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Castano v. American Tobacco Company: America's Nicotine Plaintiffs Have No Class

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NOTE

Castano v. American Tobacco Company: America's Nicotine Plaintiffs Have No Class

Judge Jones in Louisiana would be creating a Frankenstein's monster if he should allow certification of what purports to be a class action on behalf of everyone who has ever been addicted to nicotine.[1]

Professor Charles Alan Wright

I. INTRODUCTION

In *Castano v. American Tobacco Co.*,[2] the Fifth Circuit Court of Appeals was confronted with "[possibly] the largest class action ever attempted in federal court," a class action on behalf of, generally, all persons in the United States who had ever been addicted to nicotine.[3] Although the district court judge's decision was in favor of certification, the Fifth Circuit Court of Appeals, fearing the prospect of a "Frankenstein's monster,"[4] ultimately decertified the class.[5]

The scope of this note leaves the issue of nicotine addiction to the scientific experts. It examines the prior jurisprudence and *Castano*'s class action analysis as indicators of whether the federal courts can, or should, certify immature, complex, mass torts as nationwide class actions under Rule 23 of the Federal Rules of Civil Procedure. The note also discusses whether the federal courts should formulate a federal common law of torts in the mass accident context, or in the alternative, devise federal common law choice-of-law rules to apply to such class actions.

II. FACTS OF THE *CASTANO* CASE

In March 1993, a prospective class of plaintiffs, represented by countless attorneys from across the country, descended on New Orleans, Louisiana.[6] The

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1. Letter from Professor Charles Alan Wright, University of Texas School of Law, to N. Reid Neureiter, Williams & Connolly, Washington, D.C. (Dec. 22, 1994) *in* Castano v. American Tobacco Co., 84 F.3d 734, 745 n.19 (5th Cir. 1996).

2. 84 F.3d 734 (5th Cir. 1996).

3. *Id.* at 737.

4. In the late 1960s and into the 1970s, opponents of the class action device characterized it as "legalized blackmail" and a "Frankenstein's Monster." The term was first used in Chief Judge Lumbard's dissent in Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 572 (2d Cir. 1968), to apply to the specific case, but was subsequently applied to all class actions. Arthur Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 Harv. L. Rev. 664, 665 n.9 (1979).

5. *Castano*, 84 F.3d at 737.

6. Castano v. American Tobacco Co., 160 F.R.D. 544, 547 (E.D. La. 1995).

would-be class consisted of all "nicotine-dependent"[7] persons in the United States, including current, former and deceased smokers and their heirs.[8] They alleged ten causes of action in tort and products liability against cigarette manufacturers, seeking compensation solely for the injury of nicotine addiction.[9] The plaintiffs alleged that the defendants 1) failed to inform consumers that nicotine is addictive, and 2) manipulated levels of nicotine in cigarettes to sustain addictivity.[10]

The district court conditionally certified the class, under Rule 23 of the Federal Rules of Civil Procedure, on several "core" issues, dealing primarily with the liability of the cigarette manufacturers.[11] The district court contemplated that a multitude of separate adjudications on individual issues would follow a single jury's resolution of the "core" issues.[12]

The case was heard on appeal by Fifth Circuit Court of Appeals Judges Jerry E. Smith, John M. Duhe, Jr., and Harold R. DeMoss, Jr. Writing for the unanimous panel, Judge Smith called for decertification of the class. *Held*: Certification of the class did not meet the standards of Rule 23 of the Federal Rules of Civil Procedure, particularly the commonality/predominance and superiority requirements, because 1) the district court failed to consider how variations in state law would affect litigants, 2) the district court failed to inquire as to how the subsequent individual trials would be litigated, and 3) the class independently failed Rule 23's superiority requirement because of the disadvantages of litigating the action as a class action suit.

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7. *Castano*, 84 F.3d at 737.

