintiffs and their lawyers in recent years? Part of the answer regarding filings surely resides in the “no settlement” posture that the industry continues to adopt in such cases.<sup>88</sup> A tobacco plaintiff considering whether to file suit understands that, before she will recover, she will have to face a plethora of factual and legal issues that may legitimately negate her cause of action. She will have to face such issues as whether she saw or heard representations of the tobacco companies, whether she learned of the risks attendant to smoking from her physician or others, whether she made any attempt to stop smoking, and whether the injury she suffered stemmed from tobacco use or came about from sources other than tobacco. The individual facts predominate and provide good reason for the tobacco companies to litigate the claims individually rather than in class actions. Furthermore, lay juries cannot be counted on to return verdicts for plaintiffs. Many of the tobacco company victories result from jury skepticism about rewarding plaintiffs who knew of the dangers of smoking.<sup>89</sup> Many of these issues provide fertile ground for appeal in the event of a plaintiff victory at the trial level. Going to court is no guarantee for success and certainly not for an expedited victory.

The apparent success of this tactic does not rest on an inherent scarcity of resources available to lawyers who prosecute major tort claims on behalf of

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86. In cases brought against Philip Morris, by far the largest makers of cigarettes, plaintiffs won 31 of the 75 cases (41%) that were tried to verdict in this time period. See Douglas et al., *supra* note 61, at iv11.

87. In 1997, there were 375 individual smoking cases pending against Philip Morris. *Id.* at iv11 tbl.1. In 2005, if one excludes the 2,640 cases brought by flight attendants for compensatory damages arising from inhaling second-hand smoke, only 223 individual cases were pending against Philip Morris. *Id.* As of February 2010, if one excludes the previously mentioned flight attendant cases, the Florida cases following the decertification of the *Engle* case, and 8 individual cases brought against retailers that are indemnitees of Philip Morris, Altria reports 88 individual cases pending against it in its most recent Form 10-K. See Altria Grp., Inc., Annual Report, *supra* note 84, at 18–19.

88. See Rabin, *supra* note 3, at 857–58. For a view that maintaining a non-settlement posture by defendants in mass tort pharmaceutical claims raises moral and ethical issues, see Frank M. McClellan, *The Vioxx Litigation: A Critical Look at Trial Tactics, the Tort System, and the Roles of Lawyers in Mass Tort Litigation*, 57 DEPAUL L. REV. 509, 530–34 (2008). McClellan advocates several substantial changes to the rules and procedures for the litigation of mass torts. *Id.* at 534–37 (suggesting policymakers change the rules applicable to class action litigation, aggressively impose a duty of good faith and fair dealing on the litigants, or enact a statute awarding treble damages to a plaintiff when the defendant “fails to make a good-faith effort to settle a tort case in a timely manner”). We disagree with his thesis. Mass torts should not negate fundamental principles of tort litigation. See Henderson, *supra* note 52, at 329–30.

89. See Marc Z. Edell, *Cigarette Litigation: The Second Wave*, 22 TORT & INS. L.J. 90, 97–98 (1986) (stating that knowledge of the health risks of smoking has existed since the 1920s).



injured plaintiffs.<sup>90</sup> Rather, it rests on the common-sense notion that, given the relatively low probability of eventual success on the merits, it is simply not worth the unavoidably high costs, in most instances, of seeking recovery against tobacco companies.<sup>91</sup> One source of countervailing encouragement in this regard is the possibility of punitive damages, a subject discussed below.<sup>92</sup>

What explains the relatively pro-defendant responses from judges and juries in recent years in cases that reach trial? An important factor must be that the typical plaintiff began and continued using tobacco after it was widely understood that such use is extremely hazardous;<sup>93</sup> tobacco defendants argue that plaintiffs are responsible for assuming the risk of injuries.<sup>94</sup> Moreover, the negative effects of the publicity regarding tobacco company misbehaviors, which shocked the public when revealed in the mid-1990s, appear to be fading with the passage of time. Tobacco products lawfully remain on the market, and their continued use, notwithstanding the highly restrictive behavioral regulations making it increasingly difficult for tobacco users to continue their habits,<sup>95</sup> is increasingly seen to be a matter of personal choice and individual responsibility.<sup>96</sup> Moreover, many tobacco plaintiffs have difficulty causally connecting their injuries with tobacco use,<sup>97</sup> and the ailments from which they suffer are not uniquely associated with exposure to tobacco.<sup>98</sup>

90. 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, 472 (1998) (discussing how sixty plaintiffs' law firms funded the costs of litigating *Castano* by each providing \$100,000 per year).

91. See Rabin *supra* note 3, at 859–60 (discussing methods designed to drive up the cost of litigation that defense attorneys used during the second wave).

92. See *infra* notes 113–32 and accompanying text.

93. See Cupp, *supra* note 90, at 493–94 (“[T]he typical smoker has . . . received a plethora of warnings . . .”).

94. In almost every case tried to verdict in the post-*Engle* litigation in Florida, juries assessed a significant percentage of fault to plaintiffs, thus reducing their awards for compensatory damages. See *infra* Appendix A. As time marches on, recovery will be considerably more difficult for plaintiffs since juries are likely to be cynical about claims that plaintiffs were misled into smoking. This is likely to be especially true for claims brought by plaintiffs who began smoking after the Surgeon General's Report in 1964 and after the appearance of warnings on cigarette packages.

95. See generally Peter D. Jacobson & Lisa M. Zapawa, *Clean Indoor Air Restrictions: Progress and Promise*, in REGULATING TOBACCO, *supra* note 13, at 207, 215–26 (discussing federal and state clean indoor air laws banning smoking in specified locations).

96. Editorial, *Smoking as Personal Choice*, WASH. POST, July 29, 1994, at A24; *Calls for Personal Responsibility in Healthcare Reform Debate*, JOIN TOGETHER (Aug. 11, 2009), <http://www.jointogether.org/news/headlines/inthenews/2009/calls-for-personal.html>; Editorial, *Smoking Ban: Strong Arguments on all Sides*, THE VOLANTE (Jan. 28, 2009), <http://www.volanteonline.com/opinion/editorial-smoking-ban-strong-arguments-on-all-sides-1.1315083>.

97. See Donald G. Gifford, *Public Nuisance as a Mass Products Liability Tort*, 71 U. CIN. L. REV. 743, 757 (2003).

98. See Rabin, *Tobacco Control Strategies: Past Efficacy and Future Promise*, *supra* note 13, at 1743–44 (discussing that although there is a general concession by the tobacco companies of causation, there is still much room to argue that the specific plaintiff's injury was not attributed to use of their products). Professor Rabin notes that “[t]he etiology of tobacco-related disease

In trying to understand why individual personal injury claims do not appear to hold out much promise to plaintiffs, it is helpful to compare tobacco litigation with other mass tort litigation, such as litigation based on exposure to asbestos. In contrast to tobacco, government regulatory agencies have banned many uses of asbestos due to its dangerous nature.<sup>99</sup> Asbestos users have spent, and are spending, huge sums on its containment and removal.<sup>100</sup> Moreover, asbestos plaintiffs, in contrast to tobacco plaintiffs, present themselves as innocent victims who had little or no choice regarding exposure to unseen carcinogens.<sup>101</sup> And specific causation is easier for asbestos plaintiffs to prove; exposure to asbestos causes signature diseases such as mesothelioma and asbestosis.<sup>102</sup>

Taken together, the foregoing substantive characteristics comprise what might be termed the asbestos litigation model of mass tort, which is significantly different from the tobacco litigation model. But the most significant feature of the asbestos model is procedural, not substantive;<sup>103</sup> unlike the tobacco companies, the defendants in asbestos litigation are willing to settle with

frequently requires the testimony of a pathologist, a pharmacologist, an oncologist, an epidemiologist, an addiction specialist, and public health experts.” *Id.* at 1744.

99. See Occupational Safety and Health Act of 1970, Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. §§ 651-678 (2006)). In 1989, the Environmental Protection Agency (EPA) sought “to prohibit . . . the future manufacture, importation, processing, and distribution in commerce of asbestos in almost all products.” Asbestos; Manufacture, Importation, Processing, and Distribution in Commerce Prohibitions, 54 Fed. Reg. 29,460 (July 12, 1989) (to be codified at 40 C.F.R. pt. 763). However, the Fifth Circuit Court of Appeals set aside the EPA ban. *Corrosion Proof Fittings v. Env’tl. Prot. Agency*, 947 F.2d 1201, 1229-30 (5th Cir. 1991). On May 18, 1999, the EPA issued a document entitled, “EPA Asbestos Materials Bans: Clarification,” which indicated the kinds of products in which asbestos is banned by regulating agencies. ENVTL PROT. AGENCY, EPA ASBESTOS MATERIALS BANS: CLARIFICATION (1999). It also acknowledged that the “EPA does NOT track the manufacture, processing, or distribution in commerce of asbestos-containing products. It would be prudent for a consumer or other buyer to inquire as to the presence of asbestos in particular products.” *Id.*

100. Estimates are that in the decade preceding 1999, between \$3 billion and \$4 billion were spent on asbestos removal each year. Dennis Cauchon, *When Removing Asbestos Makes No Sense*, USA TODAY, Feb. 11, 1999, at 1A. One consultant estimated that expenditures on asbestos removal would equal \$100 billion. *Id.* The allocation of such vast sums on asbestos abatement has been sharply criticized as wasteful. *Id.* The chief epidemiologist for the American Cancer Society, Michael Thune, has proclaimed that “[t]he risk of getting cancer from asbestos in buildings is so small that eliminating it wouldn’t create a measurable blip in the (171,000) lung cancer deaths that occur every year.” *Id.* (internal quotation marks omitted).

