

# Michigan Law Review

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Volume 81 | Issue 8

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1983

## Class Actions for Punitive Damages

Michigan Law Review

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### Recommended Citation

Michigan Law Review, *Class Actions for Punitive Damages*, 81 MICH. L. REV. 1787 (1983).

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## NOTES

### Class Actions for Punitive Damages

#### INTRODUCTION

Two recent decisions, *In re Federal Skywalk Cases* (*Federal Skywalk Cases*)<sup>1</sup> and *In re: Northern District of California "Dalkon Shield" IUD Products Liability Litigation* (*Dalkon Shield*)<sup>2</sup> have raised the question whether a federal court can certify a class action for punitive damages under Rule 23 of the Federal Rules of Civil Procedure.<sup>3</sup> The trial courts in both of these cases theorized that where a defendant<sup>4</sup> has injured numerous plaintiffs, the risk of multiple punitive damages judgments would produce one of two undesirable results. First, courts fearing that punitive awards already had severely punished a given defendant might refuse to award punitive damages to later plaintiffs. Thus, the first plaintiffs to bring their claims to judgment would dispose of the right of later plaintiffs to seek punitive awards.<sup>5</sup> Alternatively, courts would allow plaintiffs to pursue their punitive claims in every action, thus subjecting defendants to multiple punitive awards and the risk of bankruptcy.<sup>6</sup> In either instance, the fund available for punitive recovery would be limited, establishing a basis for class certification under Rule 23(b)(1).<sup>7</sup>

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1. 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The action arose from the collapse of two skywalks in the Hyatt-Regency Hotel in Kansas City, Missouri on July 17, 1981. The disaster left 113 dead and 212 injured. 1500 to 2000 persons who were in the lobby of the hotel when the accident occurred were in a position to seek damages for emotional distress. By January 25, 1982, 150 suits had been filed either in the Federal District Court for the Western District of Missouri or the Circuit Court of Jackson County, Missouri. The federal district court certified a Rule 23(b)(1)(A) class action on the issue of liability for compensatory and punitive damages, and a Rule 23(b)(1)(B) class action on the issues of liability for and amount of punitive damages. 93 F.R.D. at 419.

2. 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded sub nom.* *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). Thousands of women allegedly had been injured by a defective IUD called the Dalkon Shield. The device produced uterine perforations, infections, spontaneous abortions, and fetal injuries. The district court certified a nationwide class action consisting of plaintiffs seeking punitive damages against A.H. Robins Co. 526 F. Supp. at 921.

3. FED. R. CIV. P. 23.

4. Although this Note refers throughout to a single defendant, the reasoning involved also applies where *several* defendants injure numerous plaintiffs. In addition, this Note assumes that most tortfeasors will be corporations because most of the cases dealing with the problem of multiple litigation for punitive damages involve corporate defendants.

5. *Federal Skywalk Cases*, 93 F.R.D. at 424; *Dalkon Shield*, 526 F. Supp. at 898, 918.

6. *Federal Skywalk Cases*, 93 F.R.D. at 424; *Dalkon Shield*, 526 F. Supp. at 897.

7. FED. R. CIV. P. 23(b)(1); *see Federal Skywalk Cases*, 93 F.R.D. at 419; *Dalkon Shield*, 526 F. Supp. at 896-900.

The Ninth Circuit vacated the certification order in *Dalkon Shield*, holding that the class was not maintainable under the prerequisites of Rule 23(a).<sup>8</sup> The Eighth Circuit vacated class certification in *Federal Skywalk Cases* on the ground that the district court's order violated the Anti-Injunction Act<sup>9</sup> by enjoining pending state court proceedings.<sup>10</sup>

Nevertheless, the problems caused when numerous plaintiffs seek punitive damages against a defendant justify the use of Rule 23. Punitive awards are often quite high in individual actions where such damages are sought,<sup>11</sup> and potential liability soars when many plaintiffs seek punitive damages.<sup>12</sup> Moreover, incidents giving rise to mass actions for punitive damages are likely to occur in the future.<sup>13</sup>

This Note argues that a Rule 23 class action offers the best way to manage multiple actions for punitive damages.<sup>14</sup> It begins by exam-

8. 693 F.2d at 851. The court observed that it was "not necessarily ruling out the class action tool as a means for expediting multi-party product liability actions in appropriate cases, but the combined difficulties overlapping from each of the elements of Rule 23(a) preclude[d] certification in this case." 693 F.2d at 851.

9. 28 U.S.C. § 2283 (1976); see part III *infra*.

10. 680 F.2d 1175 (8th Cir.), cert. denied, 103 S. Ct. 342 (1982).

11. *Dalkon Shield*, 526 F. Supp. at 899; see, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 174 Cal. Rptr. 348 (1981) (jury verdict for \$125 million in punitive damages reduced to \$3.5 million by trial court); *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 660 n.2, 437 N.E.2d 910, 914 n.2 (1982) (citing a \$10.5 million punitive award in California and an \$850,000 punitive award in the MER/29 drug liability litigation in New York); K. REDDEN, PUNITIVE DAMAGES § 4.2(A)(2), at 82-83 (1980) (reporting that each of 40 cases handled by a Chicago firm in the MER/29 drug liability litigation sought \$500,000 in punitive damages); Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present Day Society*, 49 U. Mo. KAN. CITY L. REV. 1, 1 n.1 (1980); Note, *Mass Liability and Punitive Damages Overkill*, 30 HASTINGS L.J. 1797, 1797 n.6 (1979).

12. "When all of the litigation concerning these issues is concluded, punitive totals may reach staggering levels given the volatile nature of the claims involved and the amount of compensatory damages prayed for." Putz & Astiz, *Punitive Damage Claims of Class Members Who Opt Out: Should They Survive?*, 16 U.S.F. L. REV. 1 (1981); cf. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 (2d Cir. 1967) ("We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.").

In *Dalkon Shield*, the total of multiple punitive claims against defendant A.H. Robins exceeded three billion dollars. 526 F. Supp. at 888; see also *In re: Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (order conditionally certifying class action). Prior to the court's conditional certification, defendant A.H. Robins had already lost two jury verdicts on punitive damages, one for \$75,000 and the other for \$6.2 million. 521 F. Supp. at 1193. Similarly, plaintiffs in *Federal Skywalk Cases* sought a total of over \$1 billion in compensatory damages and \$500 million in punitive damages. 93 F.R.D. at 419. See also Wall St. J., Jan. 5, 1983, at A5, col. 1 (Midwest ed.) (reporting 450 lawsuits arising out of a fire at the MGM Grand Hotel in Las Vegas, in which plaintiffs claimed a total of \$600 million in compensatory and \$2 billion in punitive damages).

13. "In a complex society such as ours, the phenomenon of numerous persons suffering the same or similar injuries as a result of a single pattern of misconduct on the part of a defendant is becoming increasingly frequent." *Dalkon Shield*, 526 F. Supp. at 892. The trend favors an award of punitive damages in such cases. See 526 F. Supp. at 900; K. REDDEN, *supra* note 11, § 4.2(A)(2), at 85-86.

14. Punitive damages pose a greater risk of producing a limited fund than compensatory damages do for three reasons. First, punitive recovery may be limited by law in situations

ining the policy underlying punitive damages and the plaintiff's interest in recovering them. It then explains why a limited fund is created when courts deny punitive damage recovery as a matter of law or when punitive claims exceed defendant's assets. The Note contends that a Rule 23(b)(1)(B)<sup>15</sup> class action provides the best means to manage this limited fund and reviews the circumstances in which a district court may properly certify a class action for punitive damages. It then examines the consequences of (b)(1)(B) certification and concludes that a class action provides the best way to protect the interests of plaintiffs, defendants, and the judicial system. The Note concludes by explaining why principles of federalism do not preclude class certification orders that effectively enjoin pending state court proceedings.

## I. CLASS ACTIONS FOR PUNITIVE DAMAGES

### A. *The Plaintiff's Interest in Recovering Punitive Damages*

The law exacts punitive damages to deter<sup>16</sup> and punish<sup>17</sup> culpable defendants.<sup>18</sup> Punitive damages are a windfall to the plaintiff, exacted for society's benefit and not for individual compensation.<sup>19</sup> Consequently, the plaintiff has no right to recover punitive damages; they are awarded at the discretion of the trier of fact.<sup>20</sup>

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where compensatory awards will not be. See notes 41-45 *infra* and accompanying text. Alternatively, punitive damages awards may be as high as jury discretion and the court allow. See note 20 *infra* and accompanying text. Because of their size, punitive damages are more likely than compensatory damages to threaten a defendant's assets and thus to create a limited fund. See notes 11-12 *supra* and accompanying text. Third, while compensatory recovery alone may not threaten a defendant's financial solvency, punitive and compensatory damages together might do so. See *Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); notes 31-40 *infra* and accompanying text. Thus, punitive damages create problems that warrant special consideration.

In some cases, compensatory damages alone may produce a limited fund. If so, a court can use the analysis presented in this Note to determine whether certification of a (b)(1)(B) class for compensatory damages is appropriate. As far as justification for certification is concerned, however, this Note restricts itself to the special dilemmas of punitive damages.

15. FED. R. CIV. P. 23(b)(1)(B).

16. *E.g.*, *Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967); *Dalkon Shield*, 526 F. Supp. at 899; D. DOBBS, *HANDBOOK ON THE LAW OF REMEDIES* § 3.9, at 205 (1973); K. REDDEN, *supra* note 11, § 4.13, at 130; Note, *Punitive Damages, the Common Question Class Action, and the Concept of Overkill*, 13 PAC. L.J. 1273, 1277 (1982).

17. *E.g.*, *Newport v. Fact Concerts*, 453 U.S. 247, 266-67 (1981); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967); K. REDDEN, *supra* note 11, § 2.1, at 23-24.

18. Misconduct coupled with malice usually describes a case for punitive damages. Extreme misconduct indicating conscious or criminal indifference to the safety of others will also render a defendant liable for punitive damages. See D. DOBBS, *supra* note 16, § 3.9, at 205.

19. *E.g.*, *Dalkon Shield*, 526 F. Supp. at 899; W. PROSSER, *HANDBOOK ON THE LAW OF TORTS*, § 2, at 13 (4th ed. 1971); Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV 1173, 1177 n.7 (1931); Note, *supra* note 11, at 1808.

20. *E.g.*, *Newport v. Fact Concerts*, 453 U.S. 247, 270 (1981); *Dalkon Shield*, 526 F. Supp.

Nevertheless, two considerations require a court to protect a plaintiff's interest in *seeking*<sup>21</sup> punitive damages. First, fairness demands that each plaintiff have an equal opportunity to sue for punitive damages. If the fund available for recovery is limited, the court should manage the litigation so that it does not "become an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest."<sup>22</sup> Second, each plaintiff has a *practical* interest in the recovery of punitive damages. Such awards often provide a plaintiff with the means to defray litigation expenses,<sup>23</sup> especially attorney's fees.<sup>24</sup> A plaintiff unable to seek punitive damages might not sue at all;<sup>25</sup> moreover, because attorneys often handle claims on the basis of contingent fees,<sup>26</sup> punitive damages may provide the only way to make a claimant whole.<sup>27</sup> Thus, while punitive damages are not designed to compensate the plaintiff,<sup>28</sup> their availability may as a practical matter be dispositive of the effectiveness of a plaintiff's suit.

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at 898-99; Duffy, *Punitive Damages: A Doctrine Which Should be Abolished*, in *THE CASE AGAINST PUNITIVE DAMAGES* 8 (D. Hirsch & J. Poulos eds. 1969); Morris, *supra* note 19, at 1189.

21. In *Dalkon Shield*, for example, the court observed that "[p]laintiffs have no right to, or vested interest in, punitive damages. Plaintiffs do, however, have a right to *seek* punitive damages. It is this right to seek that the consequences of individual actions will impair." 526 F. Supp. at 898 n.37 (emphasis in original).

22. *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977); *accord Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

23. K. REDDEN, *supra* note 11, § 4.2(A)(2), at 84; *see* Duffy, *supra* note 20, at 5.

24. W. PROSSER, *supra* note 19, § 2, at 11, 13; K. REDDEN, *supra* note 11, § 4.2(A)(2), at 84. In states that authorize punitive damages, many courts permit juries to consider plaintiff's litigation expenses, including attorney fees, in fixing the amount of punitive damages. Because this practice goes to punishment and not compensation, it does not violate the American rule against the award of attorney's fees. D. DOBBS, *supra* note 16, § 3.8, at 197; *see, e.g.*, *Cox v. Stolworthy*, 94 Idaho 683, 496 P.2d 682 (1972); *Brewer v. Home-Stake Prod. Co.*, 200 Kan. 96, 434 P.2d 828 (1967); Annot., 30 A.L.R.3d 1443 (1970).

25. *See Roginsky v. Richard-Merrell, Inc.*, 378 F.2d 832, 838 (2d Cir. 1967); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1272 (1980); D. DOBBS, *supra* note 16, § 3.9, at 205; K. REDDEN, *supra* note 11, § 2.4, at 37; Putz & Astiz, *supra* note 12, at 4.

26. *See* R. ARONSON, *ATTORNEY-CLIENT FEE ARRANGEMENTS* 75, 77 (Federal Judicial Center 1980); INSTITUTE OF JUDICIAL ADMINISTRATION, *CONTINGENT FEES IN PERSONAL INJURY AND WRONGFUL DEATH ACTIONS IN THE UNITED STATES* 9-10 (1957); J. MCGINN, *LAWYERS: A CLIENT'S MANUAL* 65 (1979).

27. Contingent fee financing may impose a Hobson's choice on a plaintiff, forcing her either to surrender a percentage of her recovery or to relinquish all hope of being made whole. *See* R. ARONSON, *supra* note 26, at 77-78 (citing J. AUERBACH, *UNEQUAL JUSTICE* 50 (1976)). The lawyer's share of the recovery may in some cases prevent the plaintiff from being fully compensated. *See* F. MACKINNON, *CONTINGENT FEES FOR LEGAL SERVICES* 64-65 (1964). By increasing plaintiff's total recovery, and thus the share that plaintiff receives after deduction of attorney's fees, punitive damages improve her chances of being made whole.

28. *See* note 19 *supra* and accompanying text.

### B. *The Limited Fund*

Multiple punitive damage actions injure a plaintiff's interest in one of two ways. First, early punitive judgments may lead a court to rule that a defendant has been punished enough, thus depriving later plaintiffs of any punitive recovery.<sup>29</sup> Alternatively, courts will not limit recovery, in which case multiple individual awards may exhaust the assets available for recovery by later plaintiffs.<sup>30</sup> Both results produce a limited fund in which all plaintiffs seeking punitive damages have an interest.

#### 1. *Limited Fund Created by A Defendant's Bankruptcy*

A limited fund will most likely appear when plaintiff's multiple punitive claims exceed defendant's assets. Although some courts have indicated a desire to limit punitive damages when many plaintiffs sue few defendants,<sup>31</sup> most authorities state that the courts cannot effectively control multiple punitive damages claims.<sup>32</sup> This inability to limit the total amount of punitive damages awarded against a particular defendant increases the risk that the defendant will be bankrupted,<sup>33</sup> especially since insurance usually does not

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29. See notes 41-45 *infra* and accompanying text.

30. See notes 31-40 *infra* and accompanying text.

31. *Dalkon Shield*, 526 F. Supp. at 898; see also *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1232 (10th Cir. 1970) (the court balanced potential burdens of punitive damage liability against doubtful improvement in enforcement of securities laws and refused to allow punitive damages in private action under Rule 10b-5); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285-87 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970) (extent of punitive liability an element of court's decision not to allow punitive damages under § 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a)); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 842 (2d Cir. 1967) (where consequences of punitive damages were great, proof of punitive damages was subject to special scrutiny). Although the *Roginsky* court ostensibly found that punitive damages could not be awarded under New York's gross negligence standard, 378 F.2d at 851, its holding may have been motivated by concern about punitive damage overkill. See K. REDDEN, *supra* note 11, § 4.2(A)(2), at 83.

32. The court in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), observed that "[w]e know of no principle whereby the first punitive award exhausts all claims for punitive damages and would thus preclude future judgments . . . . Neither does it seem either fair or practicable to limit punitive recoveries to an indeterminate number of first-comers, leaving it to some unascertained court to cry, 'Hold, enough,' in the hope that others would follow." 378 F.2d at 839-40; accord *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276, 1285 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1274 (1980). Similarly, the district court in *Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), stated that it would be "utter naivete" not to conclude that many punitive damages suits would be tried. 93 F.R.D. at 423. This result is especially likely in a state that requires mutuality of estoppel, because an action between one plaintiff and defendant would not preclude the punitive damage issue for subsequent plaintiffs. See, e.g., *Payton v. Abbott Labs*, 83 F.R.D. 382, 392 (D. Mass. 1979).

33. *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970); *Globus v. Law Research Serv., Inc.*, 418 F.2d 1276 (2d Cir. 1969), *cert. denied*, 397 U.S. 913 (1970); *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839, 841 (2d Cir. 1967); *Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F. Supp. 887, 898-99 (N.D. Cal. 1981), *vacated and*

cover a defendant's punitive liability.<sup>34</sup>

The specter of bankruptcy is far more worrisome than a limited fund created by refusing to award punitive damages to plaintiffs. A fund limited by legal restrictions compromises only the plaintiff's interest in recovery. In contrast, bankruptcy harms the plaintiffs, the defendant, the defendant's creditors, the defendant's employees and society in general. First, it affects the interest of plaintiffs whose claims come to judgment after the defendant goes bankrupt.<sup>35</sup> It does so by preventing late-suing plaintiffs from seeking punitive damages, thus depriving them of a legally protected interest.<sup>36</sup> Moreover, defendant's bankruptcy bars the *compensatory* recovery of late-suing plaintiffs, thus compromising their legal right to be made whole.<sup>37</sup> Second, society suffers because constructive bankruptcy may destroy an otherwise socially valuable defendant who is responsible for a single egregious error.<sup>38</sup> Finally, bankruptcy in-

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*remanded sub nom.* Abed v. A.H. Robins Co., 693 F.2d 847 (9th Cir. 1982), *cert denied*, 103 S. Ct. 817 (1983); *Fround v. Celotex Corp.*, 107 Ill. App. 3d 654, 659-60, 437 N.E.2d 910, 914-15 (1982) (Sullivan, P.J., specially concurring); D. DOBBS, *supra* note 16, § 3.9 at 212; Morris, *supra* note 19, at 1195; *see Note, supra* note 16, at 1273 n.3.

34. *See Federal Skywalk Cases*, 680 F.2d 1175, 1187 n.10 (8th Cir.) (Heaney, J., dissenting) *cert. denied*, 103 S. Ct. 342 (1982); Logan, *Liability Insurance Protection From Punitive Damages* in *THE CASE AGAINST PUNITIVE DAMAGES* 24-25 (D. Hirsch & J. Pourous eds. 1969). Some states prohibit recovery as a matter of public policy, reasoning that if punitive damages are to deter a potential tortfeasor, they must come from this pocket and not the insurer's. K. REDDEN, *supra* note 11, § 4.13, at 130; *see W. PROSSER, supra* note 19, § 2, at 13; Logan, *supra*, at 25; *see also Federal Skywalk Cases*, 95 F.R.D. 483, 484 (1982) (remand) ("The insurance carriers contend that their policies with the defendants do not provide coverage for punishable acts . . ."). The few states that do allow coverage do so only if the insurance contract so provides. K. REDDEN, *supra* note 11, § 4.13, at 130; Logan, *supra*, at 24.

35. Although a bankruptcy court can distribute a defendant's assets in a way designed to protect all creditors, 11 U.S.C. § 502 (Supp. V 1981), the bankruptcy trustee would not be able to avoid payment of a judgment disbursed more than ninety days before the date that defendant filed in bankruptcy. 11 U.S.C. § 547(b)(4) (Supp. V. 1981); *see Note, Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1157 n.62 (1983). Thus, the Bankruptcy Code would not prevent early plaintiffs from racing to the courthouse in order to receive a punitive damages windfall at the expense of late-suing claimants.

More important, however, is the fact that "it is very difficult to collect anything from one who has gone bankrupt." D. COWANS, *BANKRUPTCY LAW AND PRACTICE* § 304 (1978); *see note 55 infra*. This Note argues that once a defendant has been driven into bankruptcy, the disadvantages that a class action can control have already accrued.

36. The court in *Dalkon Shield* noted that 1,573 claims aggregating over 2.3 billion dollars in punitive damages had been filed against defendant A.H. Robins. The court continued: "The potential for the constructive bankruptcy of A.H. Robins, a company whose net worth is \$280,394,000.00, raises the unconscionable possibility that large numbers of plaintiffs who are not first in line at the courthouse door will be deprived of a practical means of redress." 526 F. Supp. at 893. *See notes 21-28 supra* and accompanying text.

37. D. DOBBS, *supra* note 16, § 3.9, at 212 ("heavy, multiple, and uncoordinated" punitive awards might exhaust defendant's assets and deprive later claimants of compensatory recovery).

38. The court in *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832 (2d Cir. 1967), stated that "a sufficiently egregious error as to one product can end the business life of a concern that has wrought much good in the past and might otherwise have continued to do so in the future, with many innocent stockholders suffering extinction of their investments for a single management sin." 378 F.2d at 841; *see also Note, supra* note 11, at 1797. Punitive damages should

juries employees,<sup>39</sup> shareholders, consumers, and creditors who ultimately bear the burden of a corporate defendant's tortious error.<sup>40</sup>

## 2. *Limited Fund Created by Legal Restrictions on the Award of Punitive Damages*

A limited fund also exists when the law prevents some or all plaintiffs from recovering punitive damages. This result occurs in two situations. First, state law<sup>41</sup> might limit the number of punitive recoveries against a given defendant,<sup>42</sup> in which case a court would allow only the first verdict-winning plaintiff to recover punitive damages.<sup>43</sup> This outcome disposes of the interest that later plaintiffs have

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"sting, not kill, a defendant." *Dalkon Shield*, 526 F. Supp. at 899; accord *Maxey v. Freightliner*, 450 F. Supp. 955, 961 (N.D. Tex. 1978), *aff'd*, 623 F.2d 395 (5th Cir. 1980), *modified*, 665 F.2d 1367 (5th Cir. 1982); *Wynn Oil Co. v. Purolator Chem. Corp.*, 403 F. Supp. 226, 232 (M.D. Fla. 1974); *International Union of Operating Engrs. v. Lassiter*, 295 So. 2d 634 (Fla. Dist. Ct. App. 1974); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1271 (1980). The punitive award should deter the potential tortfeasor by making any contemplated wrong unprofitable. In the area of products liability, for example, a "well-calibrated punitive award might make the producer perfect the product . . ." Note, *supra* note 11, at 1799. Inasmuch as the law's goal is to deter and not to destroy tortfeasors, see note 16 *supra* and accompanying text, courts should administer punitive damages awards both to preserve and deter culpable defendants.

39. Even if the defendant does not or cannot file for bankruptcy, jobs may be lost. See Note, *The Manville Bankruptcy: Treating Mass Tort Claims in Chapter 11 Proceedings*, 96 HARV. L. REV. 1121, 1128 (1983) ("Manville might be forced to liquidate in full or in part and thereby to eliminate a large number of jobs.")

40. See *deHaas v. Empire Petroleum Co.*, 435 F.2d 1223, 1231 (10th Cir. 1970); *Green v. Wolf Corp.*, 406 F.2d 291, 303 (2d Cir. 1968), *cert. denied*, 395 U.S. 977 (1969). If stockholders do not bear the burden, the costs of punitive damages will probably be passed on to consumers. See D. DOBBS, *supra* note 16, § 3.9, at 213.

41. Because the measure of damages is a substantive issue, state law governs the measure of damages in diversity cases. D. DOBBS, *supra* note 16, § 1.4, at 12. A federal court weighing the merits of a diversity class action must apply the punitive law of the state in which it sits. See *Northwestern Natl. Cas. Co. v. McNulty*, 307 F.2d 432 (5th Cir. 1962); *In re Paris Air Crash of March 3, 1974*, 427 F. Supp. 701, 704 (C.D. Cal. 1977), *rev'd*, 622 F.2d 1315 (9th Cir. 1980).

42. *Federal Skywalk Cases*, 93 F.R.D. 415, 424-25 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982). The court noted that Missouri law might allow only one award of punitive damages against a single defendant. Despite the court's fears, and the possibility that future laws will limit the number of punitive judgments, no jurisdiction "has considered and adopted the one bite/first comer approach to punitive damages." *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1272 (1980).

If a state court does so hold, the state's substantive interest in the distribution of the judgment might preclude an alternative distributional scheme. That is, if state law stipulated that only one plaintiff could recover a punitive judgment, the state's substantive interest in determining who may recover could prevent a federal court sitting in diversity from distributing a judgment to multiple plaintiffs. See *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938); note 41 *supra*. If, on the other hand, the state allowed only one judgment but did not specify to whom it must be awarded, a distribution of the judgment would arguably be a procedural question within the power of the federal court. Cf. *Hanna v. Plumer*, 380 U.S. 460 (1965); *Guaranty Trust Co. v. York*, 326 U.S. 99 (1945).

43. See *Dalkon Shield*, 526 F. Supp. 887, 898 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).



in seeking punitive recovery.

Second, a court may refuse to award punitive damages to later plaintiffs if it decides that previous individual judgments have sufficiently punished a defendant for a particular offense,<sup>44</sup> or that the risk of financially destroying the defendant is unacceptable.<sup>45</sup> If one or more courts so held, plaintiffs bringing suit in those courts would be denied their interest in seeking punitive damages.

