03-7140(L), 03-7141 (CON)

United States Court of Appeals *for the* Second Circuit

In re: SIMON II LITIGATION

SIMON II LITIGATION,
Plaintiffs-Appellees,
v.

PHILIP MORRIS USA INC. (formerly known as Philip Morris Incorporated),
R.J. REYNOLDS TOBACCO CO., BROWN AND WILLIAMSON TOBACCO CORP.
(individually and as successor by merger to The American Tobacco Co.)
and LORILLARD TOBACCO COMPANY,
Defendants-Appellants,

LIGGETT GROUP, INC.,
Defendant.

On Appeal from the United States District Court
for the Eastern District of New York

BRIEF OF WASHINGTON LEGAL FOUNDATION AND
THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE
IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed.R.App.P. 26.1, the Washington Legal Foundation (WLF) states that it is a corporation organized under § 501(c)(3) of the Internal Revenue Code. The National Association of Manufacturers (NAM) states that it is a corporation organized under § 501(c)(6) or the Internal Revenue Code. Neither WLF nor the NAM has a parent corporation or any stock owned by a publicly held company.

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BRIEF OF WASHINGTON LEGAL FOUNDATION AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF DEFENDANTS-APPELLANTS, URGING REVERSAL

IDENTITY AND INTERESTS OF *AMICI CURIAE*

Amici curiae Washington Legal Foundation and the National Association of Manufacturers are filing this brief with the consent of all parties.

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center with supporters in all 50 states. WLF regularly participates in appellate litigation in support of its view that certification of class actions can undermine the fairness of our court system when undertaken in inappropriate situations. Among the many federal and state court cases in which WLF has appeared as *amicus curiae* in order to espouse its views on the proper scope of class action litigation are *Gilchrest v. State Farm Mut. Automobile Ins. Co.,* No. 03-107998-H (11th Cir., dec. pending); *Linder v. Thrifty Oil Co.,* 23 Cal.4th 429 (2000); *Peterson v. BASF Corp.,* No. C3-02-857 (Minn., dec. pending); and *Ysbrand v. DaimlerChrysler Corp.,* 2003 Ok. 17 (2003).

The National Association of Manufacturers (NAM) is the nation's largest industrial trade association; it represents 14,000 member companies and 350 member associations serving manufacturers and employees in every industrial

sector and all 50 states. The NAM has actively supported adoption of class action reform by Congress.

WLF and the NAM are concerned by the proliferation of class action lawsuits being filed in state and federal courts and the inhibiting effects that such suits can have on the development and expansion of businesses. WLF and the NAM believe that the district court's class certification order, if allowed to stand, will exacerbate that trend by encouraging efforts to certify inappropriate, unwieldy classes that render the underlying lawsuits untriable. They fear that the legal principles enunciated by the district court would justify certification of a nationwide Rule 23(b)(1)(B) class for recovery of punitive damages in virtually *any* mass tort case.

STATEMENT OF THE CASE

In the interests of brevity, *amici* hereby adopt the Statement of Facts contained in the brief of Defendants-Appellants Philip Morris USA, Inc., *et al.*

In brief, this is an appeal from a September 19, 2002 district court order certifying a nationwide class of smokers seeking recovery of punitive damages for Appellants' (hereinafter, the "tobacco companies") allegedly fraudulent conduct. The class was certified pursuant to Fed.R.Civ.P. 23(b)(1)(b), which

permits such certification if, *inter alia,* prosecution of separate actions by individual class members "would as a practical matter be dispositive of the interests of the other members not parties to the adjudication or substantially impair or impede their ability to protect their interests." The order does not permit any class member to opt out of the class.

Defendants are five cigarette manufacturers, only one of which has its principal place of business in New York. Plaintiffs-Appellees are 13 smokers (or their estates), all from states other than New York. Twelve Appellees allegedly suffer (or suffered) from lung cancer and one allegedly suffers from chronic obstructive pulmonary disease. They claim that the tobacco companies' allegedly fraudulent concealment of information regarding the effects of smoking induced them to smoke cigarettes and that smoking was the proximate cause of their diseases. They seek recovery of both compensatory and punitive damages. However, they sought class certification with respect to their punitive damages claims only.

