

## JACKPOT JUSTICE: VERDICT VARIABILITY AND THE MASS TORT CLASS ACTION

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*Mass tort scholars, practitioners, and judges struggle with determining the most efficient approach to adjudicate sometimes tens of thousands of cases. Favoring class actions, mass tort scholars and judges have assumed that litigating any issue once is best. But while litigating any one issue could conceivably save attorneys' fees and court resources, a single adjudication of thousands of mass tort claims is unlikely to further tort goals of corrective justice, efficiency, or compensation in a reliable way. That is because, as recent empirical research on jury behavior shows, any one jury's verdict may be an outlier on a potential bell curve of responses applying the law to the facts before it. Indeed, one aberrational, high jury claim valuation, if extrapolated to thousands of claims through a class action, may inappropriately bankrupt an entire industry. Similarly, one unusually low jury verdict might deny legions of plaintiffs the compensation that they deserve. To illustrate the problems of attempting to resolve a mass tort with a single jury, this Article discusses the Engle tobacco class action of Florida smokers, where the application of a single jury verdict to approximately 700,000 smokers appears to be an outlier verdict in light of prior juries' verdicts in Florida tobacco cases. In contrast, this Article argues that the use of multiple juries in individual cases is a superior method of resolving a mass tort. While the use of multiple juries in class actions to create statistically cobbled claim values has been rejected as violating due process and state tort law, no such problems accompany the approach espoused here: that individual-plaintiff lawsuits, each with its own jury, be tried and that the jury verdicts be used by mass tort litigants to develop claim values for broad mass tort settlement. In addition to remaining within the strictures of constitutional and tort law, this clustering of multiple juries around an accurate valuation of mass tort claims and the resulting likely settlement furthers both the procedural goal of litigant autonomy and the tort aims of efficiency, corrective justice, and compensation.*

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## I. INTRODUCTION

In *Engle v. Liggett Group, Inc.*,<sup>1</sup> a class action of approximately 700,000 Florida smokers against the tobacco industry, a single, six-person jury rendered a verdict finding the tobacco industry liable for \$145 billion in punitive damages and also held, inter alia, that the tobacco companies acted negligently, breached warranties, and produced defective products.<sup>2</sup> By itself, the punitive damages verdict by these six jurors was sufficient to bankrupt an entire tobacco industry that employed tens of thousands of people and in which likely many more persons were stockholders.<sup>3</sup> Although the Florida Supreme Court subsequently reversed the punitive damages verdict on appeal for a variety of procedural reasons and decertified the class, the court allowed the findings of the jury with regard to negligence, breach of warranty, and product defectiveness to be resolved against the tobacco industry for individual claims brought by the 700,000 former class members.<sup>4</sup>

But what if most or many other juries would not have found punitive damages warranted at all? Or, what if these other hypothetical juries would not have found negligence, breach of warranty, or product defects in that case? The single class action verdict would have been an outlier among the responses, and its unlikely response would have been applied to every member of the class. Indeed, an entire industry may have been bankrupted, and still may be, based on what could have been an atypical jury response by a mere six jurors. During oral argument in *Engle*, one justice of the Florida Supreme Court said the court

1. 945 So. 2d 1246 (Fla. 2006), cert. denied, 128 S. Ct. 96 (2007).

2. *Engle*, 945 So. 2d at 1254-55.

3. Rick Bragg, *Tobacco Lawsuit in Florida Yields Record Damages*, N.Y. TIMES, July 15, 2000, at A1 (noting that tobacco companies claimed verdict would force them into bankruptcy).

4. *Engle*, 945 So. 2d at 1254-55.

should avoid the “jackpot justice” of individual trials.<sup>5</sup> But by moving from one plaintiff to 700,000 plaintiffs and having all 700,000 claims turn on one jury verdict, the court’s class action approach only increased the amount of the pot and the risk of the “single hand” with one jury—in effect, the court went “all in.”<sup>6</sup> Indeed, mass tort class action judgments that seek to resolve the fate of an entire industry and tens of thousands of injured plaintiffs based on the verdict of a single jury may provide a jackpot to whichever side happens to win with that particular jury, if other juries would have decided differently.

In fact, the prior verdicts of actual Florida juries that preceded *Engle* actually conflicted with the findings of the *Engle* jury. In the majority of pre-*Engle* tobacco verdicts that were not overturned on appeal, juries rejected liability entirely.<sup>7</sup> Thus, the completely pro-plaintiff result of the *Engle* class action verdict provides a 100% win rate that overstated the success plaintiffs would have achieved at trial in multiple individual actions. The Florida Supreme Court’s version of *Engle* does not solve this problem, because it provides a 100% win rate for plaintiffs on issues of negligence, breach of warranty, and product defect, while some previous plaintiffs lost on these issues. In analyzing the *Engle* class action’s inconsistent results with prior verdicts, this Article sheds light on an important point overlooked by the Florida Supreme Court and litigants in the rendered decisions, oral arguments, and briefing.

And there is good reason to suspect that the problems of jury verdict variability shown in the tobacco litigation in Florida are present in all attempts at mass tort class actions.<sup>8</sup> A growing, thorough body of empirical jury verdict research has detailed the substantial variability of jury verdicts.<sup>9</sup> While commentators and practitioners have periodically criticized the apparent risk and unpredictability inherent in a single class action, mass tort verdict,<sup>10</sup> no

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5. Unofficial Transcript of Oral Argument, *Engle*, 945 So. 2d 1246 (No. SC03-1856), <http://www.wfsu.org/gavel2gavel/transcript/03-1856.htm> (last visited Aug. 1, 2008).

6. As Judge Posner has noted, a defendant facing a class certification that will adjudicate the liability in an entire mass tort “may not wish to roll these dice” and instead may settle under pressure that has been likened to judicial blackmail. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

7. *E.g.*, Verdict Report, *Schwartz v. Liggett Group, Inc.*, at \*1, No. CA 03-02078-AA (Fla. Cir. Ct. Mar. 13, 2006), 2006 WL 986357 [hereinafter *Schwartz Verdict Report*] (finding that Liggett was not responsible for Leila Schwartz’s death). See *infra* Part III for a discussion of “jackpot justice” in class action verdicts and the results of other Florida tobacco verdicts.

8. An additional issue to be explored is the proper role of collateral estoppel. The same concerns of jury verdict variability that infect a class action based on a single jury verdict also apply to using a single jury to resolve a mass tort issue through collateral estoppel. Nevertheless, the application of collateral estoppel has been subject to different doctrinal considerations than class actions, and therefore its treatment is beyond the scope of this Article.

9. See *infra* notes 72-85 and accompanying text for evidence that the judicial management of such verdicts does not eliminate such pronounced variability. Through the devices of remittitur and additur, judges have the power to reduce or enlarge verdicts by a jury. Despite each method, however, significant verdict variability remains.

10. See, *e.g.*, Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 817 (2002) (noting unpredictable punitive damage awards in mass tort class actions).

scholar has connected these concerns with the extensive empirical jury verdict research on verdict variability. This Article fills that gap and describes the empirical basis for concluding that any single jury verdict may be an outlier and not indicative of the totality of jury responses. Indeed, *Engle* provides merely a single case study in verdict variability that is theoretically duplicated in any mass tort class action relying on a single jury. The application of an outlier verdict to potentially hundreds of thousands of claimants poses a grave concern for the sound implementation of tort goals of corrective justice, efficiency, and compensation.

But if using a single jury to resolve a mass tort is problematic, how should multiple juries be used? Some scholars have suggested that multiple juries should be used within a class action and their results compiled through statistical sampling.<sup>11</sup> These commentators and plaintiffs' attorneys proposed that a statistically significant sample of damage claims of multiple plaintiffs, grouped according to similarity of injury, be tried before one or multiple juries.<sup>12</sup> The resulting damage values would then be averaged and the mean award would be applied to those in the class with the same injury type.<sup>13</sup> But these creative class action trial plans have been rejected as violations of the constitutional rights of due process and the right to jury trial as well as of state tort law requiring proof of individual causation.<sup>14</sup> Jury verdict variability therefore continues to pose a challenge to the heart of mass tort class actions, at least insofar as the class action's underlying claims are of sufficient value to render individual litigation economically viable and therefore a genuinely superior method of adjudication.<sup>15</sup>

By contrast, the litigants' comparison of verdicts from individual cases is both permissible and useful, because the endgame is often far-reaching settlement in which the defendants seek to settle with virtually all of the mass tort claimants. A key issue in such settlements is the proper valuation of claims. Indeed, important tort goals of corrective justice, deterrence, and compensation all turn on the accuracy of claim valuation in such broad settlements. Using multiple individual cases with juries allows outlier results to be put in proper perspective and for an accurate consensus of price to emerge based on the clustering of jury verdicts. As each individual plaintiff's case is tried, the litigants may weigh the cost of continuing further litigation and sharpening claim values through additional litigation against the advantages of pursuing far-reaching settlements using what they judge to be current claim values and saving the costs

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11. See *infra* Part IV.A for a discussion of scholarly approaches to applying multiple jury statistical sampling in class actions.

12. See *infra* notes 200-23 and accompanying text for a detailed discussion of approaches to trying samples of claims grouped by injury similarity before multiple juries.

13. See *infra* notes 204-05 and accompanying text for an explanation of how the resulting verdicts of statistical samples may be averaged and applied to the same injury group.

14. See *infra* notes 224-36 and accompanying text for a discussion of legal problems with applying statistical results in class actions.

15. See FED. R. CIV. P. 23(b)(3) (requiring "that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy" for certification of class under Rule 23(b)(3)).

of further litigation.<sup>16</sup>

Indeed, the decentralized process of multiple juries echoes the superior price-setting mechanism of the free market in which numerous individuals haggle to establish proper valuations. Seen in this light, as Judge Easterbrook of the Seventh Circuit has opined, class actions utilize an inaccurate, centralized, price-setting function that developed, free economies have increasingly spurned.<sup>17</sup>

Moreover, the widespread use of global settlement offers plaintiffs the benefit of multiple-jury treatment. If individual-plaintiff trials—each with a single jury verdict—are to be used, plaintiffs might object that the defendant gets the advantage of multiple trials on its total liability, while each plaintiff must bear the “jackpot” risk of a single jury hearing his or her claim. But if global settlement is the endgame, most plaintiffs will likely receive compensation that reflects an averaging of multiple juries, gaining the same multiple-jury benefits as defendants, and, of course, defendants as well as plaintiffs remain subject to the risks of the jury in any one case.

This multiple-individual-trial approach offers many of the benefits proffered by those scholars who sought to utilize statistical sampling and multiple juries in class actions. Under both approaches, multiple juries inform proper claim values. But unlike class actions with statistical sampling, a multiple-individual-trial approach comports with constitutional guarantees and state substantive law. Moreover, autonomy considerations suggest that each litigant should retain the right to press his or her individual case to trial and should also be allowed, with the aid of counsel and experts, to act on his or her own determination of whether the present valuation gleaned from previous trials is indicative of litigant’s claim. In addition, rather than have controversial statistical claims thrust on them, the litigants may decide for themselves what constitutes an accurate claim valuation and a sufficient sample of real cases. Indeed, a litigant may even prefer to reject settlement regardless of price, as with a plaintiff seeking the public accountability of a defendant or a defendant declaring that the claims are not meritorious and will never be settled. A system of individual jury trials allows the expression of such preferences procedurally.<sup>18</sup>

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16. This Article also raises the possibility that, in addition to using actual individual trials to further claim valuation, mass tort litigants could develop claim valuation through alternate dispute resolution methods such as nonbinding arbitration and summary jury trials. Indeed, litigants’ participation in such methods might be encouraged by multidistrict litigation courts seeking to further global management of the mass tort.

17. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (“The central planning model—one case, one court, one set of rules, one settlement price for all involved—suppresses information that is vital to accurate resolution. . . . One suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. . . . When courts think of efficiency, they should think of market models . . .”).

18. While Rule 23(b)(3) class actions provide notice and opt-out rights to classes, class members in classes certified pursuant to Rule 23(b)(1) or (b)(2) are not allowed to exclude themselves from the class, and notice is only required to be sent prior to a proposed settlement. *See* FED. R. CIV. P. 23(c)(2)(B) (noting that for Rule 23(b)(3) classes, “the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can

In Part II, this Article first details the empirical research regarding verdict variability. The Article then explains the risks of using a single jury to resolve a mass tort via a class action and rejects the use of class actions in light of tort law goals. Next, in Part III, the Article reviews the *Engle* litigation as a case study in verdict variability, detailing the prior individual verdicts inconsistent with the Florida *Engle* class action verdict. Then, in Part IV, the Article analyzes the use of multiple juries to resolve mass torts. The Article reviews attempts by scholars and practitioners to incorporate sampling of plaintiffs and multiple juries in class actions and sets forth the bases on which those plans have been rejected. Penultimately, the Article outlines an approach to resolution of mass torts based on multiple juries in individual cases and broad settlement. Finally, in Part V, the Article concludes that, for the resolution of mass torts with economically viable individual claims, class actions should be avoided, and the Article instead advocates that trial of individual cases, generally combined with broad settlement, is the preferable approach for management of mass tort litigation.

## II. SINGLE VERDICT CLASS ACTIONS AND MASS TORTS

### A. Verdict Variability

That there is jury verdict variation is not surprising to any lawyer. Juries are apt to render verdicts that substantially differ, even when based on nearly identical facts. The same case could seemingly receive a wide array of responses from the jury.<sup>19</sup> In similar cases, plaintiffs may succeed in showing liability sometimes but lose other times.

Indeed, any one jury's verdict may be an outlier on a potential curve of responses applying the law to the facts before it.<sup>20</sup> If one tried the same case

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be identified through reasonable effort" and "notice must clearly and concisely state . . . that the court will exclude from the class any member who requests exclusion"); FED. R. CIV. P. 23(c)(2)(A) ("For any class certified under Rule 23(b)(1) or (b)(2), the court *may* direct appropriate notice to the class." (emphasis added)); FED. R. CIV. P. 23(e)(1) ("The court must direct notice in a reasonable manner to all class members who would be bound by the proposal."). Moreover, even issued notice may not actually be effective in reaching and informing all class members of the disposition of their rights.

19. See, e.g., Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69, 77 (observing that reasonable juries may reach different conclusions in individual mass-tort trials, even when evaluating similar evidence).

20. See, e.g., David Baldus et al., *Improving Judicial Oversight of Jury Damages Assessments: A Proposal for the Comparative Additur/Remittitur Review of Awards for Nonpecuniary Harms and Punitive Damages*, 80 IOWA L. REV. 1109, 1115-16 (1995) ("[C]ommon experience suggests that among a given class of basically comparable cases, some proportion of awards—known as outliers—are likely to deviate significantly from the median award."); Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 STAN. L. REV. 815, 833 (1992) ("Every verdict is itself merely a sample from the large population of potential verdicts."); *id.* at 834 ("The fact that we normally obtain only one award from one trial of each case obscures the population of possible awards from which that one was drawn."); *id.* at 839 ("We already have noted one flaw in the imagery of the archetypal civil trial: The verdict appears precise and individualized, but in reality it is only a sample of one from a wider population of possible outcomes.").

before different juries multiple times, one would expect to be able to chart the variety of verdict responses along a curve from high to low.<sup>21</sup> For those verdicts awarding damages, the verdict distribution might occupy a bell-curve distribution, clustering around a mean, accurate award.<sup>22</sup> As a result, the decision of any one jury may well not be indicative of whether a plaintiff would prevail with another jury or receive a similar amount of damages.<sup>23</sup> Instead, numerous trials would need to occur to sketch the likelihood of liability and the likely range of awards, if liability were found.<sup>24</sup>

Experimental research on the behavior of juries has shown variation, even when they are faced with the same evidence.<sup>25</sup> For example, in one study, jurors watched precisely the same products liability trial on videotape and then rendered verdicts.<sup>26</sup> After the trial, fifty-one percent of jurors gave verdicts for the plaintiff.<sup>27</sup> Looking at the conflicting verdicts of subsequently pooled juries,

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21. See Saks & Blanck, *supra* note 20, at 833 (“That ‘population of verdicts’ consists of all the awards that would result from trying the same case repeatedly for an infinite number of times.”); *id.* at 834 (“Imagine a case were tried 100 times. Then the verdicts are arrayed on a frequency distribution. . . . It should be apparent that any single verdict is just one from among those.”).

22. See Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 577 (1993) (“[I]f the same case were tried to a jury over and over again, one should expect the damages verdicts to fall on a normal (that is, bell-shaped) distribution curve clustering more or less closely about a mean equal to the correct damages award.”); David A. Moran, *Jury Uncertainty, Elemental Independence and the Conjunction Paradox: A Response to Allen and Jehl*, 2003 MICH. ST. L. REV. 945, 948 (noting that after trying hundreds or thousands of mock trials and assessing likelihood of prevailing on each element, “[t]his distribution of answers from the mock juries would almost certainly produce a ‘normal’ or near-normal distribution, the familiar bell curve, around the median value”).

23. See Moran, *supra* note 22, at 948 (maintaining that result from individual jury trials does not indicate likelihood of same result in repeated trial).

24. *Id.* (“[T]o determine the plaintiff’s probability of success at trial, the research firm would need to stage hundreds or thousands of mock trials in which all of the evidence is presented and argued to hundreds or thousands of mock juries, each of which is then asked to assess the probability that defendant was negligent and the probability that the defendant caused plaintiff’s injuries.”).

25. As Professors Kenneth Bordens and Irwin Horowitz have noted:

[R]esearch has shown that when [sic] different juries hearing precisely the same evidence may arrive at widely differing verdicts. The damage awards made by any one of those juries cannot be used to predict what another jury (hearing exactly the same evidence) will do. We certainly cannot predict what any hypothetical jury would do based on the verdicts of one or two juries in allegedly “similar” cases.

Kenneth S. Bordens & Irwin A. Horowitz, *The Limits of Sampling and Consolidation in Mass Tort Trials: Justice Improved or Justice Altered?*, 22 L. & PSYCHOL. REV. 43, 65 (1998) (emphasis omitted) (footnote omitted) [hereinafter Bordens & Horowitz, *Limits of Sampling and Consolidation*]; see also Kenneth S. Bordens & Irwin A. Horowitz, *Mass Tort Civil Litigation: The Impact of Procedural Changes on Jury Decisions*, 73 JUDICATURE 22, 24 (1989) [hereinafter Bordens & Horowitz, *Mass Tort Civil Litigation*] (“[T]here was a rather significant amount of inter-jury disagreement. Juries exposed to precisely the same evidence and experimental manipulations rendered highly divergent decisions.”).

26. Shari Seidman Diamond et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DEPAUL L. REV. 301, 304-05 (1998); Stephan Landsman et al., *Be Careful What You Wish for: The Paradoxical Effects of Bifurcating Claims for Punitive Damages*, 1998 WIS. L. REV. 297, 315-16.

27. Diamond et al., *supra* note 26, at 305.

the study authors noted that “[t]he combined perspective of the particular set of jurors who happen to be selected for a case will determine the outcome and that outcome might have been different if a different sample of six had been selected.”<sup>28</sup> When the jurors deliberated as part of juries, 30% of juries who saw the moderate case found for the plaintiff, and 12% of juries who saw the weak case found for the plaintiff.<sup>29</sup>

In another study in which jurors heard the same toxic tort trial and the effect of separated trials was examined, 72% of juries in a bifurcated or trifurcated trial found for plaintiff.<sup>30</sup> When liability was judged before causation, 83% of juries found liability, and, when liability was judged after causation, 97% of juries found liability.<sup>31</sup> For general causation verdicts, 85.7% of juries found for plaintiffs in a unitary trial, and 56.5% of juries found for plaintiffs in a separate trial.<sup>32</sup>

In addition, outside of experimental settings with their controlled evidence, empirical studies of actual juries also show substantial jury variation.<sup>33</sup> One study of jury verdict variability in Florida and Kansas City from the mid-1970s to the late 1980s showed that injury severity was the most important available predictor of overall damage awards, but injury severity accounted for only approximately 40% of overall award variation.<sup>34</sup> When all other objective variables were added, only 60% of the variation in awards could be explained.<sup>35</sup> Another study could only account for 23% of the award variation of individual jurors using regression analysis.<sup>36</sup> Yet another study could only account for 40-50% of the variation in pain and suffering awards prior to death.<sup>37</sup>

Juries have particular difficulty translating their judgments about noneconomic compensatory damages, such as pain and suffering, into dollar amounts.<sup>38</sup> In one study in which jurors viewed the identical case, the mean

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28. *Id.* at 317.

29. Landsman et al., *supra* note 26, at 322.

30. Bordens & Horowitz, *Mass Tort Civil Litigation*, *supra* note 25, at 26.

31. *Id.*

32. *Id.*

33. See David W. Leebron, *Final Moments: Damages for Pain and Suffering Prior to Death*, 64 N.Y.U. L. REV. 256, 310 (1989) (“[T]he empirical data explored in this Article strongly support tort law’s poorly kept secret: that similarly injured plaintiffs who experience similar pain and endure similar suffering are often awarded vastly differing amounts of damages.”).

34. Randall R. Bovbjerg et al., *Valuing Life and Limb in Tort: Scheduling “Pain and Suffering,”* 83 NW. U. L. REV. 908, 920, 923, 941 n.156 (1989); Joseph Sanders, *Why Do Proposals Designed to Control Variability in General Damages (Generally) Fall on Deaf Ears? (And Why This Is Too Bad)*, 55 DEPAUL L. REV. 489, 493 (2006).

35. Bovbjerg et al., *supra* note 34, at 923, 941 n.156; Sanders, *supra* note 34, at 493.

36. Sanders, *supra* note 34, at 495; Roselle L. Wissler et al., *Decisionmaking About General Damages: A Comparison of Jurors, Judges, and Lawyers*, 98 MICH. L. REV. 751, 794 (1999).

37. Leebron, *supra* note 33, at 309-10.

38. See W. KIP VISCUSI, *REFORMING PRODUCTS LIABILITY* 99-107 (1991) (discussing jury difficulty and inconsistency in determining noneconomic damages, particularly for pain and suffering, because of absence of clear criteria); Mark Geistfeld, *Placing a Price on Pain and Suffering: A Method for Helping Juries Determine Tort Damages for Nonmonetary Injuries*, 83 CAL. L. REV. 773, 777 (1995)



award was \$5,420,613, and the median \$458,000, with three percent of jurors awarding amounts over \$3,136,000.<sup>39</sup> In another study that examined variance among categories of injuries, the “permanent significant” category, which included loss of a limb, an eye, a kidney, or hearing, the twenty-fifth percentile award for pain and suffering was \$9,000 and the seventy-fifth percentile award was \$598,000, while the mean was \$386,000.<sup>40</sup> Moreover, in the *Cimino v. Raymark Industries, Inc.*<sup>41</sup> asbestos litigation, one jury awarded an average of \$1,010,000 to plaintiffs suffering from mesothelioma, which was more than double the second jury’s average award of \$471,000, even though the cases tried were similar.<sup>42</sup> In another study, the highest general damage award for some injuries was more than five times greater than that of the second highest award.<sup>43</sup> In addition, in the Korean Air Lines disaster, the ten nonpecuniary damage awards entered by January 1994 ranged from nothing to \$1.4 million.<sup>44</sup> Thus, there is potential for horizontal inequity among awards in that jury awards within each category of severity of injury vary enormously,<sup>45</sup> but the median and mean awards in an injury category might be seen as appropriate by the larger community from which juries are drawn.<sup>46</sup>

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(“Studies have shown that jury awards for pain and suffering vary widely for injuries that appear to be equally severe.”); Sanders, *supra* note 34, at 493 (“Within each category of damages, pain and suffering awards exhibit considerable variance.”); David Schkade et al., *Deliberating About Dollars: The Severity Shift*, 100 COLUM. L. REV. 1139, 1142-43 (2000) (“[T]he unbounded dollar scale contributes to evidently erratic monetary judgments in many areas of the law, including not only punitive damages but also compensatory awards in cases involving . . . pain and suffering[] and intentional infliction of emotional distress.” (footnote omitted)); Wissler et al., *supra* note 36, at 756 (“[T]he findings suggest that the differences between jurors’ awards and those of the other groups do not reflect fundamental differences in decisionmaking, but rather a loss of consistency in translating perceptions of severity into damages awards.”). Because of problems of uniformity and predictability, courts in England have ruled that personal injury cases should be tried by a judge, rather than a jury. Ronen Avraham, *Putting a Price on Pain-and-Suffering Damages: A Critique of the Current Approaches and a Preliminary Proposal for Change*, 100 NW. U. L. REV. 87, 91 n.22 (2006) (citing *Ward v. James*, [1966] 1 Q.B. 273); see also Scott Brister, *The Decline in Jury Trials: What Would Wal-Mart Do?*, 47 S. TEX. L. REV. 191, 201-02 (2005) (identifying unpredictability of jury awards as argument endorsed both domestically and abroad for limiting jury trials).