101. See, e.g., *John Crane, Inc. v. Wommack*, 489 S.E.2d 527, 529 (Ga. Ct. App. 1997) (affirming verdict for the plaintiff, who argued at trial that the defendant was negligent in failing to warn of the hazards of asbestos); *Hammond v. N. Am. Asbestos Corp.*, 454 N.E.2d 210, 218-19 (Ill. 1983) (affirming jury award of compensatory damages to wife of asbestos worker in loss of consortium claim).

102. STEPHEN J. CARROLL ET AL., ASBESTOS LITIGATION 12-14 (2005).

103. See generally Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. LEGAL STUD. 365, 372-76 (2006) (discussing new procedural aspects in asbestos litigation).

claimants, typically employing a bureaucratic, en masse approach.<sup>104</sup> Thus, a plaintiffs' lawyer in the asbestos context typically retains a number of clients who can plausibly link their injuries with prior exposures,<sup>105</sup> files tort actions on their behalf, and counts on compensation eventually coming out of a settlement fund, without the costs of court trials.<sup>106</sup> Many other mass tort areas have replicated this basic model, including Dalkon Shields,<sup>107</sup> Vioxx,<sup>108</sup> Shiley heart valves,<sup>109</sup> and breast implants.<sup>110</sup> The important point in the context of a discussion of tobacco litigation is that the asbestos litigation model is not relevant to the bringing and processing of tobacco claims.<sup>111</sup> The asbestos model treats tort claims on a wholesale basis as commodities to be bought and sold in bulk in specially contrived markets designed to lower transaction costs.<sup>112</sup> By contrast, the tobacco model approaches tort claims on a strictly retail basis by

104. See CARROLL ET AL., *supra* note 102, at 129 ("In asbestos litigation, individualized process is a myth. Most cases are settled, many according to standardized agreements negotiated by defendants and plaintiff attorneys[,] to apply to what attorneys conventionally refer to as their 'inventories' of cases. Under such agreements, all cases against some defendants may be settled for a flat fee, while cases against other defendants will be sorted into a 'matrix' of claims, according to a few distinguishing characteristics, and paid the values associated with the different matrix cells. Bankruptcy personal injury trusts, which absent congressional action will pay an increasing share of asbestos compensation in the future, institutionalize this administrative compensation process for asbestos claims."); Alan Calnan & Byron G. Stier, *Perspectives on Asbestos Litigation: Overview and Preview*, 37 SW. U. L. REV. 459, 464–65 (2008); Helen E. Freedman, *Selected Ethical Issues in Asbestos Litigation*, 37 SW. U. L. REV. 511, 517 (2008) (citing Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 MISS. L. J. 1, 14–20 (2001)).

105. See CARROLL ET AL., *supra* note 102, at 23–24 ("By 1985, ten firms represented one-quarter of the annual filings against major defendants. By 1992—about [twenty] years after the landmark *Borel* decision—just ten firms represented half of the annual filings against major defendants. Three years later, ten firms . . . represented three-quarters of the annual filings against asbestos defendants, even though the filings themselves had increased by a third.").

106. See *supra* note 104.

107. See *In re A.H. Robins Co.*, 42 F.3d 870, 871 (4th Cir. 1994) (per curiam) (affirming the July 1, 1991 administrative order, entered by the district and bankruptcy courts, which set forth the structure of payment for the claims); *In re A.H. Robins Co.*, 880 F.2d 709, 710–20 (4th Cir. 1989) (affirming the District Court's approval of \$2.475 billion settlement for all unliquidated claims), *abrogated by Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997).

108. *Vioxx Settlement Agreement* 1–2, <http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf> (resolving Vioxx claims "involving heart attacks, ischemic strokes, and sudden cardiac deaths" for \$4.85 billion through a "pre-funded and structured private settlement program"). The parties signed the settlement agreement on November 9, 2007. *Id.* at 1.

109. See *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141, 148, 170 (S.D. Ohio 1992) (approving settlement agreement that "offer[ed] benefits to class members and their spouses from funds totaling \$165 to \$215 million").

110. *Lindsey v. Dow Corning Corp. (In re Silicone Gel Breast Implant Prods. Liab. Litig.)*, No. CV 92-P-10000-S, 1994 WL 578353, at \*1 (N.D. Ala. Sept. 1, 1994) (enforcing \$4,225,070,000 settlement agreement for injuries arising from silicone breast implants).

111. See Rabin, *The Third Wave*, *supra* note 13, at 203 (indicating that, unlike asbestos litigation, the tobacco industry avoided settling at virtually any cost from the outset).

112. See generally CARROLL ET AL., *supra* note 102, at 32–33 (showing the "wholesale" nature of asbestos claims by discussing the regularity of claim consolidation).

treating each claim as an action to be litigated on its individual merits. Given the significant differences between these two models of litigation, it is not difficult to understand why plaintiffs' lawyers would prefer to devote their limited time and resources to pursuing individual tort claims relating to nontobacco products under the asbestos model, rather than bringing actions against the tobacco industry.

It remains to consider two countervailing factors which, in combination, may cause individual plaintiffs' tobacco claims to retain sufficient attractiveness to give them life over the near to intermediate term: first, the possibility that individual tobacco plaintiffs, when successful, will obtain awards of punitive damages sufficiently great to compensate for the low probability of winning a judgment in the first place; and second, the possibility that the individual claims being litigated in Florida, which may present a large but limited group of plaintiffs with a brighter prospect over the short term, can be replicated over the long term in other jurisdictions. Regarding punitive damages, it is common knowledge that the United States Supreme Court has undertaken to review the reasonableness of state court punitive damages awards by employing a federal due process analysis.<sup>113</sup> Although the majority opinion in the leading case, *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>114</sup> hints that a single-digit ratio between punitive damages and compensatory damages may constitute an outside limit on punitives,<sup>115</sup> the Supreme Court has yet to hold that the single-digit ratio applies to a punitive damages award where the plaintiff has suffered a personal injury. The leading tobacco decision regarding punitive damages, *Phillip Morris USA v. Williams*,<sup>116</sup> involved a roughly one hundred-to-one ratio between punitives and compensatories;<sup>117</sup> lawyers widely anticipated that the case would provide a platform for the Supreme Court to clarify the rules governing federal limits on the size of punitive damage awards in personal injury cases.<sup>118</sup> Instead, the Court reversed the state court award for the plaintiff on the ground that the trial court impermissibly allowed the jury to punish the defendant tobacco company for injuries that the company had inflicted in other states on

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113. See, e.g., *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 435 (2001) (citing and quoting *United States v. Bajakajian*, 524 U.S. 321, 336 n.10 (1998)) (requiring appellate courts to apply a de novo standard when reviewing a lower court's determination of the constitutionality of a punitive damages award); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 565–67, 574–75 (1996) (refusing to sustain a \$2 million punitive damages award when the jury awarded the plaintiff only \$4,000 in compensatory damages).

114. 538 U.S. 408 (2003).

115. *Id.* at 424–425.

116. 549 U.S. 346 (2007).

117. *Id.* at 351.

118. See Linda Greenhouse, *Justices Weigh Limits on Punitive Damages*, N.Y. TIMES, Nov. 1, 2006, at A17. In *Williams*, the Supreme Court originally granted certiorari to consider whether the Oregon Supreme Court “disregarded ‘the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm.’” *Williams*, 549 U.S. at 352 (citing *Petition for a Writ of Certiorari at I, Williams*, 549 U.S. 346 (No. 05-1256), 2006 WL 849860). However, the Court did not reach the issue of the applicability of the single-digit ratio to personal injury claims. *Id.*

other victims.<sup>119</sup> On remand, the state high court affirmed the judgment for the plaintiff on independent state law grounds,<sup>120</sup> and the Supreme Court refused to grant further review.<sup>121</sup>

Whether the Supreme Court will allow trial courts to impose substantial, high-ratio punitive awards in favor of tobacco plaintiffs suffering personal injury is not clear. On the one hand, the four dissenting Justices in *Williams* voted to uphold a punitive award based on nearly a one hundred-to-one ratio.<sup>122</sup> It would take only one more vote to establish the principle that, at least in personal injury cases involving allegedly egregious conduct, the ratio-based approach considered in *State Farm* does not apply.<sup>123</sup> On the other hand, the *Williams* restrictions on the conduct for which plaintiffs may ask juries to punish defendants may dampen plaintiffs' future attempts to inflame the passions of juries by arguing that tobacco companies deserve to pay hugely for all the harm that can be attributed to use of tobacco.<sup>124</sup> Moreover, the Supreme Court has yet to address an issue that has for decades been recognized as troublesome: the unfairness of punishing a defendant multiple times in a succession of tort actions

119. *Id.* at 353–55.