On September 19, 2002, the district court certified a nationwide "punitive damages class essentially as proposed by plaintiffs." *In re Simon II Litigation,* 211 F.R.D. 86, 108 (E.D.N.Y. 2002) ("*Simon II Certification Order*"). The

certified class (estimated to number in the millions) consists of all those living in the United States (or who lived in the United States at the time of their deaths) who smoked the Defendants' cigarettes and who were first diagnosed with one of 14 listed diseases "from April 9, 1993 through the date notice to the class is ordered disseminated." *Id.* Explicitly excluded from the class were, among others, those who had already litigated claims against the tobacco companies, Florida residents who were members of a certified class of smokers in a suit pending in Florida state court (the "*Engle* class"), those who should have first reasonably realized prior to April 9, 1993 that they had one of the 14 listed diseases, and those whose diagnosis of their disease predated their use of tobacco. *Id.* The court stated, "This constitutes a non-opt-out 'limited punishment' class action for all punitive damages allowable under the constitution and law to members of the class." *Id.* at 109. The court determined that New York law would apply to the claims of all class members. *Id.* at 194.

In determining that there was only a "limited" fund from which class members could draw in seeking punitive damage awards, the court relied on a series of recent Supreme Court decisions that have imposed caps on the amount of punitive damages that can be awarded in individual tort suits. *Id.* at 163-65.

While eschewing any fixed formula for determining the maximum permissible punitive damage award in a lawsuit, the Supreme Court has made clear that excessive punitive damage awards constitute a deprivation of substantive due process in violation of the Fourteenth Amendment. *See, e.g., BMW v. Gore,* 517 U.S. 559 (1996). From these cases, the district court discerned that there must also exist a constitutional limit on the *aggregate* punitive damages (*i.e.,* the combined punitive damages that could be awarded in all lawsuits filed against a defendant for a single course of conduct) that may be imposed on a defendant for its misconduct. *Simon II Certification Order,* 211 F.R.D. at 190. According to the court, this theoretical limit on aggregate punitive damages:

> [C]reates a potential first-in-time problem where the first plaintiffs may recover vast sums while others who arrive later are left with a depleted fund against which they cannot recover. In such instances, a Rule 23(b)(1) action may be appropriately maintained.

Id.

The court noted that while "most" tobacco liability lawsuits have been unsuccessful, *id.* at 135, there have been a number of punitive damage awards against the tobacco companies in recent years. *Id.* at 135-138, 191. The court concluded that that record "creates [a] problem," in that those who file suit first will collect punitive damages up to the constitutionally permissible limit, leaving

no funds from which subsequent litigants could collect punitive damages. *Id.* at 191. The court crafted a trial procedure that ostensibly allows the jury to determine a maximum constitutionally permissible punitive damages award and then, as it deems appropriate, to award punitive damages and to apportion those damages both to class members and to (or for the benefit of) non-class members. *Id.* at 186, 193-94. The court made clear that it intended any award to be all-encompassing; that is, it would cover "all punitive damages nationwide," including "punitive damages due to outrageous conduct by defendants toward non-class members." *Id.* at 186.

SUMMARY OF ARGUMENT

The district court's decision to certify a Fed.R.Civ.P. 23(b)(1)(B) nationwide, non-opt-out class numbering in the millions is untenable in light of the Supreme Court's decision in *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999). As the brief of the tobacco companies well documents, there are numerous reasons why both Rule 23 and the U.S. Constitution bar certification of the class cobbled together by the district court. This brief focuses on just a few of those reasons.

Most importantly, the district court made no effort to demonstrate that a

"limited fund" within the meaning of Rule 23(b)(1)(B) actually exists in this case. In the absence of such a demonstration, certification of a class under Rule 23(b)(1)(B) is wholly improper. Nor would such a demonstration ever be possible in the context of a punitive damages-only suit. While as a theoretical matter, one can infer from Supreme Court punitive damages decisions that a constitutional prohibition against excessive punitive damages creates a cap on aggregate punitive damages awardable against a defendant based on a single course of conduct, the Court has not provided any guidance regarding how such a cap would be computed. Given the Court's "reluctan[ce] to identify concrete constitutional limits" on punitive damages in individual cases, *State Farm Mut. Automobile Ins. Co. v. Campbell,* 123 S. Ct. 1513, 1524 (2003), *amici* suggest that it is virtually impossible for a court to do so when considering limits on awards from multiple lawsuits arising in all 50 states and involving millions of injury claims.