8. *Id.* at 738. More precisely, the class was made up of all nicotine-dependent persons in the United States who had purchased and smoked cigarettes manufactured by the defendants. The class also consisted of the estates and representatives of these nicotine-dependent persons, as well as their spouses, children, relatives, and "significant others" as their heirs and survivors. Persons with claims before 1943 were not included in the class.

9. *Id.* The causes of action included: 1) fraud and deceit, 2) negligent misrepresentation, 3) intentional infliction of emotional distress, 4) negligence, 5) negligent infliction of emotional distress, 6) violation of state consumer protection statutes, 7) breach of express warranty, 8) breach of implied warranty, and 9) Louisiana redhibition. The plaintiffs limited their claims to those since 1943.

10. *Id.* at 739.

11. *Id.* The issues of "core liability" were to include particular common issues of both fact and law. Common issues of fact would include whether particular defendants knew smoking was addictive, failed to inform cigarette smokers of such, and took actions to addict cigarette smokers. Common legal issues would include fraud, negligence, breach of warranty, strict liability, and violation of consumer protection statutes. In addition, the jury would determine the defendants' liability for punitive damages.

12. *Id.* at 740. The district court denied certification of the class on the issues of injury-in-fact, proximate cause, reliance, affirmative defenses, and compensatory damages because of each issue's individual nature. The district court contemplated these issues would be litigated if and when the "core issues" had been resolved in favor of the plaintiff class.

III. PRIOR LAW

A. Generally

The class action device has been the most controversial recent development in the law of federal procedure.[13] The class action was originally an instrument of equity which provided large groups of interested parties a procedural device by which they could, as plaintiffs, properly enforce their equitable rights, or as defendants, properly protect such rights.[14] Congress first recognized the class action device when it adopted Rule 23 in 1938.[15] Despite an attempt in 1966 to make the requirements more functional, the procedure remains "extremely complicated."[16]

The Advisory Committee for these 1966 amendments noted that a "mass accident," or one which results in injuries to numerous persons, is ordinarily *not* appropriate for a class action.[17] The Committee determined that a mass accident greatly increases the likelihood of significant individual questions of damages, liability, and defenses.[18] As a result, the Committee feared that such class actions would usually break down into separate, individual lawsuits.[19] Nevertheless, there is no statutory provision directly prohibiting class certification of such actions.[20]

B. Rule 23 of the Federal Rules of Civil Procedure

Rule 23 of the Federal Rules of Civil Procedure details the procedure for maintaining a suit as a class action in federal court.[21] The four prerequisites to a class action under Rule 23(a) are numerosity, adequacy, typicality and commonality.[22] First, a class must be so numerous as to make it impractical for the controversy to be litigated individually.[23] Second, the named members must adequately represent the interests of the entire class.[24] Next, the named plaintiffs of the class are required to have incentives aligned with, or those

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13. Charles A. Wright, Law of Federal Courts 872 (5th ed. 1994).
14. *Id.* (citing Montgomery Ward & Co. v. Langer, 168 F.2d 182, 187 (8th Cir. 1948)).
15. *Id.*
16. *Id.*
17. Castano v. American Tobacco Co., 84 F.3d 734, 744 (5th Cir. 1996) (citing Fed. R. Civ. P. 23(b)(3), Advisory Notes to 1966 Amendment).
18. *Id.*
19. *Id.*
20. *Id.*
21. Fed. R. Civ. P. 23.
22. *Id.*
23. Castano v. American Tobacco Co., 160 F.R.D. 544, 550 (E.D. La. 1995).
24. *Id.* at 551.

typical of, the absent members of the class.[25] Finally, there must be questions of law or fact common to the class.[26]

Rule 23(b) further mandates, among other things, that the district court find predominance (which is akin to commonality) and superiority.[27] The questions of law or fact common to the members must predominate over any questions affecting only individual members.[28] Additionally, the class action method must be shown to be superior to other methods available for the fair and efficient adjudication of the controversy.[29] The *Castano* opinion primarily addresses the issues of commonality/predominance and superiority.