### C. Potential Means To Control Punitive Awards

Given that most courts will allow punitive damages where many plaintiffs sue a single defendant,<sup>46</sup> the next question is whether a

44. [T]he existence of conflicting interests among plaintiffs as to a limited punitive damage "fund" is a conceptual certainty . . . . [I]t requires no clairvoyant power to conclude that judges in subsequently filed lawsuits will rule as a matter of law that the defendants have been punished enough and dismiss a plaintiff's claim for exemplary damages. *Dalkon Shield*, 526 F. Supp. at 918; accord *Federal Skywalk Cases*, 95 F.R.D. 483, 487 (1982) (remand) ("Missouri law, at the very least, does not permit undiminished multiple punitive damage awards.").

45. See note 31 *supra*.

46. Many commentators have made a plausible case for the abolition of punitive damages. See generally *THE CASE AGAINST PUNITIVE DAMAGES* (D. Hirsch & J. Pourous eds. 1969); K. REDDEN, *supra* note 11, §§ 7.4-7.8; Note, *supra* note 11, at 1802 nn.27-30. More recently, commentary has called for the curtailment of punitive damages, limiting their availability to certain narrowly defined categories of tortious behavior. See Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1 (1982); see also Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 VA. L. REV. 269 (1983).

The contrary argument defends punitive damages as essential to compensate plaintiffs and to deter defendants. Where the defendant enjoys greater resources than the plaintiff, the prospect of punitive liability serves as an important equalizer in settlement negotiations. Punitive damages also help defray actual litigation expenses, bringing the plaintiff's ultimate compensation closer to the value of the damages sustained. See notes 23-27 *supra* and accompanying text.

Some authorities have also argued that mere compensatory damages are insufficient to deter corporate misconduct. See, e.g., *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 812, 174 Cal. Rptr. 348, 384 (1981) (condemning auto manufacturer's "cost-benefit analysis balancing human lives and limbs against corporate profits"); Morris, *supra* note 19, at 1185, 1187; Owen, *Punitive Damages in Products Liability Litigation*, 74 MICH. L. REV. 1258, 1323-24 (1976). This argument amounts to an attack on the accuracy of compensatory damage awards, rather than a claim for deterrence beyond the value of the injuries actually caused by tortious conduct. Contemporary tort theory in fact favors "cost-benefit analysis balancing human lives and limbs against corporate profits," for this process offers the only method of reaching the optimal level of risk. See G. CALABRESI, *THE COST OF ACCIDENTS* (1970); W. BLUM & H. KALVEN, *PUBLIC LAW PERSPECTIVES ON A PRIVATE LAW PROBLEM* (1965); R. EPSTEIN, *MODERN PRODUCTS LIABILITY LAW* (1980); R. POSNER, *ECONOMIC ANALYSIS OF LAW* (2d ed. 1977); Calabresi, *Concerning Cause and the Law of Torts: An Essay for Harry Kalven, Jr.*, 43 U. CHI. L. REV. 69 (1975); Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537 (1972); Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29 (1972). Punitive damages beyond the losses actually sustained would, if effectively awarded, overdeter legitimate economic activity. But all this assumes an accurate measurement of the economic value of life and limb, a measurement fraught with uncertainties and arrived at by different juries in different ways. See, e.g., Zeckhauser & Shepard, *Where Now for Saving Lives?*, 40 L. & CONTEMP. PROBS. 5 (1976). Punitive damages may serve the critical function of enabling juries to assess more accurately the extent to which society will impose the value of life as a constraint on economic activity.

All but four states — Louisiana, Massachusetts, Nebraska, and Washington — allow punit-

court should attempt to limit the total punitive award against a given defendant. As a practical matter, courts are not likely to control effectively multiple punitive damage awards against a single defendant.<sup>47</sup>

Two alternatives, however, bear brief examination. First, evidence of a defendant's assets can be presented to the jury,<sup>48</sup> and might lead it to fashion an appropriate award in a single action. Where many plaintiffs seek punitive recovery, however, instructions concerning a defendant's wealth will not lead to balanced awards if each jury proceeds without knowing what the others are doing. Moreover, knowledge of a defendant's wealth may prejudice some juries against the tortfeasor,<sup>49</sup> thus compounding the risk of a high award. Second, after a verdict finding that defendant is *liable* for punitive damages, a court could instruct the jury as to prior punitive recovery awarded for the same offense. This information could be used in fixing damages.<sup>50</sup> If this instruction persuades a jury to reduce or eliminate a potential award of punitive damages, it will prejudice the interests of affected plaintiffs.<sup>51</sup> On the other hand, the jury may use prior punitive awards to conclude that the defendant deserves even more punishment,<sup>52</sup> thus aggravating the risk of defendant's bankruptcy.

Because punitive damages create a limited fund, the claims of the plaintiffs should be brought before a single court for unitary adjudication. Aside from bankruptcy proceedings and interpleader, a class action provides the only means to achieve this result. Moreover, a class action is superior to either of these two alternatives. A bankruptcy court should not hear collateral punitive claims against a debtor<sup>53</sup> and will in any event be constrained to use Rule 23 to join

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tive damages. "The acceptance of punitive damages in most other jurisdictions appears to be too popular and well-established to be discarded. Rationales such as compensation, punishment and deterrence, revenge, and the promotion of justice perpetuate its existence in remedial law." K. REDDEN, *supra* note 11, § 2.1, at 24; *accord* W. PROSSER, *supra* note 19, § 2, at 11.

Punitive damages have become a settled feature of American tort law. As long as courts continue to award them, both plaintiffs and defendants deserve protection against the arbitrary or unfair extraction and allocation of the punitive damages windfall. As this Note argues, the best vehicle for implementing that protection is the class action.

47. See note 32 *supra*.

48. See *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 270 (1981); *Weisenberg v. Molina*, 58 Cal. App. 3d 478, 490; 129 Cal. Rptr. 813, 820 (1976); D. DOBBS, *supra* note 16, § 3.9, at 218-19.

49. *Morris*, *supra* note 19, at 1191.

50. *Dalkon Shield*, 526 F. Supp. at 898 & n.39; *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1263, 1273-74 (1980); K. REDDEN, *supra* note 11, at § 4.8; RESTATEMENT (SECOND) OF TORTS § 908 comment 3 (1979); *Morris*, *supra* note 19, at 1195.

51. *Dalkon Shield*, 526 F. Supp. at 898; see notes 41-45 *supra* and accompanying text.

52. *Morris*, *supra* note 19, at 1195 n.40; Note, *supra* note 11, at 1806-07.

53. First, the bankruptcy court probably lacks power to hear such claims. See *Northern Pipe Line Constr. Co. v. Marathon Pipeline Co.*, 102 S. Ct. 2858 (1982); *Winter, Bankruptcies Create Asbestos Case Turmoil*, 68 A.B.A.J. 1361 (1982); cf. N.Y. Times, Aug. 27, 1982, at D4,

plaintiffs affected by a defendant's bankruptcy.<sup>54</sup> More important, the fact that a defendant has been driven to bankruptcy by punitive claims means that the defendants, plaintiffs, and society have already been injured.<sup>55</sup> Interpleader<sup>56</sup> is inadequate because the defendant's lack of control over a stake in controversy would preclude joinder of punitive damages claimants.<sup>57</sup>

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col. 1 (late ed.) (representatives of Johns-Manville, filing under Chapter 11, argue that bankruptcy court is the most appropriate place to apportion damages where creditors' claims exceed assets); note 82 *infra*.

Second, even if Congress alters the bankruptcy courts to allow them to hear collateral claims, "[t]he policies underlying the doctrines of pendent jurisdiction and the right to trial by jury suggest that the bankruptcy court should leave the estimation of individual claims to state courts and other federal courts." Note, *supra* note 39, at 1123; see also *id.* at 1136-41.

54. See 11 U.S.C. app. at 1349 (1976); Note, *supra* note 39, at 1133-34 (bankruptcy rules incorporate FED. R. Civ. P. 23). Thus, a bankruptcy court wishing to certify a class action on claims for punitive damages should use the approach discussed in Part II *infra*.

55. See notes 31-40 *supra* and accompanying text. Johns-Manville's decision to file under Chapter 11, 11 U.S.C. §§ 1101-74 (Supp. V. 1981), see note 82 *infra*, illustrates the problems that arise when a defendant is driven into bankruptcy. The Chapter 11 filing automatically stayed all litigation against Manville. 11 U.S.C. § 362(a) (Supp. III 1979); see Winter, *supra* note 53, at 1361. Thus, Manville's move may have amounted to "an effort to evade thousands of law suits filed by severely ill workers . . ." Miller, *Don't Let Industry Shirk Its Duty*, N.Y. Times, Sept. 5, 1982, § 3, at 2, col. 3 (late ed.); see Note, *supra* note 39, at 1122 ("Manville thus appears to be attempting to use the bankruptcy power largely as a tool to limit the aggregate size of its current and future liabilities." (footnote omitted)); N.Y. Times, Aug. 27, 1982, at D4, col. 1. The Chapter 11 filings may also stay proceedings against *all* defendants in actions in which Manville is a codefendant. See *In re White Motor Credit Corp.*, 11 Bankr. 294 (Bankr. N.D. Ohio 1981) (plaintiff cannot dismiss reorganization debtor and proceed only against codefendants); Winter, *supra* note 53, at 1361. Even if § 362(a) stays proceedings only against the debtor in bankruptcy, other defendants will likely file under Chapter 11 to escape or at least postpone liability. Winter, *supra* note 53, at 1361; see note 82 *infra*. In short, Manville's move injured the interests of affected plaintiffs.

In addition to claimants, "[t]he stockholders are going to take a pasting . . . and so are some of the unsecured creditors . . . . Every day this stays in bankruptcy court, the likelihood of their getting paid all they are owed diminishes." N.Y. Times, Sept. 1, 1982, at D12, col. 5 (late ed.) (quoting Professor Joseph W. Bishop, Jr., of Yale Law School). In fact, the value of Manville's stock dropped from around seven or eight dollars a share before the filing to \$4.75 a share by September 1. See *id.*, Sept. 1, 1982, at D1, col. 1.

The object is to *prevent* the defendant from going into bankruptcy in order to avoid these consequences. A class action for punitive damages achieves this result.

56. 28 U.S.C. §§ 1335, 1397, 2361 (1976) (statutory interpleader); FED. R. Civ. P. 22 (rule interpleader).

57. Both statutory and rule interpleader are used to join adverse claimants when the stakeholder controls the fund in controversy. 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE §§ 1702, 1704, (1972). The party defending against punitive damages claims cannot interplead the plaintiffs before a judgment is rendered because the amount of liability is indeterminate: The defendant does not control the fund simply because it does not yet exist. The defendant could argue that the first punitive judgment against it is the extent to which it ought to be punished, and then interplead remaining plaintiffs using the first judgment as a stake. The problem again is that the defendant does not control the fund after it is paid over to the plaintiff. Moreover, this attempt would probably fail because it would not satisfy the adverse claimant requirement inherent in interpleader. See *id.* at § 1705. The claims of subsequent plaintiffs are adverse to defendant's assets, but not to the claim of a plaintiff who has already received a punitive judgment. Cf. *Dalkon Shield*, 526 F. Supp. 887, 896 n.31 (N.D. Cal. 1981) (refusing to characterize plaintiffs' action against defendant as an "interpleader situation" but observing that "the amount of punitive damages recoverable against Robins is,

In sum, because multiple punitive damages actions will create a limited fund, the court must manage the action to produce an equitable result. A Rule 23<sup>58</sup> class action provides the best means to allow society to punish the defendant effectively, to preserve the interests of plaintiffs, and to protect socially valuable defendants.

## II. RULE 23(b)(1)(B) CERTIFICATION OF A CLASS ACTION FOR PUNITIVE DAMAGES

### A. *Appropriateness of Rule 23(b)(1)(B) in the Context of the Limited Fund*

Rule 23(b)(1)(B)<sup>59</sup> permits a court to certify a class action when "adjudications with respect to individual members of the class . . . would as a practical matter be dispositive of the interest of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests."<sup>60</sup> If state law limits a fund, or if punitive claims absorb a defendant's assets, the interests of late-suing plaintiffs will as a practical matter be disposed of.<sup>61</sup> The plaintiffs' interests in seeking punitive damages thus bring this limited fund within the ambit of Rule 23(b)(1)(B).