Amici are particularly concerned by the certification order in this case because it contains no limiting principle; the order would justify certification of a nationwide Rule 23(b)(1)(B) class for recovery of punitive damages in virtually *any* mass tort case. Such certifications would impose unwarranted pressure on

defendants to enter into settlements without regard to the merits of the suit.

The certification order also violates the due process rights of both the tobacco companies and the absent class members. By purporting to apply New York law to the claims of class members who have few if any contacts with New York, the district court is upsetting the settled expectations of those class members as well as the defendants. The certification order also deprives absent class members of their due process rights to adequate notice and to opt out of the class, rights that may not be denied in the absence of a showing that this truly is a "limited fund" case.

ARGUMENT

I. THIS IS NOT A "LIMITED FUND" CASE OF THE TYPE CONTEMPLATED BY RULE 23(b)(1)(B) BECAUSE THERE IS NO "LIMITED FUND"

The district court's certification decision was remarkable in that, although it spanned more than 100 pages, it devoted remarkably little attention to whether the proposed class met the specific criteria for class action status under Rule 23(b)(1)(B). As the tobacco companies' brief well demonstrates, those criteria clearly have not been met.

Rather than repeating all of the arguments laid out in that brief, *amici*

focus on one particularly glaring deficiency in Appellees' efforts to certify a "limited fund" class: there is no limited fund. As the Supreme Court stressed repeatedly in its *Ortiz* decision, the existence of such a fund is an absolute prerequisite to certification of a class of the type contemplated by the district court under Rule 23(b)(1)(B).[1] The Supreme Court explained:

> The first and most distinctive characteristic [of the historical antecedents of Rule 23(b)(1)(B) limited fund cases] is that the totals of the aggregated liquidated claims and the fund available for satisfying them, set definitely at their maximums, demonstrate the inadequacy of the fund to pay all the claims. . . . [T]here are good reasons to treat these characteristics as presumptively necessary, and not merely sufficient to satisfy the limited fund rationale for a mandatory action. At the least, the burden of justification rests on the proponent of any departure from the traditional norm.

Ortiz v. Fibreboard Corp., 527 U.S. 815, 838, 842 (1999).

In support of its view that a "limited fund" exists in this case, the district court pointed to Supreme Court decisions establishing constitutional limitations on punitive damage awards. The court concluded that if individual litigants were

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[1] Rule 23 contemplates mandatory class actions under subdivision (b)(1)(B) when the prosecution of separate actions by individual class members would "substantially impair or impede" the ability of other members "to protect their interests." Many Rule 23(b)(1)(B) class actions are of the "limited fund" variety, in which numerous people have claims against a fund that is insufficient to satisfy all claims. In such cases, early judgments obtained by individual claim holders quite obviously could "impair or impede" the ability of other claim holders to collect on their claims.

permitted to continue to seek punitive damage awards from the tobacco companies on a piecemeal basis, there was a danger that the constitutional ceiling on aggregate punitive damage awards could be reached before all those in the 14 disease categories could file claims of their own. *Simon II Certification Order,* 211 F.R.D. at 190. But the court never determined that the claims would in fact exceed the pot of funds available to pay punitive damage awards; it simply stated that there was "a *potential* first-in-time problem." *Id.* (emphasis added). The court made no effort to compute the size of this pot, the extent of aggregate punitive damages likely to be asserted against the tobacco companies, or the aggregate punitive damage awards likely to be imposed against them. Rather, the court contemplated that such questions would be answered during the course of trial.

Ortiz could not be clearer that Rule 23(b)(1)(B) class certification is improper unless the trial court, *prior to certification*, quantifies both the "limited fund" and the allowable claims against that fund, and determines that the fund is insufficient to pay all claims. For example, the Supreme Court held that the lower courts' certification of a Rule 23(b)(1)(B) class of asbestos claimants was improper because "there was no adequate demonstration of the second element

required for limited fund treatment, the upper limit of the fund itself, *without which no showing of insufficiency is possible*." *Ortiz,* 527 U.S. at 850 (emphasis added). The Court stated that had the trial court's "independent valuation" of the fund shown "the probability of enough assets to pay all projected claims," then "certification of *any* mandatory class on a limited fund rationale" would have been "preclud[ed]." *Id.* at 853 (emphasis added).[2] The Court also questioned any certification of a limited fund class action in light of the district court's conclusion that there was no way to estimate reliably the probable total of asbestos liability judgments that would have been imposed against Fibreboard Corp. in the absence of class settlement. *Id.* at 850.

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[2] *Ortiz* noted that the lower federal courts had "differed somewhat in articulating the standard to evaluate whether, in fact, a fund is limited." *Id.* at 848 n.26 (comparing the Ninth Circuit's standard ("class proponents must demonstrate that allowing the adjudication of individual claims will inescapably compromise the claims of absent class members") with the standard employed by Judge Weinstein in the Agent Orange litigation ("requiring only a 'substantial probability -- that is less than a preponderance but more than a mere possibility -- that if damages are awarded, the claims of earlier litigants should exhaust the defendants' assets'")). *Ortiz* found it unnecessary to decide which was the appropriate standard because under either standard, class certification was improper in *Ortiz* in the absence of any effort to evaluate quantitatively whether the fund available to pay claims was, in fact, limited. *Id.* It is worth noting that Judge Weinstein in this case, by certifying a mandatory nationwide class without first attempting to quantify available funds and to determine the likelihood that they would be insufficient to pay all damage awards, did not abide by the (lenient) standard he established for himself in the Agent Orange litigation.

Judge Weinstein's failure, in connection with his certification decision, to undertake a quantitative analysis of whether the tobacco companies' funds available to pay punitive damage awards constituted a "limited fund" cannot be excused by his plan to address those issues later, during the course of the trial. Any decision to bind a litigant to a judgment in a suit in which he is not a formal party (as when one is named a member of a mandatory limited fund class action) cuts against "our 'deep-rooted historic tradition that everyone should have his own day in court.'" *Martin v. Wilks,* 490 U.S. 755, 762 (1989) (quoting 18 C. Wright, A. Miller & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 4449 at 417 (1981)). Class actions represent a limited exception to that general rule, but due process principles prohibit a court from depriving a litigant of "his own day in court" in the absence of a showing that the prerequisites for a limited fund class action have, in fact, been met. *Ortiz*, 527 U.S. at 846-47. Indeed, Judge Weinstein's trial plan contemplates that the class certification will stand even if the jury ultimately decides to award no punitive damages, or to award punitive damages in an amount less than what he ultimately determines to be the maximum constitutionally permissible punitive damages award. 211 F.R.D. at 190-91, 193-94. Maintaining a class under those circumstances flies in the face

of *Ortiz,* which makes clear that, under those circumstances, there is no "limited fund" and therefore that resort to a Rule 23(b)(1)(B) mandatory class is "preclud[ed]." *Ortiz,* 527 U.S. at 853.

Judge Weinstein's failure to calculate the size of the alleged "limited fund" is understandable, given the virtual impossibility of such a task. The district court is correct that the Supreme Court has imposed substantive due process caps on punitive damage awards in individual cases, barring the imposition of grossly excessive or arbitrary punishments on a tortfeaser. *See, e.g., Cooper Industries, Inc. v. Leatherman Tool Group, Inc.,* 532 U.S. 424, 433 (2001). Such awards are limited by, *inter alia,* a requirement that they be "both reasonable and proportionate to the amount of the harm to the plaintiff and to the general damages recovered." *State Farm Mut. Automobile Ins. Co. v. Campbell,* 123 S. Ct. 1513, 1524 (2003). But every one of the Supreme Court's punitive damages decisions has addressed the issue of excessiveness from the standpoint of a *single* plaintiff in a *single* lawsuit. While as a theoretical matter, one can infer from these decisions that a constitutional prohibition against excessive punitive damages creates a cap on aggregate punitive damages awardable against a defendant based on a single course of conduct, the Supreme Court has not

provided any guidance regarding how such a cap would be computed. Given the Court's "reluctan[ce] to identify concrete constitutional limits" on punitive damages in individual cases, *id.*, *amici* suggest that it is virtually impossible for a court to do so when considering limits on awards from multiple lawsuits arising in all 50 states and involving millions of injury claims. Indeed, several leading commentators have identified the impossibility of quantifying the size of punitive damages "limited funds" as a principal reason for rejecting the entire concept of punitive damages-only mandatory class actions under Rule 23(b)(1)(B). *See, e.g.,* R. Nagareda, *Engle v. R.J. Reynolds Tobacco Co.: Lessons in State Class Actions, Punitive Damages, and Jury Decision-Making; Punitive Damage Class Actions and the Baseline of Tort*, 36 WAKE FOREST L. REV. 943 (2001).

While declining to speculate regarding the size of the "limited fund" whose existence he postulated, Judge Weinstein apparently believed that the number was huge. For example, at the time he issued his decision, a $145 billion class action punitive damages judgment had been rendered against the tobacco companies in Florida state court.[3] The combined net worth of all the major cigarette manufacturers is $8.3 billion, less than 6% of the size of that judgment. *Engle,*

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[3] That judgment was overturned two weeks ago. *Liggett Group Inc. v. Engle,* ___ So.2d ___, 2003 Fla. App. LEXIS 7500 (May 21, 2003).

2003 Fla. App. LEXIS at *48. Yet, Judge Weinstein's certification decision gives no indication that he believed that the *Engle* judgment exceeded the aggregate punitive damage limit; rather, he simply excluded *Engle* class members from the *Simon II* nationwide class and directed that the jury consider awarding punitive damages *in addition to* those already awarded to Florida smokers in *Engle*. *Simon II Litigation Order,* 211 F.R.D. at 108, 193-94. But a "limited fund" that vastly exceeds the combined net worth of all the defendants is no limited fund at all and thus cannot serve to justify certification of a Rule 23(b)(1)(B) class.[4]

Indeed, Judge Weinstein's real concern appears to have been not that certification was necessary to ensure equitable distribution of a limited fund, but that certification was necessary to ensure that a larger percentage of those with smoking-related diseases had an opportunity to press punitive damages claims.

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[4] Judge Weinstein did *not* seek to justify his certification order by asserting that the "limited fund" was the combined net worth of the tobacco companies and that that combined net worth was insufficient to pay expected punitive damage awards. Nor would certification ever be appropriate on that basis; *Ortiz* made clear that the drafters of Rule 23 never "contemplated that, in mass torts, (b)(1)(B) 'limited fund' classes would emerge as the functional equivalent of bankruptcy by embracing 'funds' created by the litigation itself." *Ortiz,* 527 U.S. at 843 (quoting Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members,* 98 COLUM. L.REV. 1148, 1164 (1998)).

See 211 F.R.D. at 147 ("The consequence of requiring individual proof from each smoker would be to allow defendants who have injured millions of people and caused billions of dollars in damages, to escape almost all liability."); *id.* at 5 ("The instant case is quite different from *Ortiz* or its progeny. The group here, through trial of a class action, proposes to perform the vital function of helping to close the book on a terrible chapter of American medical-legal-entrepreneurial failures in abuse of tobacco."). But while such concerns -- that individual claimants might be dissuaded by high costs from pressing claims on their own -- are properly considered in determining whether to certify a Rule 23(b)(3) class action,[5] they do not properly play any significant role in determining the appropriateness of a "limited fund" class action (which addresses situations involving too many claimants, not too few). If, as Judge Weinstein determined, very few class members would file a punitive damages claim on their own

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[5] The Supreme Court has explained:

> The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for an individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.,* 109 F.3d 338, 344 (7th Cir. 1997)).

against the tobacco companies, then there is little reason to invoke Rule 23(b)(1)(B) to deny them an opt-out right.

Nor can class certification be justified in this case, as Judge Weinstein would have it, as a commendable effort to adapt the law to meet the changing needs of modern society. *See, e.g.*, 211 F.R.D. at 192 ("Much of American modern procedural jurisprudence has developed out of this tension between predictability based on rigid rules of the past and flexibility based on present needs of a changing society."). *Ortiz* made clear that while Rule 23(b)(3) provides courts with flexibility to certify class actions in new situations not contemplated by the Rule's drafters, Rule 23(b)(1)(B) does not:

> [T]he [Advisory] Committee was consciously retrospective with intent to codify pre-Rule categories under Rule 23(b)(1), not forward looking as it was in anticipating Rule 23(b)(3). . . . Thus, the Committee intended subdivision (b)(1) to capture the "standard" class actions recognized in pre-Rule practice.

Ortiz, 527 U.S. at 842-43.

Amici do not mean any of the foregoing to suggest that there exist mass tort cases in which Rule 23(b)(1)(B) class certification *is* appropriate. To the contrary, for all the reasons stated by the tobacco companies in their brief, we have grave doubts that Rule 23(b)(1)(B) certification is ever appropriate in mass

tort cases. Indeed, while *Ortiz* did not *absolutely* foreclose the possibility of such certifications, it said, "[T]he applicability of Rule 23(b)(1)(B) to a fund and plan purporting to liquidate actual and potential tort claims is subject to question." *Ortiz,* 527 U.S. at 864; *see also, id.* at 844. But even if there are some mass tort situations for which (b)(1)(B) certification might be appropriate, this clearly is not one of them. The district court's failure to undertake even the most basic inquiries necessary to determine whether a "limited fund" exists in this case -- as well as the overwhelming evidence that such an inquiry is a virtual impossibility in the context of aggregated punitive damages claims -- require that the certification order be reversed.

II. UNDER THE DISTRICT COURT'S STANDARD, VIRTUALLY ANY MASS TORT CASE COULD BE CERTIFIED AS A NATIONWIDE RULE 23(b)(1)(B) CLASS ACTION

Amici are filing this brief not simply because the district court erred in certifying a class action in this case. Their principal concern is that the legal principles enunciated by the district court would justify certification of a nationwide Rule 23(b)(1)(B) class for recovery of punitive damages in virtually *any* mass tort case. Such certifications would be inconsistent with Rule 23 and would impose unwarranted pressure on defendants to enter into settlements

without regard to the underlying merits of the suit.

With respect to Rule 23(b)(1)(B) certification decisions, this case cannot meaningfully be distinguished on its facts from the numerous other mass tort situations now confronting the federal courts (*e.g.,* product liability suits pending against manufacturers of pharmaceuticals, medical devices, automobiles, tires, chemicals, and food). Indeed, Rule 23 prohibits federal courts from examining the underlying merits of a case in connection with a Rule 23 certification decision. *Eisen v. Carlisle & Jacquelin,* 417 U.S. 156, 177 (1974) ("We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action."). Thus, the fact that cigarette manufacturers may score lower in popularity polls than do some other major manufacturers does not serve to distinguish this case from other cases in which the plaintiffs may seek to certify a mandatory punitive damages-only class.[6]

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[6] Indeed, as the district court recognized, the great majority of suits seeking punitive damages from the tobacco companies have been unsuccessful. 211 F.R.D. at 135. Accordingly, if it were permissible for district courts to base a Rule 23(b)(1)(B) certification decision on the likelihood that a jury would award punitive damages to the plaintiff class, then punitive damages-only class actions should be even more likely to be certified in suits targeting the many

As the spate of punitive damages cases before the Supreme Court in recent years well illustrates, the cigarette industry is far from alone among major American industries in being targeted by lawsuits seeking huge punitive damages awards. The theoretical constitutionally-based cap on punitive damage awards that the district court identified with respect to claims against the tobacco companies is equally applicable to all other defendants being sued for punitive damages. Thus, if (as Judge Weinstein held) the mere "potential" that all punitive damages against a company could in the aggregate exceed the constitutional cap is by itself sufficient to create a "limited fund" for purposes of Rule 23(b)(1)(B), then virtually every major American industry will soon have a similar nationwide class action certified against it.

Amici are concerned by what they view as the unwarranted proliferation of class action lawsuits being certified in state and federal courts. The excessive number of certification orders are distorting the litigation process by forcing defendants into settling claims without regard to the merits of those claims. As numerous commentators have recognized, defendants that face a large certified class and hence enormous potential damages are "under intense pressure to

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corporations with litigation track records that are less successful than that of the cigarette industry.

settle." *In re Rhone-Poulenc Rorer, Inc.,* 51 F.3d 1293, 1298 (7th Cir.) (Posner, C.J.), *cert. denied,* 516 U.S. 1984 (1995). If not wanting to "roll the dice," they settle, often without regard to the merits of the plaintiffs' claims. *Id.* Such settlements can in many instances legitimately be deemed "blackmail settlements." H. Friendly, *Federal Jurisdiction: A General View*, at 120 (1973). *See also Castano v. American Tobacco Co.* 84 F.3d 734, 746 (5th Cir. 1996) (pressure emanating from certification of big classes amounts to "judicial blackmail," creating "insurmountable pressure on defendants to settle"; "[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low").

Class actions do, of course, serve laudable goals, and the distortions discussed above can in some circumstances be an acceptable price to pay for achieving those goals. For example, class actions can ensure that claimants to a limited fund are given equal opportunities to press their claims. They also help overcome the problem that plaintiffs seeking small recoveries often lack sufficient financial incentive to file suit to vindicate their rights. But when (as here) certification of a putative class action is unlikely to serve any of the purposes for which class actions were created, there can be little justification for

coercing defendants into settling marginal claims by certifying the class action.

The largely open-ended nature of punitive damages claims ensures that a significant percentage of plaintiffs with viable claims for punitive damages will be in a position to retain contingency-fee counsel to file non-class action suits. As the decision below notes, numerous individuals have filed non-class action suits seeking an award of punitive damages against the tobacco industry based on the same course of conduct that gave rise to this suit. 211 F.R.D. at 135-38. Juries have awarded punitive damages to some of those individuals. *Id.* That record demonstrates that the potential for recovery of substantial punitive damages has ensured that those seeking redress for alleged cigarette industry wrongdoing can have their day in court, even without class action certification.[7] The same can be said for those who claim to have suffered injury in connection with the numerous other "mass torts" that have become the subject of non-class action litigation. Yet, if the decision below is allowed to stand, *amici* can think of no principled basis for opposing creation of a nationwide punitive damages-only class action within this Circuit for each of those other "mass torts." In

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[7] In overturning certification of a class of Florida smokers, the Florida Court of Appeals rejected as both "baseless" and "intellectually improper" the claim that suits by individual smokers were economically unfeasible. *Engle,* 2003 Fla. App. LEXIS 2500 at *28.

order to prevent the unfairness to defendants that such a massive increase in class action litigation would entail, the decision below should be reversed.

III. DUE PROCESS PROHIBITS USE OF A NON-OPT-OUT CLASS AND APPLICATION OF NEW YORK LAW TO THE CLAIMS OF ALL CLASS MEMBERS

As *Ortiz* recognized, this nation has a "deep-rooted historic tradition" of granting everyone his day in court and of refusing to bind him to any court judgment unless he either voluntarily appeared as a party in that court or has been made a party by service of process. *Ortiz*, 527 U.S. at 846. While the Supreme Court has created limited exceptions to that general rule in connection with class actions, the Court has made clear that due process imposes strict limits on the power of state and federal courts to bind nonparties to a class action judgment. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985). Quite apart from its violation of Rule 23(b)(1)(B) in certifying a punitive damages-only class action, the district court also violated the Fifth Amendment's Due Process Clause by denying absent members notice of the action and an opportunity to opt out.

Shutts involved a challenge to a class action judgment issued by a state court in Kansas. The Court held, "If the forum State wishes to bind an absent

plaintiff concerning a claim for money damages or similar relief at law, it must provide minimal due process protection." *Id.* That protection includes: (1) "notice plus an opportunity to be heard and participate in the litigation"; (2) "an opportunity to remove himself from the class by executing and returning an 'opt out' or 'request for exclusion' form to the court"; and (3) "that the named plaintiff at all times adequately represent the interests of the absent class members." *Id.* at 812.[8] While *Shutts* involved a Fourteenth Amendment due process challenge to class action procedures, the Supreme Court's discussion of *Shutts* in *Ortiz* makes clear that *Shutts* applies to the Fifth Amendment's Due Process Clause as well. *Ortiz,* 527 U.S. at 848 & n.24.

Ortiz contains no suggestion that Rule 23(b)(1)(B) itself is unconstitutional because of its failure to require that absent class members be provided an opt-out right. But the Court made plain that any class action procedures that deny a litigant his own day in court -- even procedures based on a "limited fund rationale" -- raise "serious constitutional concerns." *Id.* at 845.

