Thanks for not Suing: The Prospects for State Court Class Action Litigation over Tobacco Injuries

Mark C. Weber
THANKS FOR NOT SUING: THE PROSPECTS FOR STATE COURT CLASS ACTION LITIGATION OVER TOBACCO INJURIES

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One of the most important elements of the congressional proposal to settle the state attorneys' general tobacco litigation was the bar to class action lawsuits brought by smokers against the tobacco industry. With the collapse of the original settlement and its replacement by an agreement that encompasses only the claims by the states, class action tobacco litigation has reappeared on the horizon—or even in the foreground—in many locales.

Big money is riding on class action lawsuits over tobacco use. Just as one indication, a year ago the tobacco companies were willing to pay $368.5 billion and accepted up to $2 billion in annual penalties for failing to reduce youth smoking in order to get a deal with the states that would have shielded them from class action liability and punitive damages. Their recent agreement to settle for $206 billion without obtaining those protections suggests that they believe the combination of class action liability and exposure to punitive damages is worth at least $162.5 billion plus whatever

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* Professor of Law, DePaul University. B.A. 1975, Columbia; J.D. 1978, Yale. I thank the participants in a DePaul College of Law faculty workshop for their help in developing the ideas in this paper, and my colleagues, Mary Becker, Patrick Hughes, Mary Kate Kearney, Stephen Landsman, and Stephen Siegel, for reading an early draft. Thanks also to Janet Brewer and Victoria Napolitano for their research assistance.

1 See Barry Meier, Cigarette Makers and States Draft a $206 Billion Deal, N.Y. TIMES, Nov. 14, 1998, at A1 (describing draft agreement to settle claims of 46 states that have not yet settled suits over Medicaid costs of treating people with smoking-related illnesses).

2 See id. ("Unlike the earlier state proposal, this new plan does not shield tobacco companies from punitive damages and class-action liability suits.").

3 See infra text accompanying notes 117-120 (discussing extant cases).

4 See Meier, supra note 1, at A1 (noting settlement would have provided marketing restrictions and federal regulation of nicotine in exchange for protections against some smoking-related lawsuits). These restrictions would have required congressional approval. When Congress raised the amounts the companies had to pay, they balked and support for the arrangement crumbled. See id. (stating industry opposition defeated settlement after $516 billion tobacco bill was proposed in Congress).

5 See id. (noting tobacco companies would still be subject to lawsuits from parties other than states participating in settlement).
value the risk of the annual penalties or loss of youth markets is worth.

Beyond the money is the human loss from smoking. Public health experts estimate that tobacco kills over 400,000 Americans a year,6 the equivalent of three jumbo jet crashes every day.7 The tort system may not be the only social intervention that can address the dangers of smoking8 but it does provide the prospect of compensation to victims and incentives to manufacturers either to invent safer cigarettes or to diminish production. Litigation, however, is chancy and expensive. Persons injured by exposure to tobacco may find class action procedures the best mechanism to cope with the risk and share the costs.

Current scholarship has addressed the use of the class action and similar devices in litigation over harmful products, but the work has focused on the federal class action rule and class action litigation in the federal courts.9 For reasons this Article seeks to make clear, federal class action litigation over tobacco exposure is unlikely to be

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7 Kathryn M. Doolan & Robert A. Indeglia, Jr., A Call for Action: The Burning Issue of Smoking in the Workplace, 5 J. CONTEMP. HEALTH L. & POL’Y 231, 222 (1989); see also JOHN ALLEN PAULOS, INNUMERACY: MATHEMATICAL ILLITERACY AND ITS CONSEQUENCES 94-98 (making statistical comparison of smoking-related deaths to other health and safety risks).
successful. State court class action litigation, on the other hand, appears both possible and, if certain restrictions are imposed on its use, desirable as a matter of judicial policy. This Article probes the use of state court class action litigation over tobacco exposure. The state attorneys' general settlement, by not foreclosing the use of class suits, makes the inquiry a pressing one.

Part I of this Article discusses the use of federal class procedures to redress tobacco injuries, taking up recent cases that cast doubt on the propriety of the federal class action for that purpose. Part II maps the use of state class action procedure, suggesting that the state class action avoids the problems noted by the federal courts and should, in many instances, surmount difficulties posed by state procedural rules and by legal doctrines relating to jurisdiction, choice of law, and class definition. Part III contemplates the desirability of state class action litigation in light of policy concerns, taking up economics, participation rights, fairness to defendants, and the propriety of having state decisionmakers determine the content of the tort law that relates to tobacco injuries.

I. BARRIERS TO THE USE OF THE FEDERAL CLASS ACTION
TO REDRESS TOBACCO-RELATED INJURIES

Several recent developments make class action suits over tobacco-related injuries unlikely to be successful if filed in the federal courts. One is the appellate reversal of the certification of a nationwide class of persons injured by tobacco products.10 The court in that case articulated a number of objections to proceeding as a class under the Federal Rules and other standards applicable to the federal courts.11 Another is the Supreme Court's reversal of a settlement of a nationwide class of persons injured by asbestos.12 The Court there also interpreted the federal class action rule in a way likely to make the federal courts inhospitable to class claims for damages for product injuries.13

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11 See infra Section I.A. (discussing Castano).
12 See Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231 (1997).
13 See infra Section I.B. (discussing Amchem).
A. CASTANO

In Castano v. American Tobacco Co., the Fifth Circuit Court of Appeals reversed the district court's certification of a nationwide class embracing all nicotine-dependent persons who had purchased and smoked cigarettes since 1943 as well as their estates, and their spouses, their children, and other people connected to them. According to the court of appeals, the "gravamen of [plaintiffs'] complaint is the novel and wholly untested theory that the defendants fraudulently failed to inform consumers that nicotine is addictive and manipulated the level of nicotine in cigarettes to sustain their addictive nature." The certification extended only to "core" issues: factual determinations "whether defendants knew cigarette smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers." Legal claims common to the class that arose from these factual matters included fraud, negligence, breach of warranty, strict liability, and violation of consumer protection laws. The trial court did not certify the class as to matters of compensatory damages, nor issues specific to particular class members, such as injury-in-fact, proximate cause, reliance or affirmative defenses. It did, however, certify the class concerning questions related to punitive damages and adopted a plan to have the jury determine a ratio of punitive damages to actual damages if it found punitive damages appropriate.

The court of appeals reversed certification on three grounds: (1) that the district court failed to give adequate consideration to how variations in state law affect the predominance of common issues

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14 84 F.3d 734 (5th Cir. 1996).
15 Id. at 740.
16 Id. at 737.
17 Id. at 739 (quoting Castano v. American Tobacco Co., 160 F.R.D. 544, 553 (E.D. La. 1995), rev'd, 84 F.3d 737 (5th Cir. 1996)).
18 Id.
19 Id. at 740.
20 See id. ("Class jury would develop a ratio of punitive damages to actual damages, and the court would apply that ratio in individual cases.").
21 See id. at 741-44 (stating that district court relied on consumer fraud and punitive damages surveys provided by plaintiffs and failed to "critically analyze[] how variations in state law would affect predominance"). The court further stated that the district court failed
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( predominate of common issues being one of the requirements of a class action for damages relief when there is no limited fund of assets that is being contested); 22 (2) that the predominance inquiry that was conducted failed to consider how to conduct a trial on the merits; 23 and (3) that for a tort with an inadequate record of adjudication, class proceedings do not meet the requirement for class actions for damages (not involving a limited fund of assets) 24 that a class action be the superior method of handling the case. 25

The court's list of the variations in state law included such issues as the need to establish justifiable, as opposed to reasonable, reliance for a fraud claim; the ability to employ strict liability, and which variation of strict liability, for the defective-product claim; the applicability of assumption of risk as a complete bar to recovery, or of comparative negligence as a partial bar, and which form of comparative negligence—pure or modified, and if modified, equal fault or greater fault; and the existence of a negligent infliction of emotional distress cause of action, and if one does exist, whether a physical impact is required. 26 Because the federal court lacks the ability to control the content of governing law but must follow state law under the doctrine of Erie Railroad Co. v. Tompkins, 27 a district court would have to make "Erie guesses" 28 about each of these issues for every state whose law would control. The court declared that the

to determine whether the class action would be manageable in light of the potential variations in state law. Id. at 743-44.

22 See Fed. R. Civ. P. 23(b)(3) (setting forth prerequisite that "questions of law or fact common to the members of the class predominate over any questions affecting only individual members").

23 See Castano, 84 F.3d at 744-46 ("The district court . . . failed to consider how the plaintiffs' addiction claims would be tried, individually or on a class basis.").

24 See Fed. R. Civ. P. 23(b)(3) (providing that court must find "that a class action is superior to other available methods for the fair and efficient adjudication of the controversy"). Like the predominance standard, this requirement applies only to class actions brought under subdivision (b)(3), which are generally those actions for damages relief that do not involve a common fund. Id.

25 See Castano, 84 F.3d at 746-51 ("[C]ertification of an immature tort results in a higher than normal risk that the class action may not be superior to individual adjudication.").

26 See id. at 742-43 n.15 (listing issues that make finding predominance difficult due to variations in state law).

27 304 U.S. 64, 78 (1938) (holding that state law, instead of "federal general common law," should be applied "[e]xcept in matters governed by the Federal Constitution or by Acts of Congress").

28 Castano, 84 F.3d at 747.
reliance issue, particularly the need to prove individual reliance for
the fraud claim, further justified reversal of the certification, for the
district court failed to consider the likelihood that the need to show
individual reliance on the misrepresentations would necessitate
individual trials.29

The class also failed the test of superiority, according to the court
of appeals,30 and did so for a number of reasons. First, the massing
of claims in a class action would create too high a prospective
recovery, even if the risk of liability were low, for the defendants to
resist settling.31 Second, the number of filings over tobacco exposure
so far has failed to demonstrate great judicial economy benefits from
having a single proceeding;32 any such benefits might be illusory
anyway, given the likelihood that individual trials on comparative
negligence and reliance would be needed,33 and that differences of
state law would make a common-issues trial unmanageable.34
Third, economic considerations for plaintiffs do not necessitate a
class action, according to the court.35 The size of prospective awards
makes contingent-fee financing possible, and a consortium of
plaintiff lawyers could mass resources against the defendants,36
consolidation of cases for pretrial matters might save some costs as

29 See id. at 744-45 (indicating that district court failed to decide whether reliance would
have to be proven at individual trials based upon erroneous belief that court is limited to the
pleadings when deciding certification).
30 Id. at 746.
31 See id. at 746-47 ("The risk of facing an all-or-nothing verdict presents too high a risk,
even when the probability of an adverse judgment is low. These settlements have been
referred to as judicial blackmail." (internal citation omitted)).
32 See id. at 747-48 (finding district court's belief that "judicial crisis" would result from
millions of potential individual trials was "pure speculation").
33 See id. at 749 (noting "a waste, not a savings in judicial resources" could result
because of repetition of evidence at individual trials or possible decertification after years of
litigation).
34 See id. at 749-50 (indicating that plaintiffs' multiple theories of liability make class
treatment more complicated). In this connection, the court noted the desirability of having
the state courts develop their own law. See id. at 750 (stating "[i]t is far more desirable to
allow state courts to apply and develop their own law" regarding plaintiffs' "more novel"
claims).
35 See id. at 748 (noting that potential for high individual damages, punitive damages,
and recovery of attorney's fees make individual suits feasible).
36 See id. at 747-48 n.25 ("[A] consortium of well-financed plaintiffs' lawyers . . . [could]
develop the expertise and specialized knowledge sufficient to beat the tobacco companies at
their own game.").
Fourth, according to the court, bifurcating the non-common issues, and having them decided by juries other than the one that would decide the common issues, would violate the Seventh Amendment. The court believed that severing the issues relating to the conduct of the defendants from the comparative negligence issue would necessitate reexamination of the verdict regarding the defendants’ conduct, and that the risk that the second jury would reevaluate the parties’ relative fault would be so great that a class action would not be a superior way to adjudicate the controversy.

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\(^{37}\) See id. (stating that some of defendant’s alleged advantages could be overcome through “coordination or consolidation of cases for discovery and other pretrial matters”).

\(^{38}\) See id. at 750 (“The right to a jury trial is a right to have jurable issues determined by the first jury impaneled to hear them . . . and not reexamined by another finder of fact.” (quoting In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1303 (7th Cir. 1995)). But see Patrick Wooley, Mass Tort Litigation and the Seventh Amendment Reexamination Clause, 83 IOWA L. REV. 499 (1998) (taking contrary position).

\(^{39}\) Castano, 84 F.3d at 750-51. The court did not consider whether somewhat more limited issues than the entirety of defendant’s fault might be severable. In some mass tort cases, the trial courts have severed issues such as general causation. See In re Bendectin Litig., 857 F.2d 290, 294 (6th Cir. 1988) (affirming jury finding of no causation in limited-issues trial of 1,180 claims regarding drug said to cause birth defects); see also In re Beverly Hills Fire Litig., 695 F.2d 207, 210 (6th Cir. 1982) (noting that trial judge had bifurcated trial such that jury would first decide whether allegedly defective wiring had caused restaurant fire, and if so, would then decide issues of liability and damages). Reexamination would not appear to be a risk in such a situation because the jury in the later proceeding would simply be instructed that the product has been found to be a possible causal agent for the relevant range of injuries.

The Castano court, however, rejected the further argument that despite any disadvantages, class proceedings remain the superior vehicle for the case because individual proceedings would simply take too long. Castano, 84 F.3d at 751. The court stated that delays so far have not been great, that survivorship claims are available, and that a class action may not be quicker than individual proceedings. Id. at 751 & n.32.

Regarding the Seventh Amendment, a recent asbestos decision sets up yet another barrier to one method of disposing of large numbers of tobacco cases in a single class action proceeding. In Cimino v. Raymark Indus., Inc., 151 F.3d 297 (5th Cir. 1998), the court held that use of extrapolation from representative trials to determine thousands of untried cases (and hundreds of cases not tried as to product exposure) violated the defendants’ Seventh Amendment right to individual jury determinations in each case. See id. at 319-21 (finding Seventh Amendment violation because Texas law requires that causation “be determined as to ‘individuals, not groups’”).
Castano is the decision of a single circuit, though another circuit has recently affirmed decertification of a Federal Rule 23(b)(2) class for medical monitoring of tobacco victims, reasoning that the individual nature of issues pertaining to liability prevented class treatment. Still another circuit has joined the Castano court in rejecting class certification of a mass products liability injury on the ground, inter alia, that the tort was immature and the idea that cases of this type are unsuitable for consolidated treatment has substantial support in the scholarly literature. In In re Rhone-Poulenc Rorer, Inc., the Seventh Circuit reversed the certification of a class action case over injuries from tainted blood products. The court declared that the combination of the claims would create irresistible pressures on the defendant to settle. The court also questioned the ability of the district court to manage a trial applying the disparate tort standards of different states.

The specifics of the Castano holding, and the resonance of an approach to federal class actions that challenges their appropriateness in mass products claims, particularly novel ones, combine to place severe obstacles in the way of federal class proceedings over tobacco exposure. In another case, the circuit responsible for

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41 Barnes v. American Tobacco Co., No. 97-1844, 1998 WL 783960 (3d Cir. Nov. 12, 1998). Rule 23(b)(2) allows class actions for injunctive relief when the defendant has acted on grounds generally applicable to the class. The requirements of typicality, existence of a common question of law or fact, and representative adequacy apply to subdivision (b)(2) actions, but unlike in subdivision (b)(3) actions, no predominance or superiority need be shown. FED. R. CIV. P. 23(b).

42 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995). The most influential source regarding the unsuitability of "immature" mass tort litigation for class action treatment is Francis E. McGovern, Resolving Mature Mass Tort Litigation, 69 B.U. L. REV. 659 (1989).

43 51 F.3d 1293.

44 Id. at 1298.

45 See id. at 1300 ("The law of negligence... may as the plaintiffs have argued forcefully to us differ among the states only in nuance, though we think not... but nuance can be important... ").
Castano has interpreted it to mean that a class action is not appropriate when damages claims for emotional distress from employment discrimination are to be determined by a jury even under a uniform federal law standard. This holding casts still more doubt on the propriety of federal class proceedings in a case for damages over tobacco exposure.

B. AMCHEM

The Castano decision foreshadowed Amchem Products, Inc. v. Windsor, a Supreme Court decision that rejected the settlement of a class action embracing individuals with injuries from exposure to asbestos. Amchem pushes the idea of a single, federal class action over tobacco diseases still further out of reach. The Amchem Court affirmed the reversal of the settlement of a nationwide class action over asbestos exposure. The rationale was that the class failed Federal Rule 23(b)(3)'s requirement that common issues predominate as well as Rule 23(a)(4)'s requirement that the representative adequately protect the interests of the class. The Court also expressed doubt that effective notice of the class action and settlement was possible when the class included individuals who had not yet developed illness from asbestos exposure and those who will accrue, but have not yet accrued, derivative claims (such as those for consortium) or even come into a position to accrue the claims through marriage or dependency. The Court stated that a settlement-only class need not meet the same standards of trial

46 See Allison v. Citgo Petroleum Corp., 151 F.3d 402, 419 (6th Cir. 1998) (holding that class action is inappropriate because claims for compensatory and punitive damages would "focus almost entirely on facts and issues specific to individuals rather than the class as a whole").

47 The Allison approach appears particularly restrictive in its effects when one considers that an employer-wide case under Title VII of the Civil Rights Act, which was what was before the court, had previously been considered paradigmatic for class treatment. See 7A CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1776 (2d ed. 1986) (discussing use of class actions for civil rights violations).


49 Id. at 2252.

50 Id. at 2249-50.

51 Id. at 2250-51.

52 Id. at 2252.
manageability as one to be litigated to judgment must meet. Its holdings on representative adequacy and predominance of common questions establish, however, that claimants in a mass tort class action must be separated into distinct subclasses, each with its own representatives. The division should proceed along the lines of the nature of illness or injury, certainly whether it is manifest or not, and perhaps also according to what kind of illness and of what severity; subclassing may also be needed based on the law that will govern the recovery. At least as far as settlement classes are concerned, notice considerations are likely to confine class membership to individuals who currently manifest injury.

In *Amchem*, the Court also had before it an argument that the entire case was not suitable for the federal courts because it was filed to put into place a settlement of the claims of the class against the defendants, and the class included individuals who had not manifested injury. Federal courts handle only cases and controversies, not feigned disputes or moot questions. The Court refused to consider the Article III issue, stating that the resolution of the appropriateness of the class certification was "logically antecedent"

53 *Id.* at 2248.
54 See *id.* at 2251 ("[A]dversity among subgroups requires that the members of each subgroup cannot be bound to a settlement except by consents given by those who... represent solely the members of their respective subgroups." (quoting *In re* Joint E. & S. Dist. Asbestos Litig., 982 F.2d 721, 743 (2d Cir. 1992))).
55 See *id.* (noting concern over named parties representing class members with diverse medical conditions and exposure-only class members).
56 See *id.* at 2250 (observing that differences in state law "compound" the factual disparities between exposure-only and presently-injured plaintiffs).
57 See *supra* text accompanying note 52 (recognizing notice issues for claims that may have not yet accrued).
58 See *id.* at 2244 (noting objectors' argument that proceeding is not justiciable because it is "a nonadversarial endeavor" to impose a binding administrative compensation scheme on individuals whose claims are not ripe).
59 See U.S. CONST., art III, § 2 ("The judicial Power shall extend to all Cases... [and] Controversies... "). Many authorities have questioned the existence of Article III jurisdiction in settlement class actions such as *Amchem*. See, e.g., John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1422-33 (1995); see also *Amchem*, 117 S. Ct. at 2244 (describing ripeness and standing objections).
and ought to be reached first.60 Once the class settlement was overturned, there was no occasion to revisit justiciability.61

 Authorities disagree about whether Amchem spells the end of mass tort class actions such as those over tobacco-related illness in the federal courts.62 At the minimum, Amchem has made the federal forum less attractive than the state forum for those who wish to frame classes to include persons with disparate types and degrees of injury from a given product.63 Moreover, the need to create subclasses based on governing state law limits the prospects for creating a national class in a federal case and makes a statewide class appear to be all that even the most ambitious would-be class representative could achieve.64 If a statewide class is all that the courts are likely to approve, a state forum might seem all the more attractive.

60 Amchem, 117 S. Ct. at 2244.
61 Since the Court analyzed the propriety of settlement classes under Federal Rule 23 and concluded that they did not need to meet the same trial manageability standards as cases brought with an expectation of trial (though they had to meet higher standards of commonality and representative adequacy), it may have implied that class actions brought just for settlement meet constitutional approval. The Court voiced its strongest doubts over whether exposure-only claimants without manifest injuries have claims at all, much less ones that satisfy the jurisdictional minimum for a federal court class action with diversity jurisdiction. See id. at 2244 n.15.
62 Compare Eric D. Green, A Post-Georgine Note, 30 U.C. DAVIS L. REV. 873 (1997) (asserting that mass tort class actions will not be viable after Amchem) with Linda S. Mullenix, Court Settles Settlement Class Issue, NAT'L J., Aug. 11, 1997, at B12 (stating that mass tort class actions will continue to be viable). See generally Mark C. Weber, A Consent-Based Approach to Class Action Settlement: Improving Amchem Products, Inc. v. Windsor, 59 OHIO ST. L.J. 1155, 1182-93 (1998) (criticizing approach to class action settlement taken by Amchem Court but noting that mass tort class actions are likely to continue to be brought).
63 This conclusion must be tempered by the likelihood that some of the considerations that the Court identified in Rule 23's requirements might be imposed on state court class actions as a matter of procedural due process. The Supreme Court has made clear that procedural due process protects the monetary claims of plaintiff class members. See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (1985) (holding that state court may exercise jurisdiction over absent class-action plaintiff for damages claim as long as "minimal procedural due process protection" is provided). See generally Weber, supra note 62, at 1178 (noting impact of Shutts on class action law).
64 State courts may entertain nationwide classes but must meet due process standards in so doing. See, e.g., Shutts, 472 U.S. at 799 (upholding jurisdiction over plaintiff class although class members were from all 50 states, the District of Columbia, and several foreign countries). Nevertheless, before Amchem, those bringing the cases may well have believed that federal courts would be more likely to approve a class of that breadth. See Califano v. Yamasaki, 442 U.S. 682, 701 (1979) (approving national class in federal court action concerning government benefits).
II. THE AVAILABILITY OF STATE CLASS ACTION PROCEDURE

The obstacles to the use of federal class action procedure do not stand in the way of state class action cases, at least if the classes are carefully framed. State procedure avoids the problems raised by Castano and Amchem. State procedural rules themselves appear mostly to permit class actions in mass tort cases. Moreover, objections to state court class actions based on subject matter jurisdiction, personal jurisdiction, and choice of law can be met fairly easily.

A. CASTANO ISSUES

If the state court restricts the tobacco injury class to those persons whose claims are governed by the law of the state, it will, with a stroke, eliminate most of the concerns raised by the Castano court about federal nationwide class action litigation over tobacco injuries. The need for "Esperanto instructions" will not be present. If the case is restricted to state residents, some of whose claims might require application of different law, the case will be far more manageable as to choice of law than a national class would be. Mechanisms exist for trying cases when more than one law applies to different groups of litigants. The trial becomes unmanageable when the number of groups proliferates out of control, as it would with a national class whose claims would be governed by the laws of fifty states.

62 See Castano v. American Tobacco Co., 84 F.3d 734, 750 (5th Cir. 1996) (stating preference for state courts to develop own state law rather than federal courts applying "a kind of Esperanto [jury] instruction") (quoting In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir. 1995), where court reversed certification of nationwide class because trial would require jury instruction that "merg[ed] the negligence standards of the 50 states and the District of Columbia").

66 One such procedure entails empaneling several juries, each of which hears all common evidence, but leaves the room when evidence irrelevant to its determination comes in, and listens only to instructions based on the law that applies to it. See Mark C. Weber, Mass Jury Trials in Mass Tort Cases: Some Preliminary Issues, 48 DEPAUL L. REV. 463, 473 (1999) (describing procedure).

67 Of course, particularly in the larger states, there may be one or more persons whose claims might be governed by the law of each of the 50 states. In those circumstances, the case might be split into more manageable groupings. The same would be true for those whose
Although a federal class could be fashioned with the same restrictions suggested here for state class cases, the state class has the added advantage of avoiding Castano's complaint over federal guesses about the content of state law, as would be required in a federal case by the *Erie* doctrine. The state courts would be able to develop their own law themselves and apply it immediately in a concrete setting.

The Castano court also believed that common issues did not predominate over the individual issue of reliance with regard to claims sounding in fraud and misrepresentation. The court believed that individual trials would need to take place on whether the particular plaintiff class member relied on the tobacco companies' misrepresentations. State courts may not see matters quite the same way, however. Many states have permitted class actions in consumer fraud cases, accepting conclusive or rebuttable presumptions that consumers were misled by the defendants' falsehoods.

The analogy from consumer fraud to the tobacco consumers' fraud and misrepresentation claims is close. Even federal courts have allowed securities fraud cases to proceed as class actions in spite of the supposed need to show each investor's reliance. In *Basic, Inc. v. Levinson*, the Supreme Court accepted the idea that a misrepresentation affects an entire market by temporarily and artificially raising stock prices, ultimately causing economic loss even to investors who do not themselves rely on the claims are covered in part by different laws.

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*See supra text accompanying notes 27-28 (discussing Castano court's concerns over state law variations because of *Erie*).*


*See supra text accompanying note 29 (discussing reliance issues in Castano).*

*Id.*

*See, e.g., Cope v. Metropolitan Life Ins. Co., 696 N.E.2d 1001, 1008 (Ohio 1998) (allowing inference of reliance by entire class if plaintiffs prove defendant failed to give mandatory disclosure warnings regarding insurance policies); Stellena v. Vantage Press, Inc., 492 N.Y.S.2d 390, 393 (N.Y. App. Div. 1985) (noting that reliance could be presumed in class action regarding publication contracts once representations are shown to be material and false).*

*485 U.S. 224 (1988).*
false information. Given that most smokers start before they are sixteen years old, state courts might well accept the idea that these teens rely on general impressions that the dangers of smoking have not been proven, and suffer the same harm that would have occurred had they heard the tobacco companies actually making the statements and relied on the statements. Class action proceedings might be particularly important in developing that theory. As Professor Hal Scott has chronicled, developments in class action cases led to the construction of the fraud-on-the-securities-market theory.

Another analogous situation in which state courts have dispensed with making individual determinations about plaintiff conduct is the use of "heeding presumptions" in products liability failure-to-warn cases. The "heeding presumption" lightens the plaintiff's burden in proving causation by presuming that the plaintiffs in fact read the product use warnings that they are attacking as inadequate. Not only would these presumptions be directly applicable to warning-related claims over tobacco, but their use might lead the same courts to apply a heeding presumption to fraud claims based on misinformation about the safety of smoking disseminated

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74 See id. at 247 (accepting "fraud-on-the-market theory" that presumes investor's reliance on publicly available misrepresentations since market price is based on those misrepresentations).
76 See Hal S. Scott, Comment, The Impact of Class Actions on Rule 10b-5, 38 U. CHI. L. REV. 337, 348-71 (1971) (discussing 1969 case where court found reliance by class members based on fact that defendant's fraud influenced market prices). Hal Scott is currently a professor at Harvard University Law School.
78 See id. at 720-21 (explaining presumption adopted by court).
79 Federal law preempts only claims based on the inadequacy of warnings on the cigarette packages, not claims based on the inadequacy of warnings in other materials. See Cipollone v. Liggett Group, Inc., 505 U.S. 504, 524 (1992) (holding that state law claims for failure to warn and failure to include additional or clearer warnings on cigarette packages are preempted by federal law); see also Thomas C. Galligan, Jr., Product Liability—Cigarettes and Cipollone: What's Left? What's Gone?, 53 LA. L. REV. 713, 729 (1993) (noting that state law claims regarding inadequate warnings on cigarette packages would be preempted); Michael D. Green, Cipollone Revisited: A Not So Little Secret About the Scope of Cigarette Preemption, 82 IOWA L. REV. 1257 (1997) (arguing Cipollone requires preemption only of state law failure-to-warn claims concerning warnings on cigarette packages).
by the tobacco companies. The court might presume that smokers learned of the inaccurate health claims the companies made and continued smoking based on the statements unless the defendant provides proof that a given class member did not do so.

State proceedings are also different from a federal proceeding with a national class with regard to the superiority of the class action. As for the first superiority concern listed in Castano, that the combination of claims creates irresistible pressure to settle, each of fifty or fewer combinations will be much smaller than Castano's one gargantuan class. If the fate of the industry is really at stake, it will be in the hands of juries in each of the states, not a single body of six or twelve individuals out of the whole of the country. Needless to say, state courts may also have different views from that of the Castano court about the irresistibility of settlement, and the fairness of placing the pressure of combined proceedings on the defendants.

The second and third complaints that the Castano court lodged against the federal class proceeding's superiority sounded in the economics of class actions. The court determined that there was no caseload crisis for the class action to solve, that benefits of the class action in terms of judicial economy were dubious in light of the probable need for individual proceedings, and that the individual cases would generate enough probable recovery to support individual actions. These considerations may be no different in federal court than they are in state court, but the state courts may view them in a different light. Even if the number of tobacco cases has not risen out of control, the state courts may find the comparison to the early years of the asbestos crisis to be alarming. The pattern begins with a few cases, most with defense verdicts, followed by persuasive evidence of corporate cover-ups about safety information, followed by failed attempts at legislative resolution, followed by an

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80 See supra text accompanying note 31 (discussing court's concern over pressure to settle due to massing of claims).
81 See infra Section III.C. (discussing arguments concerning fairness to defendants of class proceedings).
82 See supra text accompanying notes 32-37 (discussing Castano court's concerns over economic considerations for judicial system and plaintiffs).
aggressive plaintiffs' bar obtaining enough money from some cases to finance others: It all adds up to a crisis about to happen. The state courts may see the filing of a class action as their chance to prevent a repeat of the dislocations caused by the asbestos litigation. Asbestos, of course, injured far fewer individuals than tobacco has injured and continues to harm.

Individual follow-up proceedings to the class action, if they are needed, would certainly detract from the efficiency advantage of a class proceeding. But their necessity depends heavily on determinations of state law that the state courts have some control over. For example, if the court determines that under its version of common law fraud or misrepresentation torts that no showing of individual reliance is necessary, a large-scale trial may be held on the entirety of that claim.

Finally, the state courts might find the cost savings of a class action significant enough to justify class certification, even if individual cases could finance themselves. The savings of combined pretrial and trial activities are equally real even when the value of each case might generate enough revenue to support individual litigation. Moreover, as explained more fully below, whether any individual tobacco case will or will not pay for itself is chancy. Many claimants will find their damages reduced drastically by comparative negligence and many will fail in other respects. Figuring out which cases are strong enough to justify the considerable investment necessary to prevail against astoundingly well-funded defense lawyers will perplex even the most skillful advocates. In the absence of class proceedings, many potential plaintiffs are likely to be unable to find attorneys who will invest enough of their money and time in the cases to make them worthwhile. There may still be

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83 In the tobacco cases, the money will come from the state Medicaid class settlement. See supra notes 1-5 and accompanying text (discussing settlement between tobacco companies and states).

84 Compare Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2237 (1997) (citing prediction of 265,000 total deaths from asbestos before year 2015) (quoting from REPORT OF THE JUDICIAL CONFERENCE AD HOC COMM. ON ASBESTOS LITIG. 2-3 (Mar. 1991)), with GLANTZ, supra note 6, at 436 (citing estimate of 420,000 smoking deaths each year).

85 See Cupp, supra note 75, at 499-506 (discussing issues of comparative negligence, assumption of risk, and nicotine addiction regarding smokers' likelihood of recovery).
enough cases to swamp various jurisdictions, but recovery will not be available to some who would deserve it.

The fourth superiority objection, that the trial of the class action necessarily entails trial bifurcation in violation of the Seventh Amendment, is inapplicable to state class action proceedings for the simple reason that the Seventh Amendment does not apply to the states. States may, of course, confront similar issues with analogous state constitutional provisions or statutes. Under existing state law, the permissibility of bifurcation and the use of separate juries varies from jurisdiction to jurisdiction. Some forms of bifurcation necessarily occur in all jurisdictions, state or federal: When a jury finds for the defendant and the decision is reversed on appeal under the clear-error standard or its state law analogue, the court on remand empanels a second jury, which determines the damages. Whether this situation is sufficiently analogous to the splitting of the decision that occurs when general causation or other issues are given to one jury and individual questions of exposure or comparative fault are given to another, is a matter for each state to decide. If the state does not permit this form of bifurcation, a class trial may indeed be unmanageable, though perhaps the action might proceed as a class during pretrial proceedings.

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80 *See* supra text accompanying notes 38-39 (discussing Seventh Amendment argument in *Castano*).


82 *See, e.g.*, CAL. CIV. CODE 3295(d) (West 1997) (conferring choice as to bifurcation on trial defendant); Mason v. Dunn, 285 N.E.2d 191 (Ill. App. Ct. 1972) (holding that court lacks authority, in absence of statute or state supreme court rule, to bifurcate trial over objection of one of the parties).

83 Beyond this fairly obvious point is the reality that *Castano* departs from much existing federal precedent on bifurcation of trial in complex cases. *See, e.g.*, *In re Bendectin Litig.*, 857 F.2d 290, 308 (6th Cir. 1988) (noting that Federal Rule 42(b) gives trial judge discretion regarding trying issues separately); *In re Paris Air Crash*, 69 F.R.D. 310, 318-19 (C.D. Cal. 1975) (stating Federal Rule 42(b) allows bifurcation for convenience, avoidance of prejudice or when “conducive to expedition and economy”).

84 If bifurcation is permissible, it may still be inadvisable, for conventional wisdom and some empirical studies suggest that defense verdicts are more likely when abstract issues such as general causation are separated from issues that present information about human suffering, such as individual causation and damages. *See* Mark C. Weber, *Managing Complex Litigation in the Illinois Courts*, 27 LOYOLA U. CHI. L.J. 959, 978 nn.127-30 (1996) (citing collections of studies). A recent work of interest on this topic is Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive*
B. AMCHEM ISSUES

As for the concerns that motivated the Amchem Court, there is no telling whether state courts will find them applicable at all. Amchem relied entirely on the federal class action rule. State courts might interpret their rules differently. Nevertheless, many state class action rules are similar to Federal Rule 23, and the Supreme Court has established that some class action procedures are constitutionally required under the obligation to afford litigants procedural due process. State courts thus might apply some or all of Amchem to the tobacco class actions before them.

If they do apply Amchem, however, they still should be able to entertain the class actions. At the minimum, they will need to place those persons who have current manifestations of injury into a subclass different from that of persons who do not yet have injuries. The logistics of making that separation would not be difficult, nor would they become impossible even if Amchem were interpreted to require still further subclassing based on the severity of manifest illnesses. If all persons in the class are to have their

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Damages, 1998 Wis. L. Rev. 297 (reporting complex effects from separation of compensatory claims from punitive claims in empirical study). Some may applaud this result, contending that decisions for plaintiffs in cases that are not bifurcated may be motivated by sympathy for the plaintiff when the evidence on causation or other aspects of liability in fact exonerate the defendant. Others would argue that the sterile atmosphere presented when technical issues such as general causation are considered alone causes juries to fail to take seriously their responsibility to consider all aspects of the evidence. See, e.g., James A. Henderson, Jr. et al., Optimal Issue Separation in Modern Products Liability Litigation, 73 Tex. L. Rev. 1653 (1995) (proposing bifurcation of general causation only in limited classes of cases); see also McGovern, supra note 42, at 691-92 (discussing issue separation). One compromise is to combine a limited trial on common issues such as general causation for the class with a plenary trial on all the issues for selected individual plaintiffs. This technique avoids creating the atmosphere of a graduate seminar on epidemiology but can still expedite decision on important controversies common to all class members. See Weber, supra note 66 (discussing procedure).

See supra Section I.B. (discussing Court's rationale).

See, e.g., Conn. Super. Ct. R. 9-7 (providing state rule for class actions, which mirrors Federal Rule 23(a)); N.J. Ct. C.P.R. 4:32-1 (setting forth state class action rule, which is almost identical to Federal Rule 23).

See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 811-12 (noting that due process requires that plaintiff class members "receive notice plus an opportunity to be heard and participate in the litigation").

See supra notes 54-55 and accompanying text (discussing necessity of plaintiff subclasses based on manifestation of injury).
claims governed by the law of the same state, the rest of Amchem's concerns about commonality will disappear. 85

The problem of notice 86 is more difficult, though Amchem did not have a square holding on the subject, even one based on the federal rule. If the Court meant to say—or if the state court thinks it meant to say—that no person not currently injured is likely to appreciate the significance of class action notice in a matter as important as a toxic tort case, then all those individuals will have to be excluded from the class. Perhaps some kind of affirmative opt-in mechanism could be used to resolve their claims through a class proceeding, but ordinary class procedure will not work. The Court seemed fairly adamant that derivative claims, especially of persons who are impossible to notify, such as future spouses or dependents, cannot be precluded because of the lack of notice. 97 The state courts should, and probably will, exclude those persons from the class if the persons cannot be given notice and the right to opt out.

The Amchem Court never reached the issue of whether a class action brought with settlement in mind satisfies the adverseness requirements of Article III jurisdiction. 98 I have argued elsewhere that the proceeding meets the standards 99 but the issue is irrelevant to state courts, which are not bound by Article III. 100 Even under the federal justiciability standards, whether persons whose injuries have not manifested themselves have a case is actually a question of underlying state law, i.e., whether the state considers exposure to a toxic substance without pathology the accrual of a cause of

85 See supra note 56 and accompanying text (noting possible need to subdivide plaintiff classes based on governing state law).
86 See supra text accompanying note 52 (discussing Court's concern regarding notice to potential class members whose claims have not yet accrued).
87 Id.
88 See supra text accompanying note 60 (noting Court's refusal to decide Article III issue).
89 Weber, supra note 62, at 1180-81.
90 States vary on what degree of adversariness they require court proceedings to maintain. Some courts offer advisory opinions, while others have approaches to mootness and other justiciability issues that are far more relaxed than Article III standards. See, e.g., LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 3-11, at 82 n.1 (2d ed. 1988) (discussing problem of Supreme Court review of state court decisions in cases that do not meet federal court justiciability requirements); see also Princeton Univ. v. Schmid, 455 U.S. 100, 102 (1982) (noting that standing in state court does not preclude Supreme Court from independent determination of standing to raise constitutional issue).
action. States will need to develop their own law with regard to tobacco exposure, but any smoker's claim would be fully ripe in any state that has a cause of action for fear of disease, medical monitoring, or the probability of future harm. Courts in states without these claims will need to determine whether their law permits claims for addiction without further pathology and if the answer is no, they will need to limit the class of tobacco litigants to those with manifest injury. As indicated above, considerations of notice might induce them to do so in any instance.

C. ISSUES OF STATE PROCEDURE

Many states have class action statutes or rules similar to Federal Rule 23. These states may or may not be persuaded by the interpretations of the federal rule in Castano and the other federal cases that tobacco injuries are not suited for class treatment. Even if otherwise inclined to follow Castano, however, they might conclude that a class action restricted to the persons with claims governed by the forum state’s law or residents of the state with claims governed by its law, is sufficiently distinct from the federal class in Castano as to be permitted. In any event, some of the country's largest states, such as California and Illinois, have class action provisions different from Federal Rule 23. Though the reach of state class action law remains uncertain both in replica and non-replica states, the trend is towards permitting at least some

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101 Weber, supra note 62, at 1181.
102 Id.
103 See sources cited supra note 92.
104 Lower federal courts in a similar position have not been so persuaded. See supra note 40 (citing federal district court cases that denied class certification in tobacco cases).
105 See CAL. CIV. PROC. CODE § 382 (West 1973) (“When the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court, one or more may sue or defend for the benefit of all.”).
106 See 735 ILL. COMP. STAT. 5/2-801 to -806 (West 1982) (allowing class actions when (1) joinder is impracticable due to numerosity; (2) common questions of fact or law predominate; (3) representatives fairly and adequately protect class interests; and (4) class action is appropriate method for fair and efficient adjudication).
107 Replica states are those whose class action statutes are identical or nearly identical to Federal Rule 23.
product liability and other actions analogous to tobacco cases to go forward as class actions. Moreover, some state courts have approved class action litigation over tobacco exposure under their particular class action provisions, though not all who have been asked have done so.108

Some cases in which state courts have permitted class actions concern defective products and claims based on product liability, fraud, or related theories. Despite potential issues of individual reliance, individual damages, and individual comparative or contributory negligence, courts permitted the actions to proceed. The products involved in the cases have included cars with malfunctioning engines,109 hardwood siding said to be defective and falsely advertised,110 furnaces that leaked carbon monoxide and that were said to have been fraudulently marketed,111 lead paint that was said to have poisoned children,112 and silicone breast implants said to cause numerous ailments.113

Other analogous cases in which class actions have been allowed have involved single-incident disasters or similar occurrences. Though the comparison to tobacco products might be somewhat weaker than with the other cases, these cases also show that state courts are willing to use class action procedure to obtain the benefits of judicial economy despite the certain need for individual determinations of damages and the prospect of individual determinations with regard to defenses. These cases involve occurrences such as

108 See infra notes 117-122 and accompanying text (citing state class action suits over tobacco exposure).

109 In re Cadillac V8-6-4 Class Action, 461 A.2d 736 (N.J. 1983).

110 Ex parte Masonite Corp., 681 So. 2d 1068 (Ala. 1996).


112 Jackson v. Glidden Co., 647 N.E.2d 879 (Ohio Ct. App. 1995). Theories of recovery included absolute product liability, negligence per se, breach of implied warranties, fraud by misrepresentation, nuisance, enterprise liability, negligent infliction of emotional distress, alternative liability, and market share liability. Id. at 881.

113 Spitzfaden v. Dow Corning Corp., 619 So. 2d 795 (La. Ct. App. 1993). Theories included products liability, negligence, fraudulent misrepresentation, a state-law merchantability theory, breach of implied and express warranty, and intentional and negligent infliction of emotional distress. Id. at 797.
salmonella poisoning,\(^{114}\) a chemical spill,\(^{115}\) and a building with a contaminated ventilation system.\(^{116}\)

A few state courts have already approved class action tobacco litigation, though they have generally restricted the classes to persons with close ties to the forum state. For example, the Florida Appellate Court modified what had been a nationwide class of persons who had suffered or died from diseases and medical conditions caused by their addiction to cigarettes to make the class one of Florida citizens and residents that met the same criteria.\(^{117}\) So modified, the class satisfied the conditions of the Florida class action law and placed the state judiciary in a situation to manage the litigation efficiently.\(^{118}\) In another case, the Florida Appellate Court has allowed the plaintiffs to go forward with a nationwide class action of non-smoking flight attendants exposed to secondhand smoke.\(^{119}\) A statewide class action of smokers is also proceeding in the Louisiana state courts, having survived an attempt to remove the case to federal court.\(^{120}\) A New York court, however, found that tobacco-exposure classes did not meet the state’s standards for class litigation.\(^{121}\) New York’s Appellate Division overturned certification of classes including all nicotine-dependent smokers who purchased

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the defendants' cigarettes in the state, holding that the classes did not meet the state law's requirements of predominance of common issues and typicality, and adequacy of representation.122

D. OTHER OBSTACLES

Other obstacles to the use of state court class actions over tobacco injuries include the prospect of removal to federal court on grounds of federal subject matter jurisdiction; limits to state court personal jurisdiction; potential difficulties with choice of law; and class definition problems.

1. Removal. A defendant seeking to avoid a state-court class action suit over tobacco injuries might try to remove the action to federal court under the theory that the case could originally have been filed there under diversity jurisdiction123 or federal question jurisdiction.124 For the latter jurisdictional basis, the most likely federal claim to be identified would be that of the Racketeer-Influenced Corrupt Organization Act (RICO)125 in cases asserting state law claims of fraud or misrepresentation. The plaintiffs should be able to avoid removal on either ground but they may pay a price in potential relief by doing so.

Removal on the basis of diversity is doomed to failure in all cases in which the plaintiffs have the foresight to sue a co-citizen, such as a tobacco distributor or marketer whose place of incorporation or principal place of business is the same as that of one of the plaintiffs.126 Although federal class actions brought under diversity

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122 Id. at 600-01. The action was not a products liability class action but a consumer fraud case to recover money spent on cigarettes and obtain injunctive relief. Id. at 597.
jurisdiction are an exception to the complete diversity rule,\footnote{127} the underlying purpose of removal in a state tobacco class action would be to defeat class action treatment of the claim when it gets to federal court. Thus, under the defendants' own analysis, the action being removed may or may not be a class action for state law purposes but is most emphatically not a class action under the Federal Rules. Accordingly, there is no basis to invoke the class action exception to the complete diversity rule. If the defendant succeeds in having the court apply the class-action exception to the complete diversity rule, it could only be on the grounds that federal class action is appropriate under Federal Rule 23, and so the case ought to proceed as a class in federal court, contrary to the dictates of Castano. Of course, a federal court outside the Fifth Circuit could reject Castano, predicting that its circuit would not follow the precedent, but the combination of Castano and Amchem make it unlikely that a federal court will consider tobacco cases proper for class action treatment.

Another removal-protection tactic that might be successful would be to name one citizen of the same citizenship as the corporate defendants to be one of the named plaintiffs in the state class action, effectively destroying complete diversity among named parties. If the nondiverse representative is named in good faith, diversity would be destroyed.\footnote{128} This maneuver would not work, however, if

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\footnote{127} See Snyder v. Harris, 394 U.S. 332, 340 (1969) ("[I]f one member of a class is of diverse citizenship from the class's opponent, and no nondiverse members are named parties, the suit may be brought in federal court even though all other members of the class are citizens of the same State as the defendant ... "); see also Andrew P. Campbell, Class Actions: A Primer, 20 Am. J. Trial Advoc. 305, 320 (1996-97) ("Filing a nationwide class increases the chances of having the case removed and sent to a federal multi-district litigation panel ... "). Generally, complete diversity requires that no member of one side to a lawsuit be a citizen of the same state as any member of the opposing side. See 13B Wright et al., supra note 47, § 3605 (discussing requirement of complete diversity that arose from Strawbridge v. Curtiss, 7 U.S. (3 Cranch) 267 (1806)).

the state court were to choose to restrict the class definition to citizens of the forum state under its discretion to shape the contours of the class.

The possibility of removal based on a federal claim would still remain open even if diversity removal were foreclosed. The most plausible claim on which to remove would be RICO. The standard for federal claim removal recognizes that the plaintiff is the “master of the claim” and that if the plaintiff chooses to rely only on state law, the case should stay in state court. Only if “a federal question is presented on the face of the plaintiff’s properly pleaded complaint,” should the case be removed.

Defendants would have a difficult time arguing that a well-pleaded complaint in a tobacco class action would have to include a federal RICO claim, however. Courts have denied removal requests despite arguments that a properly pleaded complaint would include a RICO claim when the state law claims asserted were those of fraudulent conveyance, piercing the corporate veil, and improper corporate payments, as well as when the claim was common law fraud predicated on conduct that would constitute criminal acts sufficient to support a RICO claim. The common law fraud and

the North Carolina class representative’s presence to be so artificial as to constitute misjoinder. Id. at *4. The standard rule, however, is that any person who has a claim arising out of the same transaction or occurrence or series of transactions or occurrences may be joined if jurisdiction is proper. See FED. R. CIV. P. 20(a) (setting forth requirements for permissive joinder). The standards for joinder of plaintiffs are extremely elastic. See Mosley v. General Motors Corp., 497 F.2d 1330 (8th Cir. 1974) (discussing joinder under Rule 20). And while the federal jurisdictional code prohibits improper or collusive joinder of parties to confer jurisdiction on the court, it says nothing about joining parties to defeat federal jurisdiction. See 28 U.S.C. § 1359 (1994) (withdrawing federal jurisdiction when based on improper or collusive joinder); see also CHARLES ALAN WRIGHT, LAW OF FEDERAL COURTS § 31 (5th ed. 1994) (discussing devices to create or defeat diversity).


1 Id.


the tort claims involved in a tobacco action would be no more subject to removal than those claims.

The question, then, is whether plaintiffs in a state court class action should forego the RICO claim in order to stay in state court and take advantage of class action procedure. The enhanced relief available in a RICO action is a powerful incentive to bring such an action in any case. Obviously, plaintiffs benefit from increased recovery reflected in the final judgment; even if the case is not litigated to judgment, the amount of the potential recovery will influence the amount of any settlement. Decreased exposure for the defendant will depress the settlement expectations of the plaintiffs.

In some states, the solution is obvious: invoke state RICO statutes that embody the same terms of liability and provide for the same relief. Where this option is unavailable, it may be possible to mount follow-up individual or group actions in federal court, asserting that the claim was for practical purposes unavailable in the state court action. The *Restatement of Judgments* recognizes a jurisdictional competency standard under which a state judgment does not bar a later-filed federal claim over which the state court lacks jurisdiction. Nevertheless, reliance on that rule is risky in the tobacco-RICO situation. Concurrent jurisdiction exists for federal civil RICO claims, so the state court entertaining the plaintiffs' suit could have adjudicated the claim. Moreover, it is hard to imagine anything in state law that would prevent the

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136 See *RESTATEMENT (SECOND) OF JUDGMENTS* § 26(1)(c) (1982) (stating that claim is not barred when plaintiff was unable to raise it in earlier suit due to lack of subject matter jurisdiction). There may be some erosion of this rule, however, as evident in *Matsushita Electric Industrial Co. v. Epstein*, 516 U.S. 367 (1996), in which the Supreme Court held that a settlement in a state court class action can release an exclusive federal claim, even though judgment may not be entered on such a claim in state court. *Matsushita* "continued a trend of having state law dictate federal preclusion doctrine.“ Marcel Kahan & Linda Silberman, *Matsushita and Beyond: The Role of State Courts in Class Actions Involving Exclusive Federal Claims*, 1996 SUP. CT. REV. 219, 225 n.38.
137 See Kahan & Silberman, supra note 136, at 236-37 (discussing state-court class action settlement of exclusive federal claims).
plaintiffs from asserting the claim in a class action. The plaintiffs in the follow-up federal case would need to convince the court that under the preclusion law governing the state court, the practical barrier to presentation of the claim—the fact that the action would have been removed and the class decertified—would be sufficient to keep it from being barred. In other words, the federal court would need to rule that the state's law of preclusion would not bar a claim within the court's jurisdiction but practically unavailable in a state class action. That ruling seems improbable.

Thus, forbearance of the RICO claim may carry a price in foregone relief. In states where no statute provides relief comparable to RICO and in which the possibility of filing a subsequent action asserting the RICO claim is foreclosed, the representative parties will have a difficult decision whether the availability of the class proceeding justifies the lessening of the potential recovery. Of course, if the defendant prefers the state forum, the RICO claim may be asserted in the state action. But given the tobacco companies' well-justified fear of class action liability, it is unlikely they would pass up the temptation to remove to a forum inhospitable to class proceedings in tobacco cases.

2. **Limits on State Court Personal Jurisdiction.** Under a minimum contacts test for personal jurisdiction and a due process test for choice of law, the range of persons and entities that may be subject to a state's law is greater than that subject to the state's jurisdiction. Thus, even if the state class action is defined in terms of those persons whose claims would be governed by the law of the state, the court must ask if it has personal jurisdiction over those persons whose claims are subject to the state law but who are themselves out of state.

The Supreme Court, however, has established that the minimum contacts test does not apply to members of a plaintiff class action. In *Phillips Petroleum Co. v. Shutts*, the Court reasoned that class members do not bear the burdens or risks of full litigants and that in a class action for damages over failure to pay mineral rights

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royalties, out-of-state class members' due process interests were satisfied if they received notice, the right to opt out, and adequate representation.\textsuperscript{141} The significance of the individual's interests at stake in the proceeding is one factor in determining what protections procedural due process requires;\textsuperscript{142} hence, some additional procedural safeguards might be required in class actions with higher damages. Nevertheless, in determining what due process demands in cases where there is no territorial issue, courts have required nothing more than appropriate notice and adequate review of proposed settlements.\textsuperscript{143}

Personal jurisdiction is unlikely to be a problem with respect to the defendants, for all the major tobacco companies have extensive sales and marketing operations in all fifty states. The situation is unlike \textit{Asahi Metal Industry Co. v. Superior Court},\textsuperscript{144} in which the manufacturer merely placed the item in the stream of commerce far outside the jurisdiction, and the item found its way into the state by the action of various intermediaries without any marketing efforts by the manufacturer.\textsuperscript{145}

\textsuperscript{141} Id. at 809-12. \textit{Miner v. Gillette Co.}, 428 N.E.2d 478 (Ill. 1981), anticipated this development by approving a national class in an action to recover damages for failure of a company to honor a coupon-discount offer it had made. The view that minimum contacts are unnecessary has its critics. See Allen R. Kamp, \textit{The Multistate Consumer Class Action: Local Solutions, National Problems}, 87 W. Va. L. Rev. 271 (1984-85) (concluding that minimum contacts should be required for state court jurisdiction over out-of-state plaintiff class members). Professor Monaghan has criticized an approach to \textit{Shutts} that ignores minimum contacts and emphasizes opt-out, without also emphasizing adequate representation. Henry Paul Monaghan, \textit{Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members}, 98 COLUM. L. REV. 1148, 1166-75 (1998).

\textsuperscript{142} \textit{Mathews v. Eldridge}, 424 U.S. 319, 335 (1976).

\textsuperscript{143} See, e.g., \textit{Amchem Prods., Inc. v. Windsor}, 117 S. Ct. 2231, 2252 (1997) (discussing notice). \textit{Shutts} may be viewed as merging territorial and other procedural due process considerations, looking at the significance of the stake of the individual, the adequacy of existing safeguards, and the benefits from more process, all general considerations of procedural due process, in resolving an issue about the federal due process limits pertaining to territorial jurisdiction. Mark C. Weber, \textit{Purposeful Availment}, 39 S.C. L. REV. 815, 864 (1988).

\textsuperscript{144} 480 U.S. 102 (1987).

\textsuperscript{145} See id. at 112 (plurality opinion) (describing significance of chain of events outside of defendant's direct control); see also Weber, supra note 143, at 839 (analyzing \textit{Asahi}'s reasoning regarding placing object in stream of commerce). The situation is also unlike that of some asbestos defendants, who argued that they did nothing more than mine raw materials that wound up being used by others in their products. See Linda S. Mullenix, \textit{Beyond Consolidation: Postaggregative Procedure in Asbestos Mass Tort Litigation}, 32 WM. & MARY L. REV. 475, 515-17 (1991) (describing mostly unsuccessful efforts of asbestos defendants to
3. Choice of Law. State courts will maximize the use of their own expertise and will advance important federalism ends only if they can apply forum law to the tobacco class actions before them. For these reasons, a class definition that embraces those persons whose claims are governed by the forum state’s law would be optimal. Limits exist on who those persons may be. The Constitution restricts the application of forum law to issues for which the state has “a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair,” and the restriction applies irrespective of the individual or class action nature of the case. With that qualification, however, the class could include persons who are not currently residents of the state if they had exposure to tobacco in the state or if the contacts with the state were otherwise adequate to support the use of forum law with regard to the issues of liability and damages.

4. Other Class Definition Problems. Some courts may be uncomfortable with a class definition that is framed in terms of the applicability of the law of the state. It may be difficult to determine precisely who is in such a class. Without knowledge of exactly who the class members are, the court may be unable to frame a plan for affording notice and opt-out rights, and it may be concerned about the uncertain scope of the preclusive effects of the final judgment.

In the situation of tobacco liability, however, general considerations of fairness and sensible judicial practice should permit class definitions that do not identify the members specifically but that use the reach of the state’s law to determine the class’s scope. The degree of precision with which the class members are identified

escape personal jurisdiction and collecting unpublished decisions).

146 See infra text accompanying notes 168-170 (discussing federalism concerns).
148 See Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 823 (1985) ("[T]he constitutional limitations laid down in cases such as Allstate . . . must be respected even in a nationwide class action.").
149 See Adashunas v. Negley, 626 F.2d 600, 603 (7th Cir. 1980) (rejecting class certification under federal rule on ground that class members would be difficult to locate to give relief); see also Simer v. Rios, 661 F.2d 655, 669 (7th Cir. 1981) (rejecting certification of class of persons denied energy assistance on ground, inter alia, that identification of class members would be costly or impossible).
should depend on the reason for identification: If the class's interests can be protected without precise identification of class members, the effort is not necessary. With regard to claimants' interests in receiving notice, broad-based notice plans may be effective in reaching all injured persons who have claims governed by a state's law. As for defendants' and the judicial system's interests in preclusion, self-identification of class members by requests for hearings on damages or acceptance of an amount of compensation may be sufficient to determine the action's preclusive scope. If, in a given state, the tobacco class action is brought as a settlement class, and persons will effectively need to opt into the class to obtain settlement relief, identification can come at that time. Individuals who do not receive notice and who do not demand hearings or claim relief should not be considered bound by the result of the class action.

Of course, specific state class action rules may still require identification more precise than what is suggested here. Perhaps those states could employ a definition that embraces persons currently residing in the state who also had exposure to the products and suffered damage in the state. Other persons whose claims are governed by the law of the state and who desire relief might intervene to join in the class, or they might file individual actions.

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150 See JAMES WM. MOORE, 3B MOORE'S FEDERAL PRACTICE ¶ 23.04[1], at 104-05 (2d ed. 1996) ("The membership of the class must be capable of ascertainment under some objective standard so that the court may insure that the interests of the class are adequately represented." (emphasis added)). If the class members' interests are fully protected without the members being individually identified until the distribution of relief, no further identification should be needed. See Anderson v. Coughlin, 119 F.R.D. 1, 3 (N.D.N.Y. 1988) (not demanding precise definition of class of mentally ill prisoners under the circumstances of case).

151 In the Amchem case, the district court's notice plan reached millions of individuals with comprehensive and understandable information. See Carlough v. Amchem Prods., Inc., 158 F.R.D. 314, 320-23 (E.D. Pa. 1993) (describing plan). The Supreme Court's criticism was not of the plan's specifics; the Court instead challenged the conceptual possibility of giving notice to some class members, such as future spouses and children of the persons exposed to asbestos, and the practical likelihood that persons not currently injured would fail to appreciate the notice's significance. Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2252 (1997). Classes could be framed to exclude persons whose notice and opt-out rights are impossible to protect.

152 See Weber, supra note 62, at 1210 n.279 (suggesting that identification of class members may take place at distribution of relief).
III. THE DESIRABILITY OF STATE CLASS ACTION LITIGATION

Even if state courts were to determine that class actions for tobacco injuries are permissible, there remains the question whether, as a matter of policy, these state court proceedings are desirable. The answer must be qualified but if the proper qualifications are made, it would appear to be yes. There are serious economic benefits to be gained from class proceedings. Concerns should exist over whether class proceedings would afford claimants adequate participation rights, but if adequate notice and the right to opt out of the class are afforded, those concerns will be met. The legitimate interests of defendants in fair treatment do not counsel against the use of class actions. Moreover, because of federalism reasons, state forums are the superior ones to apply and determine the law of tobacco liability.

A. ECONOMIC ADVANTAGES OF CLASS PROCEEDINGS

Litigating tobacco cases is hideously expensive, largely because of the tobacco defendants' scorched-earth defensive strategy. Of course, defendants have every right to contest claims vigorously as long as they do so within the law. A rational response for plaintiffs, however, is to conserve resources by sharing the costs of litigation. Class action procedure is a logical means to do so. In class action litigation, the expenses of suit, including attorneys' fees, experts' charges, and costs of discovery, are taken off the top of the total recovery and thus shared among the members of a victorious class. The Supreme Court has described the prospect of reducing and sharing litigation costs as a significant benefit to class action claimants.153

Although tobacco injury cases involve damages so great that they might be expected to cover the costs of case development and attorneys' fees without the need to pool resources among plaintiffs, that conclusion may be too facile. It is highly likely that plaintiffs whose claims are successful will find their damages reduced considerably on account of their comparative negligence in taking up

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smoking and failing to quit despite knowledge of the dangers. In modified comparative states, which are the majority of United States jurisdictions, there may be a large number of zero verdicts because the juries will find the plaintiff's conduct to be more than half the fault involved in the injury.\textsuperscript{154} Ex ante, it is difficult to determine which cases these will be and, so, particular plaintiffs and their attorneys may be very reluctant to incur the costs of individual litigation.\textsuperscript{155} Of course, those potential plaintiffs who feel that they would do better in a fully individual proceeding should opt out of any class action when they receive notice of it.