A (b)(1)(B) class action provides the best means to manage a limited fund created by multiple punitive damage claims. The Advisory Committee Comments state that

[i]n various situations an adjudication as to one or more members of the class will necessarily or probably have an adverse practical effect on the interests of other members who should therefore be represented in the law suit. *This is plainly the case when claims are made by numerous persons against a fund insufficient to satisfy all claims . . .*<sup>62</sup>

Moreover, while some courts have indicated that Rule 23(b)(1)(B) is ordinarily inappropriate in an action for money damages,<sup>63</sup> an "indi-

at least in theory, a sum certain for interpleader purposes."), *vacated and remanded sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

58. FED. R. CIV. P. 23.

59. FED. R. CIV. P. 23(b)(1)(B).

60. FED. R. CIV. P. 23(b)(1) provides that:

An action may be maintained as class action if the prerequisites of subdivision (a) are satisfied, and in addition:

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

(A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or

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

61. See notes 21-28 *supra* and accompanying text.

62. Advisory Committee Comments, 39 F.R.D. 69, 101 (1966) (emphasis added).

63. *E.g.*, *Dalkon Shield*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976); *McDonnell*

vidual action [that] inescapably will alter the substance of the rights of others having similar claims . . . falls within Rule 23(b)(1)(B)."<sup>64</sup> For example, when numerous plaintiffs confront a fund limited by statute, the court may certify a damages claim under Rule 23(b)(1)(B).<sup>65</sup> Other cases indicate that certification should also follow when the law or the threat of bankruptcy limits the fund available for punitive recovery.<sup>66</sup> Thus, if punitive claims create a limited fund, a court should use a Rule 23(b)(1)(B) class action to protect the interests of affected plaintiffs.<sup>67</sup>

The other subdivisions of Rule 23(b) are not appropriate in a class action for punitive damages. Rule 23(b)(2), which renders a class action maintainable if the party opposing the class has acted so

Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 564 (2d Cir. 1968); Ziegler v. Gibraltar Life Ins. Co. of Am., 43 F.R.D. 169 (D.S.D. 1967).

64. *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 467 (9th Cir. 1973); *see also* McDonnell Douglas Corp. v. United States Dist. Ct., 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976) (quoting *La Mar*).

65. *See Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 n.8 (S.D. Fla. 1973), *aff'd mem.*, 507 F.2d 1278 (5th Cir. 1975), where plaintiffs sought compensatory and punitive damages. The limited fund derived from 46 U.S.C. § 183 (1976), which limits liability for owners of seagoing vessels. *See also* 42 U.S.C. § 2210 (1976) (limiting liability for a nuclear accident).

66. *Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977); *see also In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1193 n.15 (N.D. Cal. 1981) (order conditionally certifying class action).

67. Several courts and commentators have suggested that the best way to manage punitive damages is to make a single award covering all plaintiffs. *See Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 839 n.11 (2d Cir. 1967) (if cases could be brought before a single court, jury might be able to make appropriate award for distribution among all successful plaintiffs); *Froud v. Celotex Corp.*, 107 Ill. App. 3d 654, 658-59, 437 N.E.2d 910, 913 (1982) (if defendants fear backbreaking punitive damage awards, they should request that the trial court certify a class action for punitive damages); *Bartolo v. Boardwalk Regency Hotel Casino*, 185 N.J. Super. 540, 546 n.1, 449 A.2d 1343, 1346 n.1 (1982) (solution endorsed by courts and commentators "is to require all punitive damage claims based upon the same wrongful conduct to be pursued together in a single class action"); *State ex rel. Young v. Crookham*, 290 Or. 61, 618 P.2d 1268, 1274 (1980) (class actions provide for unitary consideration of punitive damages); *K. REDDEN*, *supra* note 11, § 4.16, at 134 ("[T]here should only be one award of punitive damages for the entire class of victims."); *RESTATEMENT (SECOND) OF TORTS* § 908 comment e (1979) ("In a class action involving all claims, full assessment of the punitive damages can be made."); *Morris*, *supra* note 19, at 1195 ("forced joinder" might be appropriate where multiple plaintiffs sue a defendant). *See generally Putz & Astiz*, *supra* note 12.

Similarly, Rule 23 does not foreclose "the application of class action concepts to cases . . . in which repetitive litigation based on a single set of facts threatens to cause irreparable harm both to the defendant and more importantly to thousands of plaintiffs left with a legal right but potentially no adequate remedy." *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1191 (N.D. Cal. 1981) (order conditionally certifying "Dalkon Shield" class action). Rule 23(b)(1)(B) will equitably distribute the limited fund to class members whose interests would otherwise be impaired or disposed of by damage awards that deplete the fund. *Dalkon Shield*, 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated and remanded sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

as to justify "final injunctive relief or corresponding declaratory relief to the class as a whole," does not apply to actions for money damages.<sup>68</sup> Similarly, Rule 23(b)(1)(A) ordinarily does not apply to damage suits because judgments produced by such actions do not "establish incompatible standards of conduct for a party opposing the class."<sup>69</sup>

68. See FED. R. CIV. P. 23(b)(2); *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083, 1086-87 (9th Cir. 1975); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980); *Causey v. Pan Am. World Airways*, 66 F.R.D. 392 (E.D. Va. 1975); Advisory Committee Comments, 39 F.R.D. 69, 102 (1966). This result also follows if the action seeks a declaratory judgment which does not correspond to final injunctive relief. "Declaratory relief 'corresponds' to injunctive relief when as a practical matter it affords injunctive relief or serves as a basis for later injunctive relief. Subdivision (b)(2) does not extend to cases in which the appropriate final relief relates exclusively or predominately to money damages." Advisory Committee Comments, 39 F.R.D. at 102. In *McDonnell Douglas Corp. v. United States Dist. Ct.*, 523 F.2d 1083 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976), the court rejected the notion that a mass accident class action seeking declaratory relief could be certified under Rule 23(b)(2). The court stated that "subdivision (b)(2) by its own terms does not apply to actions only for damages . . . the declaratory relief sought by plaintiffs adds nothing to their claim for damages." 523 F.2d at 1087 (citations omitted). Because punitive damage awards fall within this prohibition, a class seeking punitive damages should not be certified under subdivision (b)(2).

*Contra In re Gabel*, 350 F. Supp. 624, 630 (C.D. Cal. 1972), where the court certified a (b)(2) mass-accident class seeking declaratory relief on the question of liability without discussing the reasoning that supported certification under this subdivision. The court in *Causey v. Pan Am. World Airways*, 66 F.R.D. 392 (E.D. Va. 1975), approved the result reached in *Gabel* but rejected class certification under subdivision (b)(2). 66 F.R.D. at 397. In addition, the Ninth Circuit Court of Appeals expressly rejected *Gabel* in *McDonnell Douglas*. 523 F.2d at 1087. The *Gabel* court erred because final relief was not injunctive but was related predominately to money damages; declaratory relief was merely an interim measure, not a final judgment. Note, *Mass Accident Litigation*, 40 J. AIR. L. & COM. 320, 327 (1974).

69. FED. R. CIV. P. 23(b)(1)(A). A defendant facing multiple damage suits can avoid being placed in a position of conflict simply by compensating some plaintiffs but not others. *Causey v. Pan Am. World Airways*, 66 F.R.D. 392, 398 (E.D. Va. 1975); see, e.g., *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1340 (9th Cir. 1976); *McDonnell Douglas Corp. v. United States Dist. Court*, 523 F.2d 1083, 1086 (9th Cir. 1975), *cert. denied*, 425 U.S. 911 (1976); *La Mar v. H & B Novelty & Loan Co.*, 489 F.2d 461, 466 (9th Cir. 1973); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 789 (E.D.N.Y. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979); *Kekich v. Travelers Indem. Co.*, 64 F.R.D. 660, 677 (W.D. Pa. 1974); *Bogosian v. Gulf Oil Corp.*, 62 F.R.D. 124, 132 (E.D. Pa. 1973), *vacated*, 561 F.2d 434 (1977), *cert. denied*, 434 U.S. 1086 (1978); *Landau v. Chase Manhattan Bank*, 367 F. Supp. 992, 997 (S.D.N.Y. 1973).

However, in regard to a limited fund, one could argue that a defendant would be forced to act inconsistently if it were able to pay only some of the judgments rendered against it. See *Klenk & Kelly, Rule 23 (1966) Purpose & Prerequisites*, in *CLASS ACTIONS* [2.42] at 2-47 (Illinois Institute for Continuing Legal Education 1974); cf. *Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.) (certifying a (b)(1)(A) class on the issue of liability for compensatory and punitive damages), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 46 (E.D. Ky. 1977) (certifying (b)(1)(A) class action against limited fund because "adjudications awarding damages to individual members of the class . . . might impose inconsistent standards of conduct upon defendants. . . ."); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 561 n.8 (S.D. Fla. 1973), *affd. mem.*, 507 F.2d 1278 (5th Cir. 1975) ("a (b)(1)(A) class action is viable when a common fund exists that may be evaporated by an award to some of the prospective claimants"); *Berman v. Narragansett Racing Assn.*, 48 F.R.D. 333, 337 (D.R.I. 1969) ("One suit might well order a payment of damages and another might well forbid it."); 1 H. NEWBERG, *CLASS ACTIONS* § 1135a (1977) ((b)(1)(A) classes have been certified in actions for money damages).

But if a limited fund exists, the action can be certified under subdivision (b)(1)(B). See

Finally, a Rule 23(b)(3) "opt-out" class action would be inadequate because the limited fund created by multiple actions for punitive damages can be protected effectively only if all claimants are joined in a single action.<sup>70</sup> In fact, the most important consequence of (b)(1)(B) certification is that class members cannot opt out; the court's judgment thus binds all class members.<sup>71</sup> This feature prevents plaintiffs from pursuing independent litigation<sup>72</sup> that would as a practical matter dispose of the interests of later plaintiffs.<sup>73</sup> Because (b)(1)(B) protects a limited fund by binding all class members, it is the most appropriate subdivision under which to certify a class action for punitive damages.

### B. Finding the Limited Fund

Before a court can certify a Rule 23(b)(1)(B) class action for punitive damages, it must determine that a limited fund actually exists. In cases where the presence of a limited fund is uncertain, courts will not order a (b)(1)(B) class action.<sup>74</sup> However, even those courts that have refused to certify an action in such circumstances have held

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notes 59-67 *supra* and accompanying text. Moreover if the class action is maintainable under 23(b)(1) at all, "nothing turns on which clause is controlling." *Federal Skywalk Cases*, 93 F.R.D. at 424; accord 1 H. NEWBERG, *supra*, at § 1130. Thus, although a court could conceivably certify a class action seeking a limited fund under subdivision (b)(1)(A), the more accurate — and safer — approach would be to certify under subdivision (b)(1)(B).

70. The limited fund concept underlying (b)(1)(B) certification demands that a judgment be binding on all class members. Because plaintiffs can opt out of a (b)(3) class action, see FED. R. CIV. P. 23(c)(2), those who do not wish to participate in the action could exhaust a limited fund by winning the one or few punitive judgments that state law allows against a single defendant, or by obtaining large judgments that threaten to exhaust a defendant's assets. See K. REDDEN, *supra* note 11, § 4.8(D), § 4.16. Moreover, if a court finds that (b)(1)(B) certification is warranted, it should certify the class under subdivision (b)(1)(B) rather than (b)(3). See *Van Gemert v. Boeing Co.*, 259 F. Supp. 125 (S.D.N.Y. 1966); 1 H. NEWBERG, *supra* note 69, at § 1146.

This is not to say that (b)(3) certification should never be used where plaintiffs face a limited fund. If a court concludes that other factors, such as the Anti-Injunction Act, see Part III *infra*, preclude (b)(1)(B) certification, then a rule 23(b)(3) class action can be used as a next-best option. See *Federal Skywalk Cases*, 95 F.R.D. 483 (1982) (remand); *Payton v. Abbott Labs*, 83 F.R.D. 382, 392 (D. Mass. 1979). See generally Putz & Astiz, *supra* note 12 (urging that plaintiffs who opt out of a class action for punitive damages be precluded from bringing individual punitive claims). However, where a limited fund appears, (b)(1)(B) certification is always preferable to maintaining the class under other Rule 23 subdivisions.

71. *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335, 1339 (9th Cir. 1976); *Dalkon Shield*, 526 F. Supp. 887, 906 & n.75 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); Klenk & Kelly, *supra* note 69, [2.7], at 2-14; Note, *supra* note 35, at 1152-53.

72. *Reynolds v. National Football League*, 584 F.2d 280, 283-84 (8th Cir. 1978).

73. "Insofar as class actions which are brought under subsection (b)(1) of Rule 23 are concerned, the binding effect of a judgment on the class is necessary . . . to protect class members from adjudications which could dispose of their interests." Klenk & Kelly, *supra* note 69, [2.7], at 2-14.

74. *Abed v. A.H. Robins Co.*, 693 F.2d 847, 851 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 789-90 (E.D.N.Y. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979).

open the prospect that Rule 23(b)(1)(B) could be used if the court were certain that the fund was limited.<sup>75</sup>

Courts have not defined the legal showing required to establish the presence of a limited fund. At most, the cases indicate when a court may *not* certify a (b)(1)(B) class.<sup>76</sup> But if the law of the forum clearly indicates that only one punitive damage award may be recovered against a defendant, then the fund is clearly limited and should be subject to a (b)(1)(B) class action.<sup>77</sup>

Further, if a court considers certifying a (b)(1)(B) class action against the limited fund created when plaintiffs' claims exceed a de-

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75. Problems in proving the existence of a limited fund usually arise where plaintiffs' claims allegedly exceed defendant's assets. In *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762 (E.D.N.Y. 1980) the court refused to certify a (b)(1)(B) class because the plaintiffs had offered no evidence of the likely insolvency of the defendants. 506 F. Supp. at 789-90. The district court in *Dalkon Shield*, distinguished *Agent Orange* on that basis, holding in contrast that the Dalkon Shield claims posed a real threat of bankruptcy. 526 F. Supp. at 897. Payton v. Abbott Labs, on the other hand, rejected plaintiffs' attempt to establish a group insurance fund, paid for by defendants, as one remedy in a DES case. "The plaintiffs do not . . . offer evidence of the likely insolvency of the defendants, and I do not believe that, without more, numerous plaintiffs and a large *ad damnum* clause should guarantee (b)(1)(B) certification." 83 F.R.D. at 389. Even so, no court has categorically ruled out a (b)(1)(B) class action where plaintiffs' claims exceed defendant's assets.