Where a fund is truly "limited," the due process right of a claimant to have

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[8] The Court confined its due process holding to class actions involving claims (as here) "wholly or predominately for money judgments." *Id.* at 811 n.3.

his own day in court are outweighed by the interests of the court system in ensuring that the fund be allocated equitably among competing claimants. *See, e.g., Dickinson v. Burnham,* 197 F.2d 973 (2d Cir.), *cert. denied*, 344 U.S. 875 (1952). But there can be no justification for denying a claimant his due process right to his own day in court when there is serious doubt that the fund is "limited" in any meaningful sense. By certifying a non-opt-out class in the absence of any finding that the constitutionally capped fund available to pay punitive damages is insufficient to cover valid claims, the district court has violated the due process rights of absent class members.[9]

Moreover, the district court's intention to largely dispense with notice to

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[9] It is well settled that defendants such as the tobacco companies have standing to complain that a trial court has violated constitutional rights belonging not to themselves but to the absent class members. *Shutts* held that defendants suffer injury-in-fact sufficient for standing purposes if they must defend a suit in which plaintiffs (due to inadequate procedural protections) can choose not to be bound by any judgment with which they are not satisfied. The Court explained:

> Whether it wins or loses on the merits, petitioner has a distinct and personal interest in seeing the entire plaintiff class bound by res judicata just as petitioner is bound. The only way a class action defendant like petitioner can assure itself of this binding effect of the judgment is to ascertain that the forum court has jurisdiction over every plaintiff whose claim it seeks to adjudicate, sufficient to support a defense of res judicata in a later suit for damages by class members.

Shutts, 472 U.S. at 805.

class members (211 F.R.D. at 182-83) also violates the due process rights of absent class members. The due process right to notice recognized by *Shutts* means "individual notice . . . to all class members whose names and addresses may be ascertained through a reasonable effort." *Eisen,* 417 U.S. at 173. *See also Mullane v. Central Hanover Bank & Trust Co.,* 339 U.S. 306, 314 (1950) (due process requires notice that is "reasonably calculated under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections."). The district court proposed a notice-by-publication procedure. 211 F.R.D. at 183. As *Eisen* explained, *Mullane* held that "publication notice [does] not satisfy due process where the names and addresses of the beneficiaries were known." *Eisen*, 417 U.S. at 174. Class certification is improper in this case in the absence of a provision requiring that notice by mail be sent to all class members whose names and addresses can reasonably be ascertained.

Due process also prohibits the district court's decision to apply New York law to the claims of all class members. *Shutts* explained that due process bars application of substantive law from a forum that has only a "casual or slight" relationship with the litigation. *Shutts,* 497 U.S. at 819. To apply its own

substantive law to a case in its courts, a State must have a "significant contact or significant aggregation of contacts to *the claims asserted by each member of the plaintiff class*, contacts creating state interests in order to ensure that the choice of that substantive law is not arbitrary or fundamentally unfair." *Id.* at 821-822 (citations and quotations omitted) (emphasis added). In *Shutts*, the Kansas Supreme Court applied Kansas law to the claims of class members from ten different States. The U.S. Supreme Court determined that application of Kansas law to non-Kansas plaintiffs was unconstitutional because Kansas did not have contacts with the claims that were sufficient to create adequate state interests in the adjudication of those claims under its laws. *Id.* at 822. Although the defendant conducted significant amounts of business and owned significant property in Kansas, the Court deemed those contact constitutionally insufficient. The Court instead focused on the claims of each plaintiff class member and determined that Kansas was prohibited from applying its law to transactions involving plaintiffs who had no contacts with Kansas other than the fact that they did business with a company that operated in Kansas. *Id.* at 819.

The district court's decision to apply New York law to the claims of all class members (the vast majority of whom have no contact with New York) is

equally indefensible. None of the defendants is incorporated in New York, and only one has its principal place of business there. The cigarette sales at issue here occurred in all 50 States, each of which has its own set of laws governing sales transactions within its borders. The parties to those transactions would reasonably have expected that their conduct would be judged, in any subsequent litigation, by the law of the jurisdiction in which it occurred. The Supreme Court has made clear that such expectations largely dictate the due process analysis regarding which States' laws may constitutionally applied to litigation arising out of a transaction. *Id.* at 822; *Allstate Ins. Co. v. Hague,* 449 U.S. 302, 318 (1981). Applying the laws of a single State to the claims of every class member in a putative nationwide class action may simplify a trial judge's efforts to render the case manageable, but it is constitutionally impermissible if the result is to apply the laws of that State to claims bearing no more than a casual relationship to the State.

CONCLUSION

Amici curiae respectfully request that the district court's order certifying a class action be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of WLF is in 14-point proportionately spaced CG Times type. According to the word processing system used to prepare this brief (WordPerfect 9.0), the word count of the brief is 6,439, not including the corporate disclosure statement, table of contents, table of authorities, certificate of service, and this certificate of compliance.

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