39. Landsman et al., *supra* note 26, at 318.

40. Bovbjerg et al., *supra* note 34, at 921, 936-37; Sanders, *supra* note 34, at 493-94.

41. 151 F.3d 297 (5th Cir. 1998).

42. See Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 65 (“Clearly, the two juries were operating under different decision schemes, producing different award patterns.”).

43. Wissler et al., *supra* note 36, at 769.

44. Avraham, *supra* note 38, at 94 n.35; Aaron J. Broder, *Judges, Juries and Verdict Awards*, N.Y. L.J., Jan. 3, 1994, at 3.

45. See Avraham, *supra* note 38, at 94 (“[T]here is a lack of horizontal equity, measured by the extent of variation within a single category.”); Bovbjerg et al., *supra* note 34, at 924 (calling attention to problem of horizontal inequity); Leebron, *supra* note 33, at 324-25 (concluding that “jury system, coupled with deferential judicial review, produces an unacceptable degree of variation in the awards”); Michael J. Saks, *What Do Jury Experiments Tell Us About How Juries (Should) Make Decisions?*, 6 S. CAL. INTERDISC. L.J. 1, 45 (1997) (noting “a great deal of horizontal inequity—that is, large unexplained differences in awards for apparently similar injuries”).

46. See Avraham, *supra* note 38, at 94 (noting empirical basis that “the tort system is vertically

Jury variability has also been shown in the context of punitive damages. At the outset, juries differ on whether punitive damages should be awarded. For example, in *BMW of North America, Inc. v. Gore*,<sup>47</sup> an Alabama jury awarded compensatory damages and a punitive damages verdict of \$4 million on behalf of a BMW purchaser against BMW on the ground that BMW fraudulently sold cars as new when BMW had in fact painted over car parts that had corroded as a result of acid rain.<sup>48</sup> Yet in a case based on the same theory by another purchaser in the same court and heard by the same judge, another Alabama jury awarded compensatory damages but no punitive damages.<sup>49</sup> In one study in which juries viewed a videotaped toxic tort trial, ninety-two percent of juries who found the defendant liable also awarded punitive damages.<sup>50</sup>

Even if punitive damages are to be awarded, empirical studies show that the award often varies tremendously. For example, Professors Bordens and Horowitz found that mock “[j]uries exposed to precisely the same evidence and experimental manipulations rendered highly divergent decisions.”<sup>51</sup> Mock juries hearing the same case have returned a wide range of punitive damages between nothing and \$500,000, even though they were “reasonabl[y] consisten[t]” regarding issues of liability and causation.<sup>52</sup> In their large study involving hundreds of juries facing identical case presentations, Professors Schkade, Sunstein, and Kahneman found that a lawyer who accurately predicts a median \$2 million punitive damages verdict should also estimate a ten percent chance of a verdict over \$15.48 million and a ten percent chance of a verdict less than \$300,000.<sup>53</sup> Drawn from numerous different cases, their ratio predicts that the top ten percent of punitive damages verdicts will be more than 6.61 times the size of the median, and the bottom ten percent of verdicts will be 7.74 times less than the median.<sup>54</sup>

Numerous sources contribute to this variability. Juries vary in composition, and issues such as gender and wealth may affect juror awards.<sup>55</sup> Other sources of

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fair (the median and the mean awards in a given category are reasonable)”; *see also* Geistfeld, *supra* note 38, at 784 (observing that “[t]he system currently achieves some degree of vertical equity but fails to achieve horizontal equity”); Saks, *supra* note 45, at 45 (noting existence of “‘vertical equity’ (that is, the finding that jurors award less compensation to people with smaller losses and more to those with larger losses)”).

47. 517 U.S. 559 (1996).

48. *BMW*, 517 U.S. at 563-65; *see also* George L. Priest, *Introduction: The Problem and Efforts to Understand It*, in CASS R. SUNSTEIN ET AL., *PUNITIVE DAMAGES: HOW JURIES DECIDE* 1, 2 (2002) (discussing background and jury award against BMW in Alabama case later appealed to Supreme Court).

49. Priest, *supra* note 48, at 2-3. *But see id.* at 3 (“There are so few identical cases . . . that this example constitutes no more than an anecdote, leaving significant dispute over the extent of jury variability.”).

50. Landsman et al., *supra* note 26, at 328.

51. Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 59.

52. *Id.*

53. Schkade et al., *supra* note 38, at 1158.

54. *Id.* at 1158-59.

55. *See* Wissler et al., *supra* note 36, at 806 (“Men and wealthier jurors awarded more than

variability include the varying performances and arguments of lawyers and witnesses, differing rulings and comments by the same or different judges, and, of course, the varying circumstances and injuries of different plaintiffs.<sup>56</sup> In translating their views of severity into money, jurors are influenced by attorneys' efforts to anchor the jury with a particular recommended figure.<sup>57</sup> Moreover, juries are influenced by whether the plaintiff's lawyer frames the case as how much would make the plaintiff whole or how much the plaintiff would have to be paid to suffer the injury *ex ante*.<sup>58</sup> In addition, some variation may be due to biases in a particular jury.<sup>59</sup> Minimal explanation to, and training of, juries about their task may also lead to differing verdicts.<sup>60</sup> Further, juries often do not remember much of the instructions given to them.<sup>61</sup> Indeed, in a recent study, individual jury members achieved only an average of five percent correct when

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women and poorer jurors."'). *But see* Shari Seidman Diamond, *Beyond Fantasy and Nightmare: A Portrait of the Jury*, 54 *BUFF. L. REV.* 717, 737 (2006) ("Demographic characteristics like gender, race, and age generally account for very little of the variation in response.").

56. *See* Saks & Blanck, *supra* note 20, at 834 ("[T]he case could have been tried using different permutations of the same facts or different facts and arguments that could have been assembled out of the same basic case. Clearly, any given trial of a case is but a single instance from among thousands of possible trials of that same basic case.").

57. *See* Sanders, *supra* note 34, at 495-96 ("[M]ost explanations of the variability we observe in general damage awards place particular emphasis on how anchoring effects influence decisionmaking. Whenever people are asked to make numerical estimates, initial values tend to 'anchor' their final estimate by changing the standard of reference that they use when making their numerical judgment." (footnote omitted)). In one study, one group of jurors was asked by plaintiff's counsel to award for punitive damages a figure three times higher than that asked by the plaintiffs' counsel of another group of jurors. SUNSTEIN ET AL., *supra* note 48, at 22-23 tbl.1.1.1. The jurors receiving the larger request for damages then awarded 2.5 times more than the jurors who received the lower request. *Id.*

58. Sanders, *supra* note 34, at 495 n.40 ("Asking the jury to 'make the plaintiff whole' is one such frame, which is different from a 'selling price' frame that asks the jury to imagine how much the plaintiff 'would have to be paid to subject herself to the injury in the first place.'" (quoting Edward J. McCaffery et al., *Framing the Jury: Cognitive Perspectives on Pain and Suffering Awards*, 81 *VA. L. REV.* 1341, 1342 (1995))).

59. *See* Saks & Blanck, *supra* note 20, at 836 & n.145 (noting biases, including racism).

60. For example, juries adjudicating punitive damages are often given minimal instruction about how much punitive damages are to be awarded. In California, a jury is informed that "[i]n arriving at any award of punitive damages, you are to consider the following: 1. The reprehensibility of the conduct of the defendant. 2. The amount of punitive damages which will have a deterrent effect on the defendant in the light of the defendant's financial condition." Priest, *supra* note 48, at 13 (quoting *COMM. ON STANDARD JURY INSTRUCTIONS, CIVIL, SUPERIOR COURT OF L.A. COUNTY, CAL., CALIFORNIA JURY INSTRUCTIONS, CIVIL: BOOK OF APPROVED JURY INSTRUCTIONS [BAJI] Part 14.71* (Paul G. Breckenridge ed., West Publ'g Co. 8th ed. 1994)); *see also* Diamond, *supra* note 55, at 750 ("[T]here is . . . evidence that legal instructions as they are typically given often fail to provide jurors with helpful legal guidance."). Typically, jury instructions may also state, "[t]he law provides no fixed standards as to the amount of such punitive damages, but leaves the amount to the jury's sound discretion, exercised without passion or prejudice." Priest, *supra* note 48, at 13. With that scant instruction, the jury then proceeds to award a dollar amount for punitive damages. *Id.* ("That is it. Those phrases constitute in the entirety the 'training' of the jury with respect to the award of punitive damages. The judge tells the jury no more.").

61. SUNSTEIN ET AL., *supra* note 48, at 21 ("[W]e were surprised by how rarely jurors mentioned judicial instructions when thinking about their individual decisions and even when deliberating as juries.").

tested on their memory and understanding of jury instructions.<sup>62</sup> And what memory jurors do have may be inaccurate.<sup>63</sup>

When considering punitive damages, juries react similarly with regard to their moral outrage for an act.<sup>64</sup> But juries translate that moral outrage into widely varying dollar amounts.<sup>65</sup> This difference stems from juries' difficulty in translating their moral outrage into a fixed dollar amount.<sup>66</sup> In addition, deliberation within a group produces a severity shift in which group dynamics push dollar awards substantially higher than predeliberation individual juror figures when the group is incensed and awards somewhat higher than predeliberation individual juror figures when the group is less troubled; thus, the particular mix of jurors creates a group effect that further contributes to jury award unpredictability.<sup>67</sup> As a result, according to one study, "*the judgment of any particular dollar jury is likely to be a poor estimate of overall community sentiment.*"<sup>68</sup>

The various ways a court may take a case from a jury, or shape its verdict, do not remedy the problem of jury verdict variability. On issues of liability, the jury's decision is only partly hemmed by a summary judgment, directed verdict,

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62. *Id.* at 23 tbl.1.1. Interestingly, one study showed that the more time a jury focused on the judge's instructions, the less likely that jury was to grant punitive damages. *Id.*

63. *See id.* at 21 ("[J]urors did not have accurate memories of the instructions, even when tested a few minutes after making their decisions.").

64. *See id.* at 31 ("In evaluating cases on a bounded numerical scale, people demonstrate a remarkably high level of moral agreement. At least in the personal injury cases we study, this moral consensus, on what might be called *outrage* and *punitive intent*, cuts across differences in gender, race, income, age, and education.").

65. *See* Schkade et al., *supra* note 38, at 1141-42 ("That study . . . found that with respect to the underlying moral evaluation, groups of different (non-deliberating) jurors are likely to reach similar conclusions about the relative severity of different cases. . . . At the same time, the study found that assessment of cases in terms of dollars produces great unpredictability." (emphasis omitted) (footnotes omitted)); Cass R. Sunstein et al., *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 YALE L.J. 2071, 2078 (1998) ("Even when there is a consensus on punitive intent, there is no consensus about how much in the way of dollars is necessary to produce appropriate suffering in a defendant. . . . [W]idely shared and reasonably predictable judgments about punitive intent become highly erratic judgments about appropriate dollar punishment.").

66. SUNSTEIN ET AL., *supra* note 48, at 31-32 ("A basic source of arbitrariness in the existing system of punitive damages (and a problem not limited to the area of punitive damages) is the difficulty of expressing a moral judgment as a dollar amount."); *id.* at 42 ("When juries produce unpredictable dollar awards . . . a central reason is that jurors are asked to scale without a modulus — to come up with dollar figures for punishment without being given guidance about the meaning or consequence of different choices on the unbounded dollar scale.").

67. *See* Schkade et al., *supra* note 38, at 1143 ("[A]s compared with the median of individual predeliberation judgments, deliberation significantly increases high dollar awards, increases high punishment ratings, decreases low punishment ratings, and modestly increases low dollar awards. . . . [I]t follows that deliberating juries produce even more unpredictability than was observed for statistical juries." (emphasis omitted)).

68. SUNSTEIN ET AL., *supra* note 48, at 40-41; *cf.* Theodore Eisenberg, Jeffrey J. Rachlinski & Martin T. Wells, *Reconciling Experimental Incoherence with Real-World Coherence in Punitive Damages*, 54 STAN. L. REV. 1239, 1245, 1247 (2002) (noting that "[m]uch concern about punitive awards focuses on actual or perceived outliers—the occasional crazy jury" but that "[l]eft unreported are the mass of sensible awards").

or judgment as a matter of law. Summary judgment is only granted when there is “no genuine issue as to any material fact,” because a reasonable jury could not, based on the evidence in the record, find for the party opposing summary judgment—an approach leaving considerable leeway for variation among “reasonable” juries.<sup>69</sup> Under motions for judgment as a matter of law, a jury verdict is reversed if no reasonable factfinder, based on the evidence presented, could find as the jury had.<sup>70</sup> But, of course, where reasonable factfinders could find either way on issues of liability, those verdicts would stand.<sup>71</sup> Similarly, judges may have differing notions of what a reasonable factfinder might be able to find, resulting in further variability.

Moreover, with regard to damages, judicial oversight of juries does not curtail jury verdict variability. The existence of remittitur and additur, which allow the court to give the litigant the choice of accepting an altered award or facing a new trial,<sup>72</sup> do not remedy these problems.<sup>73</sup> In one study, victims who drowned in similar situations received pain and suffering awards that ranged from nothing to \$137,000 (in 1987 dollars), with a mean of \$32,000.<sup>74</sup> After appellate review, awards spanned from \$4,360 to \$52,800.<sup>75</sup> Most courts apply

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69. See FED. R. CIV. P. 56(c) (stating standard for granting summary judgment); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986) (interpreting Rule 56(c) standard for summary judgment as involving inquiry into presence of genuine issue of material fact); *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (concluding that summary judgment inquiry as to existence of genuine issue of material fact is whether jury could reasonably find for either party); *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (observing that there is no genuine issue of material fact where record “could not lead a rational trier of fact to find for the non-moving party”).

70. See FED. R. CIV. P. 50(b) (providing standard for judgment as matter of law after jury returned verdict); see also FED. R. CIV. P. 50(a)(1) (“If a party has been fully heard on an issue during a jury trial and the court finds that a reasonable jury would not have a legally sufficient evidentiary basis to find for the party on that issue, the court may: (A) resolve the issue against the party; and (B) grant a motion for judgment as a matter of law against the party on a claim or defense that, under the controlling law, can be maintained or defeated only with a favorable finding on that issue.”).

71. Although issues of collateral estoppel loom, most jury instructions in mass tort litigation are artfully constructed to combine liability issues with fact-specific findings so as to avoid triggering collateral estoppel. The use of collateral estoppel in mass tort litigation is beyond the scope of this Article.

72. Irene Deaville Sann, *Remittiturs (and Additurs) in the Federal Courts: An Evaluation with Suggested Alternatives*, 38 CASE W. RES. L. REV. 157, 160-64 (1987); Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 OHIO ST. L.J. 731, 736-39 (2003).

73. See Bovbjerg et al., *supra* note 34, at 915 (“Judicial oversight only marginally curbs jury discretion.”); cf. Stephan Landsman, *Appellate Courts and Civil Juries*, 70 U. CIN. L. REV. 873, 893 (2002) (“[T]here are simply too many reasons justifying new trials to attempt an enumeration, but at the heart of the rule is a concern for the avoidance of serious injustice and a desire to insure that verdicts bear some reasonable relation to the weight of the evidence.”).

74. Leebron, *supra* note 33, at 297; see also Sanders, *supra* note 34, at 494 (summarizing results of Professor Leebron’s study comparing awards made to drowning victims).

75. Leebron, *supra* note 33, at 297; Sanders, *supra* note 34, at 494; see also Bovbjerg et al., *supra* note 34, at 915-16 (“[A]ppellate judges are also required to defer to damage findings below and lack objective standards for altering awards.” (footnote omitted)). Interestingly, “New York is apparently the only state that has a statute directing the appellate division to ‘determine that an award is excessive or inadequate if it deviates materially from what would be reasonable compensation’—judged in large part by awards in other similar cases.” Sanders, *supra* note 34, at 503 (quoting N.Y. C.P.L.R. § 5501(c)

remittitur only when the jury award “shocks the conscience” of the court, leaving considerable room for jury verdict variability.<sup>76</sup> Indeed, one commentator even has argued that the arbitrariness remaining for pain and suffering damages under the current system violates due process.<sup>77</sup> And jury awards not subject to mathematical calculation, such as pain and suffering, are likely to receive deference from the court.<sup>78</sup> Indeed, empirical evidence only suggests infrequent

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(McKinney 1995)). One study in Texas found a statewide jury verdict reversal rate of twenty-five percent of cases. Lynne Liberato & Kent Rutter, *Reasons for Reversal in the Texas Courts of Appeals*, 44 S. TEX. L. REV. 431, 440 (2003). Notably, however, appellate courts reversed thirty percent of jury verdict judgments in tort and under the state Deceptive Trade Practices Act, with a forty-nine percent rate for defendants appealing a plaintiff jury verdict and a ten percent rate for plaintiffs appealing a defendant jury verdict. *Id.* at 455-56. In personal injury cases only, defendants prevailed in appeals of thirty-eight percent of plaintiff jury verdicts, and plaintiffs succeeded in appeals of six percent of defendant jury verdicts. *Id.* at 456. Sixty percent of the statewide reversals derived from legal insufficiency of evidence pertaining to causation, damages, or another element (sometimes due to expert testimony that should have been excluded). *Id.* at 440. Only four percent of the reversals were based on challenges that the jury verdict was contrary to the great weight or preponderance of the evidence. *Id.* at 442. In addition, appellate courts increased jury involvement by reversing twenty-four percent of directed verdicts and fifty-eight percent of grants of judgment notwithstanding the verdict. Liberato & Rutter, *supra*, at 443. Appellate courts also reversed thirty-three percent of awards of summary judgment, of which fifty-eight percent of the reversals were based on the existence of fact issues for the jury. *Id.* at 446-47.

76. See Mark A. Behrens & Andrew W. Crouse, *The Evolving Civil Justice Reform Movement: Procedural Reforms Have Gained Steam, but Critics Still Focus on Arguments of the Past*, 31 U. DAYTON L. REV. 173, 186 (2006) (“Absent a finding that the award shocks the conscience, courts often uphold such awards with little more than cursory review.”); Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POL’Y 231, 267 (2003) (stating that “the ‘passion or prejudice’ and ‘shocks the conscience’ standards for evaluating excessiveness are simply no standards at all” and that they can “lead[] to both arbitrary results and the perception that the process is unprincipled”); *id.* at 292 (noting that “arbitrariness . . . currently infects the trial process”); Leebron, *supra* note 33, at 324-25 (“As currently applied . . . the jury system, coupled with deferential judicial review, produces an unacceptable degree of variation in the awards.”); Sann, *supra* note 72, at 186-87 & nn.113-14 (noting that most courts follow conscience-shocking standard for remittitur, but others grant remittitur where judge disagrees with verdict); David Fink, Note, *Best v. Taylor Machine Works, the Remittitur Doctrine, and the Implications for Tort Reform*, 94 NW. U. L. REV. 227, 243 (1999) (“While remittitur is widely recognized, it is used sparingly.” (footnote omitted)); Douglas B. Keane, Commentary, *Problems with the Administration of Remittitur in Medical Malpractice Cases: Does a Solution Exist?*, 25 J. LEGAL MED. 63, 73 (2004) (“If courts can widely disagree on whether awards are so excessive as to shock the conscience, factually analogous claims can result in disparate outcomes.”). *But see* Eric Schnapper, *Judges Against Juries—Appellate Review of Federal Civil Jury Verdicts*, 1989 WIS. L. REV. 237, 246-47, 354 (noting that, of 208 published federal appeals of jury verdicts from 1984 to 1985, 102 were overturned for lack of sufficient evidence, and stating that “a large number of appellate judges simply cannot resist acting like superjurors, reviewing and revising civil verdicts to assure that the result is precisely the verdict they would have returned had they been in the jury box”); Neil Vidmar, *Medical Malpractice Lawsuits: An Essay on Patient Interests, the Contingency Fee System, Juries, and Social Policy*, 38 LOY. L.A. L. REV. 1217, 1244-45, 1247 (2005) (arguing that high “outlier awards” in medical malpractice are frequently settled for less before appeal, or reduced via remittitur by trial judge or appellate court, but noting possibility that “fear of large jury awards . . . caused defendants to settle”).

77. DeCamp, *supra* note 76, at 292 (positing that due process requires courts to supply juries with information sufficient to reach verdicts based on reasoned judgment and relevant data).

78. See Sann, *supra* note 72, at 190-91 (urging that deference by judge to jury “is especially

use of remittitur and judgment as a matter of law, and almost no use of additur.<sup>79</sup> In addition, the court's determination of what a reasonable jury would find might also vary based on the judge's prior experiences and decisions of possibly similar prior verdicts, which may in fact be dissimilar.<sup>80</sup> Moreover, remittitur has been criticized as violating the Seventh Amendment right to jury trial.<sup>81</sup> Similarly, damage caps for noneconomic damages do not curtail jury verdict variability, except by imposing a somewhat arbitrary ceiling on the high end.<sup>82</sup>

With regard to punitive damages, the United States Supreme Court has in recent years articulated a due process review of jury awards, but much room for variation remains. The Supreme Court has noted that both trial courts and appellate courts (acting *de novo*) should review punitive damages awards based on the degree of reprehensibility of the conduct of the defendant, the ratio of punitive damages to compensatory damages, and a comparison of similar civil or criminal penalties.<sup>83</sup> Moreover, the Court also indicated a presumptive

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applicable [where] . . . damages are allocated to pain and suffering . . . . In these areas the jury performs one of its most important functions—bringing the collective experiences of the group to bear on the consideration of the damages to be awarded for such a loss”).

79. See Baldus et al., *supra* note 20, at 1120 (pointing to skepticism regarding efficacy of additur and remittitur review as reason for its infrequent use); Bovbjerg et al., *supra* note 34, at 915 (“[S]uch changes occur infrequently; the law disfavors judicial intervention and calls for change only in cases of egregious error.”). One study examining medical malpractice cases found that after 210 jury verdicts for plaintiff in Florida, there were three remittiturs, one judgment as a matter of law, and no additurs; out of 112 jury verdicts for plaintiff in New York, there were twenty-three remittiturs, four instances of judgment as a matter of law, and one additur; and out of 179 jury verdicts for plaintiff in California, there were no instances of remittitur, one judgment as a matter of law, and one additur, but twenty-four cases were adjusted downward because of statutory caps on general damages. Neil Vidmar et al., *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of Those Awards*, 48 DEPAUL L. REV. 265, 285, 292, 294 (1998); see also Leebron, *supra* note 33, at 309 (finding that in cases examined from 1980 to 1987, less than twenty percent of cases received remittitur for pain and suffering damages).

80. See Baldus et al., *supra* note 20, at 1120 (arguing that judges are no better equipped than juries to make awards); Bovbjerg et al., *supra* note 34, at 915 (“[T]rial judges, like juries, lack objective standards for deciding when to apply these powers or what award levels to deem adequate and not excessive.”); Oscar G. Chase, *Helping Jurors Determine Pain and Suffering Awards*, 23 HOFSTRA L. REV. 763, 765 (1995) (“Reviewing courts are free (as jurors are not) to use information about prior awards in similar cases, but they too are hampered by lack of information and lack of commonly accepted principle.” (footnote omitted)); Sann, *supra* note 72, at 206-09 (arguing that such courts “usurp[] the function of the jury” and giving examples of basing remittitur on selected past awards); Thomas, *supra* note 72, at 738 (“[C]riticisms are advanced that in determining the maximum reasonable verdict, judges compare damages in cases which are in fact dissimilar, and that the set of cases is incomplete because it includes only those cases in which verdicts are challenged and reported.”).

81. See Thomas, *supra* note 72, at 736 (“[U]nder a static (or fixed) approach to the re-examination clause, remittitur is unconstitutional. Moreover, even if one accepts the conception of an evolving common law, remittitur is unconstitutional because remittitur effectively eliminates the plaintiff's right to have damages determined by a jury.”).

82. See Sanders, *supra* note 34, at 510-11 (exploring rationale for use of caps in light of common criticisms of caps).

83. See *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (setting forth three “guideposts” to be applied by trial courts, and reiterating necessity of appellate courts conducting de

constitutional outside limit of a nine-to-one ratio of punitive to compensatory damages.<sup>84</sup> Even within the presumptive nine-fold limit, however, much room for jury verdict variability exists, and recent decisions have continued to uphold higher multipliers.<sup>85</sup>

*B. Mass Tort Class Actions' Undermining of Tort Goals*

Because any one class action jury may deliver an atypical, outlier verdict, the use of one class action verdict to decide the claims of numerous other claimants in a mass tort only amplifies any atypicality of the first verdict.<sup>86</sup> Thus, an outlier verdict may deny recovery to hundreds of thousands of claimants or bankrupt an entire industry, even though most juries would have not so found.<sup>87</sup> As a result, using only one verdict to resolve a mass tort is a risky endeavor, akin to resolving deeply contested issues with a single roll of the dice.<sup>88</sup> As Judge Easterbrook noted in response to a proposed class action in the Bridgestone/Firestone tire litigation, “[o]ne suit is an all-or-none affair, with high risk even if the parties supply all the information at their disposal. Getting things right the first time would be an accident.”<sup>89</sup> Indeed, some have argued that the

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novo review of such application); *see also* DeCamp, *supra* note 76, at 268 (discussing application of Supreme Court’s three “guideposts” to determine whether punitive awards are excessive).

84. DeCamp, *supra* note 76, at 268.

85. *See, e.g.,* Mathias v. Accor Econ. Lodging, Inc., 347 F.3d 672, 678 (7th Cir. 2003) (upholding thirty-seven-to-one ratio of punitive damages to compensatory damages).

86. For example, Professors Saks and Blanck state:

[J]uries are not so reliable as to justify using one or a few of them to decide a large number of cases. Take the extreme situation: If one jury is used and it tends to be much too high or too low in its estimations—compared with the population of juries from which it was drawn—then the verdicts in the tried cases would under- or overstate the damage amounts for the tried cases. Those systematic inaccuracies would then be extrapolated to the untried cases as well.

Saks & Blanck, *supra* note 20, at 848.

87. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (“This jury, jury number fourteen, may disagree with twelve of the previous thirteen juries—and hurl the industry into bankruptcy.”); Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 VA. L. REV. 1481, 1516 (1992) (“Determinations that would be made dozens, hundreds, or thousands of times under a heavily individualized system may be made only once when decisions are collective. . . . Because they apply to large groups of claims, such findings will either treat all the claims correctly or all the claims incorrectly.”).

88. *See Rhone-Poulenc*, 51 F.3d at 1300 (“One jury, consisting of six persons . . . will hold the fate of an industry in the palm of its hand.”); Richard O. Faulk et al., *Building a Better Mousetrap? A New Approach to Trying Mass Tort Cases*, 29 TEX. TECH L. REV. 779, 808 (1998) (noting that “bellwether/unitary” trial could be “all or nothing event” because “[j]ust as it is possible for a defendant to win outright and to terminate a mass tort case, it is also possible that the defendant may lose on important common issues, issues that will be forever foreclosed to reconsideration insofar as the thousands of . . . plaintiffs are concerned”).

89. *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); *see also* Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1404 (2000) (“[S]uppose that the odds are fifty percent that a given jury will return a verdict for the defendant and fifty percent that it will return a verdict for the class; and suppose that if the verdict is for the class, the expected damages will be \$200 million. . . . In such a



threat of such an all-or-nothing verdict incentivizes a risk-averse defendant to settle at any cost.<sup>90</sup>

The lack of verdict accuracy of mass tort class actions undermines the substantive tort goals of corrective justice, deterrence, and compensation that the procedure is supposed to serve. Beginning in the 1970s, a group of scholars including George Fletcher<sup>91</sup> and Richard Epstein<sup>92</sup> came to view tort law as effectuating what Aristotle called “corrective justice.”<sup>93</sup> Aristotle posited that distributive justice concerned the just starting distribution of goods within

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setting, a single class trial is a highly risky proposition for both sides.”).

90. See *Rhone-Poulenc*, 51 F.3d at 1299 (discussing concern that defendants may settle even in absence of legal liability due to fear of risk of bankruptcy); Hay & Rosenberg, *supra* note 89, at 1391-92 (discussing possibility that defendant would pay “handsome premium to avoid going to trial, even if its chances of winning at trial are strong” and that “[p]laintiffs’ recovery thus reflects not the merit of their claims, but rather the defendant’s fear of staking everything on a single trial”); Trangsrud, *supra* note 19, at 85 (stating that in Las Vegas MGM Hotel fire litigation, “[m]any of the bystander defendants’ willingness to settle . . . had more to do with the enormous transaction costs and risks created by the mass trial than it had to do with the merits of the claims against them”).

91. George P. Fletcher, *Fairness and Utility in Tort Theory*, 85 HARV. L. REV. 537, 538 (1972).

92. Richard A. Epstein, *Defenses and Subsequent Pleas in a System of Strict Liability*, 3 J. LEGAL STUD. 165, 165 (1974); Richard A. Epstein, *A Theory of Strict Liability*, 2 J. LEGAL STUD. 151, 152 (1973). As has been noted, Richard Epstein has subsequently moved to a utilitarian approach to law that draws heavily on economics and efficiency. See, e.g., RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997) (arguing that potential rights should be evaluated in terms of “net social advantage” that would be gained from their recognition and positing that rights should only be created if corresponding gain outweighs loss); Richard A. Epstein, *The Tort/Crime Distinction: A Generation Later*, 76 B.U. L. REV. 1, 4 (1996) (expressing view that legal rules should be conceptualized in terms of incentives created for individual conduct); see also Christopher J. Robinette, *Can There Be a Unified Theory of Torts? A Pluralist Suggestion from History and Doctrine*, 43 BRANDEIS L.J. 369, 387 n.126 (2005) (recognizing role of economic analysis in Epstein’s work); Gary T. Schwartz, *Mixed Theories of Tort Law: Affirming Both Deterrence and Corrective Justice*, 75 TEX. L. REV. 1801, 1802 n.7 (1997) (observing that, over time, Epstein has adopted more utilitarian perspective).

93. Schwartz, *supra* note 92, at 1802. More recent corrective justice tort scholars include Alan Calnan, Jules Coleman, Gregory Keating, Stephen Perry, Ernest Weinrib, and Richard Wright. See generally ALAN CALNAN, JUSTICE AND TORT LAW (1997) (emphasizing distributive nature of tort law); ALAN CALNAN, A REVISIONIST HISTORY OF TORT LAW: FROM HOLMESIAN REALISM TO NEOCLASSICAL RATIONALISM (2005) (tracing historical development of tort law and criticizing Oliver Wendell Holmes’s influential tort historiography); JULES L. COLEMAN, RISKS AND WRONGS (1992) (emphasizing importance of market forces, providing outline of corrective-justice model, and examining relationship of corrective justice to American tort law system); ERNEST J. WEINRIB, THE IDEA OF PRIVATE LAW (1995) (discussing Aristotle’s role in development of moral norms and arguing that such norms are more important than market forces in driving development of tort law); Richard W. Wright, *The Standards of Care in Negligence Law*, in PHILOSOPHICAL FOUNDATIONS OF TORT LAW 249 (David G. Owen ed., 1995) (emphasizing Aristotle’s importance in defining normative foundations driving development of current negligence theory); Gregory C. Keating, *Reasonableness and Rationality in Negligence Theory*, 48 STAN. L. REV. 311 (1996) (developing conception of due care based on social contract theory, and arguing that that model more accurately describes current tort law than law-and-economics theories); Stephen R. Perry, *The Moral Foundations of Tort Law*, 77 IOWA L. REV. 449 (1992) (proposing model of reparative justice that takes corrective justice theories into account).

society.<sup>94</sup> Corrective justice facilitates the correction of imbalances in distributive justice effected through one person's injuring another.<sup>95</sup>

A single-adjudication approach to mass tort litigation does not serve corrective justice well. As noted, the potential for a class-action jury verdict to be too high or too low, on a bell curve of jury responses, could lead to an erroneously high or low valuation of a claim being extrapolated to perhaps tens of thousands of claimants in a mass tort litigation. In addition, an outlier jury may find liability when most juries would not or vice versa. Whether overpaid or underpaid, the deviation from the proper payment to plaintiffs departs from the requirements of corrective justice. Either the law renders the relationship unequal in favor of plaintiffs by overpaying or unequal in favor of defendants by underpaying. In contrast, the most accurate valuation of a claim is that value around which most juries would cluster, as that would best parallel community sentiment. As discussed above, an aberrational jury verdict may, for example, have been the result of any number of inappropriate decision-making factors, such as discriminatory concerns of race or gender, or an eccentric valuation of harm or assessment of liability. The class action, outlier jury verdict therefore undermines tort law's yearnings for fairly applied corrective justice.

Jury verdict variability also poses problems for mass tort class actions to satisfy the tort goals of deterrence and economic efficiency. Since the 1970s, an influential group of economically inclined tort scholars have argued that tort law should have deterrence as a primary goal.<sup>96</sup> Among the foremost advocates for this approach have been Guido Calabresi<sup>97</sup> and Richard Posner.<sup>98</sup> Commentators adopting this approach sought to have tort law deter conduct that was economically inefficient.<sup>99</sup> That is, the main concern of tort law is to provide incentives for a potential defendant to spend money on safety up to the point that the cost of the safety precautions exceeds the cost of any accidents, discounted by their likelihood.<sup>100</sup>

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94. Schwartz, *supra* note 92, at 1802 n.5.

95. *Id.*

96. *Id.* at 1803-04.

97. GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* 26-27 (1970); see Schwartz, *supra* note 92, at 1805 (noting Calabresi's evolving acceptance of tort law, rather than alternate system, as repository of economic principles).

98. See WILLIAM M. LANDES & RICHARD A. POSNER, *THE ECONOMIC STRUCTURE OF TORT LAW* 9-14 (1987) (discussing criticisms of positive economic theory of tort law in context of deterrence); Richard A. Posner, *A Theory of Negligence*, 1 J. LEGAL STUD. 29, 30 (1972) (explaining that "a negligence standard of liability, properly administered, is broadly consistent with an optimum investment in accident prevention by the enterprises subject to the standard").

99. See, e.g., Schwartz, *supra* note 92, at 1805 ("In Calabresi's 1970 view, tort rules were filled with a range of moralisms that were entirely inappropriate from a deterrence perspective."); see also Priest, *supra* note 48, at 15 ("Our legal system has made punitive damages part of a set of legal commands aimed at optimal balancing of safety and cost — that is, deterring behavior that is too risky, but not discouraging valuable innovation and production.").

100. The formula originally proposed by Learned Hand sets forth the basic efficiency approach to tort law. *United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947); see also CALABRESI, *supra* note 97, at 263 (referring to "Learned Hand's classic negligence calculus"); Geistfeld, *supra* note

Seen against the backdrop of jury verdict variation, the use of a single class action verdict fails to forward tort efficiency goals.<sup>101</sup> A single class action verdict may differ significantly from an accurate assessment of the economically efficient calculation, and its miscalculation may affect an entire class of plaintiffs and a whole mass tort litigation. Ex ante, defendants might not be incentivized to undertake efficient conduct if they are faced with the prospect of resolution of a mass tort via a single class action that varies widely from other potential verdicts; this potential variance may seem chaotic to defendants.<sup>102</sup> For example, if defendants do not believe that the tort system will accurately assess liability in connection with economic approaches to deterrence, then defendants may not be adequately deterred from undertaking societally inefficient activities. In addition, defendants might be overdeterred from efficient actions because of uncertainty and risk averseness magnified by the prospect of a single class action verdict.<sup>103</sup> Moreover, plaintiffs also might not be incentivized to take cost-

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38, at 786 (explaining that tort law promotes deterrence through liability because of individual's incentive to weigh costs of precautions that might decrease injury against liability costs that might be incurred without safety precautions); Leebron, *supra* note 33, at 272 (“[T]he tort system acts as a kind of ‘shadow pricing’ mechanism, determining the cost of certain inputs (injuries), so that correct cost/benefit decisions may be made both by the relevant enterprise and the consumer.” (footnote omitted)); Posner, *supra* note 98, at 73 (arguing that liability rules were designed to foster economically efficient levels of safety); Schwartz, *supra* note 92, at 1819 (stating that, in addition to its economic implications, Learned Hand’s formula “is also conducive to an ethical explanation of the negligence liability standard”). Under Learned Hand’s famous approach, a party should only be found negligent if the cost of precautions to prevent an accident (the “Burden” or “B”), is less than the cost of the resulting injury (the “Loss” or “L”) discounted by the likelihood that injury would have occurred (the “Probability” or “P”). *Carroll Towing*, 159 F.2d at 173. Thus, negligence should be imposed only where  $B < PL$ . *Id.* Interestingly, a defendant’s spending more than  $PL$  to prevent an accident is not economically desirable in that the cost of precautions would exceed the cost of injuries. Indeed, if the only precaution available to defendant costs more than  $PL$ , economic efficiency would counsel the defendant against undertaking the precaution and simply letting the harm occur.

101. See James F. Blumstein, *Making the System Work Better: Improving the Process for Determination of Noneconomic Loss*, 35 N.M. L. REV. 401, 411 (2005) (contending that award variability undermines tort system’s ability to function optimally as deterrent); Bovbjerg et al., *supra* note 34, at 909 (positing that greater predictability of outcomes would promote tort law’s deterrent function); Sanders, *supra* note 34, at 496 n.43 (“[T]he ad hoc and unpredictable nature of [jury] awards arguably threatens insurance systems . . . and hinders the efficient operation of tort law’s deterrence function.”).

102. Bovbjerg et al., *supra* note 34, at 925 (“To send more effective—and efficient—deterrent signals to defendants, the system should focus primarily on consistency [and] predictability . . . .”); Leebron, *supra* note 33, at 311 (“From an economic perspective, a defendant who faces an unduly risky profile of potential tort judgments will likely invest in an inefficient level of safety and production.”).

103. See Avraham, *supra* note 38, at 96 n.43 (“Another case where a wide distribution of awards is problematic [for optimal deterrence] is where defendants are risk averse.”); Baldus et al., *supra* note 20, at 1117 (“Inadequate notice of the limits of potential liability may impair planning for risk-producing activities and induce over- or under-compliance.”); Bovbjerg et al., *supra* note 34, at 925 (“[E]rrors in valuation may cause overdeterrence—the taking of too many costly precautions, or withdrawal from risky activity altogether.”); Chase, *supra* note 80, at 769 (“Unpredictability . . . leads to inefficiencies because of over- or under-precautions by affected industries and insurers.”); Geistfeld, *supra* note 38, at 786 (arguing that unpredictability of awards in tort system keeps industries from making accurate cost-benefit analysis with regard to accident prevention); Leebron, *supra* note

effective precautions if a class action jury's assessment of comparative fault is not expected to be accurate.

Furthermore, in other areas of tort law, the litigants before the court have limited sums involved the specific case, so systemic incentives for future cases are far more important to efficiency goals than is the verdict for the present litigants—after all, their accident has already occurred. In mass torts, however, the particular case might decide issues pertaining to an entire product line that may constitute the lifeblood of an entire company or industry. A verdict that significantly overestimates the cost of loss or likelihood of loss could lead to layoffs of thousands of employees and closing of manufacturing plants. Indeed, one unusually high jury claim valuation, if extrapolated to thousands of claims, may inappropriately bankrupt an entire industry.<sup>104</sup> Following such an industry-wide bankruptcy, sale and adaptation of human and physical capital to other tasks would involve significant transaction costs attending its redeployment to other uses, thus hindering efficiency goals.

Moreover, a jury may significantly underestimate the cost of loss or likelihood of loss or may overestimate the burden of precautions. In that situation, a far-reaching class action verdict may result in no finding of negligence for a product, resulting in the product's remaining in the market when it should not. The cost of losses from injury would then continue to exceed the cost of alternative safety precautions or the social costs of foregoing the activity, but the legal system would not correct the inadequate precaution investment by imposing liability. If our system does not have a process to determine the optimal safety expenditure accurately, then the ability of tort law to deter inefficient conduct is compromised.

It is no response to these tort efficiency concerns to argue that class actions consume lower transaction costs to litigate than individual suits for class members in a particular mass tort.<sup>105</sup> Initially, the cost of such an unwieldy single suit is tremendous,<sup>106</sup> and litigants will spend even larger sums in preparation

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33, at 272 (“If the tort system overvalues injuries, then business will invest too much in accident prevention. If, on the other hand, the tort system undervalues injuries, then there will be too little investment and hence too many injuries.”); Schkade et al., *supra* note 38, at 1142 (“[T]he same case, presented to different jurors, will elicit similar ratings but quite different dollar awards, producing a situation where the similarly situated are not treated similarly. This unpredictability may well produce overdeterrence in risk-averse defendants or in any case muffled and confusing signals.”). *But see* Tom Baker et al., *The Virtues of Uncertainty in Law: An Experimental Approach*, 89 IOWA L. REV. 443, 485, 487 (2004) (noting concerns of Polinsky and Shavell about overdeterrence, but arguing that “uncertainty could indeed be manipulated in order to increase deterrence”).

104. *See, e.g., In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (positing that one jury determination could cripple entire industry).

105. *See* Trangsrud, *supra* note 19, at 76 (“Many arguments have been offered for these exceptional trials, but the principal factor driving recent experimentation with mass trials is the desire to conserve scarce judicial resources.”); *cf.* FED. R. CIV. P. 1 (stating that rules of civil procedure “should be construed and administered to secure the just, speedy, and *inexpensive* determination of every action and proceeding” (emphasis added)).

106. As Professor Trangsrud has noted:

Mass trials also introduce substantial additional complications, delays, and costs that

because of the high stakes.<sup>107</sup> But even if the class action provided discounts in litigation transaction costs, the efficiency incentives set by mass tort litigation pertain to far more vast monetary amounts relating to industry decisions in pharmaceuticals, manufacturing, and consumer and medical products.<sup>108</sup> Thus, litigation transaction costs of individual trials pale in comparison to the sums involved in setting up proper efficiency incentives in the tort system. In addition, as detailed below,<sup>109</sup> settlement may well obviate the need to try many of the cases of a mass tort.

Finally, scholars have noted that one benefit of torts is its compensation of plaintiffs who need money for medical or psychological bills or merely economic support while they recuperate from their injuries.<sup>110</sup> Again, a single class action verdict approach to a mass tort may be problematic. The potentially inadequate jury verdict, judged against the majority of jury responses, may undercompensate plaintiffs who need money for their medical bills and economic hardships imposed by their injuries. If the class's claims are rejected en masse by one class action jury, these plaintiffs may therefore be unable to obtain needed medical treatment or may be bankrupted—hardly the empowerment of plaintiffs sometimes championed by class action advocates.

### III. THE *ENGLE* TOBACCO CLASS ACTION: AN EXAMPLE OF JACKPOT JUSTICE?

The *Engle v. Liggett Group, Inc. (Engle II)*<sup>111</sup> class action in Florida provides an example of the misuse of a single jury in an attempt to adjudicate an entire mass tort via a class action. In 1994, the trial court in *Engle* certified a nationwide class action of smokers and their survivors against the tobacco

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would not exist if factually related claims were tried individually. To assemble all or most plaintiffs in a single venue, to resolve questions of representation and proof at a mass trial, and to decide the host of satellite issues and motions that such an extraordinary procedure creates requires a substantial amount of judicial and attorney time that would be unnecessary if the claims were tried individually in appropriate venues. It is difficult to quantify the extent to which the inefficiencies of mass trials offset the asserted efficiencies of such proceedings, but the frequent interlocutory appeals and reversals in cases litigated to date suggest that the offset is substantial.

Trangsrud, *supra* note 19, at 78.

107. See David Friedman, *More Justice for Less Money*, 39 J.L. & ECON. 211, 222 (1996) (“With more at stake, we would expect both parties to spend more on trying to win.”).

108. See, e.g., Steven Garber, *Product Liability, Punitive Damages, Business Decisions and Economic Outcomes*, 1998 WIS. L. REV. 237, 257-70 (examining role tort system plays in economic decision making in pharmaceutical, medical device, and consumer product fields through mass tort litigation and punitive damages).

109. See *infra* Part IV.B for a discussion of multiple adjudications of individual cases as a viable approach to developing settlement values.

110. See, e.g., Jeffrey O’Connell & Christopher J. Robinette, *The Role of Compensation in Personal Injury Tort Law: A Response to the Opposite Concerns of Gary Schwartz and Patrick Atiyah*, 32 CONN. L. REV. 137, 139 (1999) (“[W]e would extend the mixed theory of tort law beyond deterrence and corrective justice to include compensation. We argue compensation is not only a plausible goal of the tort system, it is a desirable—and indeed an essential—goal.”).

111. 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007).

industry under Florida Rule of Civil Procedure 1.220(b)(3)<sup>112</sup> for injuries allegedly caused by smoking.<sup>113</sup> On interlocutory appeal in 1996, the Third District Court of Appeal affirmed class certification but limited the class to only Florida smokers.<sup>114</sup> The trial court in 1998 then issued a trial plan in three phases.<sup>115</sup> In Phase I, the six-person jury<sup>116</sup> during a year-long trial heard issues of liability and entitlement to punitive damages for the class in its entirety.<sup>117</sup> In 1999, the jury concluded Phase I by returning a verdict for the plaintiff class on all counts.<sup>118</sup> In Phase II-A, issues of entitlement and amount of compensatory damages for the three class representatives were to be determined, and in Phase II-B, the jury was to determine the total lump sum punitive damages award, if

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112. As Florida's Third District Court of Appeal in *Engle* noted, "Florida Rule of Civil Procedure 1.220[] is based upon Federal Rule of Civil Procedure 23, [and] federal precedents are persuasive authority in . . . construction of Florida's class action rules." *Liggett Group Inc. v. Engle (Engle I)*, 853 So. 2d 434, 444 n.5 (Fla. Dist. Ct. App. 2003), *approved in part, quashed in part*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007).

113. *Engle II*, 945 So. 2d at 1256. The original class definition was "[a]ll United States citizens and residents, and their survivors, who have suffered, presently suffer or who have died from diseases and medical conditions caused by their addiction to cigarettes that contain nicotine." *Id.* Defendants included cigarette companies "R.J. Reynolds Tobacco Company; RJR Nabisco, Inc.; Philip Morris Incorporated (Philip Morris U.S.A.); Philip Morris Companies, Inc.; Lorillard Tobacco Company; Lorillard, Inc.; Brown & Williamson Tobacco Corporation, individually and as successor by merger to The American Tobacco Company; Liggett Group Inc.; Brooke Group Holding Inc., and Dosal Tobacco Corp. The industry organizations are The Council for Tobacco Research-U.S.A., Inc. and The Tobacco Institute, Inc." *Id.* at 1256 n.3. When *Engle* was certified, it "was the first smokers' case to be certified as a class action anywhere in the country." *Engle I*, 853 So. 2d at 442.

114. *Engle II*, 945 So. 2d at 1256.

115. *Id.*

116. Jury decision-making reliability decreases with smaller size. *See Saks & Blanck, supra* note 20, at 850 ("As the size of the jury decreases, the error variation in awards increases.").

117. *Engle II*, 945 So. 2d at 1256.

118. *Id.* at 1256-57. According to the Florida Supreme Court, the Phase I findings were:

(1) that cigarettes cause some of the diseases at issue; (2) that nicotine is addictive; (3) that the defendants placed cigarettes on the market that were defective and unreasonably dangerous; (4) that the defendants made a false or misleading statement of material fact with the intention of misleading smokers; (4)(a) that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both; (5) that all of the defendants agreed to misrepresent information relating to the health effects of cigarettes or the addictive nature of cigarettes with the intention that smokers and the public would rely on this information to their detriment; (5)(a) that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment; (6) that all of the defendants sold or supplied cigarettes that were defective; (7) that all of the defendants sold or supplied cigarettes that at the time of the sale or supply did not conform to representations of fact made by the defendants; (8) that all of the defendants were negligent; (9) that all of the defendants engaged in extreme and outrageous conduct or with reckless disregard relating to cigarettes sold or supplied to Florida smokers with the intent to inflict severe emotional distress; and (10) that all of the defendants' conduct rose to a level that would permit an award of punitive damages.

*Id.* at 1257 n.4.

any, for the class as a whole.<sup>119</sup> The jury determined after Phase II-A that the class representatives were entitled to an aggregate compensatory award of \$12.7 million,<sup>120</sup> which included \$4.023 million to Angie Della Vecchia and \$2.85 million to Mary Farnan, both of whom suffered lung cancer, as well as \$5.8 million to throat-cancer-sufferer Frank Amodeo.<sup>121</sup> For Phase II-B, the jury awarded \$145 billion in punitive damages to the class as a whole.<sup>122</sup> Under Phase III of the trial plan, new juries were to hear issues of individual liability and compensatory damages for each of the estimated 700,000 class members.<sup>123</sup>

On appeal after the Phase II-B verdicts, the Third District Court of Appeal reversed and remanded with instructions to decertify the class.<sup>124</sup> The court held that individualized issues outweighed common issues, rendering class certification not superior.<sup>125</sup> In addition, the court reversed the punitive damages award because it preceded any determination of liability to class members other than the class representatives and prevented comparison of punitive damages and compensatory damages, taking into account class members' individual circumstances.<sup>126</sup> The court also rejected plaintiffs' proposal that for assessing punitive damages the jury could "extrapolate" the class's compensatory damages from the compensatory damages assessed for "three class representatives [who]

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119. *Id.* at 1257.

120. *Id.*

121. *Id.* at 1254-56; *see also Compensatory Damages in Engle Class Action Total \$12.7 Million*, MEALEY'S LITIG. REP.: TOBACCO, Apr. 20, 2000, at 4, 4 (reporting distribution of total compensatory damages to each class representative); *7 Tobacco Firms Liable in First Class Action Trial; Damage Phase Begins Sept 7 in Cancer Cases*, MEALEY'S LITIG. REP.: TOBACCO, July 21, 1999, at 3, 3-4 (discussing jury verdict before damage phase began). Class representatives' damages were offset by their comparative fault. *Engle II*, 945 So. 2d at 1257. The trial court subsequently granted defendants' motion for a directed verdict as to class representative Frank Amodeo on statutes of limitations grounds for several claims, and the Florida Supreme Court held Mr. Amodeo's entire award to be barred by the statute of limitations. *Id.* at 1254, 1276.

122. *Engle II*, 945 So. 2d at 1257.

123. *Id.* at 1258. Under the trial plan, class members who were successful in Phase III would be entitled to an equal share of the punitive damages. *Id.*

124. *Liggett Group Inc. v. Engle (Engle I)*, 853 So. 2d 434, 440 (Fla. Dist. Ct. App. 2003), *approved in part, quashed in part*, 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007).

125. *Id.* at 446-47 ("Because each class member had unique and different experiences that will require the litigation of substantially separate issues, class representation is not 'superior' to individual suits."). Such individualized issues included reliance, medical causation, affirmative defenses, damages, and choice of law. *Id.* at 446-48; *see also id.* at 450 ("As now demonstrated by the two-year trial, even though there is a common nucleus of facts concerning the defendants' conduct, this case presents a multitude of individualized issues which make it particularly unsuitable for class treatment."); *id.* ("Florida's class action rules, substantive tort law, and state and federal guarantees of due process and a fair trial, require class decertification.").

126. *Engle I*, 853 So. 2d at 450. The court noted that by determining class punitive damages before determining liability and compensatory damages for class members, "the class-wide punitive damages award improperly places the proverbial 'cart before the horse.'" *Id.* at 456. In addition, the court reversed the punitive damages award because the award was excessive under state and federal law, *id.*, because improper race-based arguments by plaintiffs' counsel resulted in a "runaway" jury award," *id.* at 458, and because the punitive damages verdict was barred by the tobacco settlement reached by the Florida Attorney General, *id.* at 467.

were hand-picked by plaintiffs' counsel" and who "cannot be viewed as a statistically significant nor representative 'sample.'"<sup>127</sup>

On further appeal, the Florida Supreme Court held that certain common liability findings by the jury in Phase I could stand but that remaining issues were individualized and required decertification of the class.<sup>128</sup> Accordingly, jury findings against the tobacco defendants on general causation,<sup>129</sup> addiction of cigarettes,<sup>130</sup> strict liability,<sup>131</sup> fraud by concealment,<sup>132</sup> civil conspiracy to conceal,<sup>133</sup> breach of implied warranty,<sup>134</sup> breach of express warranty,<sup>135</sup> and

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127. *Engle I*, 853 So. 2d at 455 & n.24 ("No statistical authority would condone an extrapolation of findings from three handpicked individuals to a population of 700,000."). The court noted that "[e]xtrapolation is not theoretically permissible in this case because of the absence of essential information concerning actual class size, class composition, and the amounts of compensatory damages ultimately recoverable by class members." *Id.* at 455. Here, "[e]ssentially, the compensatory damages awarded to the three Phase 2 plaintiffs proved nothing about the amounts of compensatory damages potentially recoverable by the hundreds of thousands of class members whose claims have not yet been tried." *Id.*

128. *Engle II*, 945 So. 2d at 1254-55.

129. *See id.* at 1276-77 (stating "that smoking cigarettes causes aortic aneurysm, bladder cancer, cerebrovascular disease, cervical cancer, chronic obstructive pulmonary disease, coronary heart disease, esophageal cancer, kidney cancer, laryngeal cancer, lung cancer (specifically, adenocarcinoma [sic], large cell carcinoma, small cell carcinoma, and squamous cell carcinoma), complications of pregnancy, oral cavity/tongue cancer, pancreatic cancer, peripheral vascular disease, pharyngeal cancer, and stomach cancer"); *see also* Verdict Form for Phase I at 1-2, *Engle v. RJ Reynolds Tobacco Co.*, No. 94-08273 CA-22 (Fla. Cir. Ct. July 13, 1999) (asking "[d]oes smoking cigarettes cause one or more of the following diseases or medical conditions?" and listing conditions).

130. *See Engle II*, 945 So. 2d at 1277 (describing Jury Question 2 finding as "that nicotine in cigarettes is addictive"); *see also* Verdict Form for Phase I, *supra* note 129, at 2 (containing title "Addiction/Dependence" and asking "[a]re cigarettes that contain nicotine addictive or dependence producing?").

131. *See Engle II*, 945 So. 2d at 1277 (describing Jury Question 3 finding as "that the defendants placed cigarettes on the market that were defective and unreasonably dangerous"); *see also* Verdict Form for Phase I, *supra* note 129, at 2 (containing title "Strict Liability" and asking "[d]id one or more of the Defendant Tobacco Companies place cigarettes on the market that were defective and unreasonably dangerous?").

132. *See Engle II*, 945 So. 2d at 1277 (describing Jury Question 4(a) finding as "that the defendants concealed or omitted material information not otherwise known or available knowing that the material was false or misleading or failed to disclose a material fact concerning the health effects or addictive nature of smoking cigarettes or both"); *see also* Verdict Form for Phase I, *supra* note 129, at 5 (containing title "Fraud by Concealment" and asking "[d]id one or more of the Defendants conceal or omit material information, not otherwise known or available, knowing the material was false and misleading, or failed to disclose a material fact concerning or proving the health effects and/or addictive nature of smoking cigarettes?").

133. *See Engle II*, 945 So. 2d at 1277 (describing Jury Question 5(a) finding as "that the defendants agreed to conceal or omit information regarding the health effects of cigarettes or their addictive nature with the intention that smokers and the public would rely on this information to their detriment"); *see also* Verdict Form for Phase I, *supra* note 129, at 7 (containing title "Civil Conspiracy-Concealment" and asking "[d]id two or more of the Defendants enter into an agreement to conceal or omit information regarding the health effects of cigarette smoking, or the addictive nature of smoking cigarettes, with the intention that smokers and members of the public rely to their detriment?").

134. *See Engle II*, 945 So. 2d at 1277 (describing Jury Question 6 finding as "that all of the defendants sold or supplied cigarettes that were defective"); *see also* Verdict Form for Phase I, *supra*



negligence<sup>136</sup> were res judicata as to all 700,000 class members.<sup>137</sup> The court therefore held that “[i]ndividual plaintiffs within the class will be permitted to proceed individually with the findings set forth above given res judicata effect in any subsequent trial between individual class members and the defendants.”<sup>138</sup> Citing federal precedent on issue class actions under Rule 23(c)(4),<sup>139</sup> the court noted that because “the Phase I trial has been completed” in this case, “[t]he pragmatic solution is to now decertify the class, retaining the jury’s Phase I findings other than those on the fraud and intentional infliction of emotional distress claims, which involved highly individualized determinations, and the finding on entitlement to punitive damages questions, which was premature.”<sup>140</sup>

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note 129, at 8-9 (containing title “Breach of Implied Warranty,” asking “[d]id one or more of the Defendant Tobacco Companies sell or supply cigarettes that were defective in that they were not reasonably fit for the uses intended?” and finding each defendant liable for all periods, except for Brooke Group, Ltd., Inc. prior to 1974).

135. See *Engle II*, 945 So. 2d at 1277 (describing Jury Question 7 as “that all of the defendants sold or supplied cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said defendants”); see also Verdict Form for Phase I, *supra* note 129, at 9-10 (containing title “Breach of Express Warranty,” asking “[d]id one or more of the Defendant Tobacco Companies sell or supply cigarettes that, at the time of sale or supply, did not conform to representations of fact made by said Defendant(s), either orally or in writing?” and answering affirmatively as to all defendants except as to Brooke Group Ltd., Inc. before July 1, 1974).

136. See *Engle II*, 945 So. 2d at 1277 (stating Jury Question 8 finding “that all of the defendants were negligent”); see also Verdict Form for Phase I, *supra* note 129, at 10-11 (containing title “Negligence,” asking “[h]ave Plaintiffs proven that one or more of the Defendant Tobacco Companies failed to exercise the degree of care which a reasonable cigarette manufacturer would exercise under like circumstances?” and answering affirmatively as to all defendants for all periods, except for Brooke before 1969).

137. *Engle II*, 945 So. 2d at 1255. The court, however, also found that jury findings against the defendants on fraud and misrepresentation, and on intentional infliction of emotional distress, were “inadequate to allow a subsequent jury to consider individual questions of reliance and legal cause” and therefore could not be applied to the rest of the class. *Id.* In addition, the finding of civil conspiracy for misrepresentation was not upheld, because it relied on the underlying misrepresentation finding. *Id.*

138. *Id.* at 1277 (noting that such claims must be “filed within one year of the mandate in this case”).

139. *Id.* at 1268 (citing FED. R. CIV. P. 23(c)(4)).

140. *Engle II*, 945 So. 2d at 1269. One problem with this approach is that to determine comparative fault, subsequent juries in class members’ suits would have to compare the conduct of the plaintiff with that of the defendants, requiring a reexamination of the earlier *Engle* jury’s finding on the defendants’ conduct. See *id.* at 1270-71 (discussing possibility of reexamination and determining that it does not violate Florida Constitution). Such a reexamination could infringe the defendants’ right to a jury trial under article I, section 22, of the Florida Constitution. *Id.* The Florida Supreme Court brushed off this criticism, noting that the second jury would only need to decide the extent to which the fault found by the prior jury caused harm, in proportion to the causation of any fault by plaintiff for his or her injury. *Id.* at 1270 (stating that “in considering comparative negligence, the phase two jury would not be reconsidering the first jury’s findings of whether Treasure Chest’s conduct was negligent or the [vessel] unseaworthy, but only the degree to which those conditions were the sole or contributing cause of the class member’s injury” (quoting *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 628-29 (5th Cir. 1999)) (alteration in original) (emphasis omitted)). In dissent, however, Justices Wells and Bell vigorously rejected this analysis:

The court also affirmed the reversal of punitive damages, reasoning that a finding of liability, which requires reliance and causation<sup>141</sup> as to class members, was needed.<sup>142</sup>

An indication of how the Florida Supreme Court expected future individual Florida smoker cases to proceed may be seen in the first post-*Engle* case to proceed to trial, *Lukacs v. Philip Morris Inc.*<sup>143</sup> Because Mr. Lukacs was in extremis, the court allowed his case to proceed to trial in 2002, even though the *Engle* class was on appeal.<sup>144</sup> The court allowed Mr. Lukacs to rely on the Phase I common findings in *Engle*.<sup>145</sup> Thus, the jury needed only to adjudicate causation, damages, and comparative fault.<sup>146</sup> After a two-week trial, the jury found for the plaintiff, holding him five percent responsible under comparative fault, and awarded him \$25 million in compensatory damages and his wife \$12.5 million for loss of consortium.<sup>147</sup> The trial judge, however, reduced damages for

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“At a bare minimum, a second jury will rehear evidence of the defendant’s conduct. There is a risk that in apportioning fault, the second jury could reevaluate the defendant’s fault, determine that the defendant was not at fault, and apportion 100% of the fault to the plaintiff. In such a situation, the second jury would be impermissibly reconsidering the findings of a first jury.”

*Id.* at 1287 (Wells, J., concurring in part, dissenting in part) (quoting *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 751 (5th Cir. 1996)).

141. See *Engle II*, 945 So. 2d at 1263 (majority opinion) (“[H]ad the jury found for Tobacco on the legal cause and reliance issues during Phase II, there would have been no opportunity for the jury to award the named plaintiffs damages of any type.”).

142. *Id.* Addressing the recent United States Supreme Court opinion in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), the Florida Supreme Court also noted that “the amount of compensatory damages must be determined in advance of a determination of the amount of punitive damages awardable, if any, so that the relationship between the two may be reviewed for reasonableness.” *Engle II*, 945 So. 2d at 1265. In addition, the Florida Supreme Court disagreed with Florida’s Third District Court of Appeal and found that plaintiffs’ counsel’s improper racial comments did not require reversal. *Id.* at 1255. The Florida Supreme Court also held that the settlement agreement with tobacco defendants entered by the state in the attorney general litigation did not bar private punitive damages claims. *Id.* at 1261.

143. Jury Verdict, *Lukacs v. Philip Morris Inc.*, No. 01-03822 CA 23 (Fla. Cir. Ct. June 17, 2002) [hereinafter *Lukacs Jury Verdict*]; see also *\$12.5 Million Loss of Consortium Claim Reduced to \$125,000*, MEALEY’S LITIG. REP.: TOBACCO, May 12, 2003, at 4, 4 (noting that “[t]he Lukacs case was the first individual tobacco case to go to trial after a previous Miami jury reached a historic verdict in *Engle*”).

144. Jay Weaver, *Jury Awards Smoker \$37.5 Million*, MIAMI HERALD, June 12, 2002, at 1A (“[Tobacco company] lawyers argue[d] that no class member – including Lukacs – should have been allowed to file an individual compensatory claim until [the *Engle*] appeal was resolved. But Miami-Dade Circuit Judge Amy Steele Donner disagreed, saying Lukacs’ case was exceptional because the 76-year-old [was] dying.”).

145. While the *Lukacs* court allowed plaintiff to rely on the Phase I finding on fraud, the Florida Supreme Court refused to allow subsequent plaintiffs to rely on this verdict because of the need to tie individual reliance to a particular fraudulent statement. *Engle II*, 945 So. 2d at 1255.

146. See *Lukacs Jury Verdict*, *supra* note 143, at 1-3 (including questions as to causation and reliance).

147. *\$12.5 Million Loss of Consortium Claim Reduced to \$125,000*, *supra* note 143, at 4 (noting that trial “lasted two weeks” and “[t]he jury deliberated for one day”). The court was to reduce the award by plaintiff’s comparative fault. See *Lukacs Jury Verdict*, *supra* note 143, at 3 (“In awarding

loss of consortium to \$125,000.<sup>148</sup>

Is the *Lukacs-Engle* approach the right one to resolve the claims of 700,000 Florida smokers in the *Engle* class? That approach allows 700,000 plaintiffs to prevail 100% of the time on purportedly common issues of liability.<sup>149</sup> In fact, however, the record of Florida smoker litigation other than *Engle* shows that plaintiffs did not prevail 100% of the time on these issues and suggests that the *Engle* verdict may be an outlier among jury judgments. Therefore, applying the single *Engle* verdict to 700,000 future claimants results in a skewed assessment of responsibility.

Aside from *Engle* and *Lukacs*, in thirteen cases against the tobacco industry brought by smokers whose verdicts were not overturned on appeal,<sup>150</sup> the defendants prevailed in eight of them.<sup>151</sup> In the defense verdicts, juries answered

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damages, do not make any reduction on account of any negligence or other fault you may have found on the part of JOHN LUKACS. The Court after trial will make any necessary reduction.”).

148. *\$12.5 Million Loss of Consortium Claim Reduced to \$125,000*, *supra* note 143, at 5.

149. Recent post-*Engle* Florida tobacco plaintiffs have urged the *Lukacs* approach on Florida courts. See *Post-Engle Suit Wrongly Joins Local Defendants, Cigarette Companies Argue*, MEALEY’S LITIG. REP.: TOBACCO, Dec. 2006, at 9, 9-10 (“According to [the plaintiff] Pummer, the findings made by the *Engle* jury — including findings as to the health hazards and addictive propensities of cigarettes, the defendants’ placement on the market of cigarettes that were defective and unreasonably dangerous, the defendants’ concealment and misrepresentation of these material facts, and the defendants’ negligence — are res judicata in the instant case.” (emphasis omitted)); see also *Engle Progeny Case Teeters Between State, Federal Courts*, MEALEY’S LITIG. REP.: TOBACCO, June 2007, at 13, 14 (noting that same argument as that made by plaintiff Pummer was made by plaintiff Brown); *Supermarket’s Status Key to Jurisdiction in Florida Tobacco Suit*, MEALEY’S LITIG. REP.: TOBACCO, Apr. 2007, at 16, 16 (recognizing that plaintiff Bonenfant made same argument as that made by plaintiff Pummer).

150. In *Jones v. R.J. Reynolds Tobacco Co.*, the jury returned a verdict for the plaintiff for \$200,028.57. 830 So. 2d 854, 855 (Fla. Dist. Ct. App. 2002). The trial court, however, granted a new trial to the defendant on the grounds of erroneous admission of evidence, and the appellate court affirmed. *Id.* Similarly, in *Widdick v. Brown & Williamson Tobacco Corp.*, the jury returned a plaintiff verdict for \$52,249 for medical expenses, \$500,000 for the spouse’s loss of her husband’s companionship and pain and suffering, and \$450,000 in punitive damages. Verdict Report, *Widdick v. Brown & Williamson Tobacco Corp.*, No. 97-03522-CA, 1998 WL 933419, at \*1 (Fla. Cir. Ct. June 10, 1998). The First District Court of Appeal, however, reversed the judgment below, finding that the trial court impermissibly denied the defendants’ motion to transfer venue. *Brown & Williamson Tobacco Corp. v. Widdick*, 717 So. 2d 572, 573-74 (Fla. Dist. Ct. App. 1998).

151. The eight verdicts for defendants were: *Allen v. R.J. Reynolds Tobacco Co.*, No. 01-4319-CIV-KING/O’SULLIVAN (S.D. Fla. Feb. 28, 2003) [hereinafter *Allen Jury Verdict*]; Verdict Form, *Schwartz v. Liggett Group Inc.*, No. CA 03-2078-AA (Fla. Cir. Ct. Mar. 2, 2006) [hereinafter *Schwartz Verdict Form*]; Verdict, *Beckum v. Philip Morris USA Inc.*, No. 02-01836 (Fla. Cir. Ct. Apr. 29, 2005) [hereinafter *Beckum Verdict*]; Jury Verdict, *Martinez v. Liggett Group, Inc.*, No. 02-20943-CA-15 (Fla. Cir. Ct. Feb. 11, 2005) [hereinafter *Martinez Jury Verdict*]; Verdict, *Hall v. R.J. Reynolds Tobacco Co.*, No. 00-1061 (Fla. Cir. Ct. Dec. 10, 2003) [hereinafter *Hall Verdict*]; Verdict, *Tune v. Philip Morris Inc.*, No. 97-4678-CI-11 (Fla. Cir. Ct. May 24, 2002) [hereinafter *Tune Verdict*]; *Karbiwnyk v. R.J. Reynolds Tobacco Co.*, No. 95-4697-CA (Fla. Cir. Ct. Oct. 31, 1997) [hereinafter *Karbiwnyk Jury Verdict*]; *Raulerson v. R.J. Reynolds Tobacco Co.*, No. 95-01820-CA (Fla. Cir. Ct. May 5, 1997) [hereinafter *Raulerson Jury Verdict*]. The plaintiff-verdict tobacco cases were: Verdict Form, *Arnitz v. Philip Morris USA Inc.*, No. 00-4208-Div. H (Fla. Cir. Ct. Nov. 2, 2004) [hereinafter *Arnitz Verdict Form*]; Verdict Form, *Davis v. Liggett Group Inc.*, No. 02-18944(05) (Fla. Cir. Ct. Apr. 28, 2004) [hereinafter *Davis Verdict Form*]; Jury Verdict, *Eastman v. Brown & Williamson Tobacco*

“no” to special interrogatories concerning negligence,<sup>152</sup> design defect,<sup>153</sup> defect based on failure to warn,<sup>154</sup> fraud,<sup>155</sup> and civil conspiracy.<sup>156</sup> In addition, the juries failed to find liability for claims involving lung cancer,<sup>157</sup> chronic obstructive pulmonary disease (“COPD”),<sup>158</sup> and laryngeal cancer.<sup>159</sup> Among the plaintiff verdicts, juries found for plaintiffs on negligence,<sup>160</sup> defect,<sup>161</sup> and design defect.<sup>162</sup> Juries also found for plaintiffs in claims involving lung cancer,<sup>163</sup>

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Corp., No. 97-5968-CI-11 (Fla. Cir. Ct. Apr. 3, 2003) [hereinafter Eastman Jury Verdict]; Verdict Form, *Kenyon v. R.J. Reynolds Tobacco Co.*, No. 00-05401 (Fla. Cir. Ct. Dec. 12, 2001) [hereinafter Kenyon Verdict Form]; Jury Verdict, *Carter v. Brown & Williamson Tobacco Corp.*, No. 95-00934-CA (Fla. Cir. Ct. Aug. 9, 1996) [hereinafter Carter Jury Verdict].

152. Allen Jury Verdict, *supra* note 151, at 1; Schwartz Verdict Form, *supra* note 151, at 1; Martinez Jury Verdict, *supra* note 151, at 1-2; Hall Verdict, *supra* note 151, at 2; Tune Verdict, *supra* note 151, at 1; Karbiwnyk Jury Verdict, *supra* note 151, at 1; Raulerson Jury Verdict, *supra* note 151, at 1.

153. Allen Jury Verdict, *supra* note 151, at 1; Schwartz Verdict Form, *supra* note 151, at 1; Martinez Jury Verdict, *supra* note 151, at 1; Hall Verdict, *supra* note 151, at 2; Tune Verdict, *supra* note 151, at 1; Karbiwnyk Jury Verdict, *supra* note 151, at 1; Raulerson Jury Verdict, *supra* note 151, at 1.

154. Allen Jury Verdict, *supra* note 151, at 2; Hall Verdict, *supra* note 151, at 2; Tune Verdict, *supra* note 151, at 1; Karbiwnyk Jury Verdict, *supra* note 151, at 1 (reporting jury finding with regard to “unreasonably dangerous and defective”).

155. Allen Jury Verdict, *supra* note 151, at 2; Martinez Jury Verdict, *supra* note 151, at 2; Tune Verdict, *supra* note 151, at 2.

156. Martinez Jury Verdict, *supra* note 151, at 3; Tune Verdict, *supra* note 151, at 2.

157. See Schwartz Verdict Report, *supra* note 7, at \*2 (“Plaintiff’s counsel argued that she died from lung cancer caused by the cigarettes.”); *Federal Jury Says Tobacco Companies Not Liable in Wrongful Death Case*, MEALEY’S LITIG. REP.: TOBACCO, Mar. 17, 2003, at 3, 3 (noting that, in *Allen*, plaintiff “died as a result of lung cancer”); *Florida Jury Finds RJR, B&W Not Liable in Smoker’s Injury Case*, MEALEY’S LITIG. REP.: TOBACCO, Dec. 2003, at 6, 7 (noting jury finding of no liability for lung cancer of smoker Emmett Hall); *Florida Jury Rejects Smoker’s Design Defect Claims*, MEALEY’S LITIG. REP.: TOBACCO, Apr. 2006, at 21, 21 (stating that plaintiff in *Beckum* had lung cancer); Ross Tieman & Richard Tomkins, *Jury’s New Smoke Signals: Richard Tomkins on a Setback for Anti-Tobacco Campaigners*, FIN. TIMES MANDATE, May 7, 1997, available at 1997 WLNR 4780221 (noting that “by 49 [Jean Connor] was dead from lung cancer”).

158. See *Florida Jury Finds RJR, B&W Not Liable in Smoker’s Injury Case*, *supra* note 157, at 6 (noting jury finding of no liability for COPD of smoker Emmett Hall).

159. See *Martinez v. Liggett Group, Inc.*, FLA. JURY VERDICT REP., July 2005, at 27, 27-28 (reporting jury verdict of no liability where repeated exposure to tobacco smoke gave plaintiff laryngeal cancer).

160. Carter Jury Verdict, *supra* note 151, at 1; *Davis v. Liggett Group, Inc.*, FLA. JURY VERDICT REP., Aug. 2004, at 6, 6 (noting that jury found negligence for failure to warn of possible health risks from smoking).

161. Carter Jury Verdict, *supra* note 151, at 1.

162. *Davis v. Liggett Group, Inc.*, *supra* note 160, at 6 (“The jury also found that the cigarettes manufactured by Liggett were defectively designed . . .”).

163. See *id.* at 6 (noting lung cancer diagnosis and \$545,000 award); *Kenyon v. R.J. Reynolds Tobacco Co.*, VERDICTS, SETTLEMENTS & TACTICS, Dec. 12, 2001 (noting \$165,000 verdict awarded to plaintiff with COPD and lung cancer); Nick Ravo, *Smoker’s Suit Brings Award of \$750,000 in Florida*, N.Y. TIMES, Aug. 10, 1996, § 4, at 8 (“[A] Florida jury yesterday awarded \$750,000 to a Jacksonville man [Grady Carter] who smoked for 44 years before he was stricken with lung cancer . . .”).

COPD,<sup>164</sup> tongue cancer,<sup>165</sup> and bladder cancer.<sup>166</sup>

Included in each special interrogatory was the additional conclusion that the alleged misconduct was a “legal cause” of the plaintiff’s harm, rendering seemingly imprecise the inconsistency with the common-issue findings of *Engle*.<sup>167</sup> But the defendants in the Florida tobacco cases contested these common issues, arguing, for example, that their cigarettes were not defective<sup>168</sup> and emphasizing knowledge of smoking risks pertinent to a consumer-expectations approach to design defect.<sup>169</sup> Plaintiffs also put forth detailed and controversial theories of product defect.<sup>170</sup> In short, the common issues identified

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164. See *Kenyon v. R.J. Reynolds Tobacco Co.*, *supra* note 163 (noting \$165,000 verdict awarded to plaintiff with COPD and lung cancer).

165. See Lukacs Jury Verdict, *supra* note 143, at 1 (finding cigarettes manufactured by defendants caused plaintiff’s tongue cancer).

166. See *id.* at 2 (finding defendants’ cigarettes caused plaintiff’s bladder cancer).

167. See, e.g., Martinez Jury Verdict, *supra* note 151, at 1 (“Was there negligence on the part of the Defendant in designing its products, resulting in a defect that was a *legal cause* of damage to Plaintiff ANGEL MARTINEZ?” (emphasis added)).

168. See, e.g., *Florida Jury Awards Smoker \$600,000 in Damages, Finds Smoker 40 Percent Liable*, MEALEY’S LITIG. REP.: TOBACCO, Oct. 2004, at 11, 11 (noting that defendant in *Arnitz* contended that harms from smoking were publicly known and that cigarettes were not defective); *Florida Jury Rejects Smoker’s Design Defect Claims*, *supra* note 157, at 21 (characterizing defense’s position in *Beckum*, as arguing that “[r]elative safety of cigarette does not constitute defect”). For example, in *Beckum*, the defense offered numerous arguments challenging the defectiveness of the cigarettes at issue:

[J]ust because a cigarette is not safe, does not make it defective. Philip Morris defended against Plaintiffs’ defect claims by demonstrating that additives are common in many products and that none of the additives in cigarettes make them any more dangerous than they otherwise would be. It is the burning of tobacco, not the additives, that makes smoking dangerous. In addition, people expect cigarettes to have the very properties that Plaintiffs claim make[] them defective – they expect cigarettes to taste good, to contain nicotine, to contain additives and to be inhalable. Moreover, neither the government, the public-health community nor any company in the competitive tobacco industry has endorsed or accepted Plaintiffs’ defect allegations.

*Beckum v. Philip Morris USA Inc.*, VERDICTS, SETTLEMENTS & TACTICS, Apr. 29, 2005, at 1. Defendants also contested product defect in cases they lost. See, e.g., *Carter Awarded \$750,000 in Tobacco Case Against Brown & Williamson Corp.*, MEALEY’S LITIG. REP.: TOBACCO, Aug. 15, 1996, at 4, 5 (detailing defense’s argument that “[t]he company had a duty to warn only when the hazards of using the product were not reasonably obvious” or “if the manufacturers knew more than the consumers about the product’s risks”).

169. See, e.g., *Davis v. Liggett Group, Inc.*, *supra* note 160, at 6 (“Defendants alleged that the dangers of smoking were well known, as far back as 1938.”).

170. For example, in *Beckum*:

Plaintiffs identified four alleged defects in Marlboro cigarettes: (1) that the tobacco was cured in a way that made it more carcinogenic than other means of curing; (2) that Philip Morris manipulated nicotine levels and additives to increase the likelihood of addiction; (3) that additives were used to make smoke more deeply inhalable (unlike pipe and cigar smoke), which increased the risk of lung cancer; and (4) that consumers did not expect cigarettes designed with filters to be as dangerous as they really were. Plaintiffs essentially maintained that a product is defective if it is not the safest product that can be made with the technology available at a given time. Accordingly, they argued that only the lowest-tar cigarette ever made was not defective. All other commercially available cigarettes are (and

in *Engle* were actively litigated and contested in these individual cases, and such common issues, rather than legal causation, may well have been the basis for defense verdicts.<sup>171</sup>

In fact, in *Eastman v. Brown & Williamson Tobacco Corp.*,<sup>172</sup> the jury found no negligence in failing to warn or negligence in design defect that was a legal cause of the plaintiff's injuries.<sup>173</sup> Yet the jury still found that Philip Morris and Brown and Williamson had manufactured products that were defective in design and had failed to warn, and it determined that the defects were legal causes of plaintiff's injuries.<sup>174</sup> Similarly, in *Kenyon v. R.J. Reynolds Tobacco Co.*,<sup>175</sup> the jury found no negligence in failure to warn or in design and found no defect for failure to warn.<sup>176</sup> Yet the jury found liability based on defective design.<sup>177</sup> Thus, in both *Eastman* and *Kenyon*, the jury found causation satisfied, but neither jury found negligence by the defendants, and one found no strict liability for failure to warn—both of the latter findings were inconsistent with the jury's findings in *Engle*.

With respect to the damages awarded, juries varied as well. For lung cancer cases, as detailed below, the individual case verdicts clustered from \$500,000 to \$700,000 in compensatory damages, but one low outlier jury awarded merely \$165,000. All, however, were well below the *Engle* jury verdict's lung cancer compensatory damages of \$4.023 million to Angela Della Vecchia and \$2.85 million to Mary Farnan. In *Kenyon*, which involved claims for lung cancer and COPD, the jury awarded \$165,000 for medical expenses, nothing for pain and suffering, and nothing for loss of consortium to the plaintiff's husband.<sup>178</sup> In *Davis v. Liggett Group Inc.*,<sup>179</sup> a lung cancer case, the jury awarded the plaintiff \$500,000 for past pain and suffering and \$45,000 for past medical expenses.<sup>180</sup> In

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have always been) defective and unreasonably dangerous.  
*Beckum v. Philip Morris USA Inc.*, *supra* note 168, at 1.

171. *See id.* (suggesting that jurors' questions showed their skepticism toward plaintiff's case). *But see* *Martinez v. Liggett Group Inc.*, *supra* note 159, at 27 ("Defendant alleged that Plaintiff did not smoke its cigarettes."); Verdict Report, *Schwartz v. Liggett Group, Inc.*, No. CA 03-02078-AA, 2006 WL 986357, at \*2 (Fla. Cir. Ct. Mar. 13, 2006) (noting defense argument that plaintiff's death was not result of lung cancer, thereby obviating defendant's responsibility); *Tune v. Philip Morris, Inc.*, FLA. JURY VERDICT REP., Mar. 2003, at 43, 43 (recognizing defense allegation that plaintiff's cancer may have come from regular use of alcohol, occupational exposure to harmful chemicals, and living in industrial state that posed increased cancer risk); *Wilner Begins Third Assault on Tobacco*, MEALEY'S LITIG. REP.: TOBACCO, Oct. 9, 1997, at 12, 12 (noting defense contention that plaintiff's ailment was not caused by smoking).

172. *Eastman Jury Verdict*, *supra* note 151.

173. *Id.* at 1.

174. *Id.* at 2.

175. *Kenyon Verdict Form*, *supra* note 151.

176. *Id.* at 2-3; *see also* David Karp, *Man Gets \$165,000 in Tobacco Lawsuit*, ST. PETERSBURG TIMES, Dec. 13, 2001, at 3B (noting defense lawyer Stephanie Parker's comment that "[w]e were very pleased that the jury found that our actions were reasonable").

177. *Kenyon Verdict Form*, *supra* note 151, at 2-3.

178. *Id.* at 4.

179. *Davis Verdict Form*, *supra* note 151.

180. *Id.* at 4.

the *Arnitz v. Philip Morris USA, Inc.*<sup>181</sup> case involving lung cancer, the jury returned a verdict for \$101,000 in medical expenses, \$53,000 in lost wages, and \$446,000 in pain and suffering, totaling \$600,000.<sup>182</sup> In *Carter v. Brown & Williamson Tobacco Corp.*,<sup>183</sup> which also involved lung cancer, the jury awarded \$500,000 for future damages for pain and suffering, mental anguish, and loss of capacity of life, and \$250,000 to the plaintiff's wife for loss of consortium.<sup>184</sup> By comparison, in the *Eastman* case involving a plaintiff with emphysema and an aortic aneurysm, the jury awarded \$38,000 for past medical expenses and \$6,500,000 for the remainder of the plaintiff's compensatory damages.<sup>185</sup> In *Lukacs*, in which plaintiff sued for bladder and tongue cancer, the jury awarded the smoker-plaintiff \$500,000 in economic damages and \$24,500,000 in noneconomic damages and awarded his spouse \$12,500,000.<sup>186</sup> The jury also found plaintiff five percent responsible under comparative fault.<sup>187</sup> The judge in *Lukacs* subsequently reduced the spouse's award to \$125,000.<sup>188</sup> Moreover, even though the *Eastman* and *Kenyon* juries awarded compensatory damages, they declined to award punitive damages, while the *Engle* class jury awarded punitive damages for all Florida smokers.<sup>189</sup>

#### IV. THE USE OF MULTIPLE JURIES TO RESOLVE A MASS TORT

##### A. Multiple Jury Statistical Sampling in Mass Tort Class Actions: Proposals and Problems

Seeking to address the problem of verdict variability and single adjudication, scholars and plaintiffs' attorneys have proposed using a statistical sample of jury verdicts as part of a class action. Most scholars' proposals find their genesis in the experimental trial plan undertaken in *Cimino v. Raymark Industries, Inc.*,<sup>190</sup> in which the U.S. District Court for the Eastern District of Texas used statistical aggregation in a class action for asbestos-related personal injuries.<sup>191</sup> Specifically, after classwide liability findings,<sup>192</sup> the *Cimino* court tried

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181. *Arnitz Verdict Form*, *supra* note 151.

182. *Id.* at 2.

183. *Carter Jury Verdict*, *supra* note 151.

184. *Id.* at 2. No other damages were awarded. *Id.* After the removal of the upper lobe of his left lung in 1991, the plaintiff appeared to be free of cancer, but his doctor continued to monitor him. *Jury Award to Ex-Smoker Rocks Tobacco Industry*, CHI. TRIB., Aug. 10, 1996, at News 1.

185. *Eastman Jury Verdict*, *supra* note 151, at 2-3. The jury also found the plaintiff fifty percent responsible under comparative fault. *Id.*

186. *Lukacs Jury Verdict*, *supra* note 143, at 4.

187. *Id.* at 3.

188. *\$12.5 Million Loss of Consortium Claim Reduced to \$125,000*, *supra* note 143, at 4 (describing judge's reduction in spouse's award for loss of consortium to \$125,000).

189. *Engle v. Liggett Group, Inc. (Engle II)*, 945 So. 2d 1246, 1254 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007); *Eastman Jury Verdict*, *supra* note 151, at 3; *Kenyon Verdict Form*, *supra* note 151, at 5.

190. 751 F. Supp. 649 (E.D. Tex. 1990), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998).

191. *Cimino*, 751 F. Supp. at 659-65; *see also In re "Agent Orange" Prod. Liab. Litig.*, 597 F. Supp. 740, 839 (E.D.N.Y. 1984) (approving class settlement and noting that "[i]f the claims are for one

before two juries 160 plaintiffs' damage claims, which were randomly sampled<sup>193</sup> from each of five disease categories.<sup>194</sup> Each sample plaintiff received the actual jury award, unless modified by remittitur or an order for a new trial.<sup>195</sup> Some sample plaintiffs received awards of nothing because of contributory negligence, in some instances because of tobacco smoking that could have led to the disease.<sup>196</sup> Other sample plaintiffs received a zero dollar award because they did not prove that they had an asbestos-related disease.<sup>197</sup> Subsequently, the court averaged the sample verdicts, after remittitur,<sup>198</sup> and the court granted the average award for a disease category to each remaining class plaintiff of the disease population.<sup>199</sup>

Drawing on the trial court's approach in *Cimino*, several scholars have developed statistical approaches to adjudicate mass torts, relying on sampling juries and extrapolating the results to the class. For example, Professors Michael J. Saks and Peter David Blanck, in an influential article in the *Stanford Law Review*,<sup>200</sup> argued that variation among possible jury verdicts counseled in favor of trying in a class action before multiple juries<sup>201</sup> the damage claims of multiple

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type of injury, a compensation schedule to calculate average loss could be developed based on sampling techniques"), *aff'd*, 818 F.2d 145 (2d Cir. 1987).

192. After the court completed Phase I of the *Cimino* trial plan, the jury found the defendants grossly negligent, *Cimino*, 751 F. Supp. at 657, and also found that the defendants' products were defective for lack of an adequate warning, *Cimino v. Raymark Industries, Inc.*, 151 F.3d 297, 304 (5th Cir. 1998). In addition, the jury found that punitive damages were warranted and assessed a punitive damages multiplier for actual damages awarded, the multiplier differing for each of the defendants. *Cimino*, 751 F. Supp. at 657-58 (setting punitive damages multipliers of 1.5 times actual damages for two defendants, 2 times actual damages for one defendant, and 3 times damages for another defendant). The jury also addressed causation with regard to each of the ten named plaintiffs, awarded \$3.5 million in actual damages, and apportioned the actual damages among defendants. *Cimino*, 151 F.3d at 304.

193. Based on a hearing in which the litigants presented expert testimony, the court held that the samples were in fact representative of the populations from which they were drawn. *Cimino*, 751 F. Supp. at 664.

194. The court tried 15 mesothelioma sample plaintiffs out of 32 total plaintiffs, 25 lung cancer sample plaintiffs out of 186 total plaintiffs, 20 other cancer plaintiffs out of 58 total plaintiffs, 50 asbestosis plaintiffs out of 1050 total plaintiffs, and 50 pleural disease plaintiffs out of 972 total plaintiffs. *Id.* at 653. During these trials, defendants submitted evidence of plaintiffs' contributory negligence. *Id.* at 658-59.

195. *Id.* at 658, 664-65.

196. *Id.* at 658-59, 665.

197. *Cimino*, 751 F. Supp. at 665. Two juries considered two damages questions for the 160 sample cases, including "(e) whether the Plaintiffs suffered from an asbestos-related injury or disease and, if so, (b) what damages the Plaintiffs incurred." *Cimino*, 151 F.3d at 303; *see also Cimino*, 751 F. Supp. at 653 (explaining damages only awarded where asbestos exposure was "a producing cause of an asbestos-related injury or disease").

198. Remittiturs were issued in thirty-four of the pulmonary and pleural cases and in one mesothelioma case. *Cimino*, 751 F. Supp. at 657.

199. *Id.* at 664-65.

200. Saks & Blanck, *supra* note 20, at 815.

201. To prevent a jury from unnaturally shaping its later verdicts to conform to its prior verdicts, Professors Saks and Blanck suggested that multiple juries be used to decide cases. *Id.* at 849 ("All measuring instruments change with use, perhaps especially humans. Thus, by the time a jury is hearing



plaintiffs, statistically sampled<sup>202</sup> from the larger population of plaintiffs in an injury type.<sup>203</sup> The resulting verdicts would then be averaged and the average damage amount awarded to each class member in the same injury group,<sup>204</sup> including each sampled plaintiff who might have received a differing jury award prior to verdict averaging.<sup>205</sup> Similarly, responding to the argument that the “gamble” of a single class trial could “mean catastrophic damages and even bankruptcy” for a defendant, or a “catastrophic loss” for plaintiffs, both of which create tremendous pressure to settle,<sup>206</sup> Professors David Rosenberg and Bruce

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its 80th case on similar issues, it likely is not making decisions in the same way it did in its first decision of that series.”).

202. *See id.* at 835-36 (discussing benefits of aggregation). Professors Saks and Blanck urge that the size of the sample required “depends in large part on the variability of the population. The more diverse the population, the larger the sample must be in order to reflect the population accurately.” *Id.* at 842.

203. To conserve resources by having smaller sample groups, Saks and Blanck urged that subgroups of relative similarity be created. *Id.* (“The more homogenous the population, the fewer cases that need to be sampled. Thus, dividing the population of cases into homogenous subgroups not only serves the important goal of improving the accuracy of outcomes as required by distributive justice, but also allows for more efficient sampling.” (footnote omitted)). Saks and Blanck noted that “[h]ow close a fit is close enough for the law’s purposes is a legal judgment that eventually will have to be made by the courts or Congress, and requires a balancing of the costs of greater accuracy against the consequences of error.” Saks & Blanck, *supra* note 20, at 844 (footnote omitted).

204. *See id.* at 835 (arguing that average award will better reflect damages than awards in individual cases). Notably, statistical sampling was only used for damages, not liability. *See* Bone, *supra* note 22, at 597 (“[U]sing sampling to measure liability . . . would require a major change in tort law. Tort liability is binary: a defendant is either liable or not . . . . [S]ampling applied to liability can only provide an estimate of the probability that defendant is liable to any plaintiff in an arbitrarily chosen case.”).

Subsequently, Professor David Friedman sought to refine the proposals of Professors Saks and Blanck by making more accurate the amounts distributed to each plaintiff. Friedman, *supra* note 107, at 211-12. Under Professor Friedman’s proposed procedure, the plaintiffs would submit estimates of each of their claims, the defendants would select a sample of those plaintiffs whose claims would be tried, and the ratio between estimate and real verdict would be applied to the remaining plaintiffs. *Id.* at 216-18. In situations with very large numbers of plaintiffs, Professor Friedman would allow the plaintiff to submit estimates for classes of plaintiffs, rather than individual plaintiffs; defendants would choose classes for trial; individual cases within the class would be selected at random; and again the resulting ratio between the plaintiff estimate and the litigated result would be applied to all remaining classes of plaintiffs. *Id.* at 218. Alternately, Professor Friedman suggested a more sophisticated approach in which the plaintiffs propose a statistical model to determine each plaintiff’s recovery based on variables, the defendants put forth a sampling protocol, setting forth how plaintiffs are to be chosen for trial, the court selects plaintiffs randomly pursuant to the sampling protocol, the verdicts are used to refine the model, and awards for the remaining plaintiffs are given in accordance with the refined model. *Id.* at 218-19.

205. Professors Saks and Blanck argued that this approach better approximated corrective justice than the lottery each plaintiff faced at falling somewhere within a broad range of possible jury awards. Saks & Blanck, *supra* note 20, at 835-36 (“By awarding that same amount to each of the remaining 900 plaintiffs, the court also does better, in terms of accuracy of award, than it would if it conducted 900 individualized trials. The goals of corrective justice are better achieved: defendants pay to each plaintiff an amount that is better correct [sic] than could otherwise be accomplished.” (footnote omitted)).

206. *See* Hay & Rosenberg, *supra* note 89, at 1391 (“According to the critics, such certification makes trial very risky for the defendant: its liability to the class is determined by a lone jury issuing a

Hay have proposed that the court use multiple class trials and either average the verdicts<sup>207</sup> or allow full or no damages depending on whether a majority of verdicts favor plaintiffs or defendants.<sup>208</sup> Professors Rosenberg and Hay note that rather than rely on a risky “single all-or-nothing verdict,”<sup>209</sup> their method by increasing trials “lower[s] these odds of an extreme outcome.”<sup>210</sup>

Other scholars have sought to introduce survey methodology into trials to

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single all-or-nothing verdict—a single ‘toss of the coin.’”).

207. *Id.* at 1382 n.13 (“[I]f the court held 10 trials on liability, and these resulted in two verdicts for the plaintiff and eight for the defendant, the defendant would pay 20% of the plaintiffs’ damages.”). Other articles have also endorsed sampling for liability. See Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691, 697-98 (1990) (discussing “probabilistic rule” for assessing damages for multiple victims with similar injuries); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849, 917-19 (1984) (explaining how “damage scheduling” might be useful, cost-effective way to compensate plaintiffs on class, rather than individualized, basis).

208. See Hay & Rosenberg, *supra* note 89, at 1382 n.13 (noting that court “might base its judgment on the majority of verdicts: for example, if more than half of the verdicts favor the plaintiffs, they collect their full damages; otherwise, they collect nothing”). Professors Hay and Rosenberg propose variations of their methodology for general and special verdicts:

[T]he multiple class trials approach can be adapted for both general and special verdict trials. In the context of general verdict trials, where the jury is charged with deciding both liability and damages for the class as a whole, the court would take the average of different jury awards (with a verdict for the defendant on liability being equivalent to a damage award of zero). In special verdict trials, the procedure could easily be modified to yield equivalent results. For example, if the jury is charged with deciding the question of liability alone, the court could discount the ultimate damage award by the proportion of jury verdicts for the defendant. If three-fifths of the juries return a verdict against the defendant, the court could award the class three-fifths of the aggregate damages, and so forth.

*Id.* at 1405-06. Professor Rosenberg has also advocated the use of damage scheduling in class actions based on sample of class members. Rosenberg, *supra* note 207, at 917 (“At its most general, the schedule might simply compensate all class members at a level equal to the average loss.”); see *id.* at 917 n.252 (“These estimates are derived through sampling techniques.”); *id.* at 907 n.221 (“Courts may employ multiple juries or trials to derive an average judgment on one or more common questions. This procedure closely resembles the representative trials used in test-case-pattern-settlement arrangements and, less formally, in the design of settlement schedules.”).

209. Hay & Rosenberg, *supra* note 89, at 1382.

210. *Id.* at 1404; see also *id.* at 1404-05 (“[I]f the court holds two trials (or, equivalently, holds a single trial but empanels two juries), the odds that the plaintiffs will recover nothing drop to one in four; if the court holds four trials, the odds drop to one in sixteen . . .”).

Hay and Rosenberg also argue that the average amount defendant is to pay would therefore be the same as in individual jury trials. *Id.* at 1405 (“Multiple class trials neither increase nor decrease the overall liability exposure of defendants or recovery by classes. Assuming courts award a figure equal to the average verdict returned by different juries, the aggregate expected judgment from multiple class trials remains the same as it would be from a single trial.”); Rosenberg, *supra* note 207, at 917 (“As long as the defendant was liable for no more than the aggregate loss attributable to its tortious conduct, the defendant could raise no valid complaint that either utilitarian tenets or its own rights had been violated.”). Apart from the problems in determining individual claim values from an unwieldy class action, class action treatment of mass torts would also be precluded by the presence of individual issues. See Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 879-83 (discussing individual issues of decision causation, medical causation, product defect, damages, and choice of law).

dispose of large numbers of claimants.<sup>211</sup> For example, Professors Laurens Walker and John Monahan have proposed that expert testimony<sup>212</sup> utilizing survey and sampling methodology<sup>213</sup> be imported into a class action trial<sup>214</sup> to adjudicate not only damages<sup>215</sup> but also liability.<sup>216</sup> Discussing the problem of

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211. See Bone, *supra* note 22, at 576 n.44 (“Sampling in a case like *Cimino* operates differently. Sampling [in *Cimino*] is used as a trial technique, not as a way to estimate probabilistic variables relevant to recovery.”); Donald G. Gifford, *The Challenge to the Individual Causation Requirement in Mass Products Torts*, 62 WASH. & LEE L. REV. 873, 922-24 (2005) (discussing use of expert testimony in state of Minnesota tobacco expense recoupment litigation and behavioral science and survey methodology in *Simon II* class certified by Judge Weinstein); Christopher J. Roche, Note, *A Litigation Association Model to Aggregate Mass Tort Claims for Adjudication*, 91 VA. L. REV. 1463, 1504-05 (2005) (discussing use of statistical expert testimony by Judge Weinstein in *In re Simon II* tobacco litigation); see also *In re Simon II* Litig., 211 F.R.D. 86, 127-29 (E.D.N.Y. 2002) (demonstrating experts’ use of sampling to statistically evaluate large groups of claimants), *vacated and remanded*, 407 F.3d 125 (2d Cir. 2005).

212. Walker and Monahan argue that their approach “permits abandonment of the uncertainties of due process balancing and connection with the more precise evidentiary tests established in *Daubert*.” Laurens Walker & John Monahan, *Sampling Damages*, 83 IOWA L. REV. 545, 561 (1998); see also *id.* at 563 (“After certification, the class representative, charged with the burden of proof on damages, would employ an expert to conduct the damage survey.” (footnote omitted)). The trial judge would rule under *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), on the admissibility of the survey report before the jury. Walker & Monahan, *supra*, at 563-64. Walker and Monahan note:

A prudent class representative might wish to have earlier judicial review, and might therefore present the details of a proposed survey—the categories into which the population will be stratified, the sample size for each category, the survey instrument itself—to the court in a motion in limine seeking a determination regarding admission of the results before conducting the survey.

*Id.* at 564.

213. Walker and Monahan also propose that the defendant use discovery mechanisms to undertake its own survey of the plaintiff population for damage purposes. Walker & Monahan, *supra* note 212, at 564. Walker and Monahan suggest that “[a]lternatively, both sides might choose to employ an expert and conduct a joint survey of damages.” *Id.* at 564-65. Of course, differences in choices of methodology and experts may likely preclude such cooperation. See *id.* at 565 (recognizing infrequent use of joint surveys).

214. *Id.* at 563 (“The first step would be certification of a class of plaintiffs co-extensive with the population to be surveyed.”); see also *id.* at 565 (“No individual data would be presented to the jury and no individual damage verdicts would be required or permitted.”); Laurens Walker, *A Model Plan to Resolve Federal Class Action Cases by Jury Trial*, 88 VA. L. REV. 405, 442 (2002) (discussing need for class certification to enable plaintiffs to “realize benefits”).

215. Walker, *supra* note 214, at 433 (“[S]ampling would most often be used by plaintiffs as a technique for determining gross damages.”); Walker & Monahan, *supra* note 212, at 546 (“Our thesis is that a complete solution of the numbers problem in mass torts can only be achieved by abandoning any pretense of individual adjudication and randomly sampling damages without apology.”). Referring to their proposal as “A Survey Model Without Apology,” *id.* at 556, Professors Walker and Monahan would introduce the survey results, if admitted into evidence, before the jury with an aggregated estimate of the total amount of compensation divisible among the class, *id.* at 563-64, 565 n.140 (providing report and testimony of Special Master and noting amount may be divided “among subclasses”).

216. Laurens Walker & John Monahan, *Sampling Liability*, 85 VA. L. REV. 329, 342 (1999) [hereinafter Walker & Monahan, *Sampling Liability*] (“A strong reading of *Daubert* thus suggests that in a federal court no statute would be required to permit the use of sampling to determine liability.

risk from a single jury verdict.<sup>217</sup> Professor Walker has proposed that classes could be certified for each single state, resulting in less risk to the defendants.<sup>218</sup> Similarly, Professors Glen Robinson and Kenneth Abraham, acknowledging their common task with *Cimino*,<sup>219</sup> have advocated the use of claim profiles based on prior adjudications and settlements<sup>220</sup> that could be introduced as

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Sampling is a widely accepted scientific method, and, if validly conducted, would constitute evidence under *Daubert*.” (footnote omitted)). This approach may still use a single jury to decide class action liability. Walker, *supra* note 214, at 445 (proposing “Model Plan with an operational capability that would permit the trial by a single jury of virtually any class action case in federal court”). Professors Walker and Monahan argue that their method “would be both less expensive and faster” than alternatives. Walker & Monahan, *supra* note 212, at 565. Professors Walker and Monahan also argue that their proposal benefits from leaving the surveying under the control of the parties, because “when control of the choice of information is left to the parties, the acceptability of the result is significantly higher than when the choice of information is left to others, including judges.” *Id.* at 565-66. Professors Walker and Monahan propose that sampling should apply in states where statistical causation statutes were passed in the wake of the attorney general tobacco litigation. Walker & Monahan, *Sampling Liability*, *supra*, at 350 (noting “[t]he response of some states in passing statutes permitting use of ‘statistical analysis’” and urging that “such statutes should, at a minimum, be construed to permit sampling to determine elements of liability when proof might otherwise be prohibited by cost”). In other states, Walker and Monahan urge that sampling meets *Daubert* standards. *Id.* (“According to a strong reading of *Daubert*, a valid sample of some element of liability is valid legal evidence of that element.”). Examples of such sampled liability include the use of surveys to determine exposure and epidemiological studies for alternative causation. *Id.* at 337 (noting that Minnesota attorney general tobacco litigation used survey of state residents to adjust damages for disease and expenses not cause by defendant).

217. See Walker, *supra* note 214, at 444 n.193 (recounting Judge Posner’s concern in *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293 (7th Cir. 1995) that defendants in class action “‘might . . . easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle.’” (omission in original) (quoting *Rhone-Poulenc*, 51 F.3d at 1298)); *id.* (noting Judge Smith’s concern in *Castano v. American Tobacco Co.*, 84 F.3d 734 (5th Cir. 1996), that “‘class certification creates insurmountable pressure on defendants to settle . . . . The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.’” (alteration omitted) (quoting *Castano*, 84 F.3d at 746))).

218. *Id.* (“Concerns about the coercion of defendants could be met by employing the Model Plan in conjunction with a single-state class format. Typically, a number of trials would be held, diminishing the coercion concern.”). They also argue the approach would garner greater efficiency than individual trials. *Id.* (“As compared to individual adjudication, the Model Plan would yield great benefits even if limited to a statewide class. Fifty trials, at most, would be much better than hundreds or thousands of individual trials.”).

219. Robinson & Abraham, *supra* note 87, at 1490 (noting that authors previously suggested applying techniques developed for mass tort settlements to regular trials, and comparing this innovation to that of Judge Parker in *Cimino*); *id.* at 1495 (“We do not doubt that making aggregative valuations conclusive for all claimants would work a radical change in the common-law system. The change is not so radical as to be beyond the contemplation of practically minded judges, as is evident from *Cimino* . . .”).

220. Professors Glen Robinson and Kenneth Abraham have also proposed a “scheme [that] would draw on a wider database of prior adjudications and settlements by different juries, courts, or parties.” *Id.* at 1492. Claim profiles would be assembled by statisticians and others under special master supervision to include legally relevant factors pertinent to liability, causation, and damages. Kenneth S. Abraham & Glen O. Robinson, *Aggregative Valuation of Mass Tort Claims*, LAW & CONTEMP. PROBS., Autumn 1990, at 137, 141-42.

statistical evidence for the factfinder to consider<sup>221</sup> or used to adjudicate claims conclusively once a claimant is assigned by a judge or jury<sup>222</sup> to a particular profile.<sup>223</sup>

Nevertheless, courts and commentators have criticized and rejected statistical sampling approaches in class actions, pointing out numerous problems of substantive, procedural, and constitutional law. Indeed, the Fifth Circuit reversed the trial court's statistical sampling approach in *Cimino*.<sup>224</sup> Such statistical sampling methods may violate state laws on individual causation<sup>225</sup> and

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221. See Abraham & Robinson, *supra* note 220, at 141 (“The most modest use would be to permit a profile to be introduced as statistical evidence that the trier of fact—a jury in virtually all of these cases—could consider in evaluating the claim.”); Robinson & Abraham, *supra* note 87, at 1493 (discussing factfinders’ use of claim profiles).

222. Either a jury or a hearing could determine into which claim category a particular plaintiff fell. Robinson & Abraham, *supra* note 87, at 1494 (suggesting that jury could determine which profile best suits claim); *id.* at 1499 n.50 (“In our proposed scheme, the hearing on the claim profiles could be a regular jury trial, though we are skeptical of the usefulness of a jury in such a hearing inasmuch as the hearing would focus on highly technical questions of statistical methodology.”).

223. *Id.* at 1494 (suggesting approach of “removing individualized determinations altogether and making the profiles conclusive of all claims”); cf. Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 435 (2007) (suggesting that “sampling could be used” and that “[t]he sample could be historical cases that have been adjudicated or settled, or a group of concurrent cases”). Robinson and Abraham also considered giving the claim profiles presumptive legal authority, subject to a special showing to rebut it. Abraham & Robinson, *supra* note 220, at 146 (“It may be useful . . . to consider giving the profiles special legal authority by making them presumptive of the value of each claim within the class to which the profile applies.”); see also Robinson & Abraham, *supra* note 87, at 1494 (suggesting that jury would determine which of prespecified profiles applied and then make award within “defined interval around the median claim value of the relevant profile, unless the plaintiff or the defendant showed that the particular claim cannot be fairly represented by any of the profiles” (footnote omitted)). But Robinson and Abraham rejected this approach because it would be too “cumbersome” and they were “not sure a presumption could be meaningfully applied in this context.” Robinson & Abraham, *supra* note 87, at 1494. Robinson and Abraham, however, focus on the use of claim profiles as dispositive of claims. *Id.* at 1495 (explaining objective of discovering effects of aggregative determinations and, to facilitate that goal, assumption of conclusive nature of claim profiles).

224. *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 321 (5th Cir. 1998).

225. See *id.* at 313 (“[U]nder Texas personal injury products liability law causation and damages are determined respecting plaintiffs as ‘individuals, not groups.’” (quoting *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990))); *id.* at 337 (Garza, J., specially concurring) (“The inescapable reality is that Texas law requires that determinations of damages be made as to individuals, not as to groups, and this Court is powerless to alter that reality.”); *In re Fibreboard Corp.*, 893 F.2d at 711 (“Texas has made its policy choices . . . . These choices are reflected in the requirement that a plaintiff prove both causation and damage. . . . These elements focus upon individuals, not groups. The same may be said, and with even greater confidence, of wage losses, pain and suffering, and other elements of compensation.”); James M. Wood, *The Judicial Coordination of Drug and Device Litigation: A Review and Critique*, 54 FOOD & DRUG L.J. 325, 354 (1999) (“[F]actors affecting the presumed accuracy of the aggregation of claims certainly include the discovery of an alternative cause of injury in an individual plaintiff, [or] the discovery of no causation defense verdicts in individual cases . . . .”); R. Joseph Barton, Note, *Utilizing Statistics and Bellwether Trials in Mass Torts: What Do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 228 (1999) (“The inescapable fact is that individual causation cannot be presented sufficiently by extrapolating results from even statistically significant class or bellwether representatives. To require merely a showing via statistical estimates would change the requisite proof by treating each claim as if it were fungible.”).

damages,<sup>226</sup> the Rules Enabling Act,<sup>227</sup> constitutional rights to due process,<sup>228</sup> and the right to a jury trial.<sup>229</sup> Under statistical sampling, plaintiffs with relatively good claims receive less money under a method that averages their

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226. See *Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 493 (E.D. Pa. 1997) (asserting that expert statistical evidence will not relieve case's manageability problems because each class member's "degree of injury" is still relevant); Bone, *supra* note 22, at 573 (noting differences in facts and damages that make sample plaintiffs poor substitutes for those not sampled).

227. 28 U.S.C. § 2072 (2000); see, e.g., Barton, *supra* note 225, at 229 ("Requiring no more than statistical proof is a substantial amendment of substantive rights, an action forbidden by the Rules Enabling Act and beyond the power of the federal judiciary." (footnote omitted)).

228. See *Fibreboard*, 893 F.2d at 710-11 ("We are . . . uncomfortable with the suggestion that a move from one-on-one 'traditional' modes is little more than a move to modernity. Such traditional ways of proceeding reflect far more than habit. They reflect the very culture of the jury trial and the case and controversy requirement of Article III."); *id.* at 711 ("[T]hese concerns find expression in defendants' right to due process."); Donald G. Gifford, *The Death of Causation: Mass Products Torts' Incomplete Incorporation of Social Welfare Principles*, 41 WAKE FOREST L. REV. 943, 996 (2006) ("[C]ourts have held that the kinds of 'approximations' of causation and damages that Judge Parker pioneered . . . are a violation of due process . . ."); Martin H. Redish, *Procedural Due Process and Aggregation Devices in Mass Tort Litigation*, 63 DEF. COUNS. J. 18, 18-19 (1996) (arguing that aggregation devices encourage inaccurate decisions and undermine litigants' perception of legitimacy of adjudicatory process).

229. See *Cimino*, 151 F.3d at 320-21 (noting defendant's "Seventh Amendment rights to have a jury determine[] the distinct and separable issues of the actual damages of each of the extrapolation plaintiffs"); Hay & Rosenberg, *supra* note 89, at 1406 (noting that "[o]ne possible objection to this proposal is that the Seventh Amendment may be read to give a party the right to insist on a single all-or-nothing trial"); Lahav, *supra* note 223, at 435 ("[E]ven if the [Seventh Amendment] constitutional problem could be overcome . . . , it would still mean tolerating a level of acceptable error that might make proponents of the day-in-court ideal feel uncomfortable."). *But see* *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 226 (2d Cir. 2003) (noting in nonclass union reimbursement action that Fifth Circuit's *Cimino* decision "struck down a revised trial plan" as violative of Seventh Amendment because "the jury was not to determine damages of the group as consolidated, but was only to consider the damages of certain members of the plaintiff class"); Victoria Branton, Note, *A Case for the Jury?: Seventh Amendment Rights in Asbestos Litigation*, 3 TEX. F. ON C.L. & C.R. 231, 244 (1998) ("Arguably, . . . the right to jury trial does attach to asbestos litigation in so far as it can be honored without depriving the litigants of an adequate remedy. Clearly, one-on-one jury trials deprive litigants of an adequate remedy, but jury trials in the aggregation procedure of *Cimino* do not."). Importantly, the Fifth Circuit's opinion in *Cimino* also criticized as dicta the comments favoring mass tort statistical sampling and extrapolation in a 1997 Fifth Circuit decision, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), which in fact reversed the trial plan before the court. *Cimino*, 151 F.3d at 318. Judge Jones, concurring in *Chevron*, also noted the "fine line between deriving results from trials based on statistical sampling and pure legislation. . . . Essential to due process for litigants . . . is their right to the opportunity for an individual assessment of liability and damages in each case." *Chevron*, 109 F.3d at 1023 (Jones, J., concurring). Interestingly, the *Chevron* decision was authored by Judge Parker, who, before being elevated to the Fifth Circuit, wrote the *Cimino* trial opinion as a federal district judge. See *id.* at 1017 (listing Judge Robert M. Parker as author of majority opinion); see also *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 650 (E.D. Tex. 1990) (listing Chief Judge Robert M. Parker as opinion's author), *aff'd in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998). Moreover, refusal to opt out may not be sufficient for a class member to waive his jury trial right under the Seventh Amendment. See, e.g., Branton, *supra*, at 236 ("In light of the jury trial's historical significance, an opt out procedure may be inadequate to waive the right to trial by jury despite its adequacy for waiving personal jurisdiction; defendants may have the right under *Shutts* to challenge the adequacy of the plaintiffs' waiver.").

claims with other claims likely to receive less money.<sup>230</sup> In practice, this averaging compromises the uniqueness of tort plaintiffs, each of whom has distinctive stories that touch on causation, user knowledge of product danger, and damages.<sup>231</sup> As a result, even with jury verdict variability, an individual trial geared to a particular plaintiff may be more likely to be accurate than a figure cobbled together through sampling.<sup>232</sup> In *Cimino*, for example, in one category

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230. Even Saks and Blanck admit such problems render questionable the consent of these better-claim plaintiffs to the aggregative procedure:

[O]ne is left to wonder about the quality of plaintiffs' waiver. . . . Would such a plaintiff have consented freely to including his case in the aggregative procedure, especially knowing that most others relatively less afflicted would consent? And, would such a plaintiff actually be presented with this choice by plaintiffs' counsel?

Saks & Blanck, *supra* note 20, at 825 n.77; see also Amy Gibson, Note, *Cimino v. Raymark Industries: Propriety of Using Inferential Statistics and Consolidated Trials to Establish Compensatory Damages for Mass Torts*, 46 BAYLOR L. REV. 463, 478 (1994) (noting that statistical sampling results in undercompensation of strong claims and overcompensation of weak claims).

231. See Wood, *supra* note 225, at 354 ("Such a model, while seeming to function well in a scientific laboratory, hardly is capable of taking into account the unique nature of a human plaintiff or the individual issues of liability, causation, and contributory negligence."). Indeed, as James Wood discusses in detail, because of the variation of plaintiffs in drug and medical cases, sampling is not appropriate:

If any form of categorization of cases is to be fair and constitutional, there must be a scientific certainty that a sample plaintiff is in fact identical to all other plaintiffs included in a category. Any variation among the claimants, as recognized by Saks and Blanck, would result in a variation in damages. Thus, for a hypothetical statistical aggregation of personal injury claims to work accurately, the court first must find: that all of the plaintiffs were healthy before exposure to the medicine; that their health did not bring about their use of the product (i.e., that there is no susceptibility bias); that the spectrum of their injuries can be classified by severity; that any one plaintiff will have only one type of injury from an exposure to the medicine; that no risk factors, other than a plaintiff's contributory negligence, could have caused or been a cofactor in producing the injury; that the status of the injury is either static or has a known and predictable clinical course; that the injury cannot evolve into another type of injury; and that the health, treatments, environment, and behaviors of a plaintiff will not influence the clinical course of his or her injury. Any variation in any one of these factors will prevent an aggregated or statistical finding that two individuals claimed to have been harmed by the medicine are entitled to the same compensation. Thus, the impossibility of a statistical sampling in a prescription drug or medical device case becomes obvious.

*Id.* at 355; see also Bone, *supra* note 22, at 564 ("All proposals that substitute statistically generated average verdicts for individualized tort judgments smooth over case-specific variation and sacrifice individual participation, at least to some extent."); Wood, *supra* note 225, at 354 (observing that methods that use statistical averages to inform verdicts necessarily fail to capture some case-specific variation).

232. See Bone, *supra* note 22, at 577 ("The fact is that, in many mass tort aggregations, an individual trial will give a more accurate verdict than sampling for at least some cases. This is especially true for sample averaging. . . . But it is also true for the more powerful—and more expensive—technique of regression analysis. . . . since any cost-effective regression procedure has to ignore many damage-related variables."). Indeed, the confidence level discussed by Professors Saks and Blanck only refers to the chance that the population mean falls within some range around the sampled mean. See Gibson, *supra* note 230, at 480 ("[A] 99% confidence level does not indicate a 99% probability exists that the sample exactly reflects the population. Rather, a 99% chance exists that the true population *mean* is within some *range* of values around the sample mean."). Even if one accepts

some of the representatives' damage awards were zero dollars because of contributory negligence due to smoking. These zero awards were then averaged and applied to nonsmokers, lowering the average award applied to them.<sup>233</sup> The more heterogeneous the sampled cases are, the more the award is likely to be merely an average of the figures and not an accurate figure with outliers excluded.<sup>234</sup> Sampling's averaging of claims therefore effects a transfer of money from high-value claims within a category to lower-value claims.<sup>235</sup> Even a limited attempt to take into account differences results in an unmanageably large number of subclasses.<sup>236</sup>

In addition, for a variety of reasons, the awards of a single jury rendering verdicts for multiple sampled cases may be skewed. First, if only one jury is used to try multiple plaintiffs, the concern of an outlier jury whose views are not generally representative of community sentiment is not allayed. Moreover, if there are sampled plaintiffs whose values are outliers on the high end, a jury may

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Professor McGovern's finding that in *Jenkins v. Raymark Industries, Inc.*, 782 F.2d 468 (5th Cir. 1986), "fewer than ten variables . . . can explain approximately 90% of the variation among case values," Saks & Blanck, *supra* note 20, at 845 n.188 (quoting Francis E. McGovern, *The Cycle of Mass Tort Litigation* 15 (Yale Law Sch. Program in Civil Liab., Working Paper No. 122, 1990)), that approach still quashes individuality and accepts a 10% error. See Bone, *supra* note 22, at 586 ("In an asbestos case, for example, the amount of individual damages depends on a number of complex and often hotly contested variables . . . . [T]he resulting unexplained error, combined with sampling and measurement error, may well exceed individual trial error.").

233. See Gibson, *supra* note 230, at 478 ("Because contributory negligence, such as smoking, is relevant to quality of life and life expectancy, those non-sample plaintiffs who do not smoke are penalized by receiving averaged awards that include awards to smokers. In fact, some of the representative plaintiffs' awards in *Cimino II* [751 F. Supp. 649 (E.D. Tex. 1990)] were zero due to smoking." (footnote omitted)).

234. As Saks and Blanck admit:

The more they vary from each other in legally relevant ways, the more we move away from aggregation's accuracy-producing benefits and move toward its error-producing harms. . . . At some point along the heterogeneity-homogeneity continuum, aggregation ceases to improve the accuracy of traditional trials and becomes a vitiation. . . .

. . . .

. . . The more heterogeneous the subgroups, the greater the error involved.

Saks & Blanck, *supra* note 20, at 836-37; see also Borden & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 47-48 ("Errors will increase as the degree of heterogeneity among aggregated cases increases. . . . [I]f the cases selected for trial from the underlying plaintiff population are heterogenous [sic], the awards to the plaintiffs in that sample may not be valid (that is, a plaintiff receiving more or less than is commensurate with the injury sustained)." (footnote omitted)); Wood, *supra* note 225, at 354 ("[T]he more the cases vary from each other in legally relevant ways, the more one moves away from aggregation's accuracy-producing benefits towards its error-producing harms." (citing Saks & Blanck, *supra* note 20, at 837)).

235. See Bone, *supra* note 22, at 599-600 ("[T]he sample average . . . is very likely to be less than actual damages for cases above the mean and greater than actual damages for cases below the mean. In many situations . . . high damage plaintiffs will receive verdicts substantially lower than the verdicts they would receive from an individual trial." (footnote omitted)).

236. See Barton, *supra* note 225, at 226-27 ("[I]f there were five disease categories, and ten significant variables, and an average of five different possible outcomes for each variable, this would produce 250 separate subclasses. . . . [S]uch a high number of trials hardly produces a more efficient outcome and demonstrates the lack of superiority of this method." (footnotes omitted)).



use the figure as an anchor and raise other awards given.<sup>237</sup> Further, the jury may also be biased by knowing the larger pool of plaintiffs from which the tried claims are drawn.<sup>238</sup> Indeed, a jury experiment by Professors Bordens and Horowitz indicated that the presence of a high-outlier plaintiff in a sample significantly raised the awards to other plaintiffs<sup>239</sup> and, moreover, that overall awards were raised if the jury understood that the sample was drawn from a larger population of plaintiffs.<sup>240</sup> Another problem is that a single jury, in learning of the sampling practice, may push toward a single course of adjudication, either pro-plaintiff or pro-defendant,<sup>241</sup> in order to avoid cognitive dissonance.<sup>242</sup> In addition, the representativeness of a sampled plaintiff may change over time, based on new scientific evidence or discovery from the defendant.<sup>243</sup> As a result of these many concerns, Professors Kenneth Bordens

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237. See Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 48 (“[T]here may be an assimilation effect in which the outlier serves as an anchor with the less severely injured plaintiff’s award being assimilated to that plaintiff. The result under this scenario is that the less severely injured plaintiff receives *more* money than she would have had she received a separate trial.”). Or, conversely, when faced with a high outlier, the jury may reduce awards to other less severely injured plaintiffs. *Id.* The jury may even be biased to bring the total awards together, thus lowering the award to the high plaintiff and raising that of the lower plaintiffs. *Id.*

238. *Id.* at 55 (questioning whether *Cimino* resulted in higher damages based on juries’ knowledge that claims at trial represented population of more than 2000 plaintiffs). Professors Bordens and Horowitz, in an experiment with mock juries, found that reference to a larger plaintiff population significantly raised the punitive damages awarded. *Id.* at 58 (“With respect to the size of the nontrial plaintiff population, the plaintiff with the weakest case received a higher punitive damage award when jurors were told that there were hundreds of plaintiffs. In comparison, when no information as to the size of the plaintiff population was provided, or when there were twenty-six other plaintiffs, the awards were significantly lower than in the hundreds condition.”). This increase was due to the increased blame allotted to the defendant. Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 59 (noting that juries both assigned increased blame to defendants and awarded higher damages when aware of increased number of nontrial plaintiffs).