120. *Williams v. Philip Morris, Inc.*, 176 P.3d 1255, 1263 (Or. 2008).

121. The Supreme Court initially granted certiorari on a limited basis to review the Oregon Supreme Court decision. *Philip Morris USA Inc. v. Williams*, 128 S. Ct. 2904 (2008). However, the Court later dismissed the grant of certiorari as improvidently granted. *Philip Morris USA Inc. v. Williams*, 129 S. Ct. 1436 (2009).

122. *Williams*, 549 U.S. at 358, 361–362 (Stevens, Scalia, Thomas, Ginsburg, JJ., dissenting).

123. *See id.* Some of the justices who voted with the majority in *Williams* might well take the position that the *State Farm* single-digit ratios should not apply to personal injury cases. *See id.* at 353 (listing the ratio as only one factor to consider in determining punitive damages excessiveness). The addition of Justices Sotomayor and Kagan to the Court may provide additional votes against the use of the single-digit ratios in personal injury claims. Greg Stohr, *Sotomayor on High Court May Mean Looser Limits on Damage Awards*, BLOOMBERG (June 5, 2009), [http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ay2\\_LzqaXiQY](http://www.bloomberg.com/apps/news?pid=newsarchive&sid=ay2_LzqaXiQY).

124. *But see Williams*, 549 U.S. at 357. Justice Stevens's dissent argued that there is little likelihood that juries will be less affected by an instruction that they may not punish non-parties. Justice Stevens stated:

While apparently recognizing the novelty of its holding, the majority relies on a distinction between taking third-party harm into account in order to assess the reprehensibility of the defendant's conduct—which is permitted—and doing so in order to punish the defendant “directly”—which is forbidden. This nuance eludes me. When a jury increases a punitive damages award because injuries to third parties enhanced the reprehensibility of the defendant's conduct, the jury is by definition punishing the defendant—directly—for third-party harm. A murderer who kills his victim by throwing a bomb that injures dozens of bystanders should be punished more severely than one who harms no one other than his intended victim. Similarly, there is no reason why the measure of the appropriate punishment for engaging in a campaign of deceit in distributing a poisonous and addictive substance to thousands of cigarette smokers statewide should not include consideration of the harm to those “bystanders” as well as the harm to the individual plaintiff. The Court endorses a contrary conclusion without providing us with any reasoned justification.

*Id.* at 360 (Stevens, J., dissenting) (footnote omitted) (citations omitted).

by different plaintiffs for the same egregious conduct.<sup>125</sup> Assuming that when the Court finally addresses this issue of successive, redundant punishment, it will attempt to place constitutional restrictions on multiple punishments, such restrictions will further limit the power of state courts to allow huge punitive damages awards.<sup>126</sup> On balance, we believe that all of these considerations reduce significantly the extent to which the expectations of recovering massive punitive damages awards will cause plaintiffs to pursue individual personal injury tobacco claims in the future. After all, those same expectations of recovery were in place in the recent time period when filings of tobacco claims steadily declined;<sup>127</sup> the Supreme Court's continuing concerns over punitive damages awards will serve only to reduce, not to increase, those expectations.

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125. See, e.g., *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838–41 (2d Cir. 1967) (expressing concern about the problem of “claims for punitive damages on the part of hundreds of plaintiffs”); Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 587 (2003) (“This practice of punishing the defendant . . . has led countless judges and commentators to worry about the potential for excessive multiple punishment: the possibility that several victims will obtain punitive damages awards that were each designed to punish the entire wrongful scheme, resulting in unjustly high cumulative punishment.”); Jim Gash, *Solving the Multiple Punishments Problem: A Call for a National Punitive Damages Registry*, 99 NW. U. L. REV. 1613, 1618–44 (2005) (giving an exhaustive review of both scholarly and judicial discussion of the multiple punitive issue); David G. Owen, *A Punitive Damages Overview: Functions, Problems and Reform*, 39 VILL. L. REV. 363, 406 (1994) (“Surely the most momentous question as yet unresolved by the Court is whether the Constitution imposes any restraints on the repetitive imposition of punitive damages in mass disaster litigation, such as the litigation that has confronted the asbestos industry for many years.”). The United States Supreme Court has yet to grapple with the issue of multiple punitives even though Justice Kennedy alluded to the problem when writing for the majority in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 423 (2003) (discussing the question of punishing the defendant for conduct toward non-parties and concluding that “punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct . . .”).

126. Many courts have struggled with the issue of whether multiple punitive damages awards violate the Double Jeopardy Clause of the Fifth Amendment, the Excessive Fines Clause of the Eighth Amendment, or the Due Process Clause of the Fourteenth Amendment. See, e.g., *Dunn v. HOVIC*, 1 F.3d 1371, 1385–86 (3d Cir.) (“[M]ultiple punitive damages awards are not inconsistent with the due process clause or substantive tort law principles . . .”), *modified on reh’g*, 13 F.3d 58, 62 (3d Cir. 1993); *Sch. Dist. of Lancaster v. Lake Asbestos of Que (In re Sch. Asbestos Litig.)*, 789 F.2d 996, 1004 (3d Cir. 1986) (“Unlimited multiple punishment for the same act determined in a succession of individual lawsuits and bearing no relation to the defendants’ culpability or the actual injuries suffered by victims, would violate the sense of fundamental fairness that is essential to constitutional due process.” (quoting *In re Fed. Skywalk Cases*, 680 F.2d 1175, 1188 (8th Cir. 1982) (Heaney, J., dissenting)) (internal quotation marks omitted)); *Juzwin v. Amtorg Trading Corp.*, 705 F. Supp. 1053, 1059–64 (D.N.J.) (“[A]ctions for punitive damages are not sufficiently ‘criminal’ in nature to require the protection of the Double Jeopardy Clause of the Fifth Amendment”), *vacated on reh’g*, 718 F. Supp. 1233, 1236 (D.N.J. 1989); *In re “Agent Orange” Prod. Liab. Litig.*, 100 F.R.D. 718, 728 (E.D.N.Y. 1983) (“There must, therefore, be some limit, either as a matter of policy or as a matter of due process, to the amount of times defendants may be punished for a single transaction.”).

127. See, e.g., Douglas et al., *supra* note 61, at iv11 (comparing 375 individual pending tobacco cases against Philip Morris in 1997 with only 223 in 2005, not excluding the 2,640 cases

Finally, if awards of multiple punitive damages were to become sufficiently serious as to threaten the profitability of the tobacco industry, one could expect that states would join the tobacco industry in arguing that such awards are unconstitutional. The monies from the \$206 billion Master Settlement Agreement that are to be distributed to the states over a twenty-five year period<sup>128</sup> are of vital importance to cash-strapped state governments.<sup>129</sup> They simply cannot afford to see that stream of income disappear. It would be difficult for the United States Supreme Court to ignore this reality in favor of huge punitive damages awards that would inure to the benefit of individual plaintiffs and their lawyers.

The second source that may give tobacco plaintiffs hope for the future is the current success that plaintiffs have enjoyed in going to trial recently in Florida courts.<sup>130</sup> The leading decision is *Engle v. Liggett Group, Inc.*<sup>131</sup> In that case, the trial court certified a class composed of Florida smokers who claimed resultant personal injuries.<sup>132</sup> The case proceeded through two phases of a multi-phase trial plan,<sup>133</sup> resulting in plaintiffs' special verdicts on broadly-framed issues of defectiveness, addiction, and general causation.<sup>134</sup> The intermediate court of appeals thereafter decertified the class<sup>135</sup> and the Florida Supreme Court affirmed decertification prospectively,<sup>136</sup> allowing the special jury verdicts already entered against the defendants to stand on the basis of collateral estoppel.<sup>137</sup> The court allowed *Engle* class members one year in which to refile

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brought by flight attendants); Altria Grp., Inc., Annual Report, *supra* note 84, at 18 (reporting only 88 pending individual tobacco cases against Philip Morris in February 2010).

128. See MSA, *supra* note 68.

129. See Nicholas Confessore, *Larger Cash Shortfall is Projected in Albany as Fiscal Year Nears End*, N.Y. TIMES, Mar. 18, 2010, at A29 (reporting that New York is considering refinancing its share of the proceeds from the Master Settlement Agreement, which may bring in between \$500 million to \$1.5 billion in funds to help bridge the budget gap); Dan Simmons, *State Siphons Tobacco-Settlement Funds*, CHI. BREAKING NEWS CENTER (Jan. 28, 2010, 11:03 PM), <http://www.chicagobreakingnews.com/2010/01/state-siphons-tobacco-settlement-funds.html>; George F. Will, Editorial, *The States' Tobacco Addiction*, WASH. POST, Jan. 1, 2006, at B7 ("Under the MSA, the states are scheduled to get their portions of the pot over many years. But deferral of gratification is un-American, so some states, eager to get their loot, have 'securitized' their expected portions. Securitization involves selling bonds backed by the anticipated revenue."); Allison Young, *Cigarette Taxes are Gold Rush for States: Increases Help Fill Budget Shortfalls*, U.S.A. TODAY, March 26, 2010, at A1.

130. See *infra* Appendix A.

131. 945 So. 2d 1246 (Fla. 2006) (per curiam).

132. *Id.* at 1256.

133. *Id.* at 1256–57.

134. *Id.* at 1276–77. The trial court made findings as to general causation, addiction of cigarettes, strict liability, fraud by concealment, civil-conspiracy concealment, breach of implied warranty, breach of express warranty, and negligence. *Id.*

135. *Liggett Grp., Inc. v. Engle*, 853 So. 2d 434, 470 (Fla. Dist. Ct. App. 2003).

136. *Engle*, 945 So. 2d at 1277.

137. *Id.* at 1269 ("The pragmatic solution is to now decertify the class, retaining the jury's Phase I findings other than those on the fraud and intentional infliction of emotional distress

their claims individually in order to take advantage of the favorable special jury verdicts.<sup>138</sup> Subsequently, at least 8,000 plaintiffs met this deadline.<sup>139</sup> A federal district court recognized that giving the broadly-framed jury verdicts in *Engle* preclusive collateral effect would constitute manifest error.<sup>140</sup> According to the court, issue preclusion is proper only when the previous issue is identical to the issue presented in the current litigation.<sup>141</sup> The issues decided in the *Engle* class action were general and open-ended—e.g., “Did one or more of the Defendant Tobacco Companies [ever] place cigarettes on the market that were defective and unreasonably dangerous [in any way]?”<sup>142</sup> The district court concluded that, in the nonaggregative context of post-*Engle* actions by individual plaintiffs, such a “general, non-specific finding of tortious conduct on the part of one or more [d]efendants [did] not satisfy the requirements of issue preclusion . . . .”<sup>143</sup> On appeal, the Eleventh Circuit held that the burden was on the plaintiffs to demonstrate that the findings of the jury were sufficiently specific to be binding on the parties, and it remanded the case to the district court to make the appropriate determination.<sup>144</sup> The court of appeals noted that it found nothing in the record to support the assertions of the plaintiffs that sufficient specificity was present in the trial record or in the jury findings.<sup>145</sup> Nonetheless, it remanded the issue to the district court for closer examination.<sup>146</sup> If, in the likely event that the heavy burden imposed by the Eleventh Circuit cannot be met, it would appear that much of the post-*Engle* litigation will have to be retried.<sup>147</sup>

How might one explain the pro-plaintiff outcomes in the post-*Engle* litigation in Florida? For starters, these cases may represent a randomly distributed cluster that just happened to occur early. On this view, post-*Engle*

claims . . . . Class members can choose to initiate individual damages actions and the Phase I common core findings we approved . . . will have res judicata effect in those trials.”).

138. *Id.* at 1277.

139. See Brief of Appellees at 11, *Brown v. R.J. Reynolds Tobacco Co.*, 611 F.3d 1324 (11th Cir. 2010) (No. 08-16158), 2009 WL 2816556. But see *Brown v. R.J. Reynolds Tobacco Co.*, 576 F. Supp. 2d 1328, 1334 & n.11 (M.D. Fla. 2008) (noting that “approximately 4,000 former *Engle* class members filed suit” in state court and that “[d]efendants . . . removed virtually all of [the] state court actions” to federal court (emphasis added)), *vacated*, 611 F.3d 1324 (11th Cir. 2010).

140. *Id.* at 1346.

141. *Id.* at 1340 (quoting *Goodman v. Aldrich & Ramsey Enters.*, 804 So. 2d 544, 546–47 (Fla. Dist. Ct. App. 2002) (“[F]or issue preclusion to apply, . . . an identical issue must have been presented in the prior proceeding . . . .”).

142. *Id.* at 1341–42.

143. *Id.* at 1348 (“[T]he *Engle* plaintiffs as a whole allege [that] different acts and omissions by different [d]efendants, [ultimately] breached different tort duties[,] to different people[,] at different times[,] causing different injuries.”).

144. *Brown v. R.J. Reynolds Tobacco Co.*, No. 08-16158, 2010 WL 2866923, at \*9–10 (11th Cir. July 22, 2010).

145. *Id.* at \*9.

146. *Id.* at \*10.

147. The potential of clash between the Eleventh Circuit Court of Appeals and the Florida Supreme Court as to the constitutionality of cases tried pursuant to the *Engle* remand is real. Should such a conflict eventuate, it is likely that the United States Supreme Court would resolve the issue.



plaintiffs should succeed, over time, at no greater overall rate than do individual tobacco plaintiffs generally. If this should prove true, one can expect that the number of post-*Engle* claims taken to trial will trend downward over time. Or perhaps the sample from which these early post-*Engle* cases arise is not randomly selected—the plaintiffs’ lawyers may deliberately be sending stronger cases to trial early with the hope that they will set a tone for subsequently litigated cases<sup>148</sup> or cause the tobacco companies to change their traditional “no settlement” posture.<sup>149</sup> On the reasonable assumption that the defendants do not change their posture, one can expect that post-*Engle* litigation will return to traditional patterns of outcomes, with plaintiffs taking fewer claims to trial and getting verdicts affirmed on appeal in only a small percentage of litigated cases.

Of course, the possibility exists that the special verdicts being given preclusive effect in *Engle* are making the claims less costly to litigate<sup>150</sup> and are responsible for the more favorable plaintiff verdicts.<sup>151</sup> If that is the case, eventual reversal of the collateral estoppel ruling in *Engle* will overturn these plaintiffs’ verdicts and prevent their recurrence thereafter.<sup>152</sup> Should such a

148. In reviewing the thirteen *Engle* progeny cases that have gone to verdict in Florida, we note that all but one involved plaintiffs who began smoking pre-1965 when warnings were mandated by the Federal Cigarette Labeling and Advertising Act, 15 U.S.C. §§ 1331–1341 (2006). See *infra* Appendix A. Thus, the argument that the plaintiffs made a knowledgeable choice and took into account the health risks of smoking is somewhat diminished. Also note that in many cases the verdict is significantly reduced by plaintiff fault. *Id.* One can reasonably expect that in cases when the plaintiffs began smoking before 1965, the juries will assign a lesser percentage of fault to the plaintiffs. Of the thirteen cases discussed in Appendix A, ten juries found for the plaintiff, two found for the defendant, and one case settled for \$1,000. *Id.* As we were going to press we learned that twenty-eight post-*Engle* cases have been litigated. See *Engle Verdict Tracker Updated*, COURTROOM VIEW NETWORK (Oct. 26, 2010, 11:33 AM), <http://info.courtroomview.com/Blog/bid/48811/Engle-Verdict-Tracker-Updated>. Plaintiffs have been victorious in twenty and defendants have won eight. *Id.* It is interesting to note that tobacco defendants have won the last five cases. *Id.*

149. See *supra* note 26 and accompanying text.

150. The plaintiffs are spared the lengthy presentation of witnesses and documents that span a fifty year period. The authors’ discussions with attorneys substantiate that six-to-eight week trials have now been compressed to approximately two weeks. The only issues to be litigated are specific causation and plaintiff fault. See *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1254 (Fla. 2006). This keeps the costs down. Defendant fault and general causation were determined in the Phase I litigation; juries are instructed that liability on those issues is to be assumed. *Id.* at 1277. Thus, the plaintiffs are spared the lengthy and costly presentation of witnesses and documents that can span a fifty-year period.

151. See *infra* Appendix A. One might have presumed that the issues of defendant fault and general causation would go against the defendants in the non-abbreviated trials, leaving only issues of specific causation and plaintiff fault as grounds for a defense verdict. It appears, however, that trial court instruction on all of the Phase I holdings has had a strong effect on juries. See *infra* Appendix A. In a full blown trial, contrary expert testimony on issues such as addiction and a historical overview of the tobacco industry conduct may actually soften the attitudes of juries in some cases.

152. We predict that the post-*Engle* Florida cases will be reversed because they violate fundamental res judicata principles and constitutional due process norms. See *supra* discussion in text accompanying notes 140–47. Furthermore, even if these cases legitimately go to trial and final

reversal occur, relatively few post-*Engle* plaintiffs will end up winning in Florida, at no greater rate than tobacco plaintiffs have won traditionally. Even if the collateral estoppel ruling in *Engle* should not be overturned and the ruling exerts an important pro-plaintiff influence on outcomes, the odds of a similar set of circumstances recurring in another jurisdiction are quite remote.<sup>153</sup> After all, *Engle* was a misconceived class action that the trial court separated into phases for trial and that the appellate court properly decertified while attempting to give future effect to earlier, fragmentary jury findings. It follows that the post-*Engle* litigation in Florida does not change our assessment that individual personal injury claims against the tobacco industry are transitioning into an equilibrium in which tobacco plaintiffs win only relatively rarely. Plaintiffs may do better in Florida over the short term, but that string will end when outcomes revert naturally to their normal patterns; when *Engle*'s collateral estoppel ruling is overturned on appeal; or when the several thousands of these unusually-positioned cases finally work their way through the trial and appellate processes. In our view, *Engle* and its progeny represent a unique phenomenon that does not alter our longer-term assessment of tobacco litigation.

