Class Action Watch

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The Supreme Court Sets New Punitive Damage Limits Under Federal Common Law

by William E. Thomson & Kahn A. Scolnick

As it has done consistently for more than a decade, during the last Term the United States Supreme Court handed down a highly significant decision in the area of punitive damages jurisprudence. As virtually its last act of the Term, the Court issued its decision in *Exxon Shipping Co. v. Baker*,[1] clarifying the standards for review of punitive damages under federal common-law. In the process, the Court vacated a $2.5 billion punitive damages award as excessive under federal maritime common law, and imposed an upper limit on such awards of a 1:1 punitive-to-compensatory damages ratio. Among other things, *Baker* is significant for its clear signal of the Court's increasing concerns with the stark unpredictability and potential unfairness of punitive damage awards.

I. Background

Baker arose out of the well-documented and catastrophic events of March 24, 1989—when the supertanker *Exxon Valdez*, captained by Joseph Hazelwood, ran into a reef off the Alaskan coast, fracturing its hull and spilling millions of gallons of crude oil into Prince William Sound. The plaintiffs in *Baker* were a class of commercial fisherman and native Alaskans dependent on Prince William Sound for their livelihood. They sued to recover economic losses caused by the spill. (Exxon settled state and federal claims for environmental damage for more than $1 billon, and spent about $2.1 billion in cleanup efforts.)

In the district court, Exxon stipulated to its negligence and ensuing liability for compensatory damages, and the district court divided the trial into three phases. Phase I concerned Exxon's recklessness, and thus potential for punitive liability; the jury found Exxon reckless based on the acts of Hazelwood, its managerial employee. In Phase II, the jury awarded nearly $300 million in compensatory damages. (After subtracting out released claims, settlements, and other payments, the balance was approximately $20 million.) In Phase III, the jury awarded $5 billion in punitive damages against Exxon. The Ninth Circuit Court of Appeals subsequently reduced the amount of punitive damages to $2.5 billion, a punitive-to-compensatory damages ratio of 5:1

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A Colossal Class Action

by Jim Copland

In antiquity, the Colossus of Rhodes was one of the seven "wonders of the world"; built in the 4th-century B.C., the statue stood some 110 feet, roughly the size of the Statue of Liberty. Today, a different Colossus is making legal headlines. This Colossus is at the center of what has been dubbed "the largest class-action lawsuit ever filed in America", a sprawling suit in Texarkana, Arkansas, that has targeted over 500 insurance companies and already snared over $300 million in settlements—and $70 million in legal fees for the plaintiffs' bar—from only a small percentage of the defendants sued. And today's Colossus is, like its forebear, not only massive but also archaic: even as settlement negotiations proceed, the Colossus suit is the last of its breed, the state-court, national class-action lawsuit now made obsolete by 2005's Class Action Fairness Act.

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FROM THE EDITOR

The Federalist Society publishes *Class Action Watch* periodically to apprise both our membership and the public at large of recent trends and cases in class action litigation that merit attention.

Defined as a civil action brought by one or more plaintiffs on behalf of a large group of others who have a common interest, the class action lawsuit is both criticized and acclaimed. Critics say that such actions are far too beneficial to the lawyers that bring them; in that the attorney fees in settlements are often in the millions, while the individuals in the represented group receive substantially less. Proponents of the class action lawsuit see them as a mechanism to consolidate and streamline similar actions that would otherwise clog the court system, and as a way to make certain cases attractive to plaintiffs' attorneys.

Future issues of *Class Action Watch* will feature other articles and cases that we feel are of interest to our members and to society. We hope you find this and future issues thought-provoking and informative. Comments and criticisms about this publication are most welcome. Please e-mail: info@fed-soc.org.

Arkansas Supreme Court Holds That Potential Conflicts of Law Cannot Defeat Class Certification

by Jimmy Cline

The Arkansas Supreme Court recently held in *General Motors Corporation v. Bryant*[1] that any potential choice-of-law determination and application cannot defeat a class certification where there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members. Thus, in such situations, conducting a choice-of-law analysis is not required prior to certification.

A. Complaint/Circuit Court Findings

Bryant filed a first amended class-action complaint in which he alleged that 4,000,000 pickup trucks and sport utility vehicles, model years 1999 through 2002, were equipped with defectively designed parking brakes. Specifically, Bryant alleged that the vehicles

> contain parking brakes whose linings, due to a defectively high force spring clip, do not adequately float inside the parking break drums. This failure, alone, is problematic and arms Plaintiff and Class members. But inadequate lining float, by GM's own admission, also causes the parking breaks to "self-energize" and experience excessive lining wear after only 3,500 to 6,000 miles in use.[2]

According to Bryant, General Motors discovered the defect in late 2000 and redesigned the defective clip in October 2001, but withheld admission of responsibility for the defect from dealers until January 28, 2008. Consequently, General Motors avoided paying millions of dollars in warranty claims. Bryant further alleged that General Motors recalled manual-transmission trucks with the defective parking breaks sometime in 2005; however, the recall only involved approximately 60,000 vehicles and did not include the nearly 4,000,000 automatic transmission vehicles owned by him and the members of the class.[3]

Bryant alleged the following causes of action: breach of express warranty, breach of implied warranty of merchantability, violation of the Magnuson-Moss Warranty Act, unjust enrichment, and fraudulent concealment/failure to disclose. Bryant sought damages in the amount necessary to remedy the defective parking breaks, or, alternatively, disgorgement and restitution. The circuit court held a hearing on a motion for class certification filed by Bryant and concluded in a fifty-one page order that Bryant had satisfied each of the class certification requirements under Ark. R. Civ. P. 23, including numerosity, commonality, typicality, adequacy, predominance, and superiority.[4] The circuit court defined the class as follows:

> "Owners" or "subsequent owners" of 1999-2002 1500 Series pickups and utilities originally equipped with an automatic transmission and a PBR 210x30 Drum-in-Hat parking brake system utilizing a high-force clip retainer [footnote omitted], that registered his vehicle in any state in the United States.[5]

B. Arkansas Supreme Court Holding-Majority Opinion

The primary issue on appeal was General Motor's challenge to the applicable choice-of-law. More on point, General Motors contended that the circuit court abused its discretion by certifying the class because the significant variations among the fifty-one motor-vehicles product-defect laws defeated predominance. According to General Motors, such variations required the circuit court to conduct a choice-of-law analysis prior to certification of the class. The Arkansas Supreme Court's inquiries, therefore, were whether there was a predominating question that could be answered before determining any individual issues and whether the circuit court was required to conduct a choice-of-law analysis prior to certification.[6]

Turning to the court's first inquiry, the court held that there was a predominating question; specifically, "[w]hether or not the class vehicles contain a defectively designed parking brake system and whether or not General Motors concealed that defect[.]"[7] To further address this issue, the court discussed at length one of its prior opinions, *Security Benefit*,[8] a class action that involved thirty-nine states relative to novation. In that case, the Arkansas Supreme Court held that "resolution of the common questions of law or fault would enhance efficiency for all parties, even if the individual claims still remained to be adjudicated[,]" reasoning as follows:

> The mere fact that choice of law may be involved in the case of some claimants living in different states is not sufficient in and of itself to warrant a denial of class certification. *And though we are not convinced at this stage that references to the laws of thirty-nine states will be necessary, should it be required, this does not seem a particularly daunting or unmanageable task for the parties or for the trial court.* Because Arkansas is the home state for First Pyramid and because Arkansas law is the law to be applied under the Master Policy, it is the logical situs for this action. Actions in thirty-nine states, even with considerable joinder, would be inefficient, duplicative, and a drain on judicial resources. Denial of class action status could well reduce the number of claims brought in this matter, but that result is hardly in the interest of substantial justice.[9]

Furthermore, the Arkansas Supreme Court cited *FirstPlus Home Loan Owner*,[10] a case where the court stated that "the mere fact that choice of law may be involved in the case of some parties living in different states is not sufficient in and of itself to warrant denial of class certification."[11] Notwithstanding the holdings in *Security Benefit* and *FirstPlus Home Loan Owner*, which "suggested

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The New Jersey Supreme Court Rejects Medical Monitoring in Product Liability Claims

by Laurel Harbour

The New Jersey Supreme Court recently rejected medical monitoring in product liability claims in *Sinclair v. Merck & Co., Inc.*[1] The court's decision reflects the New Jersey legislature's intent to require individuals to have a present physical injury to recover under the New Jersey Products Liability Act.

The *Sinclair* plaintiffs sought to represent a class of individuals who took the pharmaceutical Vioxx for at least six consecutive weeks between May 1999, when the defendant, Merck & Co., introduced the medication, and September 2004, when Merck withdrew it from the market. Plaintiffs made no claim that they had had suffered any adverse effect as a result of taking Vioxx. Nor did they claim that they had an electrocardiogram (EKG) since they began taking the medication. Instead, they claimed to be at enhanced risk of an undiagnosed and unrecognized "silent heart attack" and other latent injuries. They asked that Merck fund a screening program to provide medical diagnostic tests for each member of the proposed class and follow-up with an epidemiologist.

In considering plaintiffs' request to expand medical monitoring to products liability, the court examined the New Jersey legislature's intent in enacting the Product Liability Act (PLA). The legislature "intended… to limit the liability of manufacturers so as to 'balance [] the interests of the public and the individual with a view towards economic reality.'"[2] The court also focused on the legislature's decision regarding the scope of the PLA. The legislature had broadly defined the actions covered by the Act to include "any claim or action brought by a claimant for harm caused by a product, irrespective of the theory underlying the claim."[3] The sole exceptions carved out by the legislature were actions for harm caused by breach of an express warranty and environmental tort actions, which were not relevant to plaintiffs' Vioxx claims. The court concluded that the Act governed plaintiffs' request for medical monitoring of Vioxx consumers.