1. Commonality and Predominance

Rule 23(a)(2) requires there to be "questions of law or fact common to the class."[30] Rule 23(b)(3) incorporates this "commonality," requiring the court to find that such questions "predominate over any questions affecting only individual members."[31] This assures that the action can be realistically and effectively maintained and that the interests of absent members will be fairly and adequately represented.[32]

The courts usually apply a low threshold for commonality; it is often satisfied when the named plaintiffs share at least one question of fact or law with the prospective class.[33] However, courts set a higher standard for commonality when the potential class involves issues of personal injury damages. This standard is necessary to confront the individualized issues of liability and the extent of damages of such mass torts.[34] The higher standard is also required in the context of complex torts, such as products liability actions, in which no one set of facts establishes liability, and the defendants can raise different affirmative defenses against each plaintiff.[35]

The federal courts have certified classes involving complex mass torts, but those cases usually centered around the resolution of a single, determinative issue.[36] For example, in *In re "Agent Orange" Products Liability Litigation*,[37] class certification was justified because of the emphasis on the military contractor

25. *Id.* at 550-51.
26. *Id.* at 550.
27. Fed. R. Civ. P. 23(b).
28. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996).
29. *Id.* at 632.
30. Fed. R. Civ. P. 23(a)(2).
31. *Georgine*, 83 F.3d at 626.
32. *Id.* at 630.
33. *Id.* at 627.
34. *Id.*
35. *Id.*
36. *Id.* at 628.
37. 818 F.2d 145, 167 (2d Cir. 1987).

defense, which, if successful, would terminate the entire litigation.[38] However, the court in *In re Fibreboard Corp.*,[39] refused to certify a class of 2,990 members in an asbestos-related suit because of the many disparities among the individual plaintiffs, such as different diseases, various amounts of exposure, and materially different lifestyles.[40]

In *In re School Asbestos Litigation* ("*School Asbestos*"),[41] the court affirmed a class certification concerning property damage associated with asbestos removal from the nation's schools, despite the inherent variations in state law.[42] In that case, counselors for the class conducted an extensive analysis of the products liability law in each jurisdiction, determining that the applicable law of the states could be broken into four manageable patterns.[43] As a result, the court determined that the variations of state law were manageable, and therefore Rule 23's commonality/predominance requirement could still be met.[44]

However, the Third Circuit Court of Appeals in *Georgine v. Amchem Products, Inc.*[45] found that the huge number of important individual issues overwhelmed any common questions of law and fact.[46] For example, each member was exposed to a different asbestos-containing product, for different amounts of time, and in different ways.[47] Each member had differing degrees of physical injury, complicating the damages inquiry, as well as a different history of cigarette smoking, complicating the inquiry into causation.[48] Finally, the court would be dealing with fifty state law variations, including choice-of-law rules, statutes of limitations, and comparative/contributory negligence provisions.[49]

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38. *Georgine*, 83 F.3d at 628.

39. 893 F.2d 706 (5th Cir. 1990).

40. *Georgine*, 83 F.3d at 628-29 (discussing *In re Fibreboard Corp.*, 893 F.2d at 712).

41. 789 F.2d 996 (3d Cir.), *cert. denied*, 479 U.S. 852, 107 S. Ct. 182 and 479 U.S. 915, 107 S. Ct. 318 (1986).

42. *Georgine*, 83 F.3d at 627.

43. *Id.* at 627 n.13. *See also* Walsh v. Ford Motor Co., 807 F.2d 1000 (D.C. Cir. 1986), *cert. denied*, 482 U.S. 915, 107 S. Ct. 3188 (1987) (determining that after an "extensive analysis" of state law variances, that class certification did not "present insuperable obstacles").

44. *Georgine*, 83 F.3d at 627.

45. 83 F.3d 610 (3d Cir. 1996).

46. