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Certifying Mandatory Punitive Damages Classes in a Post-Ortiz and State Farm World

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I. INTRODUCTION

Punitive damages are a civil penalty "aimed at deterrence and retribution" that further the state's interest in punishing unlawful

conduct.[1] They are meant to "sting" and should be imposed proportionally according to the "egregiousness of the harm and the wealth of the transgressor."[2] While compensatory damages are intended to compensate plaintiffs for their concrete losses, punitive damages use the plaintiff as an instrument for "visiting [] punishment upon [the] extreme tortious misdeeds" of defendants.[3] As such, it is well settled that no individual plaintiff is entitled to punitive damages; however, "it is equally true that no transgressor is entitled to be relieved of exposure to them."[4]

When punitive damages are sought through adjudication of individual claims, it is feared that multiple claims brought by individual plaintiffs will over-punish defendants while giving victims who "race to the courtroom door" a windfall not available to later claimants.[5] For years, courts have struggled with concerns about duplicative punishment of defendants and the equitable distribution of such awards among plaintiffs. With the recent influx of mass tort cases dealing with products liability, courts can no longer ignore these issues.

The concept of a punitive damages class has emerged as a potential means of providing distributive justice to plaintiffs, while still protecting defendants from multiple, successive punishments. In this regard, some parties have sought to certify mandatory punitive damages classes under Federal Rule 23(b)(1)(B)[6] when "litigation would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests."[7] In other words, in the

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1. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 416 (2003).

2. Elizabeth J. Cabraser, *Unfinished Business: Reaching the Due Process Limits of Punitive Damages in Tobacco Litigation Through Unitary Classwide Adjudication*, 36 WAKE FOREST L. REV. 979, 979 (2001).

3. Richard A. Nagareda, *Punitive Damages Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943, 949 (2001).

4. Cabraser, *supra* note 2, at 982.

5. Elizabeth J. Cabraser & Thomas M. Sobol, *Equity for the Victims, Equity for the Transgressor: The Classwide Treatment of Punitive Damages Claims*, 74 TUL. L. REV. 2005, 2006 (2000).

6. FED. R. CIV. P. 23(b)(1)(B). This class is considered "mandatory" because Rule 23(c)(2), which gives class members the ability to opt out, does not apply to Rule 23(b)(1)(B); therefore, all members of the class are bound by the outcome of the certified action. FED. R. CIV. P. 23(c)(2). Generally, adjudication is considered to be dispositive of interests of other members not a party to the suit when there is a limited fund available to cover all the claims. Cabraser & Sobol, *supra* note 5, at 2008.

7. Cabraser & Sobol, *supra* note 5, at 2008. The argument for certification based on a limited fund theory is two-fold: one, the constitutional limit on punitive damages will cap the amount defendants can be forced to pay, and two, early plaintiffs who receive a windfall may prevent later plaintiffs from receiving anytbing at all.

punitive damages context, a mandatory class may be utilized where "multiple punitive damage claims for the same conduct threaten to deplete the defendant's assets [] as to foreclose or diminish later claims for both punitive and compensatory damages, [or] where multiple punitive damages claims. . .may exhaust the substantive legal limits that the Supreme Court has set as permissible punishment."[8] This Note will focus on the latter of these claims.

The traditional application of Rule 23(b)(1)(B) and current Supreme Court precedent interpreting the rule may weigh against the certification of mandatory punitive damages classes. In *Ortiz v. Fibreboard*,[9] the United States Supreme Court extensively explored the application of mandatory classes based on a limited fund under Federal Rule 23(b)(1)(B). In particular, the Court focuses on limited fund class actions, laying down the necessary requirements for class certification on a limited fund rationale.[10] The Court held that there must be evidence that the fund is limited, that the "whole of the inadequate fund be devoted to the overwhelming claims," and the claimants be identified by a "common theory of recovery [and] treated equitably among themselves."[11]

The *Ortiz* Court seemed concerned about a departure from the historical limited fund model, perhaps anticipating an increased likelihood of abuse in using mandatory limited funds at times when the fund is not sufficiently limited.[12] As a result, *Ortiz* seems to restrict certification under a mandatory limited fund rationale to a small number of cases. *Ortiz* failed to answer an important question, however: how should courts deal with mass tort litigation involving punitive damages where the limited fund is created not in the traditional way—by the defendant's inadequate assets—but instead is limited by a constitutional cap on liability? This question has become increasingly salient since *State Farm Mutual Insurance Co. v. Campbell*, where the Court solidified the notion of a constitutional due process limit on punitive damages.[13]

While other commentators have considered the viability of mandatory punitive classes under Rule 23(b)(1)(B), none have focused on certification in light of the Court's decisions in both *Ortiz* and *State Farm*. This Note will focus on how the Court's account of the

8. *Id.* at 2012-13.

9. 527 U.S. 815 (1999).

10. *Id.* at 838-41.

11. *Id.*

12. *Id.* at 842. The Court, looking to the Advisory Committee and the Rules Enabling Clause, stated that the goal of Rule 23(b)(1)(B) is to stay close to the historical model. *Id.*

13. 538 U.S. 408 (2003).

constitutional limit on punitive damages in *State Farm* fits into the framework of the Court's previous decision in *Ortiz*. Specifically, this Note will address how lower courts may reconcile the two decisions when deciding issues of certification for mandatory punitive damages classes, and whether the Court should rethink the limitations placed on mandatory limited fund class actions in *Ortiz*, in light of the constitutional caps on punitive damages in *State Farm*. Finally, this Note will consider the practical need for innovations in the area of mandatory punitive damages classes, looking at pragmatic arguments, issues of equity, and societal concerns for the evolution of civil litigation.

II. *ORTIZ* AND *STATE FARM*: THE SUPREME COURT ON PUNITIVE DAMAGES

Because certification of mandatory punitive damage classes is tightly linked to the Court's recent jurisprudence on Rule 23(b)(1)(B) and punitive damages, a survey of these essential holdings is necessary to the discussion that follows.

A. Ortiz v. Fibreboard

From the 1920s through 1971, Fibreboard Corporation manufactured a number of products which contained asbestos, resulting in hundreds of thousands of claims against the company.[14] Consequently, Fibreboard found itself litigating on "two fronts."[15] Fibreboard dealt not only with thousands of plaintiffs' claims for compensatory damages, which continued to grow throughout the 1980s and 1990s, but also fought battles with Continental Casualty and Pacific Indemnity Company, who had insured Fibreboard at different times under similar general liability policies.[16]

In 1990, a California trial court found both insurance companies responsible for the indemnification of claims brought by plaintiffs exposed to Fibreboard asbestos products during the years the insurance policies were in effect.[17] The insurance companies appealed this ruling, but with the coverage case unresolved and the

14. *Ortiz*, 527 U.S. at 821-22.

15. *Id.* at 822.

16. *Id.* Continental Casualty insured Fibreboard from May 1957 through March 1959. *Id.* Pacific Indemnity Company had insured it from 1956 to 1957 under a similar policy. *Id.* The policy was a comprehensive general liability policy which provided limits of "$1 million per occurrence, $500,000 per claim, and [had] no aggregate limit." *Id.*

17. *Id.* at 822-23.

possibility of "unbounded liability," the parties began settlement talks.[18] Attorneys for the asbestos plaintiffs, Fibreboard, and the insurance carriers eventually approved the terms of a "Global Settlement Agreement."[19] The insurers conditioned the agreement "on a guarantee of 'total peace,' ensuring no unknown future liabilities."[20] Accordingly, a settlement would require a mandatory class action that would bind all potential plaintiffs and allow none to opt out of the class.[21]

Per the agreement, a group of plaintiffs filed for certification in the United States District Court for the Eastern District of Texas, seeking certification of a mandatory class under Rule 23(b)(1)(B).[22] The class would consist of three groups: (1) all those with personal injury claims for asbestos exposure who had not yet brought suit, (2) those who had dismissed their claims but retained the right to sue, and (3) "past, present and future spouses, parents, children and other relatives of class members."[23] The plaintiffs justified the class certification by pointing to a "shared necessity of ensuring insurance funds sufficient for compensation" of all claimants.[24]

The agreement provided that Fibreboard, Continental and Pacific would create a trust to pay all plaintiffs' asbestos claims, including personal injury and death claims, in exchange for full release from liability to all class members.[25] Generally, those seeking compensation would be required to settle with the trust, funded by $1.525 billion from the insurers and $10 million from Fibreboard.[26] If the initial settlement attempts failed, the agreement required claimants to participate in mediation and arbitration before they could proceed to court.[27] Even then, the agreement limited claims to $500,000 and barred punitive damage awards. Additionally, a "spendthrift provision" provided for the payment of the most serious claims first in an effort to conserve the trust in the event of a shortfall.[28]

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18. *Id.* at 824.
19. *Id.*
20. *Id.*
21. *Id.* Rule 23(b)(1)(B) is used to certify a non-opt out class.
22. *Id.*
23. *Id.* at 825-26.
24. *Id.* at 827.
25. *Id.* at 827.
26. *Id.* at 825-27. While $10 million was coming from Fibreboard, in reality, only $500,000 would actually be paid by Fibreboard, with the other $9.5 million coming from other insurance proceeds. *Id.* at 825.
27. *Id.* at 827.
28. *Id.*

Following an eight-day fairness hearing, the District Court found that the settlement agreement met the requirements under Rule 23(a) and certified the class under Rule 23(b)(1)(B).[29] The Fifth Circuit Court of Appeals affirmed the certification under a "limited fund" rationale, noting that Fibreboard's total insurance coverage, combined with the company's net worth, would be insufficient to cover all claims against it.[30] A group of intervenors' objecting to the certification appealed and the United States Supreme Court granted certiorari to determine the issue of certification under Rule 23(b)(1)(B) on a limited fund rationale.[31]

The Supreme Court reversed the Fifth Circuit and held that the class could not be certified under Rule 23(b)(1)(B).[32] While conceding that the text of the rule was broad, the Court noted that if a more limiting interpretation was not followed, then (b)(1)(B) could be used in ways that would violate the Rules Enabling Act,[33] the Seventh Amendment, and constitutional due process.[34] Seeking to limit such a construction, the Court interpreted the limited fund through the Rule's historical context and the intent of the drafters of the 1966 amendments.[35]

After exploring the historical development of limited fund class actions, the Court found three common characteristics they believed were "presumptively necessary" to have a limited fund class action: (1) an insufficient fund; (2) the "whole inadequate fund" must be used to pay the claims; and (3) claimants must be treated equitably.[36] The Court then applied these characteristics to the settlement class before it, concluding that the elements were not met.[37]

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29. *Id.*

30. *Id.* at 829.

31. *Id.*

32. *Id.*

33. The Rules Enahling Act mandates that "rules of procedure shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(b).

34. *Ortiz,* 527 U.S. at 845-56. The Court believed certification of a mandatory class and settlement of the action would implicate the Seventh Amendment right to a jury trial for absent class members. *Id.* at 845. The mandatory class also implicates the due process principle that one is not bound by a judgment to which he is not a party by service or process. *Id.* at 846.

35. *Id.* at 833-37. In detailing an extensive history of the limited fund class action, the Court suggests that "classic" limited fund class actions "include claimants to trust assets, a bank account, insurance proceeds, company assets in a liquidation sale, proceeds of a ship sale in a maritime accident suit, and others." *Id.* at 834 (citing, *ultra vires,* FED. R. CIV. P. 23(b)(1)(B) advisory committee's note). Additionally, the Court cites several cases to illustrate the traditional use of a limited fund. *See, e.g., id.* at 836 n.14.

36. *Id.* at 838-40.

37. *Id.*

The class failed the first element because the fund was not sufficiently limited.[38] To obtain (b)(1)(B) certification, the Court held, parties must present evidence that enables a court to "ascertain the limit and insufficiency of the fund, with support in findings of fact."[39] Here, there was no evidence that the fund was limited outside the parties' own agreement.[40]

Next, the Court held that the settlement failed the characteristic requiring exhaustion of the limited fund.[41] Under the settlement agreement at issue, Fibreboard was able to retain all but $500,000 of its net worth.[42] In this regard, the arrangement did not appear to be "the best that can be provided for class members."[43]

Finally, the Court ruled that the requirement of equity among class members raises two separate issues: "the inclusiveness of the class and the fairness of distributions to those within it."[44] Here, the settlement class failed the inclusiveness prong because it excluded as much as a third of potential claimants who might at some point have cognizable claims, a number of whom were represented by class counsel.[45] The Court left open the question of whether this exclusion could be excused if all claimants ended up with comparable benefits but concluded that the settled inventory claims obtained better terms than class members.[46]

Regarding the fairness of distributions, the Court again found the settlement certification lacking.[47] Here, the class had an inherent conflict of interest between those who wanted immediate payment and those with potential future injuries.[48] Additionally, the class consisted of claimants exposed both before and after 1959, the year the insurance policies expired.[49] This distinction created another disparity of interests because claimants injured prior to the expiration of the insurance coverage had more valuable claims.[50] This conflict required the division of the class into "homogeneous subclasses under

38. *Id.* at 848.
39. *Id.* at 848-49.
40. *Id.*
41. *Id.* 859-60.
42. *Id.* at 859.
43. *Id.* at 859-60.
44. *Id.* at 854.
45. *Id.*
46. *Id.* at 855.
47. *Id.*
48. *Id.* at 855-58.
49. *Id.* at 857.
50. *Id.*

Rule 23(c)(4)(B), with separate representation to eliminate conflicting interests of counsel."[51]

In addition to finding that the proposed settlement agreement did not meet the listed requirements, the Court questioned whether the limited fund class action could ever to be used to handle mass tort claims.[52] The Court noted that the Advisory Committee did not intend the mandatory class action be used to "aggregate unliquidated tort claims."[53] Moreover, the limited fund did not fit the situation where the claims "might *eventually* result in a judgment that in the aggregate could exceed the assets available to satisfy them."[54]

The *Ortiz* Court purposely adopted a conservative view of 23(b)(1)(B): constraining its interpretation to the rule's historical roots. The question that remains is how these constraints affect the ability of lower courts to use mandatory certification to deal with issues such as mandatory punitive damage classes in the context of mass product liability suits. To better answer this question, the next Section turns to the Supreme Court's decision in *State Farm*, which emphasized the need for mandatory punitive damage classes by capping the constitutional limit for punitive damage awards against defendants.

B. State Farm v. Campbell

In recent years, the Supreme Court has granted certiorari in several cases in an effort to clarify the substantive and procedural due process requirements applicable when imposing punitive damage awards. The most recent case discussing punitive damages is *State Farm Mutual Automobile Insurance Co. v. Campbell*.[55] In *State Farm*, the Supreme Court reversed a $145 million dollar punitive damage award after concluding the amount of the award violated the due process clause of the Fourteenth Amendment.[56]

In 1981, Campbell attempted to pass the traffic ahead of him while driving on a two-lane highway.[57] Another driver, Ospital, was approaching from the opposite direction and had to swerve to avoid

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51. *Id.* at 856 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997) (noting class settlements must provide "structural assurance of fair and adequate representation for the diverse groups and individuals affected").

52. *Id.* at 843.

53. *Id.* (citations omitted).

54. *Id.* (quoting William W. Schwarzer, *Settlement of Mass Tort Class Actions: Order Out of Chaos*, 80 CORNELL L. REV. 837, 840 (1995)) (emphasis added).

55. 538 U.S. 408 (2003).

56. *Id.* at 412.

57. *Id.*

hitting Campbell.[58] Ospital lost control of the vehicle and crashed into a third driver, Slusher.[59] Ospital was killed, Slusher was permanently disabled, and the Campbells were unharmed.[60]

Slusher and Ospital's estate sued Campbell.[61] State Farm, Campbell's insurer, contested liability and declined to settle the claims for the policy limit of $50,000.[62] Even with a consensus among witnesses and investigators that Campbell caused the crash, State Farm took the case to trial, assuring the Campbells that "their assets were safe, that they had no liability for the accident, that [State Farm] would represent their interests, and that they did not need to procure separate counsel."[63] The jury returned a verdict against Campbell for $185,849 and State Farm refused to cover the amount in excess of the policy limit, the same amount proposed in the settlement.[64] Ospital and Slusher then agreed not to seek judgment from Campbell, if Campbell agreed to pursue a bad faith claim against State Farm.[65]

At the bad faith trial, Campbell's counsel "convinced the trial court that there was no limitation on the scope of evidence that could be considered," presenting evidence of State Farm's operational deficiencies from across the country.[66] The jury awarded Campbell $2.6 million in compensatory damages and $145 million in punitive damages.[67] The trial court reduced the verdict to $1 million for compensatory and $25 million for punitive damages.[68] The Utah Supreme Court later reinstated the jury award, precipitating State Farm's appeal to the United States Supreme Court.[69]

The Supreme Court reversed the Utah Supreme Court's reinstatement of the $145 million punitive damage award and delivered a broad analysis of the purpose and scope of punitive damages.[70] Warning that punitive damages can violate the Due Process Clause of the Fourteenth Amendment if they are "grossly excessive or arbitrary," the Court reiterated and expanded upon the

58. *Id.* at 412-13.