The court then determined whether the Product Liability Act would permit plaintiffs with no physical injury to recover medical monitoring damages. Under the Act, the legislature defined the harm for which a claimant could recover as "personal physical illness, injury or death."[4] In interpreting this statutory language, the court examined the legislature's intent. Before the enactment of the PLA, the New Jersey Supreme Court had required plaintiffs asserting product claims to have a physical injury.[5] Nothing in the legislative history of the PLA suggested that the legislature intended to eliminate that physical requirement.[6] The *Sinclair* plaintiffs had not alleged they had a physical injury as a result of taking Vioxx. Accordingly, the court found that their claim for medical monitoring must fail: "Plaintiffs' effort to expand the definition of harm to include medical monitoring is best directed to the Legislature."[7]

The court also rejected plaintiffs' Consumer Fraud claim. The court pointed out that the legislature had "expressly provided that claims for 'harm caused by a product' are governed by the PLA," regardless of the theory underlying the claims.[8] Given this legislative direction, the court ruled that the PLA is "paramount where the underlying claim is for harm caused by a product."[9] Plaintiffs' claim regarding Vioxx fell within the scope of the PLA. Thus, they could not recover under the Consumer Fraud Act.[10]

In rejecting medical monitoring for non-injured product liability claimants in *Sinclair,* the New Jersey Supreme Court joins a growing list of courts which have limited medical monitoring or rejected the theory outright. In *Metro-North Commuter Railroad Company*, the United States Supreme Court rejected the request of an asymptomatic pipe fitter exposed to asbestos in his work place to recover under FELA for medical monitoring.[11] In addition, several state supreme courts which have considered the issue in recent years have rejected medical monitoring.[12] Many other state and federal courts have also rejected the theory in the absence of current injury.[13]

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The Selection of Lead Plaintiff and Lead Counsel in Securities Class Actions

by Lyle Roberts

> The incentives giving rise to the classic 'free rider' phenomenon.... do not evaporate simply because securities are involved. They get overridden because securities lawyers are involved, lawyers who are vying for the chance to take the laboring oar in litigation and the monetary rewards that go with it…. That is perfectly rational from an economic perspective, but, from a public policy perspective, one might question whether the right incentives are yet in place. It is for others to determine the degree to which the Congressional goal of making class action securities cases more client-driven and less lawyer-driven has been realized.[1]

Securities class actions present a continuing dilemma: how to ensure that the cases are being brought for the benefit of investors, rather than lawyers. Two highly publicized legal matters from the past year shine a spotlight on the issue. The first matter is the criminal prosecution of prominent securities litigators for engaging in a kickback scheme to compensate investors for acting as lead plaintiffs in securities class actions. The prosecution has led to indictments, guilty pleas, monetary settlements, and the introduction of legislation in Congress to address this abuse. The second matter is the $7.2 billion settlement in the Enron securities litigation, which resulted in the award of $688 million in attorneys' fees. The presence of an institutional investor as lead plaintiff, combined with a negotiated fee structure, has led the Enron case to be held up as an example of how the current lead plaintiff process is supposed to work. When a system of selecting lead plaintiffs and lead counsel leads to such disparate results, in these examples even involving some of the same lawyers, it is worth considering whether that system should be changed.

In the Private Securities Litigation Reform Act of 1995 (PSLRA), Congress addressed the issue of selecting lead plaintiffs and lead counsel through procedural reforms designed to encourage institutional investors to act as lead plaintiffs in securities class actions. It was Congress' belief that securities class actions tended to be "lawyer-driven" and would benefit from the participation of institutional investors who had the resources to actively monitor their counsel. The relevant PSLRA provision creates a rebuttable presumption that the investor with the largest financial interest (typically measured by claimed damages) should be appointed the lead plaintiff for the suit. In turn, the lead plaintiff has fairly broad discretion in selecting lead counsel.[2] To the extent the provision would encourage institutional investors—who usually have the largest stockholdings in public companies and, concurrently, the largest claimed damages—to act as lead plaintiffs, proponents argued that it would lead to less strike suits, lower attorneys' fees, and larger settlements. With the benefit of more than a decade of experience, however, it is now fair to say that the results have been mixed.

It is certainly true that the post-PSLRA participation level of institutional investors as lead plaintiffs in securities class actions has increased. In 1996, 8% of filed cases had large institutional investors as lead plaintiffs.[3] For the last five years, in contrast, about 50% of filed cases each year have had large institutional investors as lead plaintiffs.[4] To the extent that the participation level by large institutional investors has settled in at the 50% level, however, it seems that there is a natural cap.

The vast majority of the institutional investors who agree to act as lead plaintiffs are public and labor pension funds. So why is there only a 50% participation rate and why do only certain institutional investors take on the job? Institutional investors face a number of significant disincentives to becoming a lead plaintiff, including the cost of monitoring the actions of lead counsel (for which the lead plaintiff is rarely compensated beyond out-of-pocket expenses), the lack of information about a case at the early stages of litigation, and the possibility of jeopardizing commercial relationships.[5] While private financial services firms (e.g., banks, mutual funds, and insurance companies) appear to find these disincentives overwhelming, many public and labor pension funds do not.

One can imagine as least three possible reasons for this difference. First, public and labor pension funds often view participation in securities class actions as a public service that draws favorable attention to the entity and its officials for "cleaning up corporate America." Second, public and labor pension funds do not offer financial services to the business community and, therefore, are generally unconcerned about the possibility of jeopardizing commercial relationships. Finally, and more ominously, public and labor pension funds may be susceptible to "pay-to-play" practices in which plaintiffs' law firms provide campaign contributions or other financial incentives to the controlling official(s) of a pension fund in return for the fund's agreement to act as a lead plaintiff.[6]

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Rhode Island Supreme Court Joins Other State Courts in Rejecting Product- Based Public Nuisance Claims

by Mark A. Behrens & Frank Cruz-Alvarez

In July, the Supreme Court of Rhode Island issued a landmark decision that rejected the highest profile effort to date to turn public nuisance theory into a "super tort" that would circumvent the well-settled requirements of products liability law. In *State of Rhode Island v. Lead Industries, Ass'n., Inc.*,[1] the state's attorney general, in coordination with private contingency fee lawyers, sued former manufacturers of lead pigment for current hazards associated with deteriorated lead paint in homes. The trial court allowed the novel theory, and the subsequent trial resulted in a verdict for the state. The supreme court's ruling on the defendants' appeal was closely watched by courts, attorneys general, and other legal observers around the country to determine if this new legal theory would gain traction.

In addition to the public nuisance claim, the Rhode Island Supreme Court reviewed two other issues: whether the attorney general can retain outside counsel under a contingency fee to prosecute such a lawsuit, and a successor liability issue related to one of the defendants. This article will focus on the public nuisance and contingency fee issues addressed by the court.

Public Nuisance. The court held that the trial judge erred when it denied the defendants' motion to dismiss the public nuisance claim because the trial court applied a definition of public nuisance theory that was not in accord with long-standing Rhode Island precedent. The Rhode Island Supreme Court found that in order for the state to assert and maintain a claim for public nuisance against these defendants, the state must plead and prove sufficient facts to establish four key elements: "(1) an unreasonable interference; (2) with a right common to the general public; (3) by a person or people with control over the instrumentality alleged to have created the nuisance when the damage occurred; and (4) causation."[2]

The court spent most of its analysis on the elements of "public right" and "control." First, the court found that the state failed to establish "that defendants' conduct interfered with a public right as that term has been understood in the law of public nuisance."[3]

Historically, the term "public right" has been reserved for those "indivisible resources shared by the public at-large, like air, water, or public rights of way."[4] The state, however, argued that the term "public right" should be broadened to include the cumulative right of individuals to be free from harm (e.g., the right to be free from the hazards associated with exposure to lead paint).[5] Such an interpretation would transform the meaning of the term "public right" into something that would "encompass all behavior that causes a widespread interference with the private rights of numerous individuals."[6] In rejecting this theory, the court noted that such a departure would be inconsistent with the "principle that the evolution of the common law should occur gradually, predictably, and incrementally."[7] It also would "lead to a widespread expansion of public nuisance law that never was intended."[8]

In addition, the court found that the State failed to plead and prove "that defendants were in control of lead pigment at the time it caused harm to Rhode Island's children."[9] The court noted, "For the alleged public nuisance to be actionable, the state would have had to assert that defendants not only manufactured the lead pigment but also controlled that pigment at the time it caused injury to children in Rhode Island...."[10] These defendants, as with most product manufacturers, relinquished control of their products when they put them in the stream of commerce.

In addition, the court reiterated that unreasonable "conduct" is required for public nuisance liability and that "[c]ausation is a basic requirement in any public nuisance action."[11] By contrast, the trial court allowed the public nuisance claim to be premised on unreasonable "injury" (the children ought not to have borne their injuries) and said that the jury need not find any of the defendant's product was specifically sold in Rhode Island (substituting the chain of commerce for the chain of causation). The state has acknowledged that the Rhode Island Supreme Court's ruling will bring an end to the nine-year litigation.

Attorney General Contingency Fee Arrangements. The defendants also challenged the validity of the contingency fee agreement that existed between the attorney general's office and its outside counsel. Although this issue was rendered moot by the court's dismissal of the underlying public nuisance claim, the court decided to address the propriety of these types of agreements generally. Following a careful analysis of the numerous ethical, legal, political and policy issues that this subject raises, the court found that such arrangements were not unconstitutional, but required important limitations.[12] Specifically, the attorney general must "retain complete control over the course and conduct of the case,"[13] must "retain a veto power over any decision made by outside counsel,"[14] and have a senior member of his or her staff "personally involved with all stages of the litigation."[15] The court also provided for judicial review of the contingency fee arrangement.[16]

The Rhode Island public nuisance decision has significant national implications, particularly because the ruling joins a string of recent decisions by the high courts of New Jersey, Missouri, and Illinois, rejecting product-based public nuisance claims.[17] Taken together, these decisions stand as a powerful deterrent to personal injury lawyers and attorneys general seeking to create the ultimate "super tort." In fact, days after the Rhode Island Supreme Court's decision was issued, the city attorney of Columbus, Ohio, dismissed a similar lead paint public nuisance ction.

Mark A. Behrens is a Partner in Shook, Hardy & Bacon L.L.P.'s Washington, D.C.-based Public Policy Group, and Frank Cruz-Alvarez is an Associate in the Firm's Miami office. Mr. Behrens filed an amicus brief in the Rhode Island case on behalf of the National Association of Manufacturers, American Chemistry Council, NFIB Legal Foundation, American Tort Reform Association, Coalition for Litigation Justice, Inc., American Insurance Association, and National Association of Mutual Insurance Companies.

Endnotes

1 -- A.2d ----, 2008 R.I. LEXIS 79 (R.I. July 1, 2008); *see also* Victor E. Schwartz & Phil Goldberg, *The Law of Public Nuisance: Maintaining Rational Boundaries on a Rational Tort*, 45 Washburn L.J. 541 (2006).

2 *Id.* at 39.

3 *Id.* at 57.

4 *Id.* at 59.

5 *Id.*

6 *Id.* at 61.

7 *Id.*

8 *Id.* at 59; *see also id.* at 44.

9 *Id.* at 63.

10 *Id.*

11 *Id.* at 51.

12 *Id.* at 122-123.

13 *Id.* at 129.

14 *Id.* at 130.

15 *Id.*

16 *Id.* at 136-139.

17 *See In re Lead Paint Litig.,* 924 A.2d 484 (N.J. 2007); City of St. Louis v. Benjamin Moore & Co., 226 S.W.3d 110 (Mo. 2007); City of Chicago v. Beretta U.S.A. Corp., 821 N.E.2d 1099 (Ill. 2005); *see also* City of Chicago v. American Cyanamid Co., 823 N.E.2d 126 (Ill. Ct. App.), *appeal denied,* 833 N.E.2d 1 (Ill. 2005).

Grand Theft Auto Class Action: Game Over

by Andrew M. Grossman

A July 30th decision likely spelled the end of a class action suit against the makers of the popular Grand Theft Auto videogame series for a sexually explicit "minigame" hidden in one of its episodes. Within that decision may be an insight into how judges think about a certain class of cases that capture public attention.

For a case rife with sex and violence (in virtual form), it ended with a whimper. Judge Shirley Wohl Kram, who had set in motion settlement negotiations, pulled the plug by decertifying the class.[1] The case, she determined, is "plagued by individualized issues" of fact and law, particularly the requirement that a plaintiff prove reliance upon a misrepresentation under many states' consumer-protection laws. These issues, she ruled, defeat the predominance of common questions required in class actions brought under Federal Rule of Civil Procedure 23(b)(3).

This was an unexpected end for a case that commenced with grand ambitions.

Grand Theft Auto: San Andreas, the fifth game in the series, was released for the PlayStation II in October 2004 and sold more than 12 million copies in its first six months on the market. Versions for the Xbox and personal computers followed in June 2005. The player takes on the role of Carl "CJ" Johnson, who has recently returned to his home of Los Santos and now faces the task of reviving his moribund street gang.

To advance in the game, the player undertakes scripted missions: assassinations, drive-by shootings, casino heists, sexual bondage, torture, and, in one instance, murder of a philandering preacher, his companion prostitute, their bodyguard and their driver. The three-dimensional world of San Andreas permits the player wide latitude to explore and wreak mayhem, exploding buildings with Molotov cocktails and murdering all those who cross his path—literally, even pedestrians. Wearied by his havoc, CJ recharges his batteries by purchasing lap dances and sex from roving prostitutes, who may be killed to regain the money spent for their services.

Grand Theft Auto Video Game Consumer Litigation does not concern any of this content, which earned the game an "M" rating ("suitable for persons ages 17 and older"[2]) on release from the Entertainment Software Rating Board (ESRB).

At issue is a segment that the game's publisher had never intended for release. Following a successful date mission in the game, a girlfriend may invite CJ into her home for "coffee," which is revealed as a euphemism by the muffled noises that follow, though the player's view remains outside the girlfriend's home. Soon after the PC version of the game hit the market in 2005, an enterprising hacker discovered how to restore a portion of the game that had been edited out of the final release. Applying this "Hot Coffee" "mod" (which can be downloaded from the Internet and requires special hardware to use on the PlayStation or Xbox), a player can control CJ as he engages in several blurry and pixilated sex acts with his girlfriends.[3] Based on this content, the ESRB investigated and re-rated the game "AU," or "Adults Only," meaning it "should only be played by persons 18 years and older."

When news of the mod broke, politicians were quick to condemn the game—the House passed a resolution demanding a Federal Trade Commission inquiry and "the toughest of penalties"[4] and Senator Hillary Clinton called its violence "a silent epidemic" among children that "encourages them to have sex with prostitutes and then murder them". A flurry of lawsuits followed. In February 2006, the Multidistrict Litigation Panel transferred five cases to the Southern District of New York for consolidated proceedings, and subsequently two more. The consolidated complaint alleges three causes of action: unfair and deceptive trade practices under state law, breach of implied warranty, and unjust enrichment.[5] The plaintiffs' theory was that the game's publisher had caused it to be misrated and marketed it with a false rating, leading parents and others to purchase the game because they lacked knowledge of its pornographic content. They sought compensatory and restitution damages of potentially as much as $500 million, as well as punitive damages.

The case moved quickly into discovery (aided considerably by the ongoing government investigations) and settlement talks, as attorneys for Take Two Interactive, the game's publisher, sought to cut a deal with the eight law firms[6] representing the plaintiffs. That took a year and a half, and a settlement agreement was filed with the court in November 2007. Under the terms of the deal, Take Two agreed to exchange copies of the game containing the "Hot Coffee" footage and to pay purchasers of the original version of the game who had been offended (from $35 for those with "a detailed receipt" down to $5 for those merely attesting purchase and offense), up to a total cost of $2.75 million. In the event that few claims were filed, Take Two would be on the hook for a minimum of

$1,025,000, with the unclaimed balance to go to a charity as a "cy pres" remedy.

The court conditionally certified the class that month and preliminarily approved the settlement. Take Two advertised the settlement widely, per the agreement, and sent notice emails, at a total cost of $830,000. In all, 2,676 individuals filed claims under the settlement, out of about 10 million potentially eligible purchasers of the game. Of these, 210 sought replacement discs (Take Two had already made a fix for the PC version available *gratis*, prior even to the lawsuits[7]) and 2,619 sought cash payments totaling approximately $17,000. Over 2,000 of the claimants, with claims worth an aggregate $10,250, had filed online, without providing any proof that they had actually purchased the game or been aggrieved.[8] The plaintiffs proposed that the remainder go, in equal shares, to the National PTA and the ESRB.

For their part in securing this award, the plaintiffs' attorneys sought a flat $1 million in fees and expenses. This sum was arrived at by the process of calculating a lodestar (hours expended multiplied by an attorney's normal hourly rate) for the litigation: $1,317,433.25 for 3,280.3 hours work, at just a hair over $400 per hour. The thick brief in support of the request takes pains to note that "the time spent in connection with this fee request" is not included in this figure and that the requested fee, being less than the lodestar, actually represents a negative lodestar multiplier—cheap!—providing no excess compensation for the risks and complexity of the case.[9]

It would have been smooth sailing to final approval of the settlement, but for two unexpected turns. The first, which is the focus of the court's decertification decision, was the Second Circuit's decision *McLaughlin v. American Tobacco Corp*[10] handed down in April. In that case, a class of smokers sought civil-RICO liability for fraudulent marketing of "light" cigarettes as healthier than regular cigarettes, but the court held that because smokers could have purchased light cigarettes for any number of reasons reliance was "too individualized to admit of common proof." Thus questions in common to the class did not "predominate" over those affecting only individual members of the class, as required to bring a class action under FRCP 23(b)(3).

In Judge Shirley Wohl Kram's *Grand Theft Auto* opinion, *McLaughlin* controls. The opinion works through the conflict-of-law approaches of the five states in which the Grand Theft Auto litigation arose, finding that the case requires application of the law of the state in which each class member purchased the game and many of these states require the plaintiff to prove reliance on a misrepresentation—the same "individualized" determination. In addition, others require proof of an ascertainable monetary loss, scienter, or contractual privity. The court questions the wisdom and practicability of "grouping individuals with distinctly different substantive claims in a single nationwide class." On these grounds, the court concluded that the plaintiffs had failed to show that the class was sufficiently cohesive and decertified it.

But can that really be it? The court's application of *McLaughlin* is, as others have noted, sensible, but also rather aggressive. The *McLaughlin* court explicitly rejected the Fifth Circuit's blanket rule that a reliance element precludes class certification, and Judge Kram fails to consider seriously plaintiff's argument that reliance on a rating badge is not necessarily so individualized as to preclude common proof—after all, is that not the point of an "NC-17" (formerly "X")[11] or "AO" rating, especially when the ultimate consumer is a child? And while the applicable state laws do differ, and thoughtful judges regularly end their inquiry with that finding,[12] other courts have found their way around that inconvenient fact to certify a class.[13] One way, in particular, is to paint the issue as one of manageability, rather than predominance per se.[14] Another is to claim that conflict of law issues count less, or not at all, in the settlement context.[15] Anyway, what is to stop one or more of the named plaintiffs from appropriate non-*lex loci delicti* states from refashioning their claims and then proceeding?[16] Surely New York's choice-of-law approach could be made to yield a result that recognizes this inevitability.[17]

There may be something else going on, a subtle second factor, partly of the Zeitgeist, partly in the courtroom. In the air is a wariness towards bold and aggressive litigation over profoundly unserious matters. Consider, for example, the mocking tone of *The New York Times'* take on the case, published on the front page of its Business section just a month before Judge Kram decertified the class:

Game's Hidden Sex Scenes Draw Ho-Hum,
Except From Lawyers

> Lawyers who sued the makers of the video game Grand Theft Auto: San Andreas profess to be shocked, simply shocked, that a few people who bought the game were offended by sex scenes buried in its software.
>
> Any buyer upset about hidden sex in the violent game could file a claim under a settlement the lawyers struck with the game's makers, Rockstar Games and its corporate parent, Take-Two Interactive. Of the millions of people who bought the San Andreas version after its release in 2004, exactly 2,676 filed claims.

> "Am I disappointed? Sure," said Seth R. Lesser, lead lawyer for the plaintiffs. "We can't guess as to why now, several years later, people care or don't care. The merits of the case were clear."[18]

That article's appearance was not exactly a coincidence, as the driving force behind it, as well as its subject beyond the lead, is Theodore Frank, by day director of the American Enterprise Institute's Legal Center for the Public Interest and by night (apparently) an avid gamer. Frank, who also co-edits the lawsuit abuse chronicle Overlawyered.com, was the sole (coherent) dissenter to the Grand Theft Auto settlement, and the *Times'* piece reflects his withering criticisms of the agreement, as expressed in a crisp (and accessible) 19-page brief to the court.

In his challenge, Frank leads with the theme that there is something fishy with this case. How could the plaintiffs seriously contend that an average payout of less than a quarter of a cent per class member be an "excellent result"?[19] And how could attorney's fees 50 times the payout to class members be "reasonable in light of the benefits obtained by the litigation and on behalf of the Class"?[20]

Indeed, the particulars of the class attorneys' fee request raise doubts about the case itself. For example, included in the "total recovered benefit to the Class," calculated only for the purposes of comparison with the requested fee, are replacement discs at $15 apiece, notification expenses (amounting to some 40 times the payout to class members) borne directly by Take Two, and the cy pres awards. But due to the game's age—four years is an eternity in the videogame market—discs issued after Take Two recalled the original version of the game from stores' shelves can be had for $2 or less on eBay. As for notification, expensive advertisements in *Parade* and *USA Weekend*, two of the nation's highest circulation magazines, as well as other, more targeted placements, still attracted less than 0.003 % of possible class members, providing little "benefit" to the class. And it is difficult to conceive how donations to the PRA and the ESRB—which is, in any case, a subsidiary of the video game publishers' trade association, of which Take Two is a member—exactly benefit class members.[21] These items do bulk up the appearance of the class award, but a closer look reveals just how little the class has recouped.

So what's going on here? Frank suggests two possibilities: "The Putative Class Attorneys have brought either (1) a meritorious case that is being settled for an infinitesimal fraction of the case's real value in a "sellout" of the attorneys' and class representatives' fiduciary duties to the class, or (2) a meritless lawsuit where the class device had been used to obtain leverage for one person's benefit"—that is, the representative's.[22]

One is tempted to suggest a third possibility, perhaps a variation on the second: reflexive filing and incompetence. A flurry of filings is the inevitable response to any newsworthy controversy, while the smarter section of the plaintiffs' bar moves more slowly, with greater consideration, building up major areas of litigation over years and decades. The rest duke it out over the remaining crumbs and hang on for settlements, even when time reveals that few or no members of an aggregated class believe themselves to have suffered a cognizable injury. Here, the median class members (twenty-something males, going by the game's demographics) may have actually *benefited* from the "Hot Coffee" segments. They purchased a game for its vile violence and explicit content and received an extra dollop. Even today, the original disc, with the "Hot Coffee" bits, commands a slight premium in the resale market. But this is not part of the calculation for the attorneys behind the suit. They just did what one would expect in a litigious society where parties suffer no repercussions for bringing and continuing cases that lack merit.

And that reconnects with the Zeitgeist. The "hot coffee" mod evokes memories of "McDonald's coffee case," *Liebeck v. McDonald's Restaurants*, and indeed, Wikipedia, the digital manifestation of our collective consciousness, just happens to link the two through that coincidence of words: "'Hot Coffee' redirects here."[23]

Having disposed of the case on more neutral grounds, Judge Kram notes in a footnote that "important questions" regarding the settlement's fairness and the adequacy of the class representation remain, which is enough to signal displeasure without inviting controversy. Frank, after arguing before the judge, guessed that she was sympathetic to his arguments, based on her subsequent questions to the settling attorneys on the merits of the case and fairness of the settlement.[24] It may just be that Frank succeeded in awakening the judge's fear that here, in her courtroom, was one of those cases, the kind that become known to non-lawyers and accrete their own mythologies in the telling, an infamous case. Could this be what derailed the settlement?

If so, that fact suggests several courses of action for those defending high-profile cases concerning de minimus injuries. Courting *public* opinion is one—not the *Times,* but "News of the Weird." Thousands of less reputable sources, online and in print, commented on the case before the *Times* story ran. Establishing the taint of tabloid tawdriness, and that it goes to the very merits of the matter, may tempt the judge who wishes no notoriety herself.

A second point is that *elite* opinion matters, too; it is easy, after all, to name judicial grandees whose salons shape their opinions by no more than obvious *correctness* and instant consensus.

Finally, recognize that that opinion will not, in the end, decide the case. The judge, too, needs an out, a plausible theory to reach the right result and arguing the stink will only spread the taint to your side, as well—fine for a think-tank academic who is used to brawling, but not for a white-shoe litigator.

In a more rational system, the takeaway would be that, without sanction for bringing meritless aggregation actions, some attorneys will bring them and continue to litigate them long after it would have been apparent to a disinterested observer that no member of the class suffered any compensable injury. Even if for the wrong reasons (or at least not principled reasons), courts are right to be wary of these cases when the system incentivizes their commencement and continuation.

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Endnotes

1 In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. July 30, 2008).

2 Entertainment Software Rating Board, Game Ratings & Descriptor Guide, http://www.esrb.org/ratings/ratings_guide.jsp (last visited Oct. 2, 2008).

3 Video excerpts of these scenes can be found online. Spike, Hot Coffee, http://www.spike.com/video/hot-coffee/2673401 (last visited Oct. 2, 2008).

4 H. Res. 376, 109th Cong. (2005).

5 Amended Complaint, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. June 7, 2006).

6 *See* Settlement Agreement at 7, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. Nov. 7, 2007).

7 No More Hot Coffee, http://www.nomorehotcoffee.com (last visited Oct. 2, 2008).

8 Plaintiff's Memorandum in Support of Final Approval of Class Action Settlement at 2–3 In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. May 23, 2008).

9 Plaintiff's Memorandum in Support of Class Counsel's Application for an Award of Attorney's Fees and Reimbursement of Litigation Expenses and of Class Representatives' Enhancements, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. May 23, 2008).

10 522 F.3d 215 (2nd Cir. 2008).

11 Motion Picture Association of America, Ratings Guide, http://www.mpaa.org/FlmRat_Ratings.asp (last visited Oct. 2, 2008).

12 In re Bridgestone/Firestone, Inc., 288 F.3d 1012, 1015 (7th Cir. 2002) ("No class action is proper unless all litigants are governed by the same legal rules. Otherwise the class cannot satisfy the commonality and superiority requirements of Fed.R.Civ.P. 23(a), (b)(3).").

13 *See, e.g.,* Steinberg v. Nationwide Mut. Ins. Co., 224 F.R.D. 67, 76 (E.D.N.Y. 2004) ("Significantly, here, the plaintiff's claim is for the simple breach of a standard form contract and involves only the standard rules of contract interpretation."); Muehlbauer v. Gen. Motors Corp., 431 F. Supp. 2d 847, 872 (N.D. Ill. 2006) ("We of course anticipate variations in the laws that ostensibly hew to the same standards of liability. But whether these differences destroy commonality is an issue for another day.").

14 *See, e.g.,* In re Warfarin Sodium Antitrust Litig., 391 F.3d 516, 529 (3d Cir. 2004) ("However, when dealing with variations in state laws, the same concerns with regards to case manageability that arise with litigation classes are not present with settlement classes, and thus those variations are irrelevant to certification of a settlement class."). But doesn't this subsume the distinct predominance requirement to one of the factors "pertinent" to its determination? *See* FRCP 23(b)(3).

15 *See, e.g., id.*

16 Answer: Nothing. *See, e.g.,* Kelley v. Microsoft Corp., 251 F.R.D. 544, 551 (W.D. Wash. 2008) ("Because Plaintiffs seek certification of a nation-wide class, the Court considers the law of all concerned states, i.e., all fifty states. However, the Court need not examine the law of all jurisdictions so long as actual conflict exists between Washington law and the law of one other concerned state."). Westlaw queries indicate that New Jersey is also a popular jurisdiction in this respect.