## 2. *The Light Cigarettes Litigation*

Light cigarettes litigation is comprised of statewide class actions brought under various state consumer fraud statutes on behalf of smokers who purchased light cigarettes within a designated time frame.<sup>154</sup> The claimants have not yet

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verdict, there are not likely to be more than forty to sixty trials per year. Neither Florida nor West Virginia will clog their calendars exclusively with tobacco litigation. For example, as of February 19, 2010, fifty-six *Engle* progeny cases had been set for trial in 2010. Altria Grp., Inc., Annual Report, *supra* note 84, at 19. We predict that tobacco defendants will win many of these cases. Comparative fault will likely reduce victorious plaintiffs' awards. See *infra* Appendix A. Thus, net losses to the tobacco companies will be spread over many years.

153. See Altria Grp., Inc., Annual Report, *supra* note 84, at 18 (reporting only eighty-eight individual tobacco cases nationwide aside from cases in West Virginia and Florida). Plaintiffs' attorneys do not appear eager to bring large numbers of tobacco cases. See *id.* Florida and West Virginia appear to be the only states where there is significant litigation. See *id.* In both states, courts have allowed for trials in separate phases, trying liability separate and apart from specific causation. See *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1257–57 (Fla. 2006) (per curiam); *In re Tobacco Litig.*, 624 S.E.2d 738 740 (W. Va. 2005). Moreover, in Florida, the court found that continued class certification was not feasible. See *Engle*, 945 So. 2d at 1267–68. The court permitted the bifurcated litigation only because the previous litigation was the law of the case. See *id.* at 1266–69.

154. See, e.g., *Altria Grp., Inc. v. Good*, 129 S. Ct. 538, 541 (2008) (claiming that Philip Morris USA, Inc. and Altria Group, Inc. violated state law by “intentionally deceiv[ing] the plaintiffs] about the true and harmful nature of ‘light’ cigarettes”) (citing Maine Unfair Trade Practices Act, ME. REV. STAT. ANN. tit. 5, § 207 (Supp. 2009)); *Holmes v. Philip Morris USA, Inc.*, No. 03C-08-167 JTV, 2009 WL 5193043, at \*1 (Del. Super. Ct. Dec. 4, 2009) (claiming that “the defendant violated the [Delaware Consumer Fraud Act] by deliberately deceiving consumers about the true and harmful nature of ‘light’ and ‘lowered tar and nicotine’ cigarettes”) (citing the Delaware Consumer Fraud Act, DEL. CODE ANN. tit. 6, § 2513 (2005 & Supp. 2008)); *Aspinall v. Philip*

suffered physical injuries as a result of smoking, or at least they do not claim such injuries.<sup>155</sup> Instead, they seek to recover for the economic losses they allegedly incurred when they paid money for cigarettes that the tobacco companies fraudulently advertised as being safer than ordinary cigarettes.<sup>156</sup> Given that hundreds of thousands, if not millions, of smokers in each state fall within these light cigarettes consumer classes<sup>157</sup> and that each smoker may have spent considerable sums on light cigarettes,<sup>158</sup> the liabilities these actions impose could be quite substantial. Judicial reactions to light cigarettes claims have varied. Since these cases are viable only as class actions, the major issue is whether courts will certify them. Most courts have refused to do so under Rule 23 of the Federal Rules of Civil Procedure<sup>159</sup> or the state equivalents of Rule 23.<sup>160</sup> Consistent with our earlier discussion of class actions generally,<sup>161</sup> federal courts have been especially hard on these claims.<sup>162</sup>

Morris Cos., Inc., 813 N.E.2d 476, 479–80 (Mass. 2004) (seeking damages for “deceptive conduct in a trade or business” for “the marketing of Marlboro lights as ‘light’ cigarettes that deliver ‘lowered tar and nicotine’”) (citing MASS. GEN. LAWS ch. 93A, §§ 2, 9 (2004)).

155. See, e.g., Class Action Complaint, *Good v. Altria Grp., Inc.*, 436 F. Supp. 2d 132 (2006) (No. 1:05CV00127), 2005 WL 2179239; Complaint, *Aspinall v. Philip Morris Cos.*, No. 98-6002H (1998), 1998 WL 34190483.

156. See sources cited *supra* note 155.

157. See *Aspinall*, 813 N.E.2d at 485 (estimating the number of plaintiffs in Massachusetts in the “hundreds of thousands”).

158. For a list of average retail prices for a pack of cigarettes per state, see *State Excise and Sales Taxes Per Pack of Cigarettes*, CAMPAIGN FOR TOBACCO-FREE KIDS, <http://www.tobaccofreekids.org/research/factsheets/pdf/0202.pdf> (last visited October 5, 2010).

159. See, e.g., *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008) (decertifying class because there were “numerous issues not susceptible to generalized proof” and claim did not meet the Rule 23 predominance requirement); *Benedict v. Altria Grp., Inc.*, 241 F.R.D. 668, 680–81 (D. Kan. 2007) (“[T]he individual inquiry required . . . renders a class action on [these] claims unmanageable.”); *Mulford v. Altria Grp., Inc.*, 242 F.R.D. 615, 626–27, 630 (D.N.M. 2007) (denying the class certification because “individualized questions relat[ing] to causation, loss, and the affirmative defenses overwhelm the common issues raised by [d]efendants’ conduct”).

160. See, e.g., *Cocca v. Philip Morris Inc.*, No. CV 1999-008532, 2001 WL 34090200, at \*1 (Ariz. Super. Ct. July 24, 2001) (“Although there are significant common questions of law and fact concerning liability, questions that vary from class member to class member are predominant as to liability and overwhelmingly predominant as to damages.”); *Philip Morris USA Inc., v. Hines*, 883 So. 2d 292, 294–95 (Fla. Dist. Ct. App. 2003) (“We find that the trial court erred in certifying this lawsuit as a class action . . . . Despite a common nucleus of facts concerning a prospective class-action-defendant’s conduct, a lawsuit may present individualized plaintiff-related issues which make it unsuitable for class certification.”); *Stern v. Philip Morris USA, Inc.*, No. MID-L-2584-03, 2007 WL 4841057 (N.J. Super. Ct. Law Div. Nov. 16, 2007) (decertifying action brought under state law because individual “issues related to causation, loss and affirmative defenses” predominated); *Pearson v. Philip Morris, Inc.*, No. 0211-11819, 2006 WL 663004, at \*1 (Or. Cir. Ct. Feb. 23, 2006) (denying motion to certify because individual issues predominated); *Davies v. Philip Morris U.S.A., Inc.*, No. 04-2-08174-2 SEA, 2006 WL 1600067, at \*4–5 (Wash. Super. Ct. May 26, 2006) (denying motion to certify because Rule 23 requirements of typicality, commonality, predominance, and superiority were not satisfied).

161. See *supra* notes 77–82 and accompanying text.

162. *Id.*

To be sure, some state courts have certified the relevant classes and ruled that the claims are appropriate under the relevant statutes.<sup>163</sup> Although these actions may prove costly to the tobacco industry in the short term, any future light cigarettes actions brought in state courts will be removed under CAFA to federal court,<sup>164</sup> where they will almost certainly be dismissed. Thus, in a fashion similar to the post-*Engle* individual actions in Florida, the light cigarettes class actions pending in a dozen or so states do not alter our view that the next ten to twenty years will witness a steady transition to an equilibrium in tobacco litigation.

### 3. *Medical Monitoring and Smoking Cessation Class Actions*

In recent years, smokers who have not yet manifested symptoms of physical injury have brought class actions to recover funds to establish programs to medically monitor smokers and to help them to quit smoking.<sup>165</sup> A majority of

163. See, e.g., *Holmes v. Philip Morris USA, Inc.*, No. 03C-08-167 JTV, 2009 WL 5193043 (Del. Super. Ct. Dec. 4, 2009) (denying defendant's motion for summary judgment and holding that Delaware state law covered fraudulent conduct in marketing light cigarettes); *Aspinall v. Philip Morris Cos., Inc.*, 813 N.E.2d 476, 479–80 (Mass. 2004) (certifying class under state law); *Craft v. Philip Morris Cos., Inc.*, 190 S.W.3d 368, 374, 384 (Mo. Ct. App. 2005) (certifying class under state law and noting that the issue of whether individual reliance destroys commonality was a matter to be determined since the statute did not clarify whether reliance was required).