239. *Id.*

240. *Id.* at 59-60.

241. *Id.* at 64 (asserting that juries returning verdicts favoring plaintiffs thereafter were psychologically disposed to favor later plaintiffs).

242. See *id.* (“If a person exerts a great deal of effort in some area, to admit that the effort was unjustified creates a negative motivational state called dissonance. . . . One way to reduce dissonance is to justify the effort expended or maintain a course of action to which one has become committed.”).

243. See Wood, *supra* note 225, at 354 (explaining limitations of sampling models where sampled population evolves over time); *id.* at 355-56 (“[T]he early cases of a mass tort [may] represent the most obvious or more serious injuries, while later cases may involve less severe injuries. In other instances, certain injuries, such as cancer, may appear only after the passage of time, whereas less severe injuries from the same exposure may appear earlier.”). Moreover, early filed cases may not be representative of all plaintiffs. See Bone, *supra* note 22, at 587 n.74 (“[I]t is not clear that the early cases will necessarily reflect a random sample of the larger case population. If factors such as severity of injury, amount of litigation resources, and likelihood of success correlate with early filing and disposition, then regression could produce skewed damage awards.”). And settlements may not be comparable to trial verdicts. See *id.* (“[M]ixing settlements and trial verdicts in the same database may create . . . problems. Settlements are influenced by a number of factors other than the expected trial verdict, including the transaction costs of trial versus settlement and the parties’ relative bargaining power and strategic skill.” (citation omitted)); *id.* (“[I]t can be argued that the only proper measure of damages is the trial verdict because only the trial verdict reflects the considered judgment of neutral

and Irwin Horowitz conclude that under *Cimino*'s approach, "[j]ustice may not so much be 'improved' as 'altered.'"<sup>244</sup>

Furthermore, even if stories do converge in various ways, the method of telling a story is also an important personal choice.<sup>245</sup> As a result, some have criticized sampling on grounds other than accuracy—for example, that a one-on-one jury trial is a meaningful experience itself, guaranteed as a right.<sup>246</sup> Indeed, tort plaintiffs in particular have a strong interest in the control of their lawsuits, because of the personal injuries at stake.<sup>247</sup>

Statistical sampling also does not implement the goals of tort law well. Corrective justice requires attention to suits between individuals,<sup>248</sup> whereas sampling averages claims and undermines their individuality.<sup>249</sup> Moreover, sampling cannot avoid rights-based challenges simply because of its promise of greater economy;<sup>250</sup> one might simply argue that we should pay the necessary costs to vindicate our substantive and procedural rights.<sup>251</sup> Indeed, the lack of

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decisionmakers about 'true' damages, those corresponding to the parties' legal rights.").

244. Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 63; *see also* Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 960 n.93 (1995) (noting trade-off between addressing claim's unique characteristics and achieving efficiency). As a result of their studies of jury bias in sampling, Professors Bordens and Horowitz conclude that their "research suggests that the consolidation strategy employed in *Cimino* can result in verdicts and damage awards that differ significantly under certain circumstances from those rendered in separate trials." Bordens & Horowitz, *Limits of Sampling and Consolidation*, *supra* note 25, at 60.

245. *See* Bone, *supra* note 22, at 573-74 (observing that large stakes of litigation give plaintiffs strong interest in directing their own litigation); Trangsrud, *supra* note 19, at 75 ("[P]arties often wish to settle or litigate claims based upon a variety of personal economic considerations and intangible personal beliefs or concerns which are unique to them. If the plaintiffs enjoy autonomy over the settlement or trial of their particular claim, they can obtain the outcome best suited to their personal views on the proper disposition of this property.").

246. *See, e.g.*, Gibson, *supra* note 230, at 479 ("[T]he jury trial remains one judicial process whose goal is *not* accuracy. The right of personal participation in the one-on-one forum contemplated by Article III has some bite as a right in itself."); *see also id.* at 480 ("An approach to due process that focuses exclusively on accuracy transforms the traditional tort suit into a sterile, scientific inquiry. The increasing use of science to assure accuracy threatens to fundamentally change the core of traditional decision-making processes.").

247. As Professor Trangsrud has stated:

The English and American judicial systems have long favored individual control and disposition of substantial personal injury and wrongful death claims . . . . Such claims usually involve incidents of tremendous importance to the individual plaintiff or the plaintiff's family. . . . Until recently, our system treated such incidents and the tort claims they created with uncompromised due process. This we should continue to do.

Trangsrud, *supra* note 19, at 74.

248. *See id.* ("The first purpose of our civil justice system is and should be to offer corrective justice in disputes arising between private parties.").

249. *See, e.g.*, Bone, *supra* note 22, at 611-14 (arguing that sampling does not fit well with established tort doctrine focusing on harm-based compensation of individual plaintiffs).

250. *See* Gibson, *supra* note 230, at 483 ("[C]oncern for economy should not define the parameters of basic constitutional rights. . . . [E]specially given the array of options open to courts for decreasing caseloads, plaintiffs' and defendants' rights to a fair trial must take precedence over expediency.").

251. *See* Trangsrud, *supra* note 19, at 74 ("Regardless of the burden such claims put on the

individualized attention of statistical sampling may also generate further transaction costs from greater filings of frivolous lawsuits by plaintiffs who seek to gain the average verdict amount.<sup>252</sup> And of course the imprecision of each averaged award with regard to the specific plaintiff leads to both under- and overcompensation of claimants.

Because of all of these arguments, the use of statistical sampling in mass tort class actions is problematic.<sup>253</sup> The few opinions authorizing such statistical sampling have either been reversed,<sup>254</sup> limited to their facts,<sup>255</sup> or currently await

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judicial resources of our courts, we ought not compromise in the quality of process we afford these tort plaintiffs.”).

252. See Bone, *supra* note 22, at 593-94 (noting that sampling encourages frivolous lawsuits because plaintiffs can recover without actively participating in lawsuit).

253. Dissenting to the *Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation* in 1991, Judge Thomas Hogan used words that would be echoed in subsequent judicial opinions:

[T]he use of class action “collective” trials (trials by aggregation of claims) . . . is a novel and radical procedure that has never been accepted by an appellate court. It has been challenged as being constitutionally suspect in denying defendants their due process and jury trial rights as to individualized claimants, as well as conflicting with the court’s obligation to apply state law. It would establish a new form of tort liability with far reaching ramifications to other mass tort cases.

. . . Trial by aggregation of claims and then the extrapolation of the damages by the court has been recognized by the committee itself as being “the most radical solution . . .”

Thomas F. Hogan, Separate Dissenting Statement of Judge Thomas F. Hogan to Report of the Judicial Conference Ad Hoc Committee on Asbestos Litigation, in *REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION* 41, 41 (1991); see also *Blue Cross & Blue Shield of N.J., Inc. v. Philip Morris USA Inc.*, 344 F.3d 211, 225 (2d Cir. 2003) (finding no merit in appellants’ arguments that “aggregate proof was not permissible because: 1) it violated Appellants’ constitutional right to a jury trial; [and] 2) it violated Appellants’ constitutional right to due process” but certifying appellants’ third argument, that “Section 349 requires individualized proof,” to the New York Court of Appeals). *But see In re Dow Corning Corp.*, 211 B.R. 545, 596 (Bankr. E.D. Mich. 1997) (discussing and rejecting “[d]ue process concerns . . . over the fact that not all plaintiffs receive their own day in court in connection with specific causation and damage determination”).

254. See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86, 149-52 (E.D.N.Y. 2002) (authorizing statistical sampling), *vacated*, 407 F.3d 125 (2d Cir. 2005); *Cimino v. Raymark Indus., Inc.*, 751 F. Supp. 649, 664 (E.D. Tex. 1990) (same), *aff’d in part, vacated in part*, 151 F.3d 297 (5th Cir. 1998); see also *In re Fibreboard Corp.*, 893 F.2d 706, 712 (5th Cir. 1990) (reversing district court’s creation of class where court found too many disparities among plaintiffs, and failing to reach issue of defendant’s right to jury trial).

255. See, e.g., *Hilao v. Estate of Marcos*, 103 F.3d 767, 786 (9th Cir. 1996) (approving district court’s methodology as “justified by the extraordinarily unusual nature of this case”). In *Hilao*, plaintiffs brought a class action against Ferdinand Marcos, the former President of the Philippines, for human rights violations including torture and execution against nearly 10,000 class members. *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1461-62 (D. Haw. 1995), *aff’d sub nom. Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). The trial court divided the trial into three phases: (1) liability, (2) punitive damages, and (3) compensatory damages. *Id.* at 1462. In the compensatory damages phase, a statistical expert presented to the Special Master a random sample of 137 plaintiffs, and the Special Master determined damages for three subclasses based on the testimony of sample plaintiffs. *Id.* at 1462, 1464-65 (noting subclasses included victims of torture, execution, and disappearance). After receiving the Special Master’s report, the jury found 135 of the sample plaintiffs to be valid and issued a verdict of \$766 million, which was \$1 million less than the amount

appellate review.<sup>256</sup> Thus, while there remains some experimentation with statistical sampling in class actions, the many difficulties that accompany such a procedure would likely doom further attempts at using statistical sampling to avoid the potential problem of an outlier verdict determining classwide recovery.

*B. The Use of Multiple Juries in Individual Trials to Develop Settlement Values: A Viable Approach*

Rather than a single-jury class action approach, with its problems of verdict variability, or a statistical-sampling class action approach, which has been held to violate state and constitutional law, courts should look to the benefits of multiple adjudications arising from separate individual cases.<sup>257</sup> If multiple juries evaluated the same or similar issues, then the distorting effects of outlier verdicts would be minimized, thereby improving on the single jury class action approach.<sup>258</sup> Over time, the verdicts in multiple individual trials inform

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recommended by the Special Master. *Hilao*, 103 F.3d at 784 & n.10; *In re Estate of Marcos*, 910 F. Supp. at 1466.

On appeal to the Ninth Circuit, however, defense counsel waived presentation of many of the troubling legal issues. For example, defense counsel in *Hilao* did not present to the court the argument that the plan violated the Seventh Amendment. *See Arch v. Am. Tobacco Co.*, 175 F.R.D. 469, 493 (E.D. Pa. 1997) (“The [*Hilao*] Court noted that ‘degree of injury’ would have affected the computation of damages in that case but defendants could not raise this issue because they waived any challenge to the computation of damages.”); Thomas E. Willging, *Mass Tort Problems and Proposals: A Report to the Mass Torts Working Group*, 187 F.R.D. 328, 377 (1999) (“The procedure used by the *Hilao* court had elements of jury activity that differed from *Cimino*, but those elements of *Hilao* have not been reviewed by courts faced with a Seventh Amendment challenge or evaluated by commentators.”). Moreover, the opinion of Judge Rymer, concurring and dissenting in part, underscored the difficulties. Judge Rymer noted that the methods here did not “comport[] with fundamental notions of due process.” *Hilao*, 103 F.3d at 788 (Rymer, J., concurring and dissenting). *Hilao* also relied on the trial court opinion in *Cimino* before it was overruled. *In re Estate of Marcos*, 910 F. Supp. at 1467.

256. Judge Jack Weinstein of the Eastern District of New York has recently written opinions allowing the use of statistical evidence in tobacco class actions, but his efforts have not yet been upheld by the Second Circuit. *Schwab v. Philip Morris USA, Inc.*, 449 F. Supp. 2d 992, 1244 (E.D.N.Y. 2006), *rev’d sub nom. McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215 (2d Cir. 2008); *In re Simon II Litig.*, 211 F.R.D. 86, 149-52 (E.D.N.Y. 2002), *vacated*, 407 F.3d 125 (2d Cir. 2005).

257. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (noting “concern with forcing these defendants to stake their companies on the outcome of a single jury trial . . . when it is entirely feasible to allow a . . . determination of their liability . . . to emerge from a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions”); *id.* at 1300 (stating that “the alternative [to a class action] exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers”); *cf.* FED. R. CIV. P. 23(b)(3) (requiring for class certification “that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy”). The approach articulated herein pertains to claims that are of sufficient value for plaintiffs’ attorneys to take such claims under a contingency-fee arrangement. Small-value claims, often referred to as negative value claims, are not addressed here. Mass tort litigation, however, generally involves personal injuries the value of which are sufficient to warrant individual cases. *See, e.g., Rhone-Poulenc*, 51 F.3d at 1299 (distinguishing class action where “individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation”).

258. *See Rhone-Poulenc*, 51 F.3d at 1299-1300 (stating that individual jury verdicts “will reflect a consensus, or at least a pooling of judgment, of many different tribunals.”); *Robinson & Abraham*,

defendants and plaintiffs in mass tort litigation of the value of the many pending mass tort claims.<sup>259</sup> To be sure, each verdict will supply information about the individual plaintiff, but litigants reviewing prior litigated results will be able to use the growing database to estimate a valuation of their unique claims, perhaps focusing on such potentially causation-significant issues as age, gender, workplace, length of exposure, or alternative risk factors such as other diseases or family history.<sup>260</sup> Plaintiffs may choose to bring cases initially that are among the best plaintiffs,<sup>261</sup> but defendants can then discount those claims in their claim valuation assessments. Litigants may also infer claim valuations from nonjury dispositions of cases via summary judgment, dismissal, or directed verdict.

Moreover, individual trials are at the core of state and constitutional law and, therefore, implement the dictates of such law well. Unlike proposals for statistical sampling, litigating individual trials poses no problems of violating due process, the right to jury trial, or state substantive law requiring individualized causation findings.<sup>262</sup> Indeed, individual trials provide a more steady basis for due process than any class action, which relies on the adequacy of representation of another—the named plaintiff who is class representative—to satisfy due process.<sup>263</sup>

In addition, while still pursuing individual trials outside the class context, courts and litigants can hasten the development of accurate claim values in various ways. For example, courts could prioritize trials of plaintiffs whose claim profile valuations are not yet clearly established.<sup>264</sup> Courts and litigants could

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*supra* note 87, at 1516 (“[O]ne of the great advantages of an adjudicatory system heavily focused on individualized inquiry is that its errors also are individualized. Decisions on key issues are made repeatedly, and any errors committed because of flaws in the process have a chance of averaging out over time.”).

259. See Schuck, *supra* note 244, at 959 (“Individual cases proceeding through trial, verdict, and appeal in a variety of jurisdictions gradually reveal the behavior of juries and judges, clarify the applicable rules of law, and render the expected value of individual claims more predictable.”); *id.* at 963 (“In contrast to an embryonic tort, a mature tort has generated a supply of data which, applying the methods described above, can be used to produce unbiased estimates of claim values.”).

260. See, e.g., Abraham & Robinson, *supra* note 220, at 140 (“These categories are defined as functions of certain variables that affect liability and the severity and duration of a claimant’s injury or illness.”).

261. See Faulk et al., *supra* note 88, at 809 (noting that effective case selection in early trials can inflate settlement values for later, lower value claims).

262. See *supra* Part IV.A for a discussion of the proposals and problems of multiple jury statistical sampling in mass tort class actions.

263. See, e.g., *Hansberry v. Lee*, 311 U.S. 32, 42 (1940) (stating that due process fails where procedures do not adequately protect interests of absent parties).

264. See Schuck, *supra* note 244, at 960 (“Other courts identify ‘representative’ plaintiffs, who are thought to typify larger claimant populations. The claims of these representatives then proceed to full trials, and the outcomes establish patterns that can encourage settlements . . . .”); Edward F. Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 REV. LITIG. 691, 696 (2006) (“[A] court management technique often used in complex aggregate litigation is to try a small number of selected cases to give the parties a sense of how the legal and factual issues play out in different cases to a jury.”). For example, if a court has multiple cases before it and is deciding which case to send to trial first, the court may seek to try an array of cases that first expose the variety of claims at issue and then return to multiple adjudications of similar issues, in order to

also use methods of alternative dispute resolution, such as nonbinding summary trials, to provide litigants with further information as to claim valuation.<sup>265</sup> Any previous settlements also provide litigants with information for claim valuation.<sup>266</sup> Special masters might aid this process by compiling information on related claims for the parties.<sup>267</sup> Over time, the mass tort litigation should reach maturity, with relative predictability of claim values.<sup>268</sup>

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develop claim values. *See In re Shell Oil Refinery*, 136 F.R.D. 588, 596 (E.D. La. 1991) (“[C]laims will be scheduled for trial . . . based on factors such as location of the claimant and/or his property at the time of the explosion, and the extent and nature of the damages. . . . [A]fter several waves are tried, a reasonable judgment value for each category of claims will emerge . . .”), *aff’d sub nom. Watson v. Shell Oil Co.*, 979 F.2d 1014 (5th Cir. 1992); Barton, *supra* note 225, at 235 (“A trial of bellwether plaintiffs can be used effectively to give the parties a representative idea of the claims’ value.”); Sherman, *supra*, at 697 (noting that in federal multidistrict Vioxx litigation, “[t]he parties submitted proposals for bellwether cases, and Judge Fallon selected some six cases with differing characteristics such as length of use of the drug, the age and medical condition of the plaintiff at the time of use, and the injury claimed (death or lesser health complications)”).

265. *See, e.g.*, L. Elizabeth Chamblee, *Unsettling Efficiency: When Non-Class Aggregation of Mass Torts Creates Second-Class Settlements*, 65 LA. L. REV. 157, 243 (2004) (“ADR could include test-case trials to establish a range of values for resolving similar claims.”); Thomas D. Lambros, *The Summary Jury Trial: An Effective Aid to Settlement*, 77 JUDICATURE 6, 8 (1993) (arguing summary jury trial is cost effective and enhances due process by encouraging parties to settle); Schuck, *supra* note 244, at 960 (“Courts sometimes stage non-binding ‘mini-trials,’ relying on the hypothetical verdict to induce settlements short of a full trial.”).

266. *See* Schuck, *supra* note 244, at 959 (“More accurate information about claim values in turn encourages pre-trial settlements, which further refines and improves the quality of that information, which facilitates still more settlements, and so on. In this way, the litigator acquires an increasingly solid empirical foundation for his estimates of claim values.”). Of course, defendants may try to keep the best plaintiffs from going to trial, perhaps by settling with them. *See* Paul D. Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CAL. L. REV. 116, 131 (1968) (“The defendant could and did select the cases it wanted tried. Good cases approaching trial were settled. . . . The success of these tactics is evident in verdicts for the defendants in the first three cases tried.”); Willging, *supra* note 255, at 352 (“The appearance of success, especially in the early stages of a potential mass litigation, can be controlled by a defendant’s careful choice of cases to litigate, settling the more meritorious ones and trying the rest.”). But if that is defendant’s strategy and there are many meritorious cases, the incentive of obtaining a settlement will drive the filing of additional claims. *Id.* (“If there are enough meritorious cases, settlement of those cases can be expected to keep the litigation alive.”).

267. *See* REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION, *supra* note 253, at 16 (discussing case evaluation system producing early settlement of asbestos claims); Bone, *supra* note 22, at 574 (“In some cases judges, with the help of special masters, have even compiled data on prior settlements and trial verdicts in order to provide the parties with information to assist in formulating reasonable settlement values.”); Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. REV. 659, 669-71 (1989) (describing data compilation that judge assigned to Special Master, the results of which were later presented to jury).

268. *See* Francis E. McGovern, *An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821, 1843 (1995) (defining maturity as when “there has been full and complete discovery, multiple jury verdicts, and a persistent vitality in plaintiffs’ intentions” (quoting McGovern, *supra* note 267, at 659)); *id.* (stating that “a rough equilibrium of case values ensues as the cases become more routinized and the parties’ contentions become more defined”). *But see* Elizabeth J. Cabraser, *The Road Not Taken: Thoughts on the Fifth Circuit’s Decertification of the Castano Class*, SB24 ALI-ABA 433, 447-50 (1996) (criticizing notion of immature torts).

The parties can then use the claim values developed in individual litigation for settlement of pending cases. The emerging consensus of claim values extrapolated from the laboratory of real cases would anchor litigants' otherwise speculative and overly hopeful settlement claim valuations.<sup>269</sup> Thus, individual litigation creates a "market value" for each pending litigants' claim.<sup>270</sup> To avoid further litigation costs and risk,<sup>271</sup> the parties may well decide to seek a broad-

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269. See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("[D]efendants have won twelve of the first thirteen, and, if this is a representative sample, they are likely to win most of the remaining ones as well."); *In re Shell Oil Refinery*, 136 F.R.D. 588, 596 (E.D. La. 1991) (stating that judge would try cases in groups to create "a reasonable judgment value for each category of claims . . . [that] can be used to facilitate settlement"); Abraham & Robinson, *supra* note 220, at 140 ("Essentially the strategy is to promote settlement of claims by presenting information to the parties on the valuation of similar claims in prior settlements and/or adjudications. Such a profile provides an indication of the amounts paid, in judgments or in settlement, to different categories of claimants."); *id.* ("[R]ational parties are kept from reaching settlement . . . by their different valuations of a claim, and . . . valuations in turn reflect different predictions of the probability and size of an award if the case is adjudicated. The trick . . . is to reduce these disparate valuations . . . by presenting profiles of awards in similar cases . . ."); Bone, *supra* note 22, at 574 ("The outcomes of mass tort cases that happen to settle or reach final judgment first shape future settlements by defining how much a plaintiff is likely to receive from trial, her so-called 'nonagreement baseline,' and by focusing parties on reasonable bargaining outcomes."); Francis E. McGovern, *A Model State Mass Tort Settlement Statute*, 80 TUL. L. REV. 1809, 1826 (2006) ("Once the parties felt comfortable in being able to distinguish between true and false positives, they would then be in a position to negotiate a metric that embodied a consensus for paying claims."); McGovern, *supra* note 267, at 692-93 (suggesting disclosure of "relevant data from previously resolved cases concerning key variables that drive case outcomes and settlement values" to encourage settlement); Barton, *supra* note 225, at 211 ("The traditional use of bellwether trials facilitates settlement by providing a representative picture of a range of verdicts.").

270. See Abraham & Robinson, *supra* note 220, at 140 ("This can be viewed as an attempt to construct a 'market value' for the claims. . . . Absent a true claims market, statistical claims profiles constitute an alternate source of objective valuation."); McGovern, *supra* note 269, at 1826 (noting "the assets of the litigation system with its paradigm of perfect, one-on-one trials to establish a marketplace for the characteristics and values of an alleged tort"). Judge Easterbrook commented on the efficiency of this approach, rejecting certification in the *Bridgestone/Firestone* litigation: "Markets . . . use diversified decisionmaking to supply and evaluate information. . . . This method looks 'inefficient' from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002); see also *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 752 (5th Cir. 1996) ("The collective wisdom of individual juries is necessary before this court commits the fate of an entire industry, or indeed, the fate of a class of millions, to a single jury."); *Rhone-Poulenc*, 51 F.3d at 1300 ("[I]t is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11."); Jeremy T. Grabill, Comment, *Multistate Class Actions Properly Frustrated by Choice-of-Law Complexities: The Role of Parallel Litigation in the Courts*, 80 TUL. L. REV. 299, 320 (2005) (reporting preference of Fifth and Seventh Circuits for multiple jury verdicts before certifying class of millions); *id.* at 324 (arguing that "Judge Easterbrook's opinion for the Seventh Circuit in *Bridgestone/Firestone* [] provides a normative justification for this hostility to multistate class actions, namely that diversified decisionmaking by legal communities around the country will ultimately lead to better law").