The alternative of allowing no class action litigation at all is itself an interesting one. What if the representatives of each of the 400,000 Americans that tobacco kills each year\textsuperscript{156} were to sue individually? As noted, the strength of the comparative negligence defense makes this event unlikely, but something resembling it is still within the realm of possibility. If, unlike asbestos litigation, mass accident cases and some other toxic torts,\textsuperscript{157} the litigation is evenly spread throughout the United States rather than concentrated in more limited areas, the court systems of the states might well be able to absorb the cases, albeit at a greater expenditure of resources than they might like. Whether the potential defendants could afford to defend that many individual suits is another matter. Some cases would inevitably get to trial or significant pretrial


\textsuperscript{155} One alternative to a class action that might save some costs is to use offensive preclusion, keeping the same defendant from relitigating issues over and over. This strategy has not been successful in the asbestos litigation, however, and it is unlikely to succeed in tobacco, where there have been far fewer pro-plaintiff decisions. See Michael D. Green, \textit{The Inability of Offensive Collateral Estoppel to Fulfill Its Promise: An Examination of Estoppel in Asbestos Litigation}, 70 IOWA L. REV. 141, 172-78 (1984) (noting that courts have refused to apply collateral estoppel in asbestos cases, frequently citing disuniformity of results in previous cases).

\textsuperscript{156} See \textit{supra} text accompanying note 6 (giving statistic for annual tobacco-related deaths).

proceedings, even if the trial queue in some locations grew uncontrollably. One suspects that if that event occurs, even the defendants might begin to search for some mechanism to handle the litigation in a consolidated fashion.\footnote{One possibility is an administrative compensation scheme, perhaps one funded by the tobacco companies but under government control, similar to the Black Lung program administered by the Social Security System and paid for by the coal mine operators. See generally Paul A. LeBel, Beginning the Endgame: The Search for an Injury Compensation System Alternative to Tort Liability for Tobacco-Related Harms, 24 N. KY. L. REV. 457 (1997) (discussing goals, essential elements, and recommended contours of alternative compensation system for tobacco-related injuries); sources cited supra note 8 (discussing various regulatory options for tobacco). On the general topic of administrative compensation plans for mass torts, see Richard A. Nagareda, Turning from Tort to Administration, 94 MICH. L. REV. 899 (1996); Jack B. Weinstein, Ethical Dilemmas in Mass Tort Litigation, 88 NW. U. L. REV. 469, 564-67 (1994). For discussion regarding the Black Lung compensation program, see generally Allen R. Prunty & Mark E. Solomons, The Federal Black Lung Program: Its Evolution and Current Issues, 91 W. VA. L. REV. 665 (1989) and Rita A. Massie, Note, Modification of Benefits for Claimants under the Federal Black Lung Benefits Program, 97 W. VA. L. REV. 1023 (1995).

B. PARTICIPATION CONCERNS FOR PLAINTIFF CLASS MEMBERS

Class action procedure is a solution to the problem of litigation costs that carries its own problems, including those of loss of control over the claim by individual claimants, with a decrease in the ability to participate in the judicial process. There are also problems and risks associated with conflicting interests between class action lawyers and claimants with respect to settlement. Nevertheless, these problems are not insurmountable.

Large-scale proceedings such as class actions cause individual claimants to lose control over their claims, as the choice of pretrial and trial strategy is handed over to the class representatives and their lawyers.\footnote{See Roger H. Trangsrud, Mass Trials in Mass Tort Cases: A Dissent, 1989 U. ILL. L. REV. 69, 74-76, 82-86 (explaining traditional justifications for individual claim autonomy and noting other drawbacks of mass trial proceedings).

and individual control are often lacking even in individual personal injury litigation. There is no evidence that class proceedings are necessarily worse, particularly if in later follow-up trials the judge, jury, or judicial adjunct can hear the individual plaintiff tell his or her story.

Moreover, the value that claimants place on participation rights will vary from individual to individual. Far from desiring participation, some claimants are terrified of the prospect of seeing the inside of a courtroom. Others value the opportunity to appear, but value it less than an incremental dollar in the judgment or settlement caused by the massing of claims or pooling of costs. If the class includes only those individuals who are likely to appreciate the importance of the decision to remain in the class or to opt out when they receive notice (in other words, probably only those who are currently suffering some manifest injury from smoking), and the notice those persons receive is clear and understandable, any loss of participation among the persons who decide to stay in the suit should not be of concern to the judicial system.

There exist real difficulties with some class attorneys who settle class actions cheaply in order to maximize the value of their own time on the case. Existing safeguards may solve some of these
problems, though they must be aggressively enforced to be effective. The preferred approach, however, would be to add to existing safeguards the right of each class member to decide individually to accept or reject any proposed settlement.\footnote{See Amchem Prods., Inc. v. Windsor, 117 S. Ct. 2231, 2246 (1997) (stating that drafters of Rule 23(b)(3) had “dominantly in mind vindication of the rights of groups of people who individually would be without effective strength to bring their opponents into court at all” (quoting Benjamin Kaplan, chair of the advisory committee that drafted the rule, in A Prefatory Note 10 B.C INDUS. & COM. L. REV. 497, 497 (1969))); Castano v. American Tobacco Co., 84 F.3d 734, 748 (5th Cir. 1996) (describing ability to sue when costs would otherwise exceed gains as the “most compelling rationale for finding superiority in a class action”); Harry Kalven, Jr. & Maurice Rosenfield, The Contemporary Function of the Class Suit, 8 U. CHI. L. REV. 684, 684-66 (1941) (suggesting that class action procedure facilitates legal redress by assisting individuals who are uninformed regarding corporate complexities and whose individual injuries would not warrant expenditure of litigation costs).}

C. FAIRNESS FOR DEFENDANTS

The existence of class actions in the states can be expected to confer two benefits on plaintiffs: They will be able to pool costs, and their cases will, with respect to those issues on which the class action proceeds to trial, actually get to trial. Had the procedure not been available, costs would keep some plaintiffs from suing, and the prospect of the costs would have induced others to settle more cheaply. The likelihood of a queue for trial if all cases were brought individually would have the same effects. Neither the pooling of the costs nor the circumvention of the queue is unfair to the tobacco defendants, however.

The pooling of costs simply means that more of the individuals the defendants have wronged will be able to obtain redress. It does not confer rights to redress on those whose claims are invalid. It enriches the claims of those who would otherwise have to pay duplicative costs and provides an avenue for claims for which the costs might exceed the recoveries. Giving those claims a chance to be heard is one of the most important contributions that the class action suit makes to furthering justice.\footnote{Weber, supra note 62, at 1193-1213.} If the scope of liability is accordingly increased, that is all to the good.
A class action also has the effect of bringing all cases to the head of the line for trial, solving problems with queuing for trial time when a glut of cases occurs. Whether this advantage will prove significant in tobacco litigation is uncertain, for no glut of cases has yet occurred. The defendants might, of course, wish to exploit the trial delays that a large number of filings might cause. In the absence of prejudgment interest, delays reduce the real value of judgments and decrease settlements. Nevertheless, it is hard to find a legitimate interest in the defendants' practical advantage from delay.

D. BENEFITS OF HAVING LOCAL FORUMS DETERMINE UNDERLYING ISSUES IN TOBACCO LIABILITY

If state court class actions go forward, state, as opposed to federal, decisionmakers will determine which legal rules should govern tobacco tort liability. The ability of states to determine such matters as tort law furthers important ends of democracy in a federal republic. The variety of tort law rules now found in the

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167 See HANS ZEISEL ET AL., DELAY IN THE COURT 128 (2d ed. 1978) (suggesting that computing interest from commencement of suit would increase settlement amounts).

168 This discussion may appear somewhat one-sided because it does not consider the comparative advantages from a federal legislative or judicial solution. Although I recognize the peril of experiments that lack a control group, it appears that there has been a voluntary decision not to participate in the experiment, as far as tobacco is concerned, both by Congress and by the federal judiciary, at least with respect to mass proceedings. General considerations about the desirability of federal judicial or congressional development of a law of mass torts are discussed in Weber, supra note 69, at 224-53 (concluding that federal legislative and judicial processes are inappropriate for the purpose and that federal judicial resources are better spent elsewhere). Congressional development of toxic tort law could be accompanied by a federal administrative compensation scheme. See, e.g., LeBel, supra note 168 (discussing goals and recommended contours of alternative compensation system for tobacco-related injuries). Though such a plan might be cheaper to carry out than judicial relief, it carries the dual disadvantages of federal development of the law and the risk of capture of the agency by the repeat-player defendants. See Daniel B. Rodriguez, The Positive Political Dimensions of Regulatory Reform, 72 WASH. U. L.Q. 1, 28-29 (1994) (describing regulated interests' manipulation of regulatory processes); see also Harold J. Krent, Delegation and Its Discontents, 94 COLUM. L. REV. 710, 722 (1994) (reviewing DAVID SCHOPENBROD, POWER WITHOUT RESPONSIBILITY (1993)) (suggesting that low public visibility may result in agencies acting to benefit special interests). Moreover, the plaintiffs in the tobacco cases are contending that the companies willfully concealed information about the risk of death, manipulated nicotine levels to keep smokers hooked, and deliberately promoted illegal sales of cigarettes to teenagers. See Transcript of the Florida Tobacco Litigation Sympo-
states reflect state and regional variations in how the public and their representatives—legislatures and elected judges—feel about issues of personal responsibility and economic and social regulation. A national approach would mute these differences and frustrate the exercise of local choice. Even a federal court’s guess about these matters would be one remove, or more, away from the people of the state than would the decision of state judges who must stand for reelection, or whose appointers have to do so.