164. See *supra* notes 79–82 and accompanying text. On September 10, 2009, light cigarette cases pending in federal district courts in California, Colorado, Florida, Illinois, Maine, New York, and Texas were transferred, under MDL No. 2068, to the United States District Court for the District of Maine under Chief Judge John A. Woodcock, Jr. *In re Light Cigarettes Mktg. and Sales Practices Litig.*, 652 F. Supp. 2d 1379 (J.P.M.L. 2009). At least nine other light cigarette cases are pending transfer to the same court. *Id.* at 1380 n.2. In an important development on March 5, 2010, Judge Woodcock denied the plaintiff's motion for collateral estoppel, *In re Light Cigarettes Mktg. and Sales Practices Litig.*, 691 F. Supp. 2d 239, 242 (D. Me. 2010) (quoting *United States v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 1, 28 (D.D.C. 2006), *aff'd in part, vacated in part*, 566 F.3d 1095, 1150 (D.C. Cir. 2009)), which was based on Judge Gladys Kessler's finding in *United States v. Philip Morris USA, Inc.*, that the tobacco companies had engaged in widespread fraud in marketing light cigarettes, *id.* It should be noted that class certification has yet to be decided in all the MDL No. 2068 cases. Despite these developments, the tobacco companies have said that they will vigorously defend these cases. See *Altria Grp., Inc.*, Annual Report, *supra* note 84, at 17. Furthermore, the tobacco companies will likely defend the charges of fraud on the grounds that they have worked with "members of the public health community to develop a less hazardous cigarette." See K. Michael Cummings et al., *Consumer Acceptable Risk: How Cigarette Companies have Responded to Accusations that their Products are Defective*, 15 TOBACCO CONTROL (Supp. 4) iv84, iv85–86, 87 tbl.2. Whether this defense will effectively blunt the fraud allegations remains to be seen.

165. See, e.g., *Barnes v. Am. Tobacco Co.*, 161 F.3d 127, 131 (3d Cir. 1998) ("[P]laintiffs ask[] . . . that defendants fund a court-supervised or court approved program providing medical monitoring to class members . . ."); *Badillo v. Am. Tobacco Co.*, 202 F.R.D. 261, 262 (D. Nev. 2001) ("[P]laintiffs request medical monitoring in order to detect if they have any diseases as a result of their exposure to cigarette smoke."); *Guillory v. Am. Tobacco Co.*, No. 97 C 8641, 2001 WL 290603, at \*1 (N.D. Ill. March 20, 2001) ("[P]laintiffs seek to establish a cessation program and a court supervised medical monitoring program to be funded by defendants . . ."); *Thompson*

courts that have considered these or analogous claims have rejected them, holding either that they do not satisfy the requisites for class certification<sup>166</sup> or that, in the absence of a showing of personal injury, tort claims to recover such costs will not lie.<sup>167</sup> But a significant minority of courts have allowed such claims,<sup>168</sup> and it could be argued that a trend is underway in that direction.<sup>169</sup> Notwithstanding that these claims can be very costly to tobacco company

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v. Am. Tobacco Co., 189 F.R.D. 544, 547 (D. Minn. 1999) (“Plaintiffs seek . . . the establishment of a smoking cessation program and a court-administered medical monitoring program . . .”); *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 383–84 (D. Kan. 1998) (“[P]laintiffs seek . . . medical monitoring[] and implementation of smoking cessation programs . . .”); *Lowe v. Philip Morris USA, Inc.*, 183 P.3d 181, 182–83 (Or. 2008) (“[Plaintiff seeks] injunctive relief requiring the ‘creation of a court-monitored program of medical monitoring, smoking cessation and education , for her and approximately 400,00 similarly situated oregonians.”).

166. *See, e.g., Barnes*, 161 F.3d at 149 (refusing to grant certification because of plaintiffs’ individual issues); *Badillo*, 202 F.R.D. at 265 (same); *Guillory*, 2001 WL 290603, at \*9 (same); *Thompson*, 189 F.R.D. at 557 (same); *Emig*, 184 F.R.D. at 395 (same).

167. *See, e.g., Metro-N. Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 433–34 (1997) (holding that the plaintiff, who had not manifested symptoms of disease, was not entitled to recover medical monitoring costs); *Hinton v. Monsanto Co.*, 813 So. 2d 827, 829–32 (Ala. 2001) (“Alabama law has long required a manifest, present injury before a plaintiff may recover in tort.”); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849, 859 (Ky. 2002) (requiring plaintiffs to demonstrate “present physical injury” before obtaining remedy of medical monitoring); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684, 686, 701 (Mich. 2005) (holding that the plaintiffs, who had no present injury, did not present a viable tort claim for medical monitoring costs); *Paz v. Brush Engineered Materials, Inc.*, 949 So. 2d 1, 9 (Miss. 2007) (holding that Mississippi does not recognize a medical monitoring cause of action without present injury); *Badillo v. Am. Brands Inc.*, 16 P.3d 435, 441 (Nev. 2001) (“Nevada common law does not recognize a cause of action for medical monitoring.”); *Lowe*, 183 P.3d at 187 (“[N]egligent conduct that results only in a significantly increased risk of future injury that requires medical monitoring does not give rise to a claim for negligence.”).

168. *See, e.g., In re Paoli R.R. Yard PCB Litig.*, 916 F.2d 829, 852 (3d Cir. 1990) (predicting that Pennsylvania would recognize a cause of action for medical monitoring if the plaintiff was at increased risk of disease); *Potter v. Firestone Tire & Rubber Co.*, 863 P.2d 795, 800 (Cal. 1993) (holding that medical monitoring costs are recoverable in a negligence action); *Petito v. A.H. Robins Co.*, 750 So. 2d 103, 104 (Fla. Dist. Ct. App. 1999) (holding that Florida recognizes a medical monitoring cause of action despite the absence of “identifiable physical injuries or symptoms”); *Donovan v. Philip Morris USA, Inc.*, 914 N.E.2d 891, 898 (Mass. 2009) (answering a certified question that Massachusetts law recognizes a claim for medical monitoring based on subclinical effects of exposure to cigarette smoke); *Ayers v. Twp. of Jackson*, 525 A.2d 287, 312–13 (N.J. 1987) (holding that “the cost of medical surveillance is a compensable item of damages” notwithstanding the absence of present symptoms of physical injury); *Hansen v. Mountain Fuel Supply Co.*, 858 P.2d 970, 979–81 (Utah 1993) (holding that medical monitoring costs may be recovered regardless of the existence of current injury or illness); *Bower v. Westinghouse Elec. Corp.*, 522 S.E.2d 424, 430–31 (W. Va. 1999) (recognizing a cause of action for medical monitoring costs where a plaintiff proves that “such expenses are necessary and reasonably certain to be incurred”).

169. *See James A. Henderson, Jr. & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring*, 53 S.C. L. REV. 815, 836–49 (2002). We suggest that case law is trending toward acceptance of the medical monitoring cause of action and note several courts’ recent rejections of that cause of action. *Id.* at 838–41.

defendants,<sup>170</sup> we do not view them as sufficiently significant to alter our overall assessment of tobacco litigation. Only a few jurisdictions will end up recognizing judgments establishing monitoring and cessation programs. There is no realistic chance for them to assume the proportions of a mass tort.

#### IV. CONCLUSION

The approaching equilibrium in tobacco litigation will rest on two basic foundations: first, the distinction between what we have termed the asbestos model of personal injury litigation and the tobacco model; and second, the long-held sense among Americans that injuries from tobacco use reflect the personal choices of users and are largely self-inflicted. Regarding the two models of litigation, in connection with the asbestos model, claims are commodified and traded en masse in special markets created via settlement agreements. In connection with the tobacco model, each claim remains individualized and is resolved only after exhaustion of the judicial process. These differences rest, in turn, on the differences between tobacco and all other dangerous products that have been, and continue to be, the focus of mass tort litigation based on the asbestos model. The most crucial difference may be that tobacco products are not legally defective merely because they possess the inherent, unavoidable capacity to injure those who use them precisely as intended. Other products share this quality—alcohol, for example.<sup>171</sup> But alcohol is presumably benign (even beneficial) when consumed in moderation.<sup>172</sup> And the social experiment involving federal prohibition of the sale of alcoholic beverages is viewed today as an ill-advised failure.<sup>173</sup>

As this Article has explained, over the previous sixty years of tobacco litigation, courts have resolved a number of important, but nevertheless peripheral, issues. Neither the states nor the federal government appear to have any significant future claims against the tobacco companies for the economic

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170. See *infra* Appendix A (outlining significant damages that plaintiffs received in ten Florida cases).

171. Alcohol is subject to federally mandated warnings under the Alcoholic Beverage Labeling Act of 1988. See 27 U.S.C. § 215 (2006). Unlike tobacco, however, courts have roundly rejected claims of failure-to-warn about the dangers of alcohol consumption. See, e.g., *Maguire v. Pabst Brewing Co.*, 387 N.W.2d 565, 569–70 (Iowa 1986) (holding there is no duty to warn of the dangers of drinking beers prior to driving an automobile); *Joseph E. Seagram & Sons, Inc. v. McGuire*, 814 S.W.2d 385, 388 (Tex. 1991) (finding no duty to warn of the dangers of developing alcoholism from “excessive consumption of alcoholic beverages”); *Brown Forman Corp. v. Brune*, 893 S.W.2d 640, 648 (Tex. Ct. App. 1994) (holding that there is no duty to warn of dangers of rapidly consuming a large quantity of tequila).

172. *Alcohol Use: If You Drink, Keep It Moderate*, MAYO CLINIC (Aug. 21, 2010), <http://www.mayoclinic.com/health/alcohol/SC00024>.