59. *Id.*

60. *Id.*

61. *Id.* at 413.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.* at 420. Through testimony of State Farm employees and experts, Campbell introduced evidence attempting to show that the original case was taken to trial as part of a national effort to meet "corporate fiscal goals by capping payouts on claims company wide." *Id.*

67. *Id.* at 415.

68. *Id.*

69. *Id.*

70. *Id.* at 416-18.

"three guideposts" presented in *Gore v. BMW*, which were used to determine whether an award of punitive damages was excessive.[71]

The Court held that of the three guideposts, the first, the "degree of reprehensibility of the defendant's conduct," is the most important element for determining the reasonableness of a punitive damage award.[72] The Court set out several factors courts can consider to determine reprehensibility. These factors include: whether the harm to the plaintiff(s) was physical or economic; if the defendant acted with "reckless disregard of the health or safety of others;" the financial vulnerability of the victim; whether the conduct was the result of repeated actions of the defendant or an isolated incident; and finally, whether the harm resulted from "intentional malice, trickery, or deceit, or mere accident." [73]

Applying these factors, the Court noted that while State Farm's actions "merit[ed] no praise," the award of punitive damages of this size was unwarranted.[74] Because Campbell had attempted to show that State Farm's practices "transcend[ed]" his case by introducing evidence of nationwide misconduct,[75] the Court was concerned that State Farm was being punished for its operations across the country and not for its conduct in the *Campbell* case alone.[76] The Court stated that "[a] State cannot punish a defendant for conduct that may have been lawful where it occurred," nor does a state have an interest in imposing punitive damages for conduct that occurs outside its borders.[77] Accordingly, the Court found the punitive damage award bore no relation to the *direct* harm to Campbell, but was based on State Farm's nationwide conduct and, therefore, failed the reprehensibility prong.[78]

The Court's second guidepost considers the ratio between the actual damages and the punitive damage award.[79] As in *Gore*, the Court declined to set a "concrete constitutional limit" on the ratio; however, the Court stated that "few awards exceeding a single-digit

71. *Id.* at 416.

72. *Id.* at 419.

73. *Id.* The Court also noted that "[t]he existence of any one of these factors weighing in favor of the plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect." *Id.*

74. *Id.*

75. *Id.* at 420.

76. *Id.* at 421. The Court found that the Utah courts improperly relied on evidence of the defendant's "dissimilar acts, independent from the acts upon which liability was premised," and held due process required the defendant only he punished for acts that harmed the plaintiff, not other parties who may have hypothetical claims. *Id.* at 422.

77. *Id.* at 421.

78. *Id.* at 424. The Court also found no evidence of repeated conduct. *Id.* at 423-24.

79. *Id.* at 424.

ratio between punitive and compensatory damages . . . will satisfy due process."[80] Accordingly, the Court held there is a "presumption against an award that has a 145-to-1 ratio," especially when the harm is economic and not physical.[81] The Court found that Campbell's argument that State Farm will only be punished in rare cases, mixed with references to the company's assets unrelated to his actual harm, did not justify the "unconstitutional punitive damages award."[82]

Finally, the third guidepost as outlined in *Gore* examines the "disparity between the punitive damages award and 'the civil penalties authorized or imposed in comparable cases.' "[83] In *State Farm*, the Court found a huge disparity between the $145 million award of punitive damages and the civil penalty of $10,000 for fraud.[84]

The *State Farm* decision clarifies that there is a constitutional limit on the amount of punitive damages that can be rendered against a particular defendant.[85] This limit creates a potential problem: it leaves open the possibility that early punitive damage claims may exhaust the substantive legal limits of permissible punishment, preventing subsequent plaintiffs from recovering punitive damages.[86] This conflict raises the question of whether a mandatory punitive damage class can be certified under Rule 23(b)(1)(B) on a "limited punishment" or limited fund theory, given the procedural strictures in *Ortiz* that limit certification under the Rule to its historical context.

III. THE FEASIBILITY OF MANDATORY PUNITIVE DAMAGE CLASSES UNDER *ORTIZ* AND *STATE FARM*

The question of certification for mandatory punitive damage classes under Rule 23(b)(1)(B) would be less difficult if *Ortiz* were the

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80. *Id.* at 424-25. The Court pointed out that, in its *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), decision, it had "referenced a long legislative history . . . providing for sanctions of double, treble, or quadruple damages to deter and punish." *Id.* If a particularly egregious harm results in only minimal compensatory damages, however, the punitive damages award may exceed these historical markers.

81. *Id.* at 426.

82. *Id.* at 427.

83. *Id.* at 428.

84. *Id.*

85. *See id.* at 429 (discussing the guideposts which limit punitive damages awards).

86. Cabraser & Sohol, *supra* note 5, at 2008; Joan Steinman, *Managing Punitive Damages: A Role for Mandatory Limited Generosity" Classes and Anti-Suit Injunctions?*, 36 WAKE FOREST L. REV. 1043, 1062-65 (2001). An additional argument for certifying punitive damages classes is the need to protect compensatory funds for later claimants. Cabraser & Sobol, *supra* note 5, at 2012. Because the issue of compensatory funds does not involve the constitutional caps on punitive damages under *State Farm*, it is beyond the scope of this Note.

only precedent.[87] In other words, with no constitutional rule of law limiting the amount of punitive damages that could be rendered against a defendant, arguing for certification based on a limited generosity theory[88] would be difficult. Prior to *State Farm*, only a handful of mandatory punitive damage classes had been certified under 23(b)(1)(B),[89] with the vast majority of such attempts perishing on appeal.[90] These early efforts at limited generosity certification began in the 1980s and cited concerns over the fair distribution of punitive damage awards to plaintiffs and the protection of defendants from multiple excessive punitive damage liability.[91]

For example, in *"Dalkon Shield" IUD Products Liability Litigation* and *In re School Asbestos Litigation*, two district courts certified punitive damage classes on a limited generosity theory. Both courts noted that at some point state or constitutional limits would prohibit further punitive damages from being awarded against the defendant for a single course of conduct, creating a limited fund based on legal limits that would prevent excessive and repetitive awards of punitive damages.[92] The appellate courts in both cases, while noting a

87. With no legal or constitutional limit on the amount of punitive damages that could be rendered against a defendant, it would be more difficult to analogize to a limited fund under a limited punishment theory. Courts, therefore, would be guided only by the restricted application of Rule 23(b)(1)(B) in *Ortiz*.

88. Certification under a limited generosity theory is a variant of the insufficient asset notion, describing situations where there is a "legal limit on liability" rather tban a limit on the defendant's capacity to pay. Steinman, *supra* note 86, at 1047. This limit creates a "ceiling on recovery" that proponents argue justifies certification under Rule 23(b)(1)(B), since early adjudication by plaintiffs will restrict the ability of later claimants to recover against the defendant. *Id.*

89. *See, e.g.*, *In re* "Agent Orange" Prod. Liab. Litig., 580 F. Supp. 690, 705-13 (E.D.N.Y. 1984) (certifying plaintiffs, who brought suit against defendant chemical manufacturers, under Rule 23(b)(1)(B), based on claims of serious medical problems resulting from exposure to "Agent Orange" during the Vietnam War). In certifying the class, Judge Weinstein found that federal substantive law applied and would govern punitive damages because the federal government had an overwhelming interest in the exposure that occurred during the Vietnam War. *Id.* at 705. The Second Circuit refused to grant mandamus to vacate certification under 23(b)(1)(B). *In re* Diamond Shamrock Chems. Co.. v. Ryan, 725 F.2d 858, 862 (2d Cir.), cert. denied, 465 U.S. 1067 (1984). Its opinion suggested agreement with Judge Weinstein that the high probability of future plaintiffs being unable to recover punitive damages justified mandatory certification. Steinman, *supra* note 86, at 1066-67.

90. *See infra* note 91.

91. Laura J. Hines, Engle v. R.J. Reynolds Tobacco Co.*: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making: Obstacles to Determining Punitive Damages in Class Actions*, 36 WAKE FOREST L. REV. 889, 902 (2001).