Other cases indicate that (b)(1)(B) certification *may* be appropriate where plaintiffs' claims threaten to bankrupt a defendant. In *Green v. Occidental Petroleum Corp.*, 541 F.2d 1335 (9th Cir. 1976), the court noted that (b)(1)(B) certification would be called for "where the claims of all plaintiffs exceeded the assets of the defendant and hence to allow any group of individuals to be fully compensated would impair the rights of those in court." 541 F.2d at 1340 n.9; *cf.* Klenk & Kelly, *supra* note 69, at [2.45]. The court in *Coburn v. 4-R Corp.*, 77 F.R.D. 43 (E.D. Ky. 1977), relied in part on the language in *Green* in certifying a (b)(1)(B) class action where claims arising from a nightclub fire exceeded the defendant's assets. 77 F.R.D. at 46.

However, the Ninth Circuit limited the *Green* footnote in *Abed v. A.H. Robins Co.* because *Green* involved a 10b-5 securities action and not "mass personal injury claims." 693 F.2d at 851. This distinction is not convincing because (b)(1)(B) certification turns on the presence of a limited fund, not on the nature of the action. In addition, the Ninth Circuit left open the possibility that adequate proof of threatened insolvency might warrant a class action:

The detrimental effect of earlier claims upon later claims commends itself to this court as worthy of future judicial and legislative consideration. As plaintiffs in this case correctly argue, though, not every plaintiff will prevail and not every plaintiff will receive a jury award in the amount requested. Thus *on the present state of the record*, the detrimental effect of separate punitive damages awards is not clearly inescapable. 693 F.2d at 851 (emphasis added). The few courts that have spoken to the issue thus do not rule out (b)(1)(B) certification where plaintiffs' claims exceed a defendant's assets. What they do require is evidence that such claims threaten to bankrupt the defendant.

76. See note 75 *supra*.

77. In *Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), the district court read the Missouri appellate court's decision in *Monsanto Co. v. Parker*, No. 43829 (Mo. Ct. App., argued Dec. 9, 1981), *dismissed as moot*, 634 S.W.2d 506 (Mo. Ct. App. 1982), as holding that only one punitive damage judgment would be allowed against a given defendant, and used this conclusion as a partial justification for (b)(1)(B) certification. 93 F.R.D. at 424-25. The Eighth Circuit did not reach the merits of the holding in vacating the lower court order, 680 F.2d at 1177 n.4, so the notion that a court can certify a (b)(1)(B) class action to manage a fund limited by state law retains precedential validity. See 680 F.2d at 1187 (Heaney, J., dissenting); *cf.* *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558 (S.D. Fla. 1973), *affd. mem.*, 507 F.2d 1278 (5th Cir. 1975) (fund limited by statute).



fendant's assets, it should rely on evidence showing that the fund is actually limited.<sup>78</sup> Thus, the court must decide whether punitive awards will exceed defendant's assets. Relevant evidence would include proof of defendant's actual assets, insurance, settlements, and continuing exposure.<sup>79</sup>

The court should certify a (b)(1)(B) class action only if the evidence indicates that the plaintiffs' punitive claims threaten to bankrupt the defendant. The issue, therefore, turns on the standard of certainty by which the court must test the proof. The trial court in *Dalkon Shield* opined that "[n]either the rule nor the Advisory Committee Notes requires proof that claims 'will,' as a certainty, exhaust the fund. Certification is appropriate if individual actions 'may' affect the claims of parties not before the court."<sup>80</sup> The Ninth Circuit rejected this pronouncement, declaring instead that the record must establish "that separate punitive awards inescapably will affect later awards."<sup>81</sup> Although the standard imposed by the Court of Appeals is more rigorous than that adopted by the trial court, it does not pose an insurmountable barrier to (b)(1)(B) certification. Inasmuch as multiple claims have caused defendants to file in bankruptcy in the past,<sup>82</sup> it should be possible to document such a threat where it actu-

78. See *Dalkon Shield*, 526 F. Supp. 887, 917 (N.D. Cal. 1981), *vacated and remanded sub nom.* *Abed v. A.H. Robins*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *cf.* note 79 *infra*; see also AMERICAN COLLEGE OF TRIAL LAWYERS, RECOMMENDATIONS ON MAJOR ISSUES AFFECTING COMPLEX LITIGATION 25 (1981) (trial court may authorize pre-certification discovery on issues relating to certification). Although discovery should be used to determine whether a limited fund exists, it must not amount to an inquiry into the merits of the action. 526 F. Supp. at 919; see *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974).

79. The Ninth Circuit vacated the lower court's order certifying a class action for punitive damages in part because the judge erred by ordering class certification without sufficient proof of, or even inquiry into, the defendant's actual assets, insurance, settlement experience, and continuing exposure. Although the district court conceded that discovery should be used to identify a limited fund, see note 78 *supra*, it certified the class action solely on the basis of the defendant's attorney's affidavit showing the claims against the defendant and its assets. 693 F.2d at 852. The court did not reopen discovery to permit plaintiffs to challenge the affidavits. 526 F. Supp. at 917-19; see 693 F.2d at 852. Moreover, the district court did not allow out-of-state plaintiffs to participate in punitive damage class briefings. 693 F.2d at 852. Information pertaining to a defendant's assets and the likelihood of insolvency can be obtained by *in camera* revelation. See *Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *cf.* Note, *supra* note 35, at 1158 ("Some form of evidentiary hearing will be necessary to determine the amount of assets available for recovery, the potential number of awards, and the magnitude of the amount to be recovered, but such a hearing should be quite limited.").

80. 526 F. Supp. at 897; see also *Federal Skywalk Cases*, 680 F.2d 1175, 1187 n.9 (Heaney, J., dissenting) (Rule 23(b)(1)(B) does not require proof that claims will exhaust a defendant's capacity to pay); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45-46 (E.D. Ky. 1977).

81. 693 F.2d at 851.

82. For example, Johns-Manville faced 16,500 asbestos-related claims, N.Y. Times, Sept. 5, 1982, § 3, at 2, col. 3 (late ed.), and anticipated that this number would rise to 32,000 as latent injuries materialized. *Id.*, Aug. 27, 1982, at A1, col. 6. With potential liability estimated at two billion dollars, Manville feared that the company would be unable to satisfy judgments against it. *Id.* As a result, Manville filed in bankruptcy under Chapter 11, 11 U.S.C. §§ 1101-1174 (Supp. III 1979), joining UNR Industries and several smaller asbestos insulation makers

ally exists.<sup>83</sup>

Moreover, the trial court's standard is arguably more appropriate than that used by the Court of Appeals for two reasons. First, the hazards posed to plaintiffs, defendants, and society by bankruptcy<sup>84</sup> suggest that a court should certify a (b)(1)(B) class action as a precautionary measure even where bankruptcy is not absolutely certain. Second, the Advisory Committee's Comments state that (b)(1)(B) certification is appropriate where "an adjudication as to one or more members of the class will necessarily *or probably* have an adverse practical effect on the interests of other members . . . ."<sup>85</sup> Rule 23 itself states that a (b)(1) class action is appropriate if separate adjudications merely "risk" destroying or impairing the interests of non-parties.<sup>86</sup> Thus, the court would be justified in certifying a (b)(1)(B) class action if multiple suits presented a "significant likelihood" that individual claims would affect the interests of parties not before the court.<sup>87</sup>

### C. Conducting the Class Action

Once the court concludes that the fund available for punitive recovery is limited, it must then decide whether the other prerequisites of class action are present. The number of plaintiffs seeking punitive damages must render joinder impractical, the action must pose questions of law or fact common to the class, the punitive claims of the class representatives must be typical of the entire class, and the representative parties must protect the interests of the class.<sup>88</sup>

The most important prerequisite in a class action for punitive damages is commonality. Because a mass accident affects plaintiffs in several jurisdictions, a court sitting in diversity may have difficulty

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who had already been sent into bankruptcy. See *Winter*, *supra* note 53, at 1361; N.Y. Times, Sept. 18, 1982, at 35, col. 3.

83. See Note, *supra* note 39, at 1121-22 ("Although Manville and UNR Industries are the first such apparently healthy corporations to file Chapter 11 petitions in the face of massive tort claims, manufacturers in a variety of industries that face similar liability could follow suit." (footnote omitted)).

84. See notes 36-40 *supra* and accompanying text.

85. Advisory Committee Comments, 39 F.R.D. 69, 101 (1966) (emphasis added).

86. FED. R. CIV. P. 23(b)(1); see Note, *supra* note 35, at 1158.

87. See *Federal Skywalk Cases*, 680 F.2d at 1187 n.9 (Heaney, J., dissenting).

88. FED. R. CIV. P. 23(a) provides:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

All four prerequisites must be met. See, e.g., *Payne v. Travenol Laboratories*, 673 F.2d 798 (5th Cir. 1982). The burden of establishing that a class meets these prerequisites lies with the party seeking certification. Klenk & Kelly, *supra* note 69, [2.13], at 2-17.

isolating a punitive law common to all class members.<sup>89</sup> This problem is not insurmountable for three reasons. First, a punitive damage class action poses common questions of fact going to the defendant's culpability.<sup>90</sup> Because Rule 23(a) requires only that the action present "questions of law or fact common to the class,"<sup>91</sup> the court could certify those issues relying on facts going to defendant's punitive liability and then apply the determination reached by the trier of fact to the measure of damages.<sup>92</sup> Second, "the court could determine a consensus of shared values or policies in formulating a 'compromise' standard" of punitive recovery that would account for the interests of all affected states.<sup>93</sup> Finally, the court must exclude from the class those claimants who cannot recover punitive damages under applicable state law.<sup>94</sup>

89. If the action is brought under a federal statute rather than diversity jurisdiction, federal statutory or court-made law will control, thus providing a common question of law. *D. DOBBS*, *supra* note 16, § 1.5, at 12. But if the suit is a diversity action, the federal court must apply the choice of law provisions of the state in which it sits. *Klaxon v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). If the wrong giving rise to multiple claims occurs in a single jurisdiction, and that jurisdiction uses the traditional *lex loci delicti* rule to determine whose law will control, the court will apply the punitive damage standard of the state in which it sits, *see* note 41 *supra*, and no problem of commonality will arise. Comment, *The Use of Class Actions for Mass Accident Litigation*, 23 LOY. L. REV. 383, 391 (1977). If, on the other hand, the wrong affects persons in more than one jurisdiction, the law of the forum might require the court sitting in diversity to apply different punitive damage laws to different members. For example, half of the states deny punitive damages in cases where the plaintiff dies; in addition, standards for recovery range from simple negligence to malice, fraud, and oppressive conduct. *K. REDDEN*, *supra* note 11, § 4.11, at 127. The Ninth Circuit adduced the differences in punitive damages standards as one reason for denying certification in *Dalkon Shield*. 693 F.2d at 850. However, the court went on to note that "[i]f commonality were the only problem in this case, it might be possible to sustain some kind of a punitive damage class." 693 F.2d at 850.

90. *Abed v. A.H. Robins*, 693 F.2d at 850 (the court conceded that defendant's knowledge of product safety, when defendant obtained such knowledge, what information defendant withheld from public, and what defendant stated in advertising to doctors "may all be common questions."); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (order conditionally certifying class) (defendant's conduct in manufacturing and marketing of Dalkon Shield presented common questions of law and fact with respect to punitive liability); *cf. Federal Skywalk Cases*, 680 F.2d 1175, 1189 (8th Cir. 1982) (Heaney, J., dissenting) (facts relevant to liability will not differ meaningfully from one defendant to another), *cert. denied*, 103 S. Ct. 342 (1982); *In re Gabel*, 350 F. Supp. 624, 628 (C.D. Cal. 1972) (right of each member of class to recover damages turns on a common set of facts).

91. FED. R. CIV. P. 23(a) (emphasis added).

92. The court could take different laws into account when an individual from an affected state makes his or her claim on the class fund. *Dalkon Shield*, 526 F. Supp. at 917. Alternatively, special verdicts or general verdicts with interrogatories could be used to apply different punitive laws to various individuals or groups of individuals in a single trial. *See* FED. R. CIV. P. 49(a), 49(b); Comment, *supra* note 89, at 393.

93. *Dalkon Shield*, 526 F. Supp. at 917. Although the precise measure of damages may vary from jurisdiction to jurisdiction, "[a]ll states in which punitive damages are allowed have a shared interest in seeing that the alleged misconduct is punished." 526 F. Supp. at 909.