173. See generally Mark Thornton, *Cato Institute Policy Analysis No. 157: Alcohol Prohibition Was a Failure*, CATO INST. (July 17, 1991), [http://www.cato.org/pub\\_display.php?pub\\_id=1017](http://www.cato.org/pub_display.php?pub_id=1017).

costs of caring for injured smokers under programs of public health.<sup>174</sup> Class actions based on tobacco-related personal injuries are generally not available to plaintiffs.<sup>175</sup> Individual actions based on post-1969 failure-to-warn allegations are federally preempted.<sup>176</sup> Controls on the awarding of runaway punitive damages are an ongoing project in the Supreme Court.<sup>177</sup> And consumer protection class actions to recover purely economic losses, as with the light cigarettes class actions, are riddled with difficulties.<sup>178</sup> But the central truth is the important issue: given the industry's "no settlement" posture and the high costs of litigation, individual personal injury tobacco claims are simply not worth bringing.

Of course, if juries were ready to reward tobacco plaintiffs often and generously, the equation might tip in the opposite direction. Why are American juries skeptical of tobacco users' claims? We are persuaded that the answer largely lies in the growing sentiment that adults who choose to smoke, given the widely understood risks of doing so, are responsible for their own actions. To be sure, there still remain some smokers who started smoking long enough ago to claim relative innocence. But their numbers, like the numbers of World War II veterans,<sup>179</sup> are dwindling year by year. Those who began smoking more recently face not only their own complicity, but also the much more responsible behaviors of tobacco companies in recent years.

Two possible future developments might undermine our prediction of a pro-industry equilibrium: First, American courts might recognize new legal bases of recovery, possibly for unconventional elements of loss, that might revitalize tobacco litigation in this country. Second, personal injury tobacco litigation might commence and flourish in jurisdictions abroad. Regarding the possibility that new theories of recovery may revitalize American tobacco litigation, we deem it unlikely in the extreme that such new theories will emerge. Plaintiffs have made a number of attempts in this regard and have failed, including bringing actions extending and distorting the doctrine of public nuisance<sup>180</sup> and

174. See *supra* notes 67–76 and accompanying text.

175. See *supra* note 77 and accompanying text.

176. See *supra* note 41 and accompanying text.

177. See *supra* notes 113–27 and accompanying text.

178. See cases cited *supra* Part III.B.2. But even where class certification is granted, the problem of realistically assessing damage is a daunting one. How much safer were light cigarettes supposed to be? How does one measure the differential between light and regular cigarettes? In *McLaughlin v. American Tobacco Co.*, 522 F.2d 215 (2d Cir. 2008), the Second Circuit Court of Appeals examined two models for assessing damages and found them wanting. *Id.* at 228–30. While its findings are only binding in a federal RICO action, the problems of damage assessment will also haunt plaintiffs in non-RICO actions.

179. Eight hundred fifty World War II veterans pass away per day. Nat'l Ctr. for Veterans Analysis and Statistics, *VA Stats At a Glance*, U.S. DEP'T OF VETERANS AFF. (July 30, 2010), [http://www1.va.gov/VETDATA/Pocket-Card/4X6\\_summer10\\_sharepoint.pdf](http://www1.va.gov/VETDATA/Pocket-Card/4X6_summer10_sharepoint.pdf).

180. See, e.g., *Allegheny Gen. Hosp. v. Philip Morris, Inc.*, 116 F. Supp. 2d 610, 619–20 (W.D. Pa. 1999) (holding that under Pennsylvania law, health care providers failed to state a claim

claims to recover for mental and emotional distress in the absence of personal injury.<sup>181</sup> This does not mean that no new theory is possible; proving such a negative is, itself, impossible. But on the reasonable assumption that American courts will continue to refuse to impose strict category liability on the tobacco industry merely because its products are inherently and unavoidably unsafe,<sup>182</sup> and assuming no factual disclosures of the sort that occurred in the 1990s,<sup>183</sup> pursuing tort claims under the tobacco litigation model will never be sufficiently attractive to plaintiffs' lawyers to support prolonged mass tort attacks upon the tobacco industry.

What of the possibility that tobacco litigation will become sufficiently attractive abroad to support significant streams of tort claims against American tobacco companies? We and others have written elsewhere regarding the substantive and procedural differences that make tort claims generally more difficult to prosecute in foreign courts than in American courts.<sup>184</sup> Interestingly, the substantive law of foreign jurisdictions may be more inclined, at least theoretically, to favor individual personal injury plaintiffs—the European Directive governing products liability in Europe, for example, recognizes category liability, at least in principle.<sup>185</sup> At the same time, however, it is unlikely that foreign jurisdictions would replicate the class actions that plaintiffs have pursued in some American states. In foreign courts, the future prospects for tobacco plaintiffs will ultimately turn, as they will in this country, on the likelihood of success in classic individual personal injury actions. In that

for public nuisance absent a showing that their alleged harm was different from the harm suffered by other members of the general public).

181. See DAN B. DOBBS, *THE LAW OF TORTS* 845–47 (2000) (citing numerous cases on the availability of emotional distress claims for plaintiffs exposed to toxins).

182. See, e.g., *Little v. Brown & Williamson Tobacco Corp.*, 243 F. Supp. 2d 480, 491–94 (D.S.C. 2001) (holding that a question of fact existed regarding whether the defendants' cigarettes were unreasonably dangerous); *Neri v. R.J. Reynolds Tobacco Co.*, No. 98-CV-371, 2000 WL 33911224, at \*11–15, 22 (N.D.N.Y. Sept. 28, 2000) (granting summary judgment for the defendant on the plaintiff's strict liability design defect claim); *Kotler v. Am. Tobacco Co.*, 731 F. Supp. 50, 52–53 (D. Mass. 1990) (holding that the plaintiff was not entitled to recover on the grounds that cigarettes are unreasonably dangerous), *aff'd*, 926 F.2d 1217 (1st Cir. 1990), *vacated*, 112 S. Ct. 3019 (1992); *Gianitsis v. Am. Brands, Inc.*, 685 F. Supp. 853, 856–59 (D.N.H. 1988) (holding that strict products liability was not cognizable under New Hampshire law as applied to cigarette products).

183. See *supra* notes 47–50 and accompanying text.

184. See James A. Henderson, Jr. & Aaron D. Twerski, *What Europe, Japan, and Other Countries Can Learn from the New American Restatement of Products Liability*, 34 TEX. INT'L L.J. 1, 12–20 (1999); Gary T. Schwartz, *Product Liability and Medical Malpractice in Comparative Context*, in *THE LIABILITY MAZE: THE IMPACT OF LIABILITY LAW ON SAFETY AND INNOVATION* 28, 63–76 (Peter W. Huber & Robert E. Litan eds., 1991) (noting that foreign legal systems do not allow liberal discovery and contingent fees for attorneys, impose “loser pays” attorney fee sanctions, and provide for much lower damage awards).

185. See Council Directive 85/374/EEC, art. 6, 1985 O.J. (L 210). The directive provides for a rather open-ended consumer expectations test for defective products. See *id.* Pushed to its extreme, it might be possible to encompass category liability within this framework.



context, foreign plaintiffs may face an obstacle American claimants do not: in many foreign countries, far more draconian warnings and more extensive regulations have traditionally accompanied the sale and distribution of tobacco products.<sup>186</sup>

In the final analysis, an answer to the question of whether tort claims against American tobacco companies will ever prosper in foreign courts turns on many factors, some of which are cultural. On balance, we do not believe that individual tobacco plaintiffs will do any better abroad than they have done here, and we have good reasons to believe they will do worse. Warnings in many foreign countries are more pronounced than those Congress mandates. Tobacco companies are certain to refuse to settle such claims, and with “loser pays transaction costs” rules in place,<sup>187</sup> bringing tobacco actions will be seen as unattractive gambles. Also, in the majority of foreign jurisdictions, damage awards are far more modest than in the United States and less likely to entice plaintiffs to engage in protracted litigation.<sup>188</sup>

Now let us return to our predictions regarding the future of American tobacco litigation. If we are correct in our assessments, then it follows that we are headed toward an equilibrium. In the short term—say, the next five to ten years—some plaintiffs may enjoy impressive victories in post-*Engle* cases in Florida and light cigarettes litigation in a handful of state courts. But by its seventy-fifth anniversary in 2030, tobacco litigation will be a relatively small but steady stream of personal injury claims sponsored mainly by risk-preferring plaintiffs’ attorneys in the hope of winning the punitive damages lottery. Attempts to introduce new theories and bases of recovery will no doubt punctuate this litigation at intervals, but all will fail. Nonjudicial regulations regarding the distribution, marketing, and consumption of tobacco products will continue to play a significant role in this country’s efforts to balance the demands of tobacco users with public health concerns.<sup>189</sup> But judicial regulation

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186. In Brazil, illustrations on cigarette packages include depictions of various body parts affected by cancer, one fetus aborted, and one man with his leg amputated. See *Picture Based Cigarette Warnings: Brazilian Cigarette Warnings*, PHYSICIANS FOR A SMOKE-FREE CANADA, <http://www.smoke-free.ca/warnings/brazil%20-%20warnings.htm> (last visited Oct. 5, 2010). In India, health warnings include the phrases “[t]obacco kills 2500 Indians every day” and “[y]our smoking kills babies.” *Picture Based Cigarette Warnings: India’s Cigarette Warnings*, PHYSICIANS FOR A SMOKE-FREE CANADA, <http://www.smoke-free.ca/warnings/India-warnings.htm> (last visited Oct. 5, 2010). In Jordan, the law requires an image of a diseased lung to be printed on cigarette packages. *Picture Based Cigarette Warnings: Jordan’s Cigarette Warnings*, PHYSICIANS FOR A SMOKE-FREE CANADA, <http://www.smoke-free.ca/warnings/Jordan-warnings.htm> (last visited Oct. 5, 2010). For a review of the multitude of graphic warnings in foreign countries, see *Picture Based Cigarette Warnings*, PHYSICIANS FOR A SMOKE-FREE CANADA, <http://www.smoke-free.ca/warnings/default.htm> (last visited Oct. 5, 2010).