271. See Abraham & Robinson, *supra* note 220, at 140-41 ("[P]arties will settle when the difference in their valuations is smaller than the expected cost of litigation."); Jeffrey M. Davidson, *Theories of Asbestos Litigation Costs — Why Two Decades of Procedural Reform Have Failed to Reduce Claimants' Expenses*, 7 NEV. L.J. 73, 81 (2006) (stating that decision to litigate or settle drives

ranging settlement of all remaining claims, or certain categories of claims,<sup>272</sup> with different settlement payments for different types of claims or for plaintiffs with different attributes.<sup>273</sup> Such wide-ranging settlements have become increasingly common as a method to resolve mass torts<sup>274</sup> and increasingly complex to take

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overall costs of system); Trangsrud, *supra* note 19, at 78 (“Once the strengths and weaknesses of the plaintiffs’ cases have been repeatedly tested before a series of juries, it is likely that the parties will try to negotiate a settlement reflecting the verdict record of prior plaintiffs and, in this way, avoid the expense and delay of trial.”); *id.* at 69 (“The better course is to coordinate and consolidate pretrial discovery and motions practice but then individually try the tort cases in an appropriate venue. After a number of cases have been tried substantial incentives will operate to encourage the private settlement of many of the remaining claims.”).

272. See Barbara J. Rothstein et al., *A Model Mass Tort: The PPA Experience*, 54 DRAKE L. REV. 621, 625 (2006) (noting that as final stage of mass tort model, “the opportunity for a comprehensive settlement after a series of individual federal and state trials provides a basis for valuing individual claims”); Schuck, *supra* note 244, at 961 (“A much higher percentage of tort victims file claims and receive some payment under these mass tort settlements than would sue and recover in tort. . . . [T]he relatively high percentage of *genuine* victims who will recover something under global settlements must be counted as a weighty advantage.” (footnote omitted)); *id.* at 960 (“Global settlements of mass tort claims represent the culmination of the system’s maturation.”). Although Professor Schuck discussed predominantly the class action settlements that predated the United States Supreme Court’s decisions in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), which rejected particular class action settlements, Professor Schuck’s comments attest to the long, established history of resolving mass torts through settlement. Schuck, *supra* note 244, at 947. Since the Court’s decisions in *Ortiz* and *Amchem*, mass tort global settlements have simply moved away from the class action setting. Cf. MODEL RULES OF PROFESSIONAL CONDUCT R. 1.8(g) (2004) (outlining aggregate-settlement rule); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass-Tort Cases*, 31 LOY. L.A. L. REV. 395, 395 (1998) (discussing unethical decision to settle group of tort cases for aggregated amount and divide settlement among plaintiffs); Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 736 (1997) (discussing whether aggregate settlement rule should be altered to accommodate mass cases); Willging, *supra* note 255, at 439 (discussing aggregate settlements under Model Rule of Professional Conduct 1.8(g), and noting that “[b]oth the practitioners’ and the academics’ views converge in identifying the tension created by the attempt to apply to mass torts a rule designed for a single case or a small number of cases”).

273. See Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 7 (noting use of schema for “1) determining the distribution of verdicts in similar claims; 2) adjusting the distribution of verdicts in similar claims to reflect the unique facts of the particular claim; 3) adjusting the revised distribution to reflect transaction costs; and 4) selecting a settlement value reflecting the client’s preferences and values”); Sanders, *supra* note 34, at 509 (“[E]ach case is evaluated [through] . . . a limited number of weighted factors . . . based, at least in part, on aggregative and averaging processes. . . . [I]n many settlement processes a number of variables, generally between five and twenty, may be considered and applied to individual cases by use of an algorithm or formula.” (footnote omitted)). Professors Hay and Rosenberg urge settlement in the class context based on a similar multiple-trial process. Hay & Rosenberg, *supra* note 89, at 1406 (“[C]onducting multiple class action class test-trials to derive average claim values for settling the bulk of the remaining present and future claims replicates prevailing practice in the separate action process, [except that it] . . . assures plaintiffs the same scale economy incentives defendants have . . .”).

274. The vast majority of claims are settled in civil litigation, including mass torts. See Davidson, *supra* note 271, at 81 (“To understand the asbestos litigation phenomenon, one must understand settlement.”); Schuck, *supra* note 244, at 958 (“As is well known, the cost and risks of going to trial induces settlement or other dispositions short of trial in over ninety-five percent of all civil claims, mass tort or otherwise.”); *id.* at 962 (“Experiences of litigators, courts, and claims facilities in negotiating and administering global settlements are being accumulated and integrated into patterned,



into account the varying situations of claimants.<sup>275</sup>

Such broad-ranging settlements effectively implement the goals of tort law. Because such settlements rely on the more accurate claim values developed from numerous trials, their claim valuations effectuate corrective justice by awarding amounts that are well tailored to the harm from defendant to plaintiff. In addition, the more accurate claim values implement the deterrence goal underlying efficiency rationales for tort law, because wrongdoers are required to pay an amount that corresponds to the harm done, providing a powerful incentive to the defendant and others not to undertake such activity. Moreover, the greater accuracy of these settlement payments sharpens deterrence of defendants, who are then incentivized to undertake economically efficient safety investments, whose overall value likely greatly exceeds the transaction costs involved in litigating various individual trials in mass torts.<sup>276</sup> Moreover, broad settlements also reduce transaction costs markedly for defendants and, of course, the courts.<sup>277</sup> Broad settlements thus offer savings in transaction costs similar to those promised of single-adjudication approaches to mass torts.<sup>278</sup> Furthermore, transaction costs will be reduced, to some extent, relative to a class trial, because parties will not be incentivized to spend everything possible to do best in an all-or-nothing format, and, in addition, as I have detailed in a previous article, networks of counsel and courts increasingly use information technology to share information, spread costs, and coordinate strategy.<sup>279</sup> Finally, compensation tort

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recurrent, and increasingly predictable forms. As a result, new settlements are likely to employ variations on now-familiar themes.”).

275. As Professor Schuck has noted:

Global settlements can also resolve a variety of complex administrative and policy issues. These agreements establish detailed ground rules to govern the necessary long-term relationship between bitter adversaries, under changing and unpredictable conditions. These rules cover such diverse issues as exposure criteria, medical criteria, claims administration, atypical or extraordinary claims, all aspects of compensation, funding guarantees, opt-outs, case flows, notice, counsel fees, administrative cost, informal dispute resolution, limits on judicial review, and termination of the agreement. In the absence of global settlements, these thorny issues would have to be resolved by further litigation and courts lacking good information and relevant expertise.

Schuck, *supra* note 244, at 962; *see also id.* at 987 (“[Mass tort settlements] contain detailed definitions, decision criteria, and distribution protocols. They provide a mix of categorical and individualized treatment of claims. . . . They seek to anticipate numerous contingencies . . . that cannot be foreseen or immediately resolved.” (footnote omitted)).

276. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (“With the aggregate stakes in the tens or hundreds of millions of dollars, or even in the billions, it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow . . . into Chapter 11.”).

277. *See, e.g.*, Schuck, *supra* note 244, at 962 (discussing efficiency with which global settlements resolve administrative issues and issues between litigants to reduce need for additional litigation).

278. *See, e.g.*, Trangsrud, *supra* note 19, at 78 (noting that judicial efficiency achieved by mass trials is overstated due to likelihood of settlement following individual trials).

279. *See Stier, supra* note 210, at 895-96 (describing ease of communication enabled by e-mail and listservs, and ease of dissemination of documents by CD or central depository). Professors Hay and Rosenberg note the concerns of high spending in a single class action trial in the context of multiple class trials compared to a single class trial: “[D]espite redundancy costs, multiple class trials

goals are satisfied because plaintiffs receive relatively quickly under a settlement the funds they need to pay bills for medical treatment or other expenses.

Settlement thus gains much of the benefits of sampling groups, without the procedural problems present in the trial plan in *Cimino*.<sup>280</sup> Parties might assemble their settlement grids according to many of the same variables that have been considered for sampling.<sup>281</sup> For example, in settlement, the parties may choose to utilize the type of regression analysis championed by Robinson and Abraham.<sup>282</sup> Such an approach has already been tried by various mass tort claim facilities.<sup>283</sup> But unlike the *Cimino* trial plan, central to settlement is the notion of consent.<sup>284</sup> In contrast, sampling as tried by the district court in *Cimino* imposes the court's view of adequate sampling and damage averaging on the litigants.<sup>285</sup> A party to settlement can bargain for the best deal and reject the preferred claim valuation as not satisfactory, awaiting trial of additional cases.<sup>286</sup> Any plaintiff may elect to hold out rather than settling, instead preferring individual litigation because perhaps the plaintiff would rather tell his or her own story in court, seek a legal finding of responsibility for defendants, or pursue an award the plaintiff believes will be larger than that offered in settlement. Although some have argued that the day-in-court model is not accurate because of the prevalence of settlement and the lack of the plaintiff's contact with his or

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might well reduce the parties' costs overall. The prospect of a single class trial would induce risk-averse parties to spend excessively on pre-trial preparation as a measure of insurance against the possible horrendous verdict." Hay & Rosenberg, *supra* note 89, at 1406.

280. See Bone, *supra* note 22, at 574-75 ("The similarity to *Cimino*-style sampling is obvious. The set of early cases constitutes a kind of sample (although not necessarily a random sample) of the overall population, and attorneys in later cases use a rough statistical method, such as weighted averaging, to infer settlement information from this sample group."); Barton, *supra* note 225, at 211 n.100 ("Although the district court's extrapolation to non-bellwether plaintiffs in *Cimino* is controversial, using the average to determine a settlement value is not.").

281. See, e.g., Faulk et al., *supra* note 88, at 803 (explaining procedure for categorizing plaintiffs by characteristics).

282. See, e.g., Robinson & Abraham, *supra* note 87, at 1490 (proposing statistical modeling of claims in mass tort litigation); Schuck, *supra* note 244, at 959 ("One such approach employs regression analysis of claim profiles and other statistical methods to model the precise relationship that various claim characteristics bear to claim values in recent litigation and settlements. This approach enables lawyers to estimate more accurately the expected value of pending and future claims.").

283. See Schuck, *supra* note 244, at 959 ("The claims-processing facilities established by mass tort defendants and insurers (as in the asbestos and silicone gel breast implant litigation) and by courts administering settlement funds (as in the Agent Orange and Dalkon Shield litigation) employ some variants of this approach.").

284. See Bone, *supra* note 22, at 575 ("Despite these similarities, sampling presents more serious problems than settlement. Settlement always requires consent.").

285. See *id.* ("[C]onsent is not analytically essential to sampling. A judge might require consent, as Judge Parker did for the plaintiffs in *Cimino*, but he need not do so."). Of course, the defendants in *Cimino* vigorously opposed the sampling methodology used. See *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 311 (5th Cir. 1998) (describing defendant's attack of trial plan on basis that it failed to determine individual causation).

286. See Bone, *supra* note 22, at 575 ("Parties bargain when they settle, and all must agree to the ultimate resolution. If a party believes that previous case outcomes are not representative of her case, all she need do is reject her opponent's offer and insist on a higher settlement figure.").

her attorney,<sup>287</sup> each litigant in individual litigation still retains the meaningful right to press his or her claim to trial before a jury, rather than settle.<sup>288</sup> Similarly, any defendant may choose not to settle, because for example the defendant may want to discourage other claimants from coming forward.<sup>289</sup> If the parties choose not to settle, the courts must therefore continue to try the claims.<sup>290</sup> Indeed, defendants may prevail in a mass tort by consistently winning individual cases, which also deters the filing of additional cases.<sup>291</sup> On the other hand, defendants who choose further litigation and lose may be punished with verdicts that in total will cause bankruptcy.<sup>292</sup>

In addition, the use of individual juries in individual cases is superior to sampling, because sampling takes static science at one time, whereas individually litigated cases will track changes over time. For example, scientific changes may establish or dispel causation.<sup>293</sup> Such an approach also allows flexibility for parties to take into account the effect of changing legal rules<sup>294</sup> as well as new

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287. See, e.g., Deborah R. Hensler, *Resolving Mass Toxic Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 92-93 (describing research suggesting distant lawyer-client relationships and lack of client control).

288. See Anne Bloom, *From Justice to Global Peace: A (Brief) Genealogy of the Class Action Crisis*, 39 LOY. L.A. L. REV. 719, 749 (2006) (noting *Agent Orange* veterans' discontent with class-action resolution because "the veterans wanted to tell their stories and have them heard by a court of law"); Schuck, *supra* note 244, at 978 ("[W]hatever the distance between ideal and reality, the [client's day in court] retains overwhelming symbolic power. Indeed, the larger the gap, the more enchanting the ideal.").

289. See Abraham & Robinson, *supra* note 220, at 141 ("It is notoriously true that defendants who face large exposure to multiple claims may adopt a strategy of litigating claims regardless of their individual value to discourage future claims or to encourage more favorable settlements."); Branton, *supra* note 229, at 243 (noting possibility that "defendants have adopted a 'fortress mentality' to achieve exactly this result").

290. Cf. Barton, *supra* note 225, at 212 ("If the trial of the bellwether plaintiffs does not result in a settlement of the remaining claims, the court is left potentially with the same daunting task it encountered before the bellwether trial—trial of the remaining non-bellwether claims.").

291. Willging, *supra* note 255, at 352 (noting that, in the repetitive stress injury cases, "[i]ndividual trials in seven different jurisdictions resulted in defense verdicts or judgments. Those outcomes . . . led to a dramatic reduction in the rate of filing of new computer keyboard claims" and as a result, "what was once compared to asbestos litigation and described as the mass tort of the nineties seems to have paused far short of that mark." (footnotes omitted) (internal quotation marks omitted)).

292. In the asbestos context, one defendant after another has been pushed into bankruptcy by such individual trials. Branton, *supra* note 229, at 243.

293. In the breast implant litigation, for example, a scientific consensus on the safety of silicone breast implants emerged after the bankruptcy of major manufacturer Dow Corning. See B.J. Feder, *Dow Corning in Bankruptcy over Lawsuits*, N.Y. TIMES, May 16, 1995, at A1 (describing Dow Corning seeking protection of bankruptcy to deal with claims worth billions of dollars); FOOD & DRUG ADMIN., FDA BREAST IMPLANT CONSUMER HANDBOOK 68-69 (2004) (noting that in 1999 Institute of Medicine concluded there was "insufficient evidence" of systemic health concerns from silicone and saline breast implants), available at <http://www.fda.gov/cdrh/breastimplants/indexbip.PDF>. Today, silicone breast implants are again on the market. All About Silicone Breast Implants, <http://www.justbreastimplants.com/implants/silicone.htm> (last visited Sept. 1, 2008).

294. Cf. Robinson & Abraham, *supra* note 87, at 1493 (observing that changes in legal rules over time can lead to differences in valuation).

evidence uncovered in discovery or trial testimony.<sup>295</sup>

Interestingly, one remedy proposed for jury verdict variability is that the jury be informed of past verdicts.<sup>296</sup> Using multiple individual trials to develop claim values for broad settlement, however, better accomplishes that same end. Whereas proposals to inform juries of past verdicts may have foundered on concerns about which claims should be considered similar and offered to the jury, the parties considering a settlement approach based on individual trials have incentives to search out prior claim values fully and may negotiate claim values in the context of arguments about the application of past values that they themselves consider to be pertinent.

Of course, the ability of the legal system to process claims expeditiously affects the claim valuations, as well. By delaying potential payment, the system reduces the claim valuation of the plaintiff for settlement purposes, even though pre- and postjudgment interest would accrue for damages awarded. An extreme delay may mean the plaintiff may not be alive when the funds are paid.<sup>297</sup> Such an extreme delay in processing claims thus aids the defendant<sup>298</sup> and pushes the plaintiff to accept a settlement based on prior valuations that the plaintiff might otherwise reject as inappropriately low.<sup>299</sup> Extremely long court delays may therefore lead to undervaluation of claims in settlement.<sup>300</sup> Because the prospect

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295. See Trangsrud, *supra* note 19, at 79 (explaining that “persistent discovery efforts” in Dalkon Shield and asbestos litigation bore fruit while participants in Bendectin mass trial were precluded from further action).

296. See Richard Abel, *General Damages Are Incoherent, Incalculable, Incommensurable, and Inegalitarian (But Otherwise a Great Idea)*, 55 DEPAUL L. REV. 253, 299 (2006) (“Others have recommended that jurors receive data on ‘similar’ awards . . . . But experience is unique . . . .”); Chase, *supra* note 80, at 777 (“I propose that jurors in all personal injury actions in which nonpecuniary damages are sought be informed of the range of awards made by other juries in the same state for such damages during a contemporaneous time period.”); DeCamp, *supra* note 76, at 235 (“[J]uries should be informed of the range of previous awards for comparable cases.”); Wissler et al., *supra* note 36, at 817 (“Another powerful yet modest reform would be to pool jury awards made for similar injuries, and to present these cases and their award distributions to juries for guidance in reaching their general damages awards and to judges for conducting their additur/remittitur reviews.” (footnote omitted)); see also Sanders, *supra* note 34, at 507 (“Each [proposal] suggests one or more ways of using aggregate data to estimate the ‘proper’ level of pain and suffering damages in each case.”).

297. See Branton, *supra* note 229, at 245 (“The Federal Rules have not made individual jury trials a practical possibility for asbestos plaintiffs, as most of them would predecease the resolution of individual trials . . . .”); see also Bone, *supra* note 22, at 575 (“[A]t the limit delay costs exceed expected trial recovery, and plaintiff’s baseline drops to zero.”).

298. See Bone, *supra* note 22, at 575 (“By the same token, a defendant’s baseline improves because a mass tort defendant normally benefits from longer delays.”).

299. See *id.* (“Bargaining power therefore becomes more asymmetric as delay increases, and a plaintiff becomes more willing to accept a settlement based on previous case outcomes even when she thinks that those outcomes do not accurately reflect the merits of her own case.”).

300. See *id.* (“[T]here is reason to disapprove of a settlement baseline significantly skewed in the defendant’s favor by high delay costs.”). Professor Bone therefore rejects such settlements: “If one rejects the baseline, one must also reject the bargaining outcome. Stated differently, consent cannot legitimate a settlement when a plaintiff’s fallback position is itself normatively flawed.” *Id.*; see also Edward F. Sherman, *Aggregate Disposition of Related Cases: The Policy Issues*, 10 REV. LITIG. 231, 238-39 (1991) (arguing individualized trials contribute to court congestion, thereby preventing

of trial focuses litigants on settlements,<sup>301</sup> our judicial system must uphold its basic responsibility to provide timely trials to litigants. Judicial management of mass tort litigation and trials has been greatly aided by information technology, multidistrict litigation procedures, and growing state and federal judicial networks to coordinate efforts.<sup>302</sup> Still, if litigants continue to resist settlement, the trials would require judges and courtrooms, and legislatures should ensure that the judiciary has adequate funding for them.<sup>303</sup>

Furthermore, subjecting the plaintiff to the risk and potential inaccuracy of a single trial is not inconsistent with the defendant's use of multiple trials to determine its overall liability.<sup>304</sup> First, each defendant is similarly subjected to

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plaintiffs' cases from being tried and therefore that reducing settlement value). Professor Bone ultimately views both mass tort settlements and trial sampling to be coercive:

Once one discredits consent as a legitimating factor . . . mass tort settlement takes on a coercive character similar to sampling. One has to answer the following question for each process: What justifies "forcing" case outcomes on a party who neither participated in litigating those cases nor effectively waived her participation right?

Bone, *supra* note 22, at 576. Nevertheless, Professor Bone believes "this question may pose more of a challenge for sampling than for settlement," because "[s]ampling reflects a deliberate institutional decision to impose outcomes on nonparticipants whereas settlement ordinarily takes place incidental to the adjudicative process." *Id.*; *see also id.* (arguing that state action that deliberately burdens parties not participating in suit with particular outcome may be more troubling than when same outcome results incidental to proper state action). *But see id.* (observing trend toward institutionalizing settlement and noting that trend makes distinctions less meaningful).

301. *See, e.g.,* ACandS, Inc. v. Godwin, 667 A.2d 116, 159 (Md. 1995) (quoting letter from judge consolidating 8555 asbestos cases: "From four years of my own experience and that of virtually everybody else, if there are firm credible trial dates, these cases will settle. If not, they will not. . . . [D]efendants will only settle when they have nowhere to go" (emphasis omitted)).

302. *See* Stier, *supra* note 210, at 912-19 (discussing benefits of judicial mass tort networks).

303. *See* FED. R. CIV. P. 1 (stating that rules of civil procedure "should be construed and administered to secure the just, *speedy*, and inexpensive determination of every action and proceeding" (emphasis added)). Courts can ease their burden by prioritizing claims of those with more significant, physical injuries. *See, e.g.,* Behrens & Crouse, *supra* note 76, at 197 (noting courts' "giv[ing] trial priority to the truly sick and preserv[ing] compensation for those that may become sick in the future, rather than hav[ing] those resources depleted by earlier-filing unimpaired claimants").

304. *See* Hay & Rosenberg, *supra* note 89, at 1403-04 ("An all-or-nothing gamble is precisely what each plaintiff—but no defendant—faces in the separate action process. . . . If it is inappropriate to face *both parties* with an all-or-nothing gamble (a single class trial), we do not see how it improves things to simply face *one party*—the plaintiff—with an all-or-nothing gamble (which is what occurs with separate actions)." (footnote omitted)); *id.* at 1404 n.53 ("In the separate action process, trial is an all-or-nothing event for the plaintiff; a loss may be catastrophic. But it is not an all-or-nothing event for the defendant firm; a loss means paying only one plaintiff."). Professors Hay and Rosenberg argue that defendants can use this supposed asymmetry of risk to extract from a risk-averse plaintiff a settlement that is beneath what the claim should be worth. *Id.* at 1404 ("[W]e should expect the defendant to be able to exploit plaintiff risk aversion in separate actions—by offering the plaintiff, who may have a meritorious case, less than his claim is worth."); T. Dean Malone, Comment, *Castano v. American Tobacco Co. and Beyond: The Propriety of Certifying Nationwide Mass-Tort Class Actions Under Federal Rule of Civil Procedure 23 When the Basis of the Suit Is a "Novel" Claim or Injury*, 49 BAYLOR L. REV. 817, 842 (1997) ("Every day, the United States judicial system allows a single jury to decide that a person deserves execution or that a company should pay millions of dollars to a single individual. Therefore, the argument that a single jury should not be able to decide the fate of an industry elevates the value of commerce above that of a person's life.").

the risk of a single jury trial for the plaintiff in which the defendant's overall liability is determined with regard to that plaintiff. Indeed, the set up of a single jury is embodied in our constitutional guarantee of a right to a jury trial.<sup>305</sup> Moreover, if settlement is prevalent, each litigant, including the plaintiff, can choose to forego trial for a settlement valuation that is the product of multiple juries' verdicts, thus providing the benefits of multiple-verdict adjudication to plaintiffs as well. Finally, reducing individual trial jury verdict variability by radically expanding the size of a jury or using multiple juries for each individual's trial is not likely to be deemed practically possible, given the volume of disputes pending and the burdens of jury service. The individual jury represents a serious attempt at obtaining a just adjudication channeling the community's wisdom, but its imperfection in variability should prevent a single jury's verdict from being miscast as a perfect adjudication and applied to thousands or millions via the class action.

#### V. CONCLUSION

Mass tort class actions pose great risks of an outlier verdict being applied to perhaps millions of claimants, thereby imperiling tort goals of corrective justice, efficiency, and compensation. Indeed, the *Engle v. Liggett Group, Inc. (Engle II)*<sup>306</sup> case provides a glaring example of a single class trial conflicting with the results of numerous individual trials. Proposals to incorporate multiple juries into mass torts via statistical sampling and damages averaging fail to rescue the class action method, because they have foundered on concerns of violating due process, right to jury trial, and state tort law. My proposal is that the problems of verdict variability in class actions be avoided through individual litigation with multiple individual trials, the verdicts of which would be used to develop accurate claim values that could be used for broad-reaching settlements that would reduce transaction costs. As long as the underlying claims involve sufficient economic value to warrant the undertaking of individual litigation by plaintiffs' counsel, this approach provides a superior alternative to class actions, serving the laudable goals of both tort law and civil procedure.

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305. See Trangsrud, *supra* note 19, at 77 (“[O]ur civil justice system has traditionally and correctly aimed to give each individual tort litigant a fair and equal *opportunity* to try his case, knowing that similarly situated plaintiffs will sometimes obtain widely different outcomes.”).

306. 945 So. 2d 1246 (Fla. 2006), *cert. denied*, 128 S. Ct. 96 (2007).