94. *Dalkon Shield*, 526 F. Supp. at 916 n.158. This result follows because plaintiffs without punitive claims pose no threat to the limited fund. However, the court should consider the viability of individual claims under applicable state law in assessing the risk that punitive awards will exhaust defendant's assets. *See* notes 78-87 *supra* and accompanying text.

The numerosity requirement is usually satisfied when punitive claims are so numerous that they exceed a defendant's assets.<sup>95</sup> Where the law limits the number of possible punitive recoveries, the

95. The numerosity requirement is satisfied where joinder is impracticable. See, e.g., *Federal Skywalk Cases*, 93 F.R.D. 415, 421 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir. 1982) (class arising from accident where several hundred people had been killed or injured held sufficiently numerous), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (order conditionally certifying class action) (1600 claims pending nationwide in state and federal courts sufficiently numerous); *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 44 (E.D. Ky. 1977) (concluding that a class consisting of the legal representatives of over 200 people killed or injured in a fire satisfied the numerosity prerequisite). Joinder need only be impracticable, not impossible. *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 787 (E.D.N.Y. 1980); *Payton v. Abbott Labs*, 83 F.R.D. 382, 389 (D. Mass. 1979); C. WRIGHT, *HANDBOOK ON THE LAW OF FEDERAL COURTS* § 72, at 346 (1976). A showing of "strong litigational inconvenience" satisfies the numerosity requirement. *Federal Skywalk Cases*, 93 F.R.D. 415, 421 (W.D. Mo.) *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982).

Because a tort provides the most common reason to seek punitive damages, K. REDDEN, *supra* note 11, at § 2.6, a mass tort is the paradigm situation in which the numerosity requirement will be satisfied. For example, both *Federal Skywalk Cases* and *Dalkon Shield* involved mass torts. See notes 1-2 *supra*. This observation is important because the Advisory Committee Comments indicate that class certification may not be appropriate in a "mass accident" situation:

A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses to liability, would be present, affecting the individuals in different ways. In these circumstances an action would degenerate in practice into multiple law suits separately tried.

Advisory Committee Comments, 39 F.R.D. 69, 103 (1966).

This admonition does not bar (b)(1)(B) certification of a class action for punitive damages for four reasons. First, the comment states only that a class action will not "ordinarily" be appropriate for a mass accident; it does not indicate that certification would never be called for. Because punitive damages claims go to the defendant's conduct relative to a class of plaintiffs, (b)(1)(B) certification poses no risk of degenerating into multiple law suits.

Second, the Committee expressed its concern "with particular reference to subdivision (b)(3) of the Rule." *Causey v. Pan Am. World Airways*, 66 F.R.D. 392, 396-97 (E.D. Va. 1975). In a (b)(3) situation, "class-action treatment is not as clearly called for as in" a (b)(1) or (b)(2) class action. Advisory Committee Comments, 39 F.R.D. 69, 102-03. A (b)(3) class action allows "opt out" and requires notice, while actions maintained under (b)(1) and (b)(2) do not. See FED. R. CIV. P. 23(c)(2). Because a subdivision (b)(3) class action differs materially from its subdivision (b)(1) or (b)(2) counterpart, the Advisory Committee's opposition to class certification for mass accidents may apply only to actions arising under subdivision (b)(3).

Third, because Rule 23 itself does not prohibit a class action in a mass tort, it arguably permits certification of a (b)(1) mass accident class action. *In re Gabel*, 350 F. Supp. 624, 627 (C.D. Cal. 1972) (If Rule 23 was not intended to cover mass tort actions, "it would have been simple enough to have said so in the text of the rule."); accord *Federal Skywalk Cases*, 680 F.2d 1175, 1189 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982).

Finally, courts indicate that class certification can be used when the class action is limited to a single issue, such as liability. See *Payton v. Abbott Labs*, 83 F.R.D. 382, 389-91 (D. Mass. 1979); *Hernandez v. Motor Vessel Skyward*, 61 F.R.D. 558, 560 (S.D. Fla. 1973), *affd. mem.*, 507 F.2d 1278 (5th Cir. 1975); *American Trading & Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969); accord *Federal Skywalk Cases*, 680 F.2d 1175, 1189 (8th Cir. 1982) (Heaney, J., dissenting) (concerns expressed in Advisory Committee Comments simply do not apply when facts relevant to punitive liability do not differ meaningfully from one claimant to another), *cert. denied*, 103 S. Ct. 342 (1982). Even cases that have refused class certification in a mass disaster admit that a court can use the device where it can limit class issues. E.g., *Causey v. Pan Am. World Airways*, 66 F.R.D. 392, 397 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76, 80 (E.D. Pa. 1970). Thus, even if the punitive damages arise from a mass tort, the court can still use (b)(1)(B) class certification to protect a limited fund.

number of plaintiffs *may* satisfy the numerosity prerequisite;<sup>96</sup> however, the claims of few plaintiffs against such a fund would be better managed by joinder.<sup>97</sup>

The typicality<sup>98</sup> and adequacy of representation<sup>99</sup> prerequisites pose no problems unique to class actions for punitive damages.<sup>100</sup> In any event, where doubt remains as to whether the prerequisites for a punitive damage class are present, the court should resolve that doubt in favor of certification.<sup>101</sup>

Upon concluding that a limited fund exists and that the prerequisites of Rule 23(a) are satisfied, the court should exercise its discretion to certify as soon as possible a class action consisting of all persons who claim punitive damages against a particular defendant.<sup>102</sup> The court should certify the class even if no party to the

96. See *Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom.* *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

97. In this sense, joinder would be *practicable* because only a few plaintiffs would be seeking a punitive award. See FED. R. CIV. P. 19(a)(2) (person subject to service of process who will not deprive court of subject matter jurisdiction shall be joined if "he claims an interest relating to the subject of the action and is so situated that the disposition of the action in his absence may (i) as a practical matter impair or impede his ability to protect that interest . . ."); FED. R. CIV. P. 20 (permissive joinder).

98. The claims will be typical if they arise from the same factual setting. *Dalkon Shield*, 526 F. Supp. at 900. The typicality requirement does not mandate total identity of interests among class members. *Payton v. Abbott Labs*, 83 F.R.D. 382, 388 (D. Mass. 1979).

99. "Adequacy of representation depends on the qualifications and interests of counsel for the class representatives, the absence of antagonism or conflicting interests, and a showing of interests between class representatives and absentees." *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 788 (E.D.N.Y. 1980). In *Federal Skywalk Cases*, 93 F.R.D. 415 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), the court held that representation was adequate where the class representatives were able to act as fiduciaries in protecting class interests and possessed the resources needed to prosecute certified claims. The representatives had no conflicts of interests with other class members, were not motivated by factors unrelated to the case itself, and had a substantial stake in the outcome of the controversy. In addition, lead counsel was experienced in complex litigation and was therefore qualified to conduct the action. 93 F.R.D. at 422. As to the adequacy of representatives' counsel, courts have considered counsel's pleadings and briefs, compliance with the Federal Rules of Civil Procedure, and litigation experience. Klenk & Kelly, *supra* note 69, [2.35], at 2-41; see *Coburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977) (representation adequate where lead counsel was experienced in tort class action litigation and in the substantive law of Kentucky).

100. Two additional requirements often inferred from Rule 23 — that the class must be identifiable and that the class representatives must be members of the class — also present no difficulty peculiar to a (b)(1)(B) action for punitive damages. See *In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 788 (E.D.N.Y. 1980).

101. Klenk & Kelly, *supra* note 69, [2.13], at 2-17.

102. FED. R. CIV. P. 23(c)(1) provides that "[a]s soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained." The court can always alter the order if facts develop that lead the court to revise its position. *Dalkon Shield*, 526 F. Supp. 887, 918-19 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom.* *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

action has so moved,<sup>103</sup> and need only exercise personal jurisdiction over named plaintiffs.<sup>104</sup> Although class members may also have compensatory claims against the defendant, the court can certify the punitive damage issue for separate class action treatment.<sup>105</sup>

Named plaintiffs representing the punitive damage class can then present to the jury evidence relevant to punitive damage issues, such as the defendant's wealth, the nature and number of injuries allegedly caused by the defendant's wrongful act, and the extent to which the defendant's conduct was malicious.<sup>106</sup> If the jury finds the defendant liable for punitive damages, the court will ask it to award a sum to punish the defendant once for all potential claimants.<sup>107</sup> The sum awarded can then be allocated according to an equitable formula approved by the court<sup>108</sup> among class members who file

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103. *Senter v. General Motors Corp.*, 532 F.2d 511 (6th Cir. 1976), *cert. denied*, 429 U.S. 870 (1976); *Huff v. N.D. Cass Co.*, 485 F.2d 710, 712 (5th Cir. 1973) (*en banc*); *Federal Skywalk Cases*, 93 F.R.D. 415, 423 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F. Supp. at 894-95; *Robinson v. First Natl. City Bank*, 482 F. Supp. 92, 100 (S.D.N.Y. 1979); *Stevenson v. Smith*, 73 F.R.D. 79, 81 (D. Del. 1976). *Contra Wilson v. Zarhadnick*, 534 F.2d 55, 57 (5th Cir. 1976) (court cannot certify a class action *sua sponte*). *Zarhadnick* was rejected in *Dalkon Shield*. 526 F. Supp. at 895 n.18.

104. *Dalkon Shield*, 526 F. Supp. at 905-07 & 905 n.71 ("adequate representation, and not presence, is the foundation of due process in the class suit"); *see Hansberry v. Lee*, 311 U.S. 32, 40-41 (1940); *Supreme Tribe of Ben-Hur v. Cauble*, 255 U.S. 356, 364 (1921); *Dosier v. Miami Valley Broadcasting Corp.*, 656 F.2d 1295, 1299 (9th Cir. 1981); *Calagaz v. Calhoon*, 309 F.2d 248, 254 (5th Cir. 1962). Federal courts can also assume jurisdiction over a nationwide class even when many plaintiffs are not within the jurisdiction of the district court. *See, e.g., United States v. Will*, 449 U.S. 200 (1980); *Califano v. Yamasaki*, 442 U.S. 682, 701-03 (1979).

105. FED. R. CIV. P. 23 (4)(c)(A) provides that "an action may be brought or maintained as a class action with respect to particular issues . . . ." *See, e.g., American Trading and Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969); *Advisory Committee Comments*, 39 F.R.D. 69, 106 (1966).

106. *See Dalkon Shield*, 526 F. Supp. 887, 920 (N.D. Cal. 1981), *vacated on other grounds sub nom. Abed v. A.H. Robins Co.*, 680 F.2d 1175 (8th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

107. *Dalkon Shield*, 526 F. Supp. at 920.

108. *See Federal Skywalk Cases*, 680 F.2d 1175, 1185 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (order conditionally certifying class action). Claimants seeking their share of the recovery fund would be required to present evidence demonstrating that they are members of the punitive class. *See Coburn v. 4-R Corp.*, 77 F.R.D. 43, 47 (E.D. Ky. 1977); *American Trading and Prod. Corp. v. Fischbach & Moore, Inc.*, 47 F.R.D. 155 (N.D. Ill. 1969). Damages could be apportioned by a master appointed pursuant to FED. R. CIV. P. 53. *Coburn*, 77 F.R.D. at 47. The formula for apportionment could be a straight pro rata share based on the total number of claimants, or a pro rata share based on the amount of compensatory damages recovered by a claimant relative to those secured by others. *Dalkon Shield*, 526 F. Supp. at 920 n.183. The second formulation is more appropriate because allocation in proportion to actual recovery accords with the rule that punitive damages are generally not recoverable unless the plaintiff can show actual loss. *See D. DOBBS, supra* note 16, § 3.9, at 208. A plaintiff would not be a member of the punitive damage class unless he or she had obtained a compensatory recovery against the defendant. Thus, the determination of punitive liability would be "followed by separate proof of the amount of each valid claim and proportionate distribution of the funds." *Advisory Committee Comments*, 39 F.R.D. 69, 101 (1966).

claims "at the end of some reasonable period of time."<sup>109</sup>

#### D. *Advantages of a Rule (23)(b)(1)(B) Class Action for Punitive Damages*

A class action for punitive damages secures the plaintiff's interests in the limited recovery fund, protects the defendant, and promotes judicial economy. It protects plaintiffs' interests in three ways. First, a class action tried in a single forum will insure that all plaintiffs have an equal opportunity to assert their punitive claims.<sup>110</sup> Thus, "[w]hile this coordination will prevent any one plaintiff from receiving an individual 'windfall' punitive damage award, it will also insure the right of *all* plaintiffs to some proportionate share of any punitive damage recovery."<sup>111</sup> Second, a class action prorates the

109. *Dalkon Shield*, 526 F. Supp. at 920. In a footnote to this comment, the court observed that "[t]he class necessarily will close at some time. However, in light of the existence of a statute of limitations, the number of claimants, which is increasing today, will dwindle to a minimal or nonexistent number at some definite point in the future." 526 F. Supp. at 920 n.184.