92. *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 521 F. Supp. 1188, 1193 (N.D. Cal. 1981) (certifying a punitive damages class under 23(b)(1)(B) on a limited punishment theory); *In re* Sch. Asbestos Litig., 104 F.R.D. 422, 434 (E.D. Pa. 1984) (certifying a punitive damages class under 23(b)(1)(B) finding a likelihood that multiple punitive damages judgments against a defendant will eventually lead to "overkill") (citations omitted); Hines, *supra* note 91,

concern for excessive punishment, nevertheless overturned certification on the basis that no rule of law existed limiting the amount of punitive damages that may be awarded against defendants.[93]

It is possible that the Court's decision in *State Farm*, had it been in effect at the time of the appeals, would have mandated different outcomes in the foregoing cases. It is important to note, however, that these cases were also certified by the district courts prior to the decision in *Ortiz*, which seems to limit Rule 23(b)(1)(B) certification to its historical context.

The landscape of mass tort litigation has changed, bringing with it an influx of confusion. Not long after *Ortiz*, which seemingly sounded the death knell for mandatory certification of punitive damage classes under 23(b)(1)(B),[94] *State Farm* again enlivened the debate over the certification of punitive damage classes based on a limited generosity theory. This Note will now focus on how *State Farm* has reopened the door for proponents of mandatory punitive damage class certification to argue the need for such certification under 23(b)(1)(B).

A. State Farm*'s Effect on Mandatory Punitive Damage Classes*

While the *Ortiz* opinion strictly limits the certification of mandatory classes under 23(b)(1)(B) to its historical roots, *State Farm* may call that practice into question. The arguments for certifying mandatory punitive damage classes extend beyond the limited generosity theory, which analogizes the constitutional limit on the amount of punitive damages to a traditional limited fund. *State Farm* has led some commentators to argue additional reasons for the certification of mandatory punitive damage classes in mass torts cases.[95]

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at 902-06 (noting the history of cases starting in the 1980s that attempted certification on a limited generosity theory).

93. *In re* N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 852 (9th Cir. 1982); *In re* Sch. Asbestos Litig., 789 F.2d 996, 1004-05 (3d Cir. 1986).

94. *Leading Cases: II. Federal Jurisdiction and Procedure,* 113 HARV. L. REV. 306, 311 (1999).

95. *See e.g.* Elizabeth J. Cabraser & Michael G. Nast, *A Plaintiff's Perspective on the Effect of* State Farm v. Campbell *on Punitive Damages in Mass Torts*, 3 Litig. Rep.: Class Actions (Mealey's) (June 19, 2003). (arguing the Supreme Court's holding in *State Farm* supports the role of class actions in mass tort litigation). For the purposes of this Note, it is assumed that the propositions of these commentators suggest a plausible reading of the *State Farm* opinion and its potential effects on mass tort litigation; however, the essential premise that *State Farm* allows certification of punitive damage classes in all cases, based on the limited generosity theory, will be questioned *infra*, Part II.C.2.

In *State Farm*, the Court found that the punitive damage award was improperly determined by taking into account evidence of the out-of-state conduct of State Farm in unrelated cases.[96] The Court held that out-of-state conduct is only admissible when the conduct "has a specific nexus to the specific harm suffered by the plaintiff."[97] Accordingly, *State Farm*'s holding suggests class certification to meet the due process requirements for punitive damages. [98]

In most mass tort cases involving the mass marketing of products, almost all bad conduct takes place in a state other than the plaintiff's.[99] For example, a product may be made in one state, tested in another, and marketed in a number of different states.[100] In the mass tort context, the out-of-state conduct is often admissible for rendering punitive damages because it "satisfies the critical requirement of the 'nexus to the specific harm suffered by the plaintiff.' "[101] As such, certification of punitive damage classes comports with the Supreme Court's requirement that defendants only be punished for conduct directed toward parties before the court.[102]

Additionally, in cases where there is no class action, parties who are not before the court are not bound by the judgment of earlier plaintiffs; therefore, nonparties are free to seek their own punitive damage awards against defendants, potentially leading to multiple punitive damage awards for the same conduct.[103] The certification of a punitive damage class alleviates the concern over multiple punitive damage awards for similar conduct, since as a non-opt out class, all parties' claims are bound by the judgment.[104] It seems, therefore, that mandatory certification of punitive damage classes comports with the requirements of *State Farm*, while avoiding both windfalls to early plaintiffs and over-punishment for similar conduct by defendants.[105]

The question of certification of mandatory punitive damage classes under 23(b)(1)(B) has assumed considerable practical significance with the *Simon II* tobacco litigation, which is among the first mandatory punitive damage classes to attempt certification after

96. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421 (2003).

97. *Id.*; Cabraser & Nast, *supra* note 95, at 5.

98. *State Farm*, 123 U.S. at 1522; Cahraser & Nast, *supra* note 95, at 5 (arguing that the Court's decision in *State Farm* would permit certification of punitive damages in mass torts).

99. Cabraser & Nast, *supra* note 95, at 5.

100. *Id.*

101. *Id.*

102. *Id.*

103. *Id.*

104. *Id.*

105. *Id.*

Ortiz and *State Farm*.[106] In *Simon II*, U.S. District Judge Jack Weinstein certified a limited fund class action for punitive damages against the tobacco industry.[107] The Second Circuit Court of Appeals recently vacated the class certification;[108] however, *Simon II* provides a working example of how courts are applying *Ortiz* and *State Farm* to mandatory punitive damage classes under Rule 23(b)(1)(B).

The *Simon II* plaintiffs sued the tobacco industry, alleging fraudulent conduct toward consumers and seeking class certification for a mandatory punitive damage class.[109] This certification request was based on Rule 23(b)(1)(B) under a "limited punishment" theory.[110] While Judge Weinstein granted certification of the punitive damage class on a limited fund/limited generosity theory, it was not without extensive consideration. Before establishing certification under (b)(1)(B), the court considered a number of substantive, procedural, and factual issues.[111] First, since plaintiffs from all fifty states alleged injuries, the court dealt with conflicts of law that would affect a non-opt out punitive damage national class.[112] Second, the court addressed how it would handle proof of causation and damages calculations.[113] Finally, the court considered whether the non-opt out punitive damage class met the requirements of certification under Rule 23(b)(1)(B).[114]

Judge Weinstein ultimately agreed with the plaintiffs and certified the class, noting "[b]ecause punitive damages will be capped, plaintiffs are forced to draw any damages from a limited fund of resources."[115] This situation creates a "first-in-time" problem, where early plaintiffs will recover windfalls from punitive damage verdicts while later plaintiffs are left with a depleted fund from which they cannot recover.[116]

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106. *In re* Simon II Litig., 211 F.R.D. 86 (E.D.N.Y 2002).

107. *Id.* at 96.

108. The Second Circuit Court of Appeals rejected the premise that the constitutional due process limitation on the amount of punitive damages that may be assessed against a defendant created a limited fund. The court held the constitutional cap on punitive damages is "a theoretical one, unlike any of those in the cases cited in *Ortiz*...and for that reason it is not easily susceptible to proof, definition, or even estimation, by any precise figure." The court also noted that the certification order likely failed the requirements in *State Farm* by allowing class certification for the determination of punitive damages prior to any assessment of compensatory damages. *See infra* Part III C (2).

109. *Id.*

110. *Id.* at 190.

111. *Id.* at 107.

112. *Id.* at 165-74.

113. *Id.* at 146-59.

114. *Id.* at 183-86, 190.

115. *Id.* at 190.

116. *Id.*

While the question of certification of punitive damage classes can arise in a number of mass tort contexts outside tobacco litigation, *Simon II* provides a useful lens to view whether such certification should be granted in light of *Ortiz*'s procedural restrictions on certification and *State Farm*'s constitutional limits on punitive damages. The next section of this Note will consider whether the *Simon II* class certification should survive its appeal and how lower courts should consider similar cases, in light of *State Farm* and *Ortiz*.

B. Ortiz's Relevance to Certification of Limited Generosity Classes

Before courts determine whether certification of mandatory limited generosity funds can be reconciled with the *Ortiz* opinion, they must first determine whether *Ortiz* should apply at all. Because *Ortiz* dealt with the traditional application of limited funds and not a limited generosity class, the answer to this question is debatable. Not surprisingly, those seeking certification of limited generosity funds suggest *Ortiz* has limited applicability to the question of certification,[117] while opponents of certification contend it prevents certification of these classes entirely.[118]

Because the *Ortiz* Court restricted its discussion to traditional limited funds, some commentators argue that the Court intentionally left open the possibility of other types of mass tort certification, including certification of punitive damage classes.[119] Under this theory of "decisional minimalism," it is arguable that the Justices were making a "deliberate decision[] about what should be left unsaid," namely the possibility of mass tort certification in future cases.[120] This argument is strengthened by the *Ortiz* opinion itself, where the majority stated at three different points in the opinion that they were not deciding whether Rule 23(b)(1)(B) enabled class certification of mass tort claims.[121]

While limiting *Ortiz*'s application only to traditional limited funds would certainly ease lower courts' concerns about granting

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117. *See* Steinman, *supra* note 86, at 1075 ("Neither *Ortiz*, nor *Amchem*, nor any other Supreme Court decision disallowed, or even addressed, mandatory punitive damages classes certified under Ruler 23(b)(1)(B)."). For example, the plaintiffs seeking certification in *Simon II* argued that *Ortiz* did not apply, and Judge Weinstein seemed to agree. *Simon II*, 211 F.R.D. at 13. Judge Weinstein noted, "the instant case is quite different from *Ortiz* and its progeny." *Id.* The basic argument is that, because *Ortiz* did not address the issue of mandatory punitive damage classes certified under Rule 23(b)(1)(B), the decision is inapplicable outside the traditional limited fund context. *Id.*

118. Nagareda, *supra* note 3, at 949.

119. *Leading Cases*, *supra* note 94, at 311.

120. *Id.* at 311-12.

121. *Id.*; Ortiz v. Fibreboard Corp., 527 U.S. 815, 844, 860 n.34, 864 (1999).

certification of punitive damage classes under 23(b)(1)(B), doing so is contrary to the Court's mandate in *Ortiz*. The *Ortiz* Court conceded that the text of Rule 23(b)(1)(B) was broad enough to incorporate additional classes for certification; nevertheless, the Court held that in granting certification courts should stick to the Rule's "historical" context, explicitly rejecting an "adventurous application" of the Rule.[122]

It is hard to imagine that certifying mandatory punitive damage classes under 23(b)(1)(B) would not be considered "adventurous" by the *Ortiz* Court. In fact, the Ortiz majority found it

> simply implausible that the Advisory Committee, so concerned about tbe potential difficulties posed by mass tort cases under Ruler 23(b)(3), with its provision for notice and the right to opt out . . . would bave uncritically assumed that mandatory versions of such class actions, lacking such protection[], could be certified under Rule 23(b)(1)(B).[123]

One commentator advises that *Ortiz* reaffirmed the "protections that must accompany the coercive potential that is endemic to aggregate litigation techniques . . . [to] safeguard against the risk of collusion and outright betrayal of the interests of absent class members."[124]

While *Ortiz* did not directly address the question of punitive damage classes under 23(b)(1)(B), the Court's language impliedly disallows a departure from the rule's traditional application. Accordingly, the *Ortiz* procedural restrictions are better understood as applying to Rule 23(b)(1)(B) generally, rather than being restricted to the context of the traditional limited fund. Accordingly, any attempts to certify punitive damage classes should meet the "presumptive" requirements for limited funds as explained in *Ortiz*,[125] with no exceptions for more adventurous applications of the Rule that were left unexplored in the opinion. Application of *Ortiz* would require mandatory punitive damage classes to: (1) demonstrate the existence of a limited fund; (2) ensure inclusion of all claimants; and (3) have equitable distribution among all claimants.[126] This Note will now explore whether mandatory punitive damage classes can fulfill these requirements.

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122. *Ortiz*, 527 U.S. at 843, 845.

123. *Id.* at 844.

124. Samuel Issacharoff, *"Shocked": Mass Torts and Aggregate Asbestos Litigation After* Amchem *and* Ortiz, 80 TEX. L. REV. 1925, 1940 (2002) (applauding the safeguards the Court established in *Ortiz* to protect the interests of absent class members).

125. *Ortiz*, 527 U.S. at 841-42.

126. *Id.*

C. *Obstacles to Mandatory Punitive Damage Classes Posed by* Ortiz *and* State Farm

The procedural limitations set forth in *Ortiz* may serve as a barrier to many mandatory punitive damage classes seeking certification on a limited generosity theory; however, *State Farm*'s due process limitation on punitive damages suggests an emerging need for such classes as a procedural mechanism. Thus, outright rejection of certification is difficult. The answer will require an evaluation of each individual punitive damage class to determine whether it meets the standards set out in *Ortiz*.

Several issues arise when considering whether such classes are permitted under the procedural requirements of *Ortiz*. A primary concern is whether there is a definitely ascertainable amount that exceeds the limit that can be awarded for punitive damages against a defendant for the same source of conduct. In considering the existence of a definitely ascertainable limit for mandatory punitive damage classes, one must consider: (1) whether a constitutional due process limit creates a definitely ascertainable limit or one that is merely theoretically limited; and (2) whether the fund will be exceeded by the aggregate claims of the plaintiffs.

1. The Nature of a Due Process Limitation on Punitive Damages

The arguments in favor of certification for punitive damage classes under 23(b)(1)(B) stem from an analogy of these classes to traditional limited funds.[127] Proponents of certification contend that the constitutional due process limit on the amount of punitive damages creates a pool of potential funds that is limited by law, in the same way that the net worth of a defendant corporation imposes a limit on its ability to pay damages in a traditional limited fund.[128] Accordingly, because juries would be permitted to reduce damage awards for later plaintiffs in light of prior awards, "there is a substantial probability that 'adjudication with respect to individual members of the class. . .would as a practical matter be dispositive of the interests of the other members not parties to the adjudication.' "[129]

Limited generosity funds, however, are fundamentally different than the traditional limited funds contemplated in *Ortiz*. In *Ortiz*, the

127. Nagareda, *supra* note 3, at 956-57.

128. *Id.*; *see also* Steinman, *supra* note 86, at 1063-65 (noting that subsequent plaintiffs would be unable to collect damages); Cabraser & Sobol, *supra* note 5, at 2005 (noting that the limited pool of damages money posed the danger of a race to file).

129. *Id.* at 2013; FED. R. CIV. P. 23(b)(1)(B).

Court required evidence with support in findings of fact that the fund was actually limited, and not simply limited by virtue of the parties' own agreement.[130] In view of that requirement, the certification on a limited fund concept should survive only "for funds that truly would be limited in the context of actual litigation, absent the existence of the class action."[131] In other words, because the constitutional limit on punitive damages cannot be determined prior to certification of the class, one commentator suggests that it is "limited only in some theoretical sense that can be given practical bite only upon certification of the class."[132]

The limited nature of the punitive damage fund is only theoretically limited because of the decentralized structure of the tort system itself.[133] With no centralized government control requiring suits to be brought against defendants, efforts to enforce the constitutional limit outside certification are nonexistent.[134] The limited fund created by the constitutional cap is only a *possible* or *hypothetical* limit, which fails to meet *Ortiz*'s mandate that there be evidence, based in fact, of the limited fund. This argument is supported by the fact that no plaintiff has ever been denied punitive damages based on the defendant reaching its purported constitutional limit in previously litigated cases.[135]

Because the constitutional limit for punitive damages is unlikely to be attained without class certification, certifying the class under 23(b)(1)(B) violates a central premise in *Ortiz*: that the fund be limited "independent[] of the agreement of the parties to the action."[136] Even assuming that the constitutional limit on punitive damages could be determined prior to certification, other roadblocks still exist, specifically whether it can be determined if the aggregate claims of the plaintiffs will exceed the fund.

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130. Ortiz v. Fibreboard Corp., 527 U.S. 815, 843, 848 (1999).

131. Nagareda, *supra* note 3, at 957.

132. *Id.*

133. *Id.* at 958.

134. *Id.* at 950, 958.

135. *Id.* at 958.

136. Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999); *see also In re* N. Dist of Cal. Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 849-50 (9th Cir. 1982) (rejecting certification of a mandatory punitive damages class because the parties failed to prove the fund was limited); Nagareda, *supra* note 3, at 957 (noting that *Ortiz* demands proof of the limited fund).

2. Determining Whether Plaintiffs' Claims Exceed the Constitutional Limit

To grant certification, a court must determine that the aggregated claims exceed the amount of the limited fund. Accordingly, plaintiffs seeking certification must demonstrate that their aggregated claims for punitive damages will exceed the maximum amount permitted under the Due Process Clause.[137] Potential problems arise under both *State Farm* and *Ortiz* in certifying such funds on a limited generosity theory.

In *Ortiz*, the Court noted that the "Advisory Committee did not contemplate that mandatory class actions under 23(b)(1)(B) would be used to aggregate unliquidated tort claims on a limited fund rationale."[138] When certifying mandatory punitive damage classes, however, the tort claims often will be unliquidated at the time of certification. For example, in *Simon II*, certification of the mandatory punitive damage class, which would determine punitive damages class-wide, occurred prior to the determination of compensatory damages for class members.[139] This certification occurred earlier because it is considered impractical to hold off on a class-wide determination of punitive damages until all mass tort claims for compensatory damages have been liquidated, a task that could take decades.[140]

Deciding punitive damages prior to compensatory damages in this manner might be putting "the cart before the horse" in light of the Court's holding in *State Farm*.[141] There, as noted *supra*, the Court reiterated a key guidepost used to review awards of punitive damages, stating that "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm."[142] Additionally, the Court held that while no bright-line existed, few awards exceeding a single-digit ratio between punitive and compensatory damages would satisfy the requirements of due process.[143] A court, therefore, cannot evaluate a punitive damage award for proportionality without first determining compensatory harm.

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137. Steinman, *supra* note 86, at 1080.

138. *Ortiz*, 527 U.S. at 843.

139. *In re* Simon II Litig., No. 00-CV-5332, 2002 U.S. Dist. LEXIS 25632, at *25 (E.D.N.Y. Oct. 22, 2003).

140. Steinman, *supra* note 86, at 1080.

141. John C. Coffee, Jr., *The Tobacco Wars: Peace in Our Time?*, N.Y. L.J., July 20, 2000, at 1.

142. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 426 (2003).

143. *Id.*

Despite *State Farm's* anchoring of punitive damages to the compensatory harm, some proponents of certification suggest the Court's prior holding in *TXO Production Corp. v. Alliance Resources Corp.* negates the notion that a determination of compensatory damages must precede a finding of punitive damages.[144] In *TXO*, the Supreme Court upheld a $10 million punitive damage award where the compensatory harm was only $19,000.[145] The Court held that it was "appropriate to consider the magnitude of the potential harm that the defendant's conduct would have caused to its intended victim if the wrongful plan succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred."[146] *TXO* suggests that punitive damages need not be closely linked with compensatory harm.[147]

The *TXO* Court linked the actual harm with a contemplation of potential harm in determining that the punitive damage award was not excessive.[148] The Court considered the potential harm to others only to the extent that it could have, but *had not* yet, occurred.[149] While the Court considered *potential* harm, it should be noted that the compensatory harm was still decided *prior* to any determination of punitive damages. Further, "just because a class jury does not yet know the total amount of actual harm suffered by class members does not make such harm 'potential' for purposes of determining class punitive damages."[150] As such, the jury will only know the extent of harm caused, and should only consider any potential harm that could have been caused, once class members have proven their compensatory damages.[151] Therefore, *State Farm* could be read as a reiteration that punitive damages should only be determined after a finding of compensatory harm.

Such an interpretation of *State Farm* prevents the certification of punitive damage classes in the majority of mass tort cases, including *Simon II*; however, it would not preclude all classes from certification, because those classes that determined compensatory damages prior to a calculation of class-wide punitive damages would

144. Coffee, *supra* note 141141, at 3.

145. TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).

146. *Id.* at 460.

147. Coffee, *supra* note 141, at 3.

148. *TXO Prod. Corp.* 509 U.S. at 460 (noting it was appropriate to consider the "potential harm that the defendant's conduct would have caused to its intended victims...as well as, the possible harm to other victims").

149. Hines, *supra* note 91, at 941-42.

150. *Id.* at 942.

151. *Id.*

meet the *State Farm* proportionality review.[152] Although such an approach would be more time consuming, it would achieve the most accurate measure of punitive damages and would comply with the requirements of *State Farm* and its progeny.

Even if compensatory claims are determined before the consideration of punitive damages, other obstacles remain to ascertaining a definite limit on a fund, so as to justify the certification of a mandatory punitive damage class under (b)(1)(B). One such concern stems from choice of law issues.

3. Choice of Law

Choice of law issues arise when a dispute involves the interest of more than one state and the application of each state's law would be "consistent with the Full Faith and Credit and Due Process Clauses of the Constitution."[153] To establish an ascertainable limit on the "fund," choice of law principles would require the selection of a single state's punitive damage law to govern the class; however, the selection of a single state's law to govern a nationwide class action for punitive damages raises constitutional concerns.[154] In *Phillips Petroleum Co. v. Shutts*, the Supreme Court affirmed the jurisdiction of Kansas courts over a class action involving all fifty states and the District of Columbia; however, it reversed the application of Kansas law to all the transactions because Kansas did not have significant contact with each of the class members.[155] For a particular state's law to apply in a multi-state action, the Court held that the state "must have a significant contact or significant aggregation of contacts, creating state interests, such that choice of its law is neither arbitrary nor fundamentally unfair."[156]

In certifying the tobacco plaintiffs for a mandatory punitive damage class in *Simon II*, Judge Weinstein determined that choice of

152. *Id.* at 938-40 (suggesting that *Icicle Seafoods, Inc. v. Baker* (*In re* The Exxon Valdez), 229 F.3d 790, 793 (9th Cir. 2000), provides a good example of a mandatory punitive damages class that meets the requirements of proportionality for punitive damages awards because the jury determined class-wide punitive damages *after* determining the amount of compensatory harm); *see also* Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1217 (6th Cir. 1988) (allowing class-wide determination of punitive damages when compensatory claims were tried first).

153. *In re* Simon II Litig., No. 00-CV-5332, 2002 U.S. Dist. LEXIS 25632, at *228 (E.D.N.Y. Oct. 22, 2002).

154. *See* Steinman *supra* note 86, at 1075-77 (noting "if no such single body of punitive damages law will govern the punitive damages to be awarded for mass tort course of conduct, mandatory class certification under Rule 23(b)(1)(B) might be 'dead in the water' 'right off the bat' ").

155. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 821-22 (1985).

156. *Id.* at 818-22.

law rules would permit the application of a single state's law to the claims of the nationwide class.[157] He noted that the choice of New York law met the requirements of *Shutts* because much of the defendants' conduct occurred in New York: the defendants were incorporated in New York, substantial sales occurred in New York, and the industry's major investors were based there.[158]

While proponents of certification argue that *State Farm* suggests the need for nationwide punitive damage class certification,[159] the holding may instead mandate the opposite. In *State Farm*, the Court held:

> [A State does not] have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction. Any proper adjudication of conduct that occurred outside Utah to other persons would require their inclusion, and, to those parties, the Utah courts, in the usual case, would need to apply the laws of their relevant jurisdiction.[160]

From this language, it can be argued that each state must apply its own substantive law to plaintiffs' claims that lack sufficient contacts to the proposed forum state.

Notably, *State Farm* holds that "a State cannot punish a defendant for conduct that may have been lawful where it occurred."[161] There is a vast variation among states' punitive damage laws, a variation that even alters the standards of conduct giving rise to punitive damage liability.[162] Accordingly, a defendant theoretically could engage in grossly negligent conduct that would create punitive damage liability in one state, but not in another state where punitive damages require conduct that is willfully wanton.[163] In this regard, the defendant's conduct may be unlawful in terms of compensatory damages in all states, but not in terms of punitive damage liability. This difference in state laws suggests that claims should not be aggregated for nationwide class determination on issues of punitive damages.

Finally, a strict reading of *Shutts* suggests that mandatory certification of a nationwide punitive damage class under 23(b)(1)(B)

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157. *Simon II*, 2002 U.S. Dist. LEXIS 25632 at *228-63.

158. *Id.* at 261-62.

159. *See supra* Part II.

160. State Farm Mut. Auto. Ins. Co. v. Campbell, 538 U.S. 408, 421-22 (2003).

161. *Id.*

162. Hines, *supra* note 91, at 916-18 (noting "just as differing factual bases for punitive liability may prevent a finding of commonality or predominance, commonality also may be undermined to the extent that class claims arise under state laws containing different legal standards for determining liability for punitive damages.").

163. *See* Steinman, *supra* note 86, at app. A at 1111-27 (exploring different state punitive damages laws in terms of substantive limitations and procedural requirements for the imposition of punitive damages).

may now be an impossibility. *Shutts* involved a state class action for overdue royalty payments from gas leases in various states.[164] After losing at trial, the defendants appealed, claiming that the state court lacked jurisdiction over out-of-state plaintiffs.[165] The Supreme Court affirmed the lower court's jurisdiction but noted that, before extinguishing an absent class member's claim, that plaintiff must "receive notice plus an opportunity to be heard and participate in the litigation" and "at a minimum . . . an absent plaintiff [must] be provided with an opportunity to remove himself from the class."[166]

The Court articulated similar concerns in *Ortiz*, as noted *supra*, rejecting the nationwide settlement action as an overly adventurous application of Rule 23(b)(1)(B) and expressing unease about the due process implications of exercising jurisdiction over absent class members in a mandatory class action.[167] In doing so, the Court distinguished *Shutts* on the basis that out-of-state class members in *Shutts* were given an opportunity to remove themselves from the class.[168]

The ability to certify mandatory punitive damage classes depends on one's view of Shutts and mandatory classes. Some commentators suggest that *Shutts* is a case about "distant forum abuse."[169] Under this theory, *Shutts* does not eliminate all mandatory classes.[170] Instead, it prevents only those classes that are brought in inappropriate forums.[171] To determine if a mandatory action is maintainable, therefore, one must consider whether there are sufficient contacts between the plaintiffs and the forum jurisdiction.[172] If there are not sufficient contacts, then under *Shutts*, the plaintiff must have the ability to opt out of the class, making the class non-mandatory.[173]

For example, a distant forum abuse analysis would not support certification of mandatory punitive damages classes in nationwide products liability cases.[174] Yet the distant forum analysis may lead to successful certification of mandatory punitive damage classes for

164. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 799 (1985).

165. *Id.*

166. *Id.* at 802.

167. Ortiz v. Fibreboard Corp., 527 U.S. 815, 845 (1999); Hines, *supra* note 91, at 909-10.

168. *Ortiz*, 527 U.S. at 847-48; Hines, *supra* note 91, at 910.

169. Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After* Phillips Petroleum Co. v. Shutts, 96 YALE L. J. 1, 52 (1986).

170. *Id.*

171. *Id.*

172. *Id.*

173. *Id.*

174. *Id.* at 53.

plaintiffs wishing to certify claims that arise out of actions occurring in the same jurisdiction. These cases often fall into the "mass accident" category and liability concerns focus on an event that occurred at a specific time and place.[175] A weaker case exists for certification arising from nationally distributed products that give rise to products liability claims by plaintiffs in multiple jurisdictions with a variety of injuries occurring at difference times.[176] This analysis suggests that the *Simon II* plaintiffs have a weak argument for certification, with plaintiffs in a multitude of jurisdictions seeking relief from the tobacco companies for a variety of injuries occurring at different times.

4. The Nature of Punitive Damages

Finally, the nature of punitive damages itself undermines one of the main arguments for the certification of punitive damage classes. Proponents of certification suggest that certification under 23(b)(1)(B) is necessary to prevent windfalls to early plaintiffs that will be unavailable to later claimants.[177] In other words, certification is needed because early adjudication may be dispositive of the interests of other class members not a party to the suit.[178]

The allocation of punitive damages among plaintiffs is markedly different than the allocation of compensatory awards. Compensatory damages are allocated on the notion that a particular individual has been tortiously injured.[179] Accordingly, that person should receive compensation for those injuries, regardless of injury and subsequent compensation to other persons by the same

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175. *See id.* at 44-50 (describing various mass accident cases); *see also* Hines, *supra* note 91, at 908-10 (noting that cases involving mass accidents may "be of limited utility" to those advocating for a mandatory punitive damages class for mass torts). Icicle Seafoods, Inc. v. Baker (*In re* The Exxon Valdez), 229 F.3d 790 (9th Cir. 2000), is an example of a mass accident where liability concerns are confined to a specific time and place. The district court certified a mandatory punitive damages class after the grounding of an Exxon ship that caused an oil spill affecting thousands of people in Alaska. *Id.* at 793, 797. The court noted that this case was "uniquely" suited for mandatory class treatment because the case involved a mass accident and not a nationwide products liability case. *Id.*; Hines, *supra* note 91, at 908.

176. Miller & Crump, *supra* note 169, at 45-46 (noting *Dalkon Shield*, a nationwide products liability suit, which involved plaintiffs across jurisdictions claiming a variety of injuries from "uterine perforations, infections, and hysterectomies to spontaneous abortion, fetal injuries and pregnancy" provided an example of a weak case for certifying a mandatory punitive damages class).

177. *See* Cabraser & Sobol, *supra* note 5, at 2006 (claiming that certification "brings rationality and proportionality to the process and achieves more equitable and socially palatable results than would . . . awarding windfalls" to early plaintiffs).

178. *Id.*; FED. R. CIV. P. 23(b)(1)(B).

179. Nagareda, *supra* note 3, at 948.

defendant.[180] Punitive damages, however, serve a different purpose; they are meant to punish defendants for extremely tortious misdeeds.[181] In this respect, individual plaintiffs have no entitlement to punitive damage awards, in contradiction to the "to each, her own" principle of compensatory awards.[182]

Because punitive damages are not used to allocate compensation to a particular plaintiff, but instead are an expression of moral condemnation, each plaintiff can be viewed as an instrument for visiting such punishment on defendants.[183] Awarding punitive damages to early plaintiffs at the potential expense of later claimants does not appear to violate the underlying principle of punitive damages.[184] Accordingly, the "lottery like" nature of punitive damages does not affect the true goal of punitive damages: the punishment and deterrence of harmful conduct by the defendant.[185]

IV. LOOKING FORWARD

While the certification of mandatory punitive damage classes may not be reconcilable with current legal precedent, utility and fairness suggest a need for the availability of such certification. The final section of this Note will explore arguments in favor of mandatory punitive damage classes, specifically focusing on issues of fairness to plaintiffs and defendants, and on pragmatic concerns for how civil litigation should evolve in the future. Finally, it will suggest that the Supreme Court revisit the issue and make an exception from the traditional mandate in *Ortiz* when applying Rule 23(b)(1)(B) to punitive damage classes.

A. Fairness to Plaintiffs

While lottery-like windfalls of punitive damages to early plaintiffs do not technically violate corrective justice,[186] there is a

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180. *Id.*

181. *Id.* at 949; *see also* Cabraser & Sobol, *supra* note 5, at 2006-07 (punitive damages are meant to "sting" defendants in order to perform their deterrent function).

182. *See* Nagareda, *supra* note 3, at 949 (suggesting that punitive damages are not an entitlement of victims, but of society).

183. *Id.*; Cabraser & Sobol, *supra* note 5, at 2006-07.

184. *See* Nagareda, *supra* note 3, at 949 (discussing the "tendency . . . toward the front-loading of punitive damages on early plaintiffs").

185. *Id.*

186. *See supra* Part III.A.; *see also* Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 594 n.31 (2003) ("Because there is no entitlement to punitive damages, and because these damages by definition exceed the amount necessary to fully compensate the plaintiff, allowing

strong argument that such awards violate distributive justice.[187] As one commentator suggests, there is simply "something unfair about awarding all of the punitive damages to a single victim."[188] This argument takes on considerable force if the potential compensatory damages are too low to create an adequate incentive for plaintiffs to pursue claims.[189] In other words, plaintiffs (and plaintiffs' lawyers) are unlikely to file a "costly and complex lawsuit" if the compensatory damages are minimal and punitive damages are capped by previous plaintiffs who reached the substantive legal limits that may be rendered against the defendant.[190] Allowing early plaintiffs to collect all of the punitive damage pie may prevent later claimants from collecting even their compensatory award.[191]

Another potential fairness issue stems from the opposite situation, where the plaintiff's damages are enormous. In this scenario, if initial plaintiffs are able to bring punitive damage claims representative of the "total harm" to all potential plaintiffs, there is a risk that these initial awards will bankrupt the defendant.[192] Here again, later claimants will not only be barred from seeking punitive damages, but will be unable to receive compensatory awards because the defendant's assets will have been consumed by prior punitive damage awards.[193]

An inability to certify mandatory punitive damage classes may also lead to systemic bias against plaintiffs.[194] This problem arises from the ability of defendants to create "de facto" certification.[195] Here, defendants faced with "classable claims"—those presenting common issues of liability and damages—can prepare one defense to cover all claims.[196] This strategy enables the defendant to litigate as if the plaintiffs were contained in a certified class.[197] Defendants are

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only one plaintiff to recover all of the punitive damages does not inherently violate notions of corrective justice.").

187. *See id.* at 594 n.20 (arguing that some scholars view distributive justice as seeking to ensure a fair division of punitive damages awards among all victims, not simply those who race to the courtroom door).

188. *Id.* at 594.

189. *Id.* at 595.

190. *Id.*

191. *Id.*

192. *Id.*; *see also* Cabraser & Sobol, *supra* note 5, at 2012-13 (describing how initial plaintiffs may "deplete the defendant's assets so severely as to foreclose or diminish later claims").

193. Colby, *supra* note 186, at 595.

194. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393-96 (2000).

195. *Id.* at 400.

196. *Id.* at 394.