17 *In re Allstate Ins. Co. (Stolarz)*, 613 N.E.2d 936, 938 (N.Y. 1993) (extolling "modern, more flexible approaches to choice of law").

18 Jonathan Glater, *Hidden Sex Scene Draws Ho-Hum, Except from Lawyers*, N.Y. Times, June 25, 2008, at C1.

19 Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement, Certification of Conditional Settlement, Certification of Condition Settlement Class, and Approval of Settlement Notice at 1, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. Nov. 19, 2007). In later filings, after the paucity of claim filings became clear, it was "fair and adequate." Plaintiff's Memorandum in Support of Class Counsel's Application for an Award of Attorney's Fees and Reimbursement of Litigation Expenses and of Class Representatives' Enhancements at 1, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. May 23, 2008).

20 Plaintiffs' Memorandum in Support of Motion for Preliminary Approval of Class Action Settlement, Certification of Conditional Settlement, Certification of Condition Settlement Class, and Approval of Settlement Notice at 1, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. Nov. 19, 2007).

21 *See* (conveniently enough) Theodore H. Frank, Cy Pres *Settlements*, Class Action Watch, March 2008.

22 Brief of Objector Theodore H. Frank in Opposition to Plaintiffs' Memoranda in Support of Proposed Settlement and Award of Attorneys' Fees and Expenses at 3, In re Grand Theft Auto Video Game Consumer Litigation, No. 06-MD-1739 (S.D.N.Y. June 6, 2008).

23 Liebeck v. McDonald's Restaurants, http://en.wikipedia.org/w/index.php?title=Liebeck_v._McDonald%27s_Restaurants&oldid=241925464 (last visited Oct. 2, 2008).

24 Overlawyered, Grant Theft Auto: Class Action—The Argument, http://overlawyered.com/2008/06/grand-theft-auto-class-action-the-argument/ (last visited Oct. 2, 2008).

A Colossal Class Action

Continued from page 1

"Colossus" is the name of a computer program developed by the California-based Computer Sciences Corporation. Originally used by the Government Insurance Office of Australia, the program was brought to private insurers in the United States in the 1990s and is licensed today to more than 20 insurers. The program is designed to reduce costs for insurance companies by replacing the broad discretion historically given to individual claims adjusters with a more systemic response to claims, based on sophisticated algorithms that incorporate a vast array of data—more than 7,000 factors—including the type of injury alleged, the plaintiff's demographic profile and claims history, the historical record of the plaintiff's attorney and doctor, and average jury verdicts in the area. The cost savings to insurers was substantial: after Farmers Insurance adopted the Colossus program in 2000, it saw its loss ratio (personal injury payouts per dollar of premium) fall 20 percent, from 1.13 to 0.87. With such losses, the program also had a corresponding impact on the litigation industry, noted by critics of the plaintiffs' bar.

Texarkana, Arkansas plaintiffs' firm Keil & Goodson filed the national class action lawsuit in state court against Computer Sciences and two other software companies that made software packages similar to Colossus, in addition to 581 insurance companies that had purportedly used the software, on February 7, 2005.[1] The complaint alleged that the software and insurance companies had "conspired" to reduce payouts and to "underpay" claims by withholding "faults" in the computer programs.

In practice, defendants' actions varied; the huge number of insurance company defendants by the complaint's own allegations used three different software packages, and how each company used each program would seem to be a separate question of fact. And whether any individual claimant was "underpaid" would also involve a separate question of fact. The Colossus class action, then, has on both sides plaintiffs and defendants who are not actually 'similarly situated'." But by packaging the case as a 'conspiracy', the attorneys tied together all the defendants as well as all the plaintiffs into one giant claim effectively making the case into a class suing a class.

In one of three separate Manhattan Institute studies empirically examining class action magnet courts, O'Melveny & Myers' John Beisner described the "perfect plaintiff" problem:

> Counsel may pick and choose among the facts presented by the many plaintiffs in attempting to establish all the various elements of the claim and the jury is often left with the indelible impression that the collective evidence counsel offers satisfies each individual plaintiff's particular burden of proof. For example, if one plaintiff had an allegedly misleading conversation with a defendant's representative about the potential side-effects of a drug, that conversation will be repeatedly referenced to the jury, even though none of the other 1,000 plaintiffs in the action had such a conversation. As a result, the jury may come away with the patently false impression that all plaintiffs had such conversations and relied on them in electing to use the drug at issue.

In the Colossus class action, the case is compromised by not only a perfect plaintiff problem but also a "perfect defendant" problem: any evidence that convinced a jury that a single insurance company defendant did something wrong could be wrongly attributed, by extension, to other insurance company defendants. As Beisner explains, in such a case

> it is difficult for any particular defendant to have a fair opportunity to put on its unique defenses at trial: evidence admitted as to one defendant's knowledge of a defect many years ago will inevitably tar other defendants as well. The jury will also be hopelessly lost in attempting to determine the precise lawfulness of any one particular defendant's conduct.

Facing such prejudicial odds, it is little wonder that many defendants quickly moved to settle with attorneys. As with any large class action case, those reasons are amplified by the prospect of substantial legal expenses, particularly in the form of discovery, which will never be reimbursed under the "American rule" that prevents fee-shifting; as well as a significant risk of massive "lottery" losses in the event of actual trial. Moreover, companies in the business of writing insurance policies would understandably be averse to publicized proceedings accusing them of being nefariously stingy in paying out claims submitted by policyholders, however unfair such a charge may be, which increases their pressure to settle. And with literally hundreds of defendants named in this suit, a real game-theoretic "first-mover" advantage exists for any individual defendant: by defecting and settling early, an individual defendant can avoid costly discovery and protect its own trade secrets at a discounted settlement price, because its own settlement increases pressure on those remaining in the litigation.

The imperative for a joined defendant to settle is also a function of the substantive law of Arkansas, which makes the Colossus case possible. In Arkansas, even if a defendant conspirator is not itself liable for interfering with a contract, it can become liable for others in the conspiracy,[2] even if it did not itself profit from that conspiracy.[3] And a plaintiff that could establish liability against its own insurance company could collect from others in conspiracy, who are jointly and severally liable as a matter of law.

Although such a scheme raises questions about its suitability for class action resolution, in Arkansas the state supreme court takes a more lenient view of class certification, and because the case is lodged in state court, the national defendants in this nationwide class action have no recourse to federal court interlocutory appeal. In addition to the procedural unfairness to defendants, having national insurance class actions in state courts creates real problems of federalism because insurance companies face different regulations across the 50 states; the prospect of one state enforcing rules in an insurance case that undermine other states' considered policy judgments is a real risk that has been previously evidenced in similar cases.

Critics suggest, then, that it is little coincidence that the plaintiffs' attorneys in the Colossus case rushed their filing to court in February 2005, 10 days before the President signed into law the Class Action Fairness Act, which would make such cases removable to federal court. When defendants tried to remove the case to federal court, they were unsuccessful, notwithstanding that the Court found that "this is the type of class action Congress now intends to be heard in federal court by expanding a district court's jurisdiction over putative class action suits." Thus, the case resides on the docket of an elected Arkansas judge in a county of 40,000, who in his first year on the bench oversaw a $100-million class action case against travel vendors.

On the merits, the claims underlying the Colossus case are rather problematic: of course defendants will look to hosts of factors including jurisdiction, injury type, attorney quality, and plaintiff demographics in assessing settlement offers, just as plaintiffs' attorneys do in reverse. But, critics say, the defendants in the case have reason to be wary—facing a small-town elected judge who in his first year on the bench oversaw a $100-million class action case against travel vendors. In the problems it poses for purposes of federalism and fundamental fairness, the Colossus case illustrates well the inherent problems with loose application of the class action device and the reasons for Congress' 2005 class action reform legislation. But while the case is in some respects a path-breaking case, its path is also not one that future litigants will have to trod.

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Endnotes

1 *See* Hensley v. Computer Sciences Corp., No. 2005-59-3.

2 *See* Mason v. Funderburk, 446 S.W.2d 543 (1969).

3 *See* Stewart v. Hedrick, 172 S.W.2d 416 (1943).

Arkansas Supreme Court Holds that Potential Conflicts of Law Cannot Defeat Class Certification

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that multistate class actions are not per se problematic for Arkansas courts[,]"[12] a question of first impression remained as to the court's second inquiry—whether the circuit court was required to conduct a choice-of-law analysis before certifying the multistate class action.[13] In addressing this issue, the Arkansas Supreme Court first stated that it must keep in mind that it has been resolute in affording circuit courts broad discretion in matters regarding class certification.[14]

The court again referenced *FirstPlus Home Loan Owner*, in which it held that individual issues and defenses raised by a defendant regarding the recovery of individual members cannot defeat class certification if there are common questions concerning the defendant's alleged wrongdoing, which must be resolved for all class members.[15] The court recognized, however, that other courts, including the Eighth Circuit,[16] the court of appeals of Arkansas, have held that conducting a choice-of-law analysis is required prior to certification of a class. Nonetheless, the court stated that "those decisions do not bind this court"[17] and "we are simply not persuaded by the reasoning of these courts as we have previously rejected any requirement of a rigorous-analysis inquiry by our circuit courts."[18] "Instead," the court added, "we have given the circuit courts of our state broad discretion in determining whether the requirements for class certification have been met, recognizing the caveat that *a class can always be decertified at a later date if necessary*."[19]

Keeping these principles in mind, the court concluded that "we view any potential choice-of-law determination and application as being similar to a determination of individual issues, which cannot defeat certification."[20] The court added that "it is possible that other states' laws might be applicable to the class members' claims[; h]owever, *we cannot say that our class-action jurisprudence requires an Arkansas circuit court to engage in a choice-of-law analysis prior to certifying a class… so long as common issue to all class members predominated over individual issues.*"[21]

C. Arkansas Supreme Court-Concurring Opinion

In a concurring opinion, two Arkansas Supreme Court Justices agreed with the majority's opinion that the circuit court did not abuse its discretion in finding that Bryant met the class certification requirements under Ark. R. Civ. P. 23.[22] The concurring justices, however, opined that the majority court's interpretation of the court's prior cases pertaining to choice of law was overbroad. For instance, the concurring opinion noted that the majority court held that "*any* potential choice-of-law determination and application" is "similar to a determination of individual issues, which cannot defeat certification."[23] The concurring opinion acknowledged that the court in *Security Benefit* indeed "rejected the argument that application of the law of thirty-nine states relative to a defense of novation defeated the predominance element of class certification" because "a class action would resolve several common questions more efficiently than joinder of plaintiffs," and "it did not 'seem a particularly daunting or unmanageable task for the parties or the trial court' to apply the laws of multiple states to determine whether the insurer could avail itself of a defense of novation against the class members who resided in the respective states."[24] According to the concurring opinion, the court in *Security Benefit* "did not, however, conclude" that "the circuit court was prohibited from considering any choice-of-law issues at the class-certification stage."[25]

The concurring opinion further stated:

> The majority declares that addressing any choice-of-law argument at the class-certification stage goes beyond our required analysis of the elements of certification and is, therefore, never indicated. Such a declaration extends far past the holdings of our prior case law addressing class certification and forecloses analysis that could conceivably be required.[26]

In sum, the concurring opinion concluded that the "majority opinion ratifies the circuit court's declaration and thereby cuts off any future possibility that a conflict of laws could defeat findings of predominance."[27]

CONCLUSION

As the concurring opinion points out, the majority's holding restricts a trial court from delving into a choice-of-analysis once it determines that there are common questions concerning the defendant's alleged wrongdoing that must be resolved for all class members. Therefore, not only does the holding prevent trial courts from even considering whether conflicts of law should defeat predominance, the holding also is contrary to the Arkansas Supreme Court's tradition of giving trial courts broad discretion in matters regarding class certification.

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Endnotes

1 General Motors Corporation v. Bryant, 2008 WL 2447477 (Ark. June 19, 2008).

2 *Id.* at *1.

3 *Id.*

4 *Id.*

5 *Id.*

6 *Id.* at *2-3.

7 *Id.* at *3.

8 Security Benefit Life Insurance Co. v. Graham, 306 Ark. 39, 810 S.W.2d 943 (1991).

9 *General Motors Corporation*, 2008 WL 2447477 at *4 (quoting *Security Benefit*, 306 Ark. at 44-45, 810 S.W.2d at 945-46)) (citations omitted).

10 FirstPlus Home Loan Owner 1997-1 v. Bryant, 372 Ark. 466 (2008).

11 *General Motors Corp*., 2008 WL 2447477 at *4.

12 *Id.*

13 *Id.*

14 *Id.*

15 *Id.*

16 *In re Prempro Prod. Liab. Litig*., 230 F.R.D. 555 (E.D. Ark. 2005) ("observing that when class certification is sought in a case based on common-law claims, the question of which law governs is crucial in making a class-certification decision).

17 *General Motors Corporation*, 2008 WL 2447477 at *5.

18 *Id.*

19 *Id.* (emphasis added).

20 *General Motors Corporation*, 2008 WL 2447477 at *4.

21 *Id.* at *5 (emphasis added).

22 *Id.* at *9.

23 *Id.* at *10.

24 *Id.*

25 *Id.* at *11.

26 *Id.* at *9-10.

27 *Id.* at *11.

Supreme Court Sets New Punitive Damage Limit

Continued from page 1

(the total relevant compensatory damages, taking into account all the related awards and settlements, was $507 million). Against Captain Hazelwood himself, the jury imposed punitive damages of $5,000.

Exxon sought review of the remaining $2.5 billion punitive damages award under both federal maritime common law and the Due Process Clause of the Fifth Amendment, but the Supreme Court granted review on only the federal maritime-law question.

In seeking to overturn, or at least reduce, the $2.5 billion in punitive damages awarded against it, Exxon presented three arguments: (1) maritime law precludes the imposition of punitive damages against a shipowner based on the acts of its managerial agents, (2) the federal Clean Water Act (CWA),[2] which has its own extensive penalty scheme, forecloses awards of punitive damages in maritime spill cases, and (3) the punitive damages were excessive as a matter of maritime common law. Justice Alito took no part in the consideration of the case, and thus only eight justices participated in the decision.

II. The *Baker* Decision

The first part of Justice Souter's majority opinion acknowledged that statements from two nineteenth-century maritime cases supported Exxon's argument against liability for the acts of the ship's captain. The Court also referred to Exxon's argument that the decision in *Kolstad v. American Dental Assn.*,[3] which established that employers are not liable for punitive damages for the discriminatory acts of their managerial employees if they maintained good-faith antidiscrimination policies, further supported a finding of no derivative liability in this case. The Court noted, however, that plaintiffs argued that the Restatement of Torts recognizes imposition of punitive-damages liability for the reckless acts of managerial agents, and that maritime-based common law should generally conform to land-based common law principles. Because the Court was equally divided (four-to-four) on this issue, the lower court's ruling was left intact.

The Court unanimously rejected Exxon's second argument—that the Clean Water Act's statutory penalty scheme preempts punitive damages in maritime spill cases. Exxon conceded that Congress could not have intended the CWA to preempt broad categories of damage awards that were not expressly mentioned in the statute, including compensatory damages for thwarting economic activity and compensatory damages for personal injury. Absent a clear indication of Congressional intent to preempt punitive damages, or a conflict with the statutory scheme, the Court was unwilling to accord the CWA that preemptive effect.

The Court then turned to Exxon's third issue, which was one of first impression. Namely, as a matter of federal common law in maritime cases, was the $2.5 billion punitive damage award excessive? Writing for himself, Chief Justice Roberts, and Justices Kennedy, Scalia, and Thomas, Justice Souter began by tracing the "modern Anglo-American doctrine of punitive damages" from the eighteenth century to today, noting that in earlier eras punitive damages were often intended to provide redress for otherwise uncompensated injuries. Contemporary decisions, on the other hand, recognize that "punitives are aimed not at compensation but principally at retribution and deterring harmful conduct." In addition, the Court noted, heavier punitive damage awards have generally been thought to be justifiable when wrongdoing is hard to detect (increasing the defendant's chances of getting away with it), and when the value of injury and the corresponding compensatory award are small (providing low incentives to sue).

The majority opinion next examined various states' experiences with punitive damage awards, and the different methods employed to regulate them, such as barring punitive damages altogether, permitting them only when specifically authorized by statute, imposing statutory limits in the form of absolute monetary caps, and imposing a maximum ratio of punitive-to-compensatory damages. Yet despite these limitations, the Court noted with concern, "punitive damages overall are higher and more frequent in the United States than they are anywhere else" in the world.

The Court acknowledged that American punitive damages have been the target of significant criticism in recent decades, but noted scholarly research that indicated that the median ratio of punitive-to-compensatory awards in practice does not exceed 1:1. This shows "an overall restraint," the majority stated, and "that in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter."

The heart of the punitive damages problem is not, the Court concluded, "mass-produced runaway awards." Rather, "[t]he real problem… is the stark unpredictability of punitive awards." Two cases with "strikingly similar facts" could produce two very different results; one defendant subjected to massive punitive damages, the other subjected to no punitives at all. This implicates one of the core values of our justice system: a sense of fairness. The scholarly research suggested that in some outlier cases, the ratio is significantly higher than 1:1, and thus in these cases punitive liability "dwarf[s] the corresponding compensatories."

The Court briefly summarized its earlier punitive damages decisions, in which it had imposed guidelines and limitations based on the Due Process Clause. Although the Court has thus far rejected any precise mathematical formula, it has also said that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process."[4] Yet the question presented in *Baker* was a somewhat different one; the issue was not the outer limits of the Constitution, but rather the Court's common law authority to regulate unpredictable and eccentrically high punitive damage awards in the absence of a statute.

With this goal in mind, the Court considered three possible "approaches"—one verbal and two quantitative. First, several states had devised multi-factor "tests" to guide judicial review of juries' punitive awards. But the Court was "skeptical that verbal formulas, superimposed on general jury instructions, are the best insurance against unpredictable outliers." The Court's experience with attempts to produce consistency in criminal sentencing provided a useful comparison, and left the Justices "doubtful that anything but a quantified approach will work." In particular, in the last quarter-century, federal sentencing had rejected an "indeterminate" sentencing scheme, where "similarly situated offenders" received vastly disparate sentences, with a system of detailed guidelines tied to exactly quantified sentencing results. This experience "strongly suggest[ed]" that, absent specific limitations, "it is inevitable that the specific amount of punitive damages awarded… will be arbitrary."

Second, the Court considered a "hard dollar cap on punitive damages," which had been adopted by several states. The Court quickly dismissed this option, however, because of the difficulty in settling on a particular dollar figure that would apply across the board to all tort and contract injuries. Moreover, unlike legislation, court-imposed dollar caps cannot easily be revised to account for inflation or other unanticipated concerns.