187. See Schwartz, *supra* note 184, at 66–70.

188. See *id.* at 70–76.

189. See Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified at 21 U.S.C. § 387a-1 (2009)); *Commonwealth Brands, Inc. v. United States*,

through tobacco litigation will play no significant role. Final equilibrium, at levels that do not threaten the survival of the tobacco industry, will have been reached.

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678 F. Supp. 2d 512, 519, 541 (W.D. Ky. 2010) (upholding all but two provisions of the Family Smoking Prevention and Tobacco Control Act against constitutional challenges).

**APPENDIX A****FLORIDA CASES TRIED TO VERDICT SINCE *ENGLE V. LIGGETT GROUP, INC.*<sup>207</sup>  
(THROUGH MAY 2010)**

| Name of Case   | Year Plaintiff Began Smoking | Verdict   | Initial Verdict | Plaintiff Fault | Final Verdict   | Appeal Status |
|--|------------------------------|-----------|-----------------|-----------------|-----------------|---------------|
| <i>Cohen v. R.J. Reynolds Tobacco Co.</i> <sup>208</sup> | 1940                         | Plaintiff | \$30,000,000    | 33.3%           | \$26,666,666.70 |               |
| <i>Gray v. R.J. Reynolds Tobacco Co.</i> <sup>209</sup>  | Late 1940s                   | Plaintiff | \$9,000,000     | 40%             | \$6,200,000     |               |
| <i>Naugle v. Philip Morris USA</i> <sup>210</sup>        | 1968                         | Plaintiff | \$300,600,000   | 10%             | \$294,931,000   |               |

207. 945 So. 2d 1246 (Fla. 2006) (per curiam).

208. Verdict and Settlement Summary, *Cohen v. R.J. Reynolds Tobacco Co.*, No. 2007-11515, 2010 WL 1347299 (Fla. Cir. Ct. Mar. 24, 2010).

209. Verdict and Settlement Summary, *Gray v. R.J. Reynolds Tobacco Co.*, No. 2007 CA 002773, 2010 WL 752011 (Fla. Cir. Ct. Feb. 8, 2010).

210. Verdict-Phase 2, *Naugle v. Philip Morris USA, Inc.*, No. 07-036736 (19) (Fla. Cir. Ct. Nov. 19, 2009), available at <http://weblogs.sun-sentinel.com/news/politics/broward/blog/smokingverdict.pdf>. The plaintiff received \$244 million in punitive damages and \$36,590,000 in compensatory damages. *Id.* The latter award was reduced by 10%. Edward Pettersson, *Altria's Philip Morris Gets Verdict of Almost \$300 Million Cut*, BLOOMBERG BUSINESSWEEK (Feb. 25, 2010 12:03 AM), <http://www.businessweek.com/news/2010-02-25/altria-s-philip-morris-gets-verdict-of-almost-300-million-cut.html>.

|   |       |           |              |       |              |   |
|---|-------|-----------|--------------|-------|--------------|---|
| <i>Campbell v. R.J. Reynolds Tobacco Co.</i> <sup>211</sup> | 1958  | Plaintiff | \$7,800,000  | 57%   | \$3,354,000  | <i>Appeal docketed</i> , No. 1D10-210 (Fla. Dist. Ct. App. Jan. 14, 2010)   |
| <i>Barbanell v. Philip Morris USA, Inc.</i> <sup>212</sup>  | 1939  | Plaintiff | \$5,339,198  | 63.5% | \$1,948,807  | <i>Appeal docketed</i> , No. 4D09-3987 (Fla. Dist. Ct. App. Oct. 2, 2009)   |
| <i>Martin v. R.J. Reynolds Tobacco Co.</i> <sup>213</sup>   | 1940s | Plaintiff | \$30,000,000 | 34%   | \$28,300,000 | <i>Appeal docketed</i> , No. 1D09-4934 (Fla. Dist. Ct. App. Sept. 29, 2009) |
| <i>Brown v. R.J. Reynolds Tobacco Co.</i> <sup>214</sup>    | 1940s | Plaintiff | \$1,200,000  | 50%   | \$600,000    | <i>Appeal docketed</i> , No. 4D09-2664 (Fla. Dist. Ct. App. July 2, 2009)   |

211. Verdict and Settlement Summary, *Campbell v. R.J. Reynolds Tobacco Co.*, No. 2008 CA 002147, 2009 WL 3470280 (Fla. Cir. Ct. Aug. 21, 2009).

212. Verdict and Settlement Summary, *Barbanell v. R.J. Reynolds Tobacco Co.*, No. 2007-CA-036737, 2009 WL 3032563 (Fla. Cir. Ct. Aug. 13, 2009).

213. Verdict and Settlement Summary, *Martin v. R.J. Reynolds Tobacco Co.*, No. 2007-CA-2520, 2009 WL 5512876 (Fla. Cir. Ct. June 1, 2009). Of the \$30 million verdict, \$5 million was compensatory damages; the remainder was punitive damages. *Id.* The \$5 million was reduced by the plaintiff's comparative fault to \$3.3 million. *Id.*

214. Verdict and Settlement Summary, *Brown v. R.J. Reynolds Tobacco Co.*, No. 07-004646 (19), 2009 WL 2385144 (Fla. Cir. Ct. May 22, 2009).

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|--|-------------|-----------|-------------|-----|-------------|--|
| <i>Sherman v. R.J. Reynolds Tobacco Co.</i> <sup>215</sup> | Before 1953 | Plaintiff | \$1,550,000 | 50% | \$775,000   | <i>Appeal docketed</i> , No. 4D09-2472 (Fla. Dist. Ct. App. June 24, 2009) |
| <i>Kalyvas v. Philip Morris USA, Inc.</i> <sup>216</sup>   | 1970s       | Defendant |             |     |             |  |
| <i>Ferlanti v. Liggett Grp.</i> <sup>217</sup>             | 1941        | Plaintiff | \$1,295,972 | 40% | \$815,972   | <i>Appeal docketed</i> , No. 4D09-1392 (Fla. Dist. Ct. App. Apr. 14, 2009) |
| <i>Hess v. R.J. Reynolds Tobacco Co.</i> <sup>218</sup>    | 1957        | Plaintiff | \$8,000,000 | 58% | \$8,000,000 | <i>Appeal docketed</i> , No. 4D09-2666 (Fla. Dist. Ct. App. July 2, 2009)  |

215. Verdict and Settlement Summary, *Sherman v. R.J. Reynolds Tobacco Co.*, No. CACE07-23438, 2009 WL 3359070 (Fla. Cir. Ct. May 8, 2009).

216. Verdict and Settlement Summary, *Kalyvas v. Philip Morris USA, Inc.*, No. 07-CA-15071, 2009 WL 4731105 (Fla. Cir. Ct. Apr. 29, 2009).

217. Verdict and Settlement Summary, *Ferlanti v. Liggett Grp.*, No. 03-21697, 2009 WL 903507 (Fla. Cir. Ct. Mar. 6 2009).

218. Verdict and Settlement Summary, *Hess v. R.J. Reynolds Tobacco Co.*, No. CACE07011513, 2009 WL 754802 (Fla. Cir. Ct. Feb. 18, 2009). The jury found that the defendant intentionally misled consumers. *Id.*

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| <i>Gelep v. R.J. Reynolds Tobacco Co.</i> <sup>219</sup> | Information not available | Defendant  |  |  |  | <i>Appeal docketed, No. 2D09-2502 (Fla. Dist. Ct. App. May 29, 2009)</i> |
| <i>Cohen v. R.J. Reynolds Tobacco Co.</i> <sup>220</sup> | Information not available | Settlement |  |  |  |  |

219. Jordana Mishory, *Big Tobacco Strategy Scares Off Potential Plaintiffs*, LAW.COM (Jan. 19, 2010), <http://www.law.com/jsp/article.jsp?id=1202466533810>. The Gelep family paid \$100,000 in defense attorneys fees. *Id.* Florida law allows a plaintiff to be held liable for defense attorneys fees and costs if the plaintiff rejects a settlement offer and loses, or if he obtains a judgment of at least 25% less than the offer. *Id.* (citing FLA. STAT. ANN. § 768.79 (West 2005)).

220. *Id.* The case settled for \$1,000 during trial. *Id.*

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