110. *See Federal Skywalk Cases*, 680 F.2d 1175, 1186 (8th Cir.) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982); *In re Northern Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 521 F. Supp. 1188, 1192 (N.D. Cal. 1981) (order conditionally certifying class); Klenk & Kelly, *supra* note 69, at [2.7]. "The courts should be looking to achieve the fundamental fairness which is essential to the maintenance of the judicial system. At a time when mass accidents occur with increasing frequency, the courts should strive to find alternatives which will allow members of a class to redress a mass wrong as rapidly, as inexpensively, and as fairly as possible." Comment, *Federal Rules of Civil Procedure — Litigation of Mass Air Crashes*, 29 RUTGERS L. REV. 425 (1976) (footnote omitted).

111. *Dalkon Shield*, 526 F. Supp. 887, 896 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983). However, one Note argues that allowing awards to go to plaintiffs who sue early will encourage efficient litigation by rewarding prompt prosecution of claims. Note, *supra* note 11, at 1811-12. This approach subordinates legitimate claims to the varying diligence of counsel, as well as to other circumstances that might delay an action. *See Putz & Astiz, supra* note 12, at 6 n.27. Moreover, the judicial system would sanction an unseemly race to the courthouse by placing a premium on this sort of efficiency. *See Federal Skywalk Cases*, 93 F.R.D. 415, 424 (W.D. Mo.), *vacated on other grounds*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F. Supp. 887, 897 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom. Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983); *Corburn v. 4-R Corp.*, 77 F.R.D. 43, 45 (E.D. Ky. 1977).

Some litigants might contend that their individual interest in control of the litigation precludes class certification. *See Causey v. Pan Am. World Airways*, 66 F.R.D. 392, 399 (E.D. Va. 1975); *Hobbs v. Northeast Airlines*, 50 F.R.D. 76 (E.D. Pa. 1970); Note, *Mass Accident Class Actions*, 60 CALIF. L. REV. 1615, 1634 (1972); Note, *supra* note 89, at 397. However, because the interest in individual control is an articulated concern only with respect to a Rule 23(b)(3) class action, a court certifying a class action for punitive damages is not required to consider a claimant's interest in individual control. *Federal Skywalk Cases*, 680 F.2d 1175, 1188-89 (8th Cir. 1982) (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 343 (1982); Note, *supra* note 89, at 400-01. Moreover, "[b]ecause of the possible savings in litigation costs to individual class members, it may even be more accurate to assume that many of the class members would be willing to sacrifice individual control to gain the benefit of those savings." Note, *supra* note 89, at 399; *cf. In re "Agent Orange" Prod. Liab. Litig.*, 506 F. Supp. 762, 790 (E.D.N.Y. 1980) (where problems inherent in individual litigation are great, individual class members "have almost no interest in individually controlling the prosecution of separate actions.").

cost of litigation among class members,<sup>112</sup> thus reducing the likelihood that individual plaintiff's attorneys will be outmaneuvered by "litigation-wise corporate defendants."<sup>113</sup> Finally, it reduces conflicts of interest among plaintiffs' counsel.<sup>114</sup>

A class action for punitive damages also protects the defendant. First, and most important, it prevents bankruptcy because a single resolution of the punitive damages issue would allow careful consideration of the total award needed to punish a wrongdoer and to deter others.<sup>115</sup> Second, the class action device protects the defendant by eliminating costly multiple litigation of the punitive damage issue.<sup>116</sup>

In addition, the class action for punitive damages promotes judicial economy by avoiding numerous law suits involving the same facts, issues, and defendants. Because multiple trials of complex issues severely burden the court system,<sup>117</sup> public policy opposes mul-

112. See, e.g., *Federal Skywalk Cases*, 680 F.2d 1175, 1185 (Heaney, J., dissenting), *cert. denied*, 103 S. Ct. 342 (1982); *Dalkon Shield*, 526 F.Supp. 887, 918 n.172 (N.D. Cal. 1981), *vacated and remanded on other grounds sub nom.* *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983).

113. *Dalkon Shield*, 526 F. Supp. at 921; see also O'Toole, *Special Aspects of Class Actions*, in CLASS ACTIONS [11.6] (Illinois Institute for Continuing Legal Education 1974) (class actions eradicate disparity between small plaintiff and large defendant).

114. If a lawyer represents two clients, one with an early trial date and another with a later date, and both face a limited fund, the attorney can zealously pursue the first client's claim only to the detriment of the second. This conflict produces an ethical dilemma, see ABA Disciplinary Rule No. 5-105, that is resolved by a mandatory class action in which both plaintiffs would pursue their claims at the same time. *Federal Skywalk Cases*, 93 F.R.D. at 425; *Dalkon Shield*, 526 F. Supp. at 895 n.22.

115. "Probably the best use to which punitive damages could be put is a common fund used to help correct the defendant's misdeed to society as a whole, as with 'fluid recoveries' in class action suits." Note, *supra* note 11, at 1799; see Putz & Astiz, *supra* note 12, at 23 ("[T]he problem of arriving at a rational determination of punishment to be imposed on the defendant would disappear if all claims could be brought in a single action before one tribunal."); note 67 *supra*.

116. Comment, *supra* note 110, at 451. A defendant should prefer a judgment binding on all class members when it wants to avoid the harassment of many suits. Klenk & Kelly, *supra* note 69, at [2.7].

117. In *Dalkon Shield*, 526 F. Supp. 887 (N.D. Cal. 1981), *vacated and remanded sub nom.* *Abed v. A.H. Robins Co.*, 693 F.2d 847 (9th Cir. 1982), *cert. denied*, 103 S. Ct. 817 (1983), the court had spent nine weeks trying a single claim for Dalkon Shield product liability. "[A]ny attempts to try all these cases would bankrupt the district court's calendar and result in a tedium of repetition lasting well into the next century." 526 F. Supp. at 893. The court concluded that individual adjudication of the many claims for compensatory and punitive damages pending in California "would produce an unnecessary and unprecedented burden on California's federal judicial system." 526 F. Supp. at 903; cf. *Federal Skywalk Cases*, 680 F.2d 1175, 1186 (8th Cir.) (Heaney, J., dissenting) (class action promotes judicial economy by focusing litigation in the court that must resolve major disputed issues), *cert. denied*, 103 S. Ct. 342 (1982); *Federal Skywalk Cases*, 95 F.R.D. 483, 485 (W.D. Mo. 1982) (remand).

The class action itself does not impose an unusual burden on the court. An examination of Rule 23(b) class actions in the U.S. District Court for the District of Columbia revealed that "class actions have less impact on the court's workload than critics assert and at least in the District of Columbia, class actions do not appear to place an overwhelming burden on the federal district court." SENATE COMM. ON COMMERCE, 93D CONG., 2D SESS., CLASS ACTION STUDY 4 (Comm. Print 1974). The study reached this conclusion despite the fact that the number of class actions filed in the district court had increased by a factor of seven, rising from



multiple suits.<sup>118</sup> A (b)(1)(B) class promotes this policy by resolving the punitive damages issue in a single action.

### III. PROBLEMS OF FEDERALISM

Certifying a mandatory class precludes further proceedings in state courts on claims arising from the mass accident that is the subject of the federal class action. Consequently, mandatory class actions in diversity cases implicate basic principles of American federalism. In a federal system, comity requires the courts of one sovereign to act with deference to the courts of another. An injunction against further proceedings in an action previously initiated in the state courts must surmount the obstacles posed by the Anti-Injunction Act<sup>119</sup> and the nonintervention doctrine of *Younger v. Harris*.<sup>120</sup>

#### A. *The Anti-Injunction Act*

The Anti-Injunction Act provides that a federal court may enjoin state court proceedings<sup>121</sup> only "expressly as authorized by Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."<sup>122</sup> In *Federal Skywalk Cases*, the Eighth Circuit held that this statute prohibited a mandatory class action in a mass accident situation.<sup>123</sup> The court noted the accepted principle that the federal courts must construe the Act strictly against the granting of

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sixteen in the fiscal year following the 1966 Rule 23 Amendments to 125 in 1972. *Id.* at 5. In any event, the court should find the class action unmanageable only if the *issues* it presents are too complex. Administrative burdens alone should not defeat certification. Freeman, *Requirements for Class Actions*, in CLASS ACTIONS [3.15] (Illinois Institute for Continuing Legal Education 1974).

118. "[T]he avoidance of multiple litigation is often a goal of our procedural system, and with good reason. The duplication of effort, time, and expense that results from such proceedings is wasteful." Redish, *The Anti-Injunction Statute Reconsidered*, 44 U. CHI. L. REV. 717, 756 1977; see *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974); C. WRIGHT, *HANDBOOK ON THE LAW OF FEDERAL COURTS* § 12, at 352 (1973); O'Toole, *supra* note 113, [11.6], at 11-4. Similarly, FED. R. CIV. P. 1 requires that the rules "be construed to secure the just, speedy, and inexpensive determination of every action."

119. 28 U.S.C. § 2283 (1976).

120. 401 U.S. 37 (1971).

121. It is now well-settled that the federal court may not circumvent the Act by enjoining the parties, rather than the state court itself, or by use of similar subterfuges. See *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engrs.*, 398 U.S. 281, 287 (1970); *Hill v. Martin*, 296 U.S. 393, 403 (1935). On the injunctive effect of a mandatory class action, see *Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982); *Piambino v. Bailey*, 610 F.2d 1306, 1330-31 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980). This approach has prevailed despite the inconsistency between the rules governing appealability of traditional injunctions and class certification orders. See Note, *supra* note 35, at 1160.

122. 28 U.S.C. § 2283 (1976).

123. See 680 F.2d at 1181-83.

an injunction,<sup>124</sup> and declined to apply the “in aid of jurisdiction” exception.<sup>125</sup> Even allowing for the rigorous application of the statute, however, the exceptions for legislative authorization and aid of jurisdiction appear to justify certifying a mandatory class.

### 1. “Except as Expressly Authorized by Congress”

In *Mitchum v. Foster*, the Supreme Court defined the criterion for determining when Congress has authorized an injunction against state court proceedings: “The test . . . is whether an act of Congress, clearly creating a federal right or remedy enforceable in a federal court of equity, could be given its intended scope only by the stay of a state court proceeding.”<sup>126</sup> The Court held that 42 U.S.C. § 1983 could not be “given its intended scope” without the federal power to enjoin state court proceedings, and remanded the case for further consideration of the nonintervention doctrine.<sup>127</sup> The Court has subsequently distinguished other statutes of great public importance by emphasizing the peculiar focus of section 1983 on remedying abuses of state authority, noting the absence of congressional intent to constrain the states by other legislation.<sup>128</sup>

Congressional ratification is a prerequisite to the adoption of a Federal Rule of Civil Procedure.<sup>129</sup> The Rules have the force of a statute,<sup>130</sup> and may therefore bring mandatory class actions within the ambit of the express authorization exception to the Anti-Injunction Act. Like section 1983, diversity jurisdiction directly addresses defects in American federalism.<sup>131</sup> In cases of direct and substantial conflict, the federal rules override the comity principle of *Erie R.R. v.*

124. 680 F.2d at 1181, quoting *Atlantic Coast Line R.R. Co. v. Brotherhood of Locomotive Engrs.*, 398 U.S. 281, 297 (1970).

125. The superficially attractive exception for protecting or effectuating the *judgment* of the federal court does not apply until *after* the court has entered a judgment. See, e.g., *Essex Sys. Co. v. Steinberg*, 335 F. Supp. 298, 300, *affd. mem.*, 447 F.2d 1405 (2d Cir. 1971); 17 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 4226 (1978).

126. 407 U.S. 225, 237-38 (1972).

127. 407 U.S. 242-43.

128. See *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623 (1977) (single state court case cannot be enjoined pursuant to the antitrust laws) (plurality opinion); Mayton, *Ersatz Federalism Under the Anti-Injunction Statute*, 78 COLUM. L. REV. 330, 355 (1978).

129. Changes in the rules take effect ninety days after the Chief Justice reports them to the Congress. 28 U.S.C. § 2072 (1976).

130. See, e.g., *United States ex rel. Tanos v. St. Paul Mercury Ins. Co.*, 361 F.2d 838 (5th Cir.), *cert. denied*, 385 U.S. 971 (1966); *Rumsey v. George E. Failing Co.*, 333 F.2d 960 (10th Cir. 1964).

131. Whatever its contemporary merits, diversity jurisdiction was intended to restrict the power of the states to discriminate against nonresidents. See *Bank of the United States v. Deveaux*, 9 U.S. (5 Cranch) 61, 87 (1809); THE FEDERALIST No. 81 (A. Hamilton) (J. Cooke ed. 1961); 13 C. WRIGHT, A. MILLER & E. COOPER, *FEDERAL PRACTICE AND PROCEDURE* § 3601 (1975); Moore & Weckstein, *Diversity Jurisdiction: Past, Present and Future*, 43 TEXAS L. REV. 1 (1964).