The "more promising alternative" was to peg punitive to compensatory damages by using a ratio or maximum multiple. To critics who would complain that this sort of judicial policymaking is better left to the legislature, the Court answered that the judiciary could not wash its hands of a problem it created (by allowing punitive damage awards in the first place) by calling quantified standards "legislative." In any event, courts have historically fashioned numerical caps in other contexts—for example, the 21-year rule against perpetuities, and certain judge-made limitations periods for civil actions. "And of course," the Court importantly added, "the relevance of the ratio between compensatory and punitive damages is indisputable, being a central feature in our due process analysis."

When it came to selecting a specific numerical ratio, the Court first considered and rejected 3:1. This was too high because states with 3:1 ratios generally apply them where the underlying tortious action is worse than negligent, but less than malicious. In *Baker*, Exxon's actions were merely reckless, and Exxon's recklessness regarding Captain Hazelwood was not motivated by financial gain. The Court also considered and rejected a 2:1 ratio, which arose from treble-damages statutes devised to induce private enforcement. This concern was not present in *Baker*, with its "staggering" damages and multiple criminal indictments.

The Court ultimately settled on a 1:1 ratio, for several reasons. It again cited the scholarly research that had catalogued hundreds of punitive awards—in these cases, which ranged from malice to recklessness to gross negligence, the median ratio was significantly *less than 1:1*. Specifically, the ratio expressed in these studies was 0.65:1. "In a well-functioning system, we would expect that awards at the median *or lower* would roughly express jurors' sense of reasonable penalties in cases with no earmarks of exceptional blameworthiness… and without the modest economic harm or odds of detection that would have opened the door to higher awards." The Court also referred back to its due process cases, in which it had announced that "substantial" compensatory damages warrant a lower ratio, perhaps "only *equal to* compensatory damages." Accordingly, the Court concluded "that a 1:1 ratio, which is above the median award, is a fair upper limit."

As a result, the Court vacated the judgment and remanded for re-calculation of punitive damages, given this maximum 1:1 ratio. In practical terms, *Baker* reduced the punitive award against Exxon from the Ninth Circuit's $2.5 billion to a maximum award of approximately $500 million.

Justice Scalia, joined by Justice Thomas, concurred, noting their continuing belief that prior decisions imposing due process limits on punitive damages "were in error," but "agree[ing] with the argumentation based upon those prior holdings."

Justice Stevens dissented as to the use of any precise ratio. Congress, not the Court, he wrote, should make these sorts of empirical judgments. He also argued that, unlike land-based tort cases, punitive awards in federal maritime cases are more likely necessary to *compensate* for certain "intangible injuries," such as pain and suffering, that are not compensable under general maritime law. In addition, Justice Stevens pointed out that the majority had failed to identify a single state *court*, as opposed to legislature, that had imposed a precise ratio. Finally, Justice Stevens contended that abuse-of-discretion review was adequate to deal with the sort of outlier cases driving the majority's decision, and that it, rather than the majority's more searching review, is more consonant with courts' traditional common-law review where no constitutional issue is implicated.

Justice Ginsburg also dissented. Although she recognized that it was "beyond question [that] 'the Court possesses the power to craft the rule it announce[d],'" she found "that the question is close [but she]… share[d] Justice Stevens' view that Congress is the better equipped decisionmaker."

Finally, Justice Breyer dissented as to the application of a 1:1 standard under the facts of the case. In his view, "a limited exception to the Court's 1:1 ratio is warranted here" because Exxon's behavior went beyond the mine-run case of reckless behavior, and because the Ninth Circuit had already reduced the award by 50%.

III. *Baker*'s Potential Implications for The Future

The *Baker* decision is significant not only for the limit it establishes in federal maritime common law but also for the broader guidance that it provides to courts throughout the country in interpreting the scope of the limits on punitive damage awards under the federal Due Process Clause and state common law. While *Baker* of course arose in a specific and somewhat specialized context—federal maritime law—the decision is important in several respects that may have application far beyond that narrow context.

Perhaps most directly, there is little principled basis for refusing to extend *Baker*'s 1:1 ratio to other areas of federal common law. After all, the impetus for this fixed upper limit derived from the Court's concern—expressed in its most dramatic statement yet—over the problem of the "stark unpredictability of punitive awards." It found that the "spread [between punitive damages awards] is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories," and that this disparity flows not from legitimate case-specific differences, or reasonable judgments by judges and juries based thereon, but from "the inherent uncertainty of the trial process."[5] The Court concluded that this "implication of unfairness" is in fundamental tension with our system, where the "commonly held notion of law rests on a sense of fairness in dealing with one another." And the Court reaffirmed the centrality of the "fair notice" principle, stating that even those defendants characterized as the worst offenders should be able to "look ahead with some ability to know what the stakes are in choosing one course of action or another."

Decisions relying on *Baker* are still sparse, of course, but there is some early indication that its fundamental holding will be applied outside of the maritime context. For example, in *Mendez v. County of San Bernardino*, the Ninth Circuit indicated that *Baker*'s 1:1 ratio would also apply in the context of a federal civil rights case. Indeed, Justice Stevens noted in his *Baker* dissent that "there may be *less* reason to limit punitive damages in this sphere [of maritime cases] than in any other" because certain types of intangible harm are not compensable under general maritime law.[6]

The obvious question after *Baker* is whether the 1:1 maximum common-law ratio indicates a shift in the Court's due process jurisprudence toward a tighter limit on an acceptable ratio. Specifically, while the Court had consistently declined to impose a strict numerical limit in prior due process cases, might *Baker* signal a willingness to reconsider that approach? Justice Ginsburg squarely raises this question in her dissent: "On next opportunity, will the Court rule, definitively, that 1:1 is the upper limit due process requires"? In this respect it seems quite important that the Court expressly and repeatedly supported its 1:1 limit for federal maritime law with reference to its prior constitutional due process decisions in *BMW of North America, Inc. v. Gore*,[7] and *State Farm Mutual Automobile Insurance Co. v. Campbell*.[8] In particular, it noted *State Farm*'s presumption that single-digit multipliers are more likely to comport with due process, and that in cases with "substantial" compensatory damages a 1:1 ratio "can reach the outermost limit of the due process guarantee." *State Farm* powerfully signaled to lower courts that anything above a 9:1 ratio was likely to be unconstitutionally excessive. And *Baker* should point the courts in the further direction of tighter ratios and more searching excessiveness review, because concerns over unpredictability and "fair notice" to defendants have long been at the heart of constitutional due process review.

And specifically with respect to class actions, *Baker* makes the important observation that class actions involving a large number of potential plaintiffs may necessary involve "substantial" compensatory damages, regardless of the amount of the individual awards. "[I]n such cases, individual awards are not the touchstone, for it is the class option that facilitates suit, and a class recovery of $500 million is substantial. In this case, then, the constitutional outer limit may well be 1:1." In other words, at least in large class actions, *Baker*'s 1:1 ratio may in fact represent the due process ceiling for punitive damage awards.

Interestingly, the Court relied extensively at several junctures on scholarly studies in establishing the factual basis for its conclusion that there is a disturbing disparity in punitive damages awards, signaling for the first time the potential jurisprudential importance of statistical analysis in this area. Yet the Court explicitly declined to rely on other academic literature that demonstrated, anecdotally, consistency in punitive awards, "[b]ecause this research was funded in part by Exxon." Apparently research funded by the defendant before the Court will be accorded no weight, regardless of its quality and scholarly bona fides.

The significance of *Baker*'s 1:1 ratio cannot logically be confined to federal maritime cases. At the very least, this same ratio arguably should apply across the board in other types of federal cases as a matter of federal common law. But even more important, *Baker* may be a crucial step in the Court's progression toward a more precise due process limitation on punitive damages in *all* state and federal cases.

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Endnotes

1 Exxon Shipping Co. v. Baker, 128 S. Ct. 2605 (2008)

2 33 U.S.C. § 1251 et seq.

3 527 U.S. 526, 544 (1999)

4 State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 425 (2003).

5 Quoting BMW of N. Am., Inc. v. Gore (Ala. 1994) 646 So.2d 619, 626 (per curiam).

6 540 F.3d 1109 (9th Cir. 2008).

7 517 U.S. 559 (1996).

8 538 U.S. 408 (2003).

The Reform Act and Selection of Lead Plaintiffs and Lead Counsel in Securities Class Actions

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The balancing of these factors apparently leads to limited, but significant, public and labor pension fund participation in securities class actions. More importantly, what public and labor pension funds do is cherry-pick the best cases. Two recent studies have found that institutional investors are more likely to become the lead plaintiff in larger cases where there is a higher probability of corporate malfeasance (e.g., there has already been a financial restatement or an SEC investigation).[7] Less compelling cases are thus left to individual investors—exactly the type of plaintiffs that Congress feared would be unable to effectively monitor class counsel.