197. *Id.*

therefore able to "exploit economies of scale by investing once-and-for-all in common questions and spreading the cost of that investment across all claims."[198] In doing so, defendants can avoid redundancy costs that will drain resources away from more productive uses and decrease the net benefits of litigation.[199]

Because different lawyers generally represent different plaintiffs, no one lawyer will own a beneficial interest in all of the claims that would enable the lawyer to invest once-and-for-all in common questions of fact. "[N]o plaintiff's lawyer is able to spread costs and reap the return gained by investing to maximize the aggregate value from litigating the questions common to all claims."[200] Accordingly, plaintiffs are denied the efficiencies of class certification that benefit defendants. This asymmetry allows defendants to make significantly larger investments in the litigation, that plaintiffs, through their individual lawyers, can never match.[201]

The concerns surrounding defendants' ability to utilize de facto class certification at the expense of plaintiffs is evident in the tobacco litigation.[202] Tobacco defendants have been fairly successful at defeating class certification by arguing that the plaintiffs' individual characteristics, such as behavior and physiology, prevent such certification.[203] This strategy traditionally has allowed defendants to exploit economies of scale, investing in a common defense for all claims, while exhausting individual plaintiffs with an "endless array of pretrial delays and discovery mechanizations."[204]

The concern for fairness to plaintiffs is only one of the arguments for certifying mandatory punitive damage classes. Concern for defendants and for the efficiency of the litigation process counsel in favor of mandatory punitive damage certification.

B. Benefits to Defendants

While it is true that the tobacco defendants are fighting to prevent punitive damage class certification,[205] opposition from

198. *Id.* at 397.

199. *Id.*

200. *Id.* 400-01.

201. *Id.* at 401.

202. Cabraser, *supra* note 2, at 1000.

203. *Id.*

204. *Id.* at 1001.

205. Purely speculating, tobacco defendants likely viewed their liability after class certification as higher than it would be through individual plaintiff's suits. This outcome may have been a result of the defendants' early luck in quashing plaintiffs' suits through pre-trial delays, etc. *See* Cabraser, *supra* note 2, at 1001 (discussing the tobacco defendants' use of

defendants will not always be the case. In the *Exxon Valdez* litigation, it was the defendant, Exxon Corporation, who sought certification on a limited generosity theory.[206] In such a situation, the inability to certify and decide punitive damages for the entire class will leave defendants open to excessive punishment from multiple plaintiffs seeking punitive damages.

This concern is not unfounded. When plaintiffs bring claims for punitive damages against a defendant, the damages awarded to them are for harm allegedly caused to an entire mass of people.[207] While punitive damages are considered quasi-criminal in nature,[208] they do not have the procedural protection against double jeopardy that is available in the criminal context.[209] As such, there is nothing to prevent successive punishment resulting from later plaintiffs who seek "total harm" punitive damages for themselves.[210] In effect, this over-punishes defendants, forcing them, through fragmented litigation, to pay repeatedly for the total harm caused to all plaintiffs.

Notably, the constitutional limit on punitive damages that can be rendered against a defendant does not serve as a successful barrier to multiple, successive "total harm" punitive damage awards against defendants. As Professor Richard Nagareda notes, "[n]otwithstanding decades of mass tort litigation, the harsh fact remains that not a single defendant has succeeded in constraining demands for punitive damages based on the invocation of the purported constitutional bound."[211] In this regard, defendants' interest in fairness also suggests a need for mandatory punitive damage certification in mass torts.

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strategies to delay litigation). Certifying the plaintiffs' class also would allow plaintiffs to exploit economies of scale, bringing them in economic parity with the tobacco defendants—something the defendants likely were trying to avoid. *See* Rosenberg, *supra* note 194, at 397-403 (describing how aggregating mass tort claims allows plaintiffs to exploit economies of scale). This economy suggests the need for certification of such classes to prevent unfairness to plaintiffs.

206. Icicle Seafoods, Inc. v. Baker (*In re* The Exxon Valdez), 229 F.3d 790, 793 (9th Cir. 2000) (detailing procedural history of Exxon Valdez litigation).

207. Colby, *supra* note 186, at 596 (noting that the system of awarding punitive damages as it stands may be unfair to defendants in that it awards punitive damages for the "harm allegedly caused to an entire mass of people in a lawsuit brought by only one person").

208. Nagareda, *supra* note 3, at 948 (describing punitive damages as quasi-criminal damages that "operate as 'private fines' intended to punish the defendant and to deter future wrongdoing" (citations omitted)).

209. Colby, *supra* note 186, at 597 (noting that res judicata plays no role when different plaintiffs are seeking the same damages).

210. *Id.*

211. Nagareda, *supra* note 3, at 958.

C. *Efficiency Concerns for Mass Tort Litigation*

In evaluating the certification of mandatory punitive damage classes, it is important to consider the effect certification will have on civil litigation in the future. With the influx of products that are mass advertised, produced, and distributed, mass tort litigation will continue to evolve. The question now is how the civil system should handle such cases in the future.

As it stands, defendants have little incentive to resolve pending litigation quickly and efficiently because of plaintiffs' inability to achieve certification under *Ortiz* and *State Farm*.[212] Defendants who have no assurance about potential future punitive damage liability will be more apt to "bide their time, trying or settling cases only as actual trial dates approach on court dockets across the country."[213] Defendants will only consider an attempt at a "comprehensive resolution" of pending litigation if it offers them peace, in some form, from punitive damage awards.[214] In other words, defendants' inability to assure peace on the punitive damage front is creating "a roadblock" for the resolution of mass tort litigation.[215]

If certification of mandatory, non-opt out punitive damage classes becomes a possibility, defendants could achieve certainty on the punitive damage front. This certainty would allow defendants to define an outer boundary on punitive damage liability, creating an increased incentive to resolve remaining issues in the litigation efficiently. In this regard, the comprehensive resolution of plaintiffs' compensatory claims will be more attractive, motivating defendants to offer settlement in appropriate cases and making them less likely to barrage plaintiffs with an array of pre-trial motions and delays.[216] The certification of mandatory punitive damage classes therefore allows for a civil litigation process that gives assurance to defendants on issues of liability and encourages efficient resolution of mass tort claims.

D. *Looking Forward—Deciding the Issue of Mandatory Certification*

While *Ortiz* did not address explicitly the issue of certification of limited generosity funds under 23(b)(1)(B), that decision clearly will

212. *Id.* at 952.

213. *Id.*

214. *Id.* (noting that "peace" does not mean "paying little or nothing;" instead, it means only a discernable outer boundary on liability for punitive damages).

215. *Id.*

216. *See id.* (arguing that the idea of a mandatory class action will result in a rethinking of class action in tort litigation).

have far-reaching implications for plaintiffs' ability to achieve certification of such classes in a majority of mass tort cases.[217] It seems that the easiest way to facilitate a needed change in the law would be for the Supreme Court to grant certiorari on this issue. To achieve fairness and efficiency in mass tort litigation in the future, the Supreme Court should rethink *Ortiz*'s limitations on certification under 23(b)(1)(B).[218] By making an exception to the traditional application of the rule for mandatory punitive damage classes, courts will be able to grant certification on a limited fund theory—even when the fund is only theoretically limited by the legal limits on punitive damage liability.

V. CONCLUSION

Today, with the wealth of products that are mass produced, marketed and consumed, complex issues in mass tort litigation have become increasingly salient. While some view *State Farm* as embracing the concept of mandatory punitive damage certification under a limited generosity theory, lower courts remain constrained by the traditional application of Rule 23(b)(1)(B) mandated in *Ortiz* and by the limitations in *State Farm* itself.

Fairness to both plaintiffs and defendants, combined with the desire for efficiency in the resolution of mass tort cases, suggests a need for change. Unconstrained by explicit language in *Ortiz* that prohibits certification of mandatory punitive damage classes, the Supreme Court is in a position to carve out an exception from the traditional application of 23(b)(1)(B) for punitive damage classes, allowing certification to accommodate the interests of defendants and plaintiffs alike.

Aileen L. Nagy *

217. *See supra* Part II.B.

218. It should be noted that granting certiorari on the issue of limitations in *Ortiz* will still leave multi-state mass tort cases vulnerable under choice of law issues. Although outside the scope of this Note, the Supreme Court could resolve this additional problem by granting certiorari in a case like *Simon II*. The Court then could not only expand the holding of *Ortiz* in order to allow mandatory punitive damages classes, but also clarify the holding of *Shutts* to allow certification of non-opt-out punitive damages classes under one state's law or, alternatively, to permit sub-classification by state. *See* Steinman, *supra* note 86 (discussing the issue of sub-classification of mass tort claims).

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