It is also true that having a variety of state law tort rules authoritatively applied to the similar facts of tobacco exposure will provide valuable information about the consequences of imposing various rules of liability. Justice Brandeis described the states as laboratories of democracy in which different jurisdictions adopt differing rules of law and the citizens of other states and the nation at large can observe the rules’ effects. If multiple statewide


See Weber, supra note 69, at 236-45 (arguing nationalizing mass tort law would be mistake because of advantages of divergent state laws).

See id. at 224-35. Already, a number of courts have passed on state law issues pertinent to tobacco liability when adjudicating individual smokers’ actions. Because either the plaintiffs preferred to bring the cases in federal court or the actions were subject to removal, however, the decisionmakers have mostly been federal. See, e.g., Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168 (6th Cir. 1996) (denying liability under Texas law for failure to establish reliance); Jones v. American Tobacco Co., 17 F. Supp. 2d 706 (N.D. Ohio 1999) (dismissing products liability claims under Ohio statute but denying motion to dismiss on common law fraud and conspiracy claims); Tompkin v. American Brands, Inc., 10 F. Supp. 2d 985 (N.D. Ohio 1999) (granting summary judgment under state law for products liability and related claims); Burton v. R.J. Reynolds Tobacco Co., 884 F. Supp. 1515 (D. Kan. 1995) (permitting action to proceed on failure to warn and fraudulent concealment claims). In addition to the class actions cited supra notes 117-120, an individual’s state case has been permitted to go forward, obtaining several authoritative determinations about the applicability of the state’s tort law to tobacco injuries. See American Tobacco Co. v. Grinnell, 951 S.W.2d 420 (Tex. 1997) (barring tort claims based on design defect, warning, and other theories but permitting claims for marketing defect related to addictive qualities of tobacco and manufacturing defect over pesticide residue).

See New State Ice Co. v. Leibmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) (“It is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”).
tobacco class actions appear, the citizens of the nation will witness the effects of contrasting rules on a number of important issues, all applied to the same basic facts of tobacco marketing and consumption.

In addition to the issue of reliance on misrepresentations, discussed above, there are several important tort issues on which states may develop the law that reflects the view of their people and learn about the effects of different rules. They include: (1) whether products liability exists for a dangerous defect even when an adequate warning is given; (2) whether the assumption of risk defense should be assimilated into comparative negligence defenses; and (3) whether, and in what fashion, market-share liability may be imposed in a mass toxic tort. Substantial controversy exists on each of the issues, and states' views on them reflect the states' own assessments of how personal and corporate responsibility relate to civil liability.

1. The Significance of Failure to Warn. Some states follow a comment in the Restatement (Second) of Torts, which generally establishes that a product is not defective if the warnings provided are adequate and the product is safe when the warnings are followed. Other states, either on their own or following the black letter and comments of the new Restatement (Third) of Torts: Products Liability, adhere to the view that product defects and failure to warn are separate heads of liability, and that the defendant may be liable for an unreasonably dangerous product,

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172 See, e.g., Sherk v. Daisy-Heddon, 450 A.2d 615, 619 (Pa. 1982) (holding that injury was not caused by allegedly defective warnings accompanying air rifle because instructions were not read or followed); Dugan v. Sears, Roebuck & Co., 454 N.E.2d 64, 67 (Ill. App. Ct. 1983) (finding that lawn mower operator's conduct in ignoring warnings relieved manufacturer of liability for alleged design defect).

173 See Restatement (Second) of Torts § 402A cmt. j (1965) ("Where warning is given, the seller may reasonably assume that it will be read and heeded; and a product bearing such a warning, which is safe for use if it is followed, is not in defective condition, nor is it unreasonably dangerous.").

174 See Restatement (Third) of Torts: Products Liability § 2 (1998) ("A product is defective when . . . it contains a manufacturing defect, is defective in design, or is defective because of inadequate instructions or warnings.").
even when the warning was adequate. Any failure to follow the warning might give rise to a comparative negligence or other defense but it would not bar liability.

The controversy relates directly to tobacco products, for cigarette packages and advertising have carried warnings for years. States following the old Restatement may deny product defect liability, relying on the adequacy of the warnings. States that follow the new Restatement or similar approaches would leave the avenue of products liability open.

Which rule the state adopts reflects that state's view about personal responsibility, as opposed to manufacturer responsibility, for the use and sale of a dangerous product. Judges in state courts are representatives of their locales and typically are elected by district or statewide electorates. If they respond to their constituents, the new Restatement's approach will prevail in those parts of the country where people sympathize with individuals who take risks in disregard of warnings and who feel that the responsibility of the individual in that case is not so great as to foreclose recovery. The older approach will continue in those areas where the people wish to impose on individuals all the consequences of their personal decisions. Voters in the nation at large will witness the effects of the two approaches. When and where legislative action is contemplated, legislators will have the benefit of the states' experience with the different rules.

2. Assumption of Risk and Comparative Negligence. Most courts apply comparative negligence doctrine to products liability cases, but states diverge on whether to apply pure comparative negligence, equal-fault comparative negligence, or greater-fault comparative negligence.

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175 See Rogers v. Ingersoll-Rand Co., 144 F.3d 841, 844 (D.C. Cir. 1998) (stating that "warnings alone will not necessarily save a product from being unreasonably dangerous"); Uniroyal Goodrich Tire Co. v. Martinez, 977 S.W.2d 328, 336-37 (Tex. 1998) (citing new Restatement with approval and holding that "warnings and safer alternative designs are factors...in determining whether the product as designed is reasonably safe"); RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. I ("Warnings are not...a substitute for the provision of a reasonably safe design."). Preemption may also be a barrier to some cases based on inadequate warnings. See supra note 79 (discussing preemption).


177 Liability may still exist under fraud, misrepresentation, or other theories, of course. See supra note 170 (describing theories of various tobacco cases).
negligence. They also differ on whether and how assumption of risk is merged into comparative negligence or whether it is a separate and absolute defense to liability.

The state’s choice of doctrines has an obvious impact on the likelihood and scope of tobacco liability. If the choice to smoke is viewed as assumption of the risk or contributory negligence, and that conduct is a complete defense, recovery is out of reach. On the other hand, smoking that is considered comparative fault will merely reduce damages. In pure comparative negligence states, recovery of some amount would be highly likely. The odds will diminish somewhat in the modified comparative negligence states, but some large recoveries are still likely.

The choice of rules regarding comparative negligence again implicates important issues about personal responsibility. One commentator has noted the moral attraction of a position that assigns some responsibility to the smoker but discounts the fault on account of the early age at which smokers become addicted and the misleading conduct of the tobacco companies with regard to information about smoking’s hazards. Comparative negligence doctrine allows juries to put that position into practice.

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179 See, e.g., KEETON ET AL., supra note 154, § 68 (discussing defense of assumption of risk).

180 Most states assimilate assumption of risk into the comparative negligence defense in products cases. See, e.g., Blackburn v. Dorta, 348 So. 2d 287, 293 (Fla. 1977) (merging doctrines); see also RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 17 cmt. d (1988) (noting that majority view considers “all forms of plaintiff’s failure to conform to applicable standards of care,” such as assumption of risk and contributory or comparative negligence); KEETON ET AL., supra note 156, § 68, at 495-98 (discussing relationship between comparative negligence and assumption of risk defenses). Alabama applies a contributory negligence defense to some forms of products liability. See Culpepper v. Weihrauch, 991 F. Supp. 1397, 1400 (M.D. Ala. 1997) (allowing contributory negligence defense for misuse of product).

181 See Cupp, supra note 75, at 485-98 (discussing how issues, such as youth, advertising, deception, and addiction may affect assumption of risk or contributory negligence defenses); see also Robert L. Rabin, A Sociolegal History of the Tobacco Tort Litigation, 44 STAN. L. REV. 853 (1992) (describing moral concerns in assigning tobacco liability). A stomach-turning account of tobacco companies’ manipulation of information is found in GLANTZ, supra note 6.

182 See Cupp, supra note 75, at 503-06 (discussing possible approaches to addiction and comparative negligence).
That view is not necessarily shared by the entire country, however. State-by-state decisions on matters of personal responsibility express the divergent views that may control. Perhaps, over time, nationwide views on personal responsibility will converge. If so, cases decided under the diverse law that has developed during that time will supply the electorate with useful data about the exact results of the variations on the comparative negligence approach.

3. Market-Share Liability. States also have diverse approaches to whether and when it is appropriate to allocate liability for a defective product to all makers of the product according to market share. Market-share liability could be a matter of considerable importance in actions in which the plaintiffs cannot prevail on conspiracy or joint action theories that would confer joint and several liability on all the various tobacco manufacturers. Smokers who switch brands and individuals harmed by second-hand smoke could have their entire ability to recover depend on the court's adoption of a market-share theory. If one or more of the manufacturers goes bankrupt and the conspiracy and joint-action theories fail, availability of a market-share theory will be of key importance to many plaintiffs.

Nevertheless, market-share ideas are a departure from traditional ideas of tort liability. Some courts reject them for that reason alone; others have circumscribed their operation. Again, decisions about morality are involved: whether it is fair to allocate damages based on a form of collective contribution even if the defendants cannot be shown to have acted together. Collective responsibility ideas, like individual responsibility notions, vary from region to region and locality to locality. Local majorities should have the ability to weigh in on the matter. The results of their legislative or judicial representatives' decisions will provide useful

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184 See, e.g., Smith, 560 N.E.2d at 337 (rejecting market-share liability because it "is too great a deviation from . . . existing tort principles").

185 See, e.g., Goldman v. Johns-Manville Sales Corp., 514 N.E.2d 691, 700-01 (Ohio 1987) (refusing to extend theory to asbestos products when type and percentage of asbestos in product varied widely).
information, particularly if a national solution ultimately appears advisable on how to deal with injuries from second-hand smoke.

IV. CONCLUSION

The state courts are the neglected option in most discussions of complex litigation. Class action proceedings in those courts, however, may emerge as the most sensible way in which to apply the law of tort to injuries from exposure to tobacco. If limits are imposed on the classes and safeguards for class members are carefully followed, state class proceedings might administer justice highly effectively. The administration of justice by state courts will permit the decisionmakers who are closest to the people, and sensitive to local and regional differences among the people to develop legal rules that are most appropriately applied to tobacco injuries in their jurisdictions.