As for the cases in which institutional investors do participate, proponents of the PSLRA's lead plaintiff provision had hoped their participation would lead to larger settlements and reduced attorneys' fees. The empirical evidence suggests that this is happening, but it is not entirely conclusive. Studies have found that the participation of institutional investors is associated with a statistically significant increase in settlement amounts.[8] The extent to which this may just be the result of institutional investors taking on the stronger cases, however, has been difficult to measure.[9] The data on attorneys' fees awards is also mixed. The most comprehensive academic study to date, for example, has found that the participation of public pension funds leads to smaller fee requests and awards, but that the participation of labor pension funds has no such effect.[10]

With appropriate caveats, one can summarize the overall impact of the PSLRA's lead plaintiff provision as follows: the good cases have gotten better, but the bad cases are still bad. The two matters that have recently caught the public's attention support that conclusion. The Milberg Weiss criminal case related to smaller securities class actions, including post-PSLRA cases, in which individual investors agreed to act as lead plaintiffs in return for a kickback from the eventual attorneys' fees award.[11] The courts were unaware of these illegal side agreements. The lack of client oversight led to higher fee awards, with class members receiving correspondingly smaller payments.[12]

In contrast, the Enron securities class action has been held up as a sterling example of the PSLRA at work.[13] As a high-profile, large damages case with every possible indicia of fraud, there was extensive competition among plaintiffs' law firms to represent the institutional investors that experienced significant losses. The Regents of the University of California, who were selected as lead plaintiff in the case, interviewed a number of class action specialist firms and were able to negotiate a sliding scale fee of 8% to 10% of the eventual recovery (well below the typical 25% - 30% contingency fee in securities class actions).[14] Even though the agreement resulted in a record attorneys' fees request of $688 million, the court enthusiastically granted the award after finding it reasonable based on, among other things, the fact that the fee structure had been competitively negotiated.[15]

In light of these two matters, the question for legislators is how to modify the PSLRA's lead plaintiff provisions to ensure that the Milberg Weiss lead plaintiff process never happens again and that the Enron lead plaintiff process happens more often. A valuable step in the right direction is the Securities Litigation Attorney Accountability and Transparency Act (SLAATA), which was introduced in the Senate earlier this year by Sen. John Cornyn (R-TX).[16] The bill would require sworn certifications from lead plaintiffs and their attorneys disclosing potential conflicts of interest (including financial payments between the parties) and directs courts, as part of the lead counsel approval process, to consider the prospective lead counsel's fees and solicit competitive bids to ensure that those fees are based on market rates. Although SLAATA does an admirable job of addressing the issues of kickbacks and non-negotiated fee structures, it does not take the next step of trying to ensure that the selected lead plaintiff is the best candidate for the job.

Two potential additional changes to the PSLRA's lead plaintiff provision come to mind, one minor and one major. First, Congress should mandate that a lead plaintiff be awarded all of its reasonable expenses associated with participating in a case, including the time spent by in-house personnel monitoring lead counsel. There is no reason why lead plaintiffs should be forced to pay out of their own pocket for the benefit (in large part) of other investors and this is one disincentive to institutional investor participation that can be easily removed. Second, SLAATA correctly would require courts to take a more activist role in assessing the appropriateness of lead counsel at the outset of the case. Congress should extend that activist role to the assessment of lead plaintiffs and do away with the "largest financial stake" test in favor of a more flexible multi-factor test. These factors should include the proposed lead plaintiff's ability to monitor the litigation, the amount of potential damages it has suffered, and any fee structure it has negotiated with its preferred counsel. The ideal candidate, of course, would be a large institutional investor with significant damages and low-cost, competent counsel.[17] While these reforms would not guarantee an increase in the number of institutional investor lead plaintiffs, they would improve the odds, while giving courts more flexibility in achieving Congress' goal of "client-driven" cases.

If the events of the past year demonstrate anything, it is that the PSLRA's lead plaintiff provision is too much of a hit-or-miss affair. SLAATA should spur a deeper legislative examination of how to improve the management of securities class actions so that investors, and not plaintiffs' lawyers, are consistently the primary beneficiaries of successful cases.

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Endnotes

1 *In re Molson Coors Brewing Co. Sec. Litig.*, 233 F.R.D. 147, 149 n.4 (D. Del. 2005).

2 15 U.S.C. §77z-1; 15 U.S.C. §78u-4.

3 *See* PriceWaterhouseCoopers, 2007 Securities Litigation Study 33 (2008), *available at* http://www.pwc.com/extweb/pwcpublications.nsf/docid/71BC6FB788E2FE8785257425006DEE88/$file/2007_security_litigation_study.pdf.

4 *Id.*

5 *See* James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Actions*, 106 Colum. L. Rev. 1587, 1606-09 (2006) ("Cox & Thomas").

6 *See id.* at 1611-14 (examining evidence of pay-to-play in the conduct of securities class actions).

7 *See id.* at 1629-30; Stephen J. Choi, Jill E. Fisch & A.C. Pritchard, *Do Institutions Matter? The Impact of the Lead Plaintiff Provision of the Private Securities Litigation Reform Act*, 83 Wash. U.L.Q. 869, 892 (2005) ("Choi, Fisch, & Pritchard") (finding 46% of public pension fund lead plaintiff cases involved defendant with pre-litigation accounting restatement or SEC investigation versus 23% of cases with other types of lead plaintiffs); Michael A. Perino, *Institutional Activism through Litigation: An Empirical Analysis of Public Pension Fund Participation in Securities Class Actions*, St. John's U. School of Law Legal Studies Research Paper No. 06-0055, at 12 (2006) ("Perino"), *available at* http://ssrn.com/abstract=938722.

8 *See* Cox & Thomas at 1631-32, 1636 (presence of institutional investor lead plaintiff increased settlement value by 4% for every 1% increase in provable losses); Choi, Fisch & Pritchard at 893-96, 900-01.

9 *See id.*; *cf.* Perino at 13-25 (even controlling for self-selection of cases there may be an increase in settlement amounts).

10 *See* Michael A. Perino, *Markets and Mentors: The Impact of Competition and Experience on Attorneys' Fees in Securities Class Actions*, St. John's U. School of Law Legal Studies Research Paper No. 06-0034, at 2-3 (2006) ("Perino II), *available at* http://ssrn.com/abstract=870577.

11 *See* Michael A. Perino, *The Milberg Weiss Prosecution: No Harm, No Foul?*, 11 Briefly 9 (AEI Legal Center for the Public Interest 2008), *available at* ttp://www.aei.org/docLib/20080528_Briefly_v11n9_web(2).pdf.

12 *Id.*at 7-8 (comparing fee awards).

13 *See, e.g.,* Paul S. Atkins, Speech by SEC Commission: Remarks before the U.S. Chamber Institute for Legal Reform (Feb. 16, 2006) ("When talking about the importance and effectiveness of the lead plaintiff provision of the PSLRA, Chairman [Christopher] Cox likes to point to the Enron class action suits... One of the first moves made by the UC [University of California] Regents was to negotiate a significantly reduced legal fee that resulted in hundreds of millions more dollars for injured investors."), *available at* http://www.sec.gov/news/speech/spch021606psa.htm.

14 *In re Enron Corp. Sec., Derivative & ERISA Lit.*, No. MDL-1446, Civil Action No. H-01-3624, 2008 WL 4178130, at **24-26 (S.D. Tex. Sept. 8, 2008).

15 *Id.* at *73. The focus here is on the lead plaintiff and lead counsel interaction, not the appropriateness of the actual amount of fees awarded (which was the subject of numerous objections from class members).

16 S. 3033, 110th Cong. (2008), *available at* http://thomas.loc.gov/cgi-bin/bdquery/z?d110:s.03033:.

17 If Congress were to implement this reform, it would limit the need for the auctioning of the lead counsel role to cases where the available lead plaintiffs do not appear to have used competition or otherwise engaged in arm's length bargaining in their retention of counsel. *See also* Perino II at 33-35 (recommending courts continue to experiment with auctioning lead counsel role in such circumstances).

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1 948 A.2d 587 (N.J. 2008).

2 *Id*. at 593 (quoting Zaza v. Marquess & Nell, Inc., 144 N.J. 34, 47-48, 675 A.2d 620 (1996) (second alteration in original) (quoting Shackil v. Lederle Labs., 116 N.J.155, 188, 561 A 2d. 511 (1989)).

3 N.J. Stat. Ann. § 2A:58C-1b(3); N.J. Stat. Ann. § 2A:58C-6.

4 N.J. Stat. Ann. § 2A:58-C-1b(2).

5 *Sinclair*, 948 A.2d at 595 (citing Cepeda v. Cumberland Eng'g Co., 76 N.J. 152, 163, 169, 386 A. 2d 816 (1978), *overruled on other grounds by* Suter v. San Angelo Foundry & Mach. Co., 81 N.J. 150, 177, 406 A. 2d 140 (1979); *see also* Brown v. United States Stove Co., 98 N.J. 155, 178, 484 A 2d 1234 (1984) (adopting generally the view of the *Restatement(Second) of Torts* § 402A (1965)).

6 *Sinclair*, 948 A.2d at 595.

7 *Id.*

8 *Id.* (N.J. Stat. Ann. § 2A:58C-1b(3)).

9 *Id.* at 596.

10 *Id.*

11 *Id.* at 444.

12 *Id*. at 141-146 (citing *Badillo v. American Brands, Inc.,* 16 P.3d 435, 441 (Nev. 2001); *Hinton v. Monsanto Co.,* 813 So.2d 827, 828 (Ala. 2001); *Wood v. Wyeth-Ayerst Labs.*, 82 S.W.3d 849 (Ky. 2002); *Henry v. Dow Chem. Co.*, 701 N.W.2d 684 (Mich. 2005); *Paz v. Busch Engineered Materials, Inc.,* 949 So. 2d 1 (Miss. 2007)); *Lowe v. Philip Morris USA, Inc*., 183 P.2d 181 (Or. 2008); *see also* 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, 840-841 (2002).

13 Mark A. Behrens & Christopher E. Appel, *Medical Monitoring in Missouri After Meyer ex rel. Coplin v. Fluor Corp.: Sound Policy Should Be Restored to a Vague and Unsound Directive*, 27 St. Louis U. Pub. L. Rev. 135, 146 (2007) (citing cases).

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