*Tompkins*.<sup>132</sup> In the mass-accident context, staying state court proceedings in favor of a single federal class action does no more than protect both plaintiffs and defendants against the improvident insistence on individual punitive damages by courts sympathetic to local claimants.<sup>133</sup> Viewed as a remedy for arbitrary and inequitable assessment of punitive damages in diversity cases, the mandatory class procedure falls well within the statutory exception defined by *Mitchum v. Foster*.<sup>134</sup>

## 2. The "Necessary in Aid of Its Jurisdiction" Exception

Dissenting in *Federal Skywalk Cases*, Judge Heaney found it "self-evident that an injunction to protect the ordinary scope of a mandatory class action is 'necessary in aid of' the federal jurisdiction over such a class."<sup>135</sup> The individual claimants constitute the class; if they remain free to opt out of the federal action, the court has effectively lost jurisdiction over the class.<sup>136</sup>

This approach appears analogous to the Anti-Injunction Act analysis adopted in the context of interpleader under Rule 22.<sup>137</sup> Rule 22 interpleader protects an individual's stake in a limited fund

132. *Hanna v. Plumer*, 380 U.S. 460 (1965). The Court reaffirmed this doctrine in *Walker v. Armco Steel Corp.*, 446 U.S. 740 (1980): "The Federal Rules should be given their plain meaning. If a direct collision with state law arises from that plain meaning, then the analysis developed in *Hanna v. Plumer* applies." 446 U.S. at 750 n.9. The Court viewed the *Walker* case as not presenting a genuine collision between state and federal rules, and therefore applied the state rule for tolling the statute of limitations. On the applicability of *Hanna v. Plumer* to Rule 23, see 7 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE, at § 1758.

Such a "procedural" characterization of Rule 23 for *Erie* purposes does not involve serious tension with the test in *Mitchum*. Deeming a mandatory class procedure a remedy for the arbitrary and inequitable assessment of punitive damages, a remedy protected in diversity cases by the federal rules, is consistent with both the formal criterion and underlying analysis of both *Hanna* and *Mitchum*.

133. See *Mitchum v. Foster*, 407 U.S. 225 1972; note 22 *supra* and accompanying text.

134. In *In re Glenn W. Turner Enters. Litg.*, 521 F.2d 775, 781 (3d Cir. 1975), the court rejected this exception to the Act as applied to an opt-out class, because such a class can be given its intended effect without staying state court cases. The court left open the application of the "authorized by Congress" exception in the case of a mandatory class. In *Piambino v. Bailey*, 610 F.2d 1306, 1331 (5th Cir.), *cert. denied*, 449 U.S. 1011 (1980), the court rejected this exception as applied to a preliminary injunction pursuant to Rule 23(d) but did not address the question whether mandatory class certification under Rule 23(b)(1) or 23(b)(2) might be "authorized by Congress." The majority opinion in *Federal Skywalk Cases*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 103 S. Ct. 342 (1982), did not discuss the possibility of this exception.

135. 680 F.2d at 1192.

136. This is an inherent feature of Rule 23(b)(1)(B) class certification. Judge Heaney wrote that

the implication of the majority view is that mandatory classes are not truly mandatory — any member who has previously commenced independent litigation is somehow not subject to the ordinary rules of such class actions . . . . If certification in a mandatory class action is proper, as here it clearly is, then the ordinary rules of such actions simply preclude independent litigation of class claims in state or federal courts.

680 F.2d at 1191.

137. FED. R. CIV. P. 22; see Note, *supra* note 35, at 1159-60.

against multiple claims, despite the procedure's inherent restraint of state court proceedings.<sup>138</sup> The *Federal Skywalk Cases* majority rejected this analogy because "an uncertain claim for punitive damages against defendants who have not conceded liability . . . does not qualify as a limited fund."<sup>139</sup> This analysis assumes that because interpleader itself is unavailable,<sup>140</sup> the jurisdictional exception to the Anti-Injunction Act is also unavailable. But if a limited fund exists for Rule 23 purposes, the mandatory class procedure protects the jurisdiction of the court under that rule in precisely the same way. Future courts, following the *Federal Skywalk Cases* dissent, should look to the realities of the litigation, and recognize that probable liability sufficient to create a limited fund under Rule 23 also brings a mandatory class within the "in aid of its jurisdiction" exception.

Even granting the somewhat dubious case for retaining punitive damages in any circumstances,<sup>141</sup> the suggestion that a state might, by such an action, better protect its citizens against tortious injury is unsound; potential mass tortfeasors surely do not care by whom their assets are consumed when they analyze the benefits and costs of their behavior.

Moreover, a federal class action does not eliminate the state's comparatively unimportant interest but only ensures the litigation of the action in a federal forum. The role of diversity jurisdiction in harmonizing the federal system, by directly restricting the authority of the state courts, negates any claim that comity requires abstention in mass accident cases.<sup>142</sup> The district courts do not invoke the *Younger* doctrine whenever a defendant removes a pending action to the federal system. A mandatory class action does no more than remove pending cases from the state courts in the same manner.

### B. *Mandatory Class Actions and Younger v. Harris*

If the Anti-Injunction Act does not forbid staying state court proceedings, principles of "equity, comity and federalism" may never-

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138. A casual reliance on this analogy, *see* Note, *supra* note 35, at 1159-60, is unwarranted. Most of the cases enjoining pending state court proceedings involve *statutory* interpleader, under 28 U.S.C. § 2361, which is expressly excepted from the Anti-Injunction Act by 28 U.S.C. § 2361 (1976). Injunctions pursuant to statutory interpleader therefore come within the "expressly authorized by Congress" exception to the Act, and do not support an analogy based on the "in aid of its jurisdiction" exception.

But injunctions pursuant to Rule 22 interpleader are within the jurisdictional exception and provide ample support for the analogy. *See* 3A J. MOORE, FEDERAL PRACTICE § 22.3, at 22-37 (1982).

139. 680 F.2d at 1182.

140. *See* notes 56-57 *supra*.

141. *See* note 46 *supra*.

142. *See* notes 129-33 *supra* and accompanying text.

theless militate against a federal injunction.<sup>143</sup> In identifying when the doctrine applies, the Supreme Court has looked to the nature of the state interest involved;<sup>144</sup> in deciding whether the facts justify an exception to the doctrine when it applies, the Court has looked to the good faith with which the state parties have brought the action against which an injunction is sought.<sup>145</sup> Both considerations support certifying a mandatory class for punitive damages in the mass-accident context.

### 1. *Does Younger Apply?*

*Younger* and its immediate progeny involved injunctions that sought to restrain state criminal prosecutions,<sup>146</sup> proceedings close to the core of a state's legitimate interest.<sup>147</sup> The Supreme Court has expanded the doctrine's scope to encompass civil actions that resemble criminal prosecutions,<sup>148</sup> and the lower courts have refused to issue injunctions, based on *Younger*, against actions where the state is not a party.<sup>149</sup> Nevertheless, the Supreme Court has repeatedly declined to declare that the doctrine applies to all civil actions in

143. See *Mitchum v. Foster*, 407 U.S. 225, 243 (1972) (remanding for consideration of *Younger* doctrine after holding injunction not barred by the Anti-Injunction Act).

There is authority holding that *Younger* does not apply to an injunction against a civil suit to which the state itself is not a party. See *Puerto Rico Intl. Airlines v. Silva Recio*, 520 F.2d 1342 (1st Cir. 1975); *NLRB v. Committee of Interns & Residents*, 426 F. Supp. 438 (S.D.N.Y. 1977), cert. denied, 435 U.S. 904 (1978); *United States Gen., Inc. v. Arndt*, 417 F. Supp. 1300 (E.D. Wis. 1976). But the persuasive weight of authority rejects this simplistic distinction. The Supreme Court has never held that *Younger* does apply to all state court proceedings, but it has steadily broadened the doctrine's reach. See *Moore v. Sims*, 442 U.S. 415 (1979) (child custody proceedings); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt proceeding); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (state-initiated nuisance suit). Lower federal courts have applied the doctrine to private civil actions. See *Lamb Enters. v. Kiroff*, 549 F.2d 1052 (6th Cir.), cert. denied, 431 U.S. 968 (1977); *Louisville Area Inter-faith Comm. for United Farm Workers v. Nottingham Ltd.*, 542 F.2d 652 (6th Cir. 1976); *Neebuhr v. Bayer*, 502 F. Supp. 1216 (N.D. Ohio 1980). This result is more consistent with the spirit of comity underlying the doctrine. See Whitten, *Federal Declaratory and Injunctive Interference with State Court Proceedings: The Supreme Court and the Limits of Judicial Discretion*, 53 N.C. L. REV. 591, 682 (1975); Comment, *Limiting the Younger Doctrine: A Critique and Proposal*, 67 CALIF. L. REV. 1318, 1320, 1343-45 (1979).

144. See *Dombrowski v. Pfister*, 380 U.S. 479 (1965).

145. See *Younger v. Harris*, 401 U.S. at 53-54; 17 C. WRIGHT, A. MILLER & E. COOPER, FEDERAL PRACTICE AND PROCEDURE *supra* note 125, § 4255, at 578 ("[T]he general understanding has been that to obtain relief in a case to which *Younger* applies there must be a showing of bad faith or harassment . . .").

146. See *Younger*, 401 U.S. at 55 (Stewart, J., concurring).

147. See, e.g., *Zurcher v. Stanford Daily*, 436 U.S. 547 (1978); *Branzburg v. Hayes*, 408 U.S. 665, 690 (1972) (plurality opinion) ("the public interest in law enforcement" overrides claim of reporter's privilege).

148. See *Trainor v. Hernandez*, 431 U.S. 434 (1977) (state interest in preventing welfare fraud); *Juidice v. Vail*, 430 U.S. 327 (1977) (civil contempt action); *Huffman v. Pursue, Ltd.*, 420 U.S. 592 (1975) (*Younger* applies to quasi-criminal public nuisance suit brought by the state).

149. See note 143 *supra*.

state courts.<sup>150</sup> Punitive damage actions for mass accidents outside a federal diversity class action offer a particularly attractive candidate for clarifying the reservation in holding as well as dicta.

The only state interest in separate punitive damage awards is enriching its own citizens at the expense of compensating other states' citizens, as well as many of its own, for serious injuries.

## 2. *Good Faith*

Viewed realistically, the pursuit of individual punitive damages claims at the expense of a federal class action fails to reflect good faith on the claimant's part. Punitive damages serve an exclusively public purpose.<sup>151</sup> The pursuit of redundant punishment results from the plaintiff's desire to pocket the entire windfall personally. Such motives scarcely qualify as "good faith."<sup>152</sup> Skepticism becomes especially justified when individuals choose to pursue their claims on the advice of counsel who would lose fees if the class is certified.<sup>153</sup> Abstention therefore appears inappropriate in the mass accident context.

Even if federalism bars a mandatory class, the federal courts can take steps to minimize the burdens of multiple adjudications. First, the federal court should immediately enjoin, pending the certification decision, any state proceedings not already commenced.<sup>154</sup> Second, the court should certify an opt-out class action if abstention or the Anti-Injunction Act preclude a mandatory class.<sup>155</sup> The class action should then proceed as rapidly as possible, so as to minimize the incentive to opt out by maximizing the chance that the class judgment will consume the limited fund before an individual plaintiff can bring his claim to trial.

## CONCLUSION

A court may conclude that punitive claims against a defendant produce one of two types of limited fund. First, applicable law may

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150. See, e.g., *Trainor v. Hernandez*, 431 U.S. 434, 444 n.8 (1977) ("[W]e have no occasion to decide whether *Younger* principles apply to all civil litigation . . .").

151. See note 19 *supra* and accompanying text.

152. See note 22 *supra* and accompanying text ("an unseemly race to the courtroom door with monetary prizes for a few winners and worthless judgments for the rest").

153. See Note, *supra* note 35, at 1148.

154. See 17 C. WRIGHT, A. MILLER & E. COOPER, *supra* note 125, § 4251, at 534 ("[T]he settled rule has long been that the statute applies only to injunctions against pending proceedings and does not bar an injunction against the initiation of state proceedings in the future."). Both injunctions and declaratory relief are available from federal courts regarding threatened, rather than pending, state proceedings. See *Wooley v. Maynard*, 430 U.S. 705 (1977) (permanent injunction); *Steffel v. Thompson*, 415 U.S. 452 (1974) (declaratory relief).

155. In *Federal Skywalk Cases*, for example, Judge Wright, on remand, certified an opt-out class. See *Federal Skywalk Cases*, 95 F.R.D. 483 (W.D. Mo. 1982).

limit punitive recovery. Second, the court may obtain evidence showing that multiple punitive awards will bankrupt the defendant. In either case, early judgments for some plaintiffs will preclude punitive recovery for later claimants; bankruptcy would have the additional effect of precluding the compensatory recovery of late-suing plaintiffs. To protect plaintiffs' interests, the court should certify a Rule 23(b)(1)(B) class action for punitive damages. Rule 23(b)(1)(B) solves the limited fund problem by joining and protecting all interested plaintiffs, by insuring that the punitive judgment against the defendant will be well-calibrated, and by promoting judicial economy. Moreover, a careful analysis of the Anti-Injunction Act and the *Younger* doctrine indicates that principles of federalism do not preclude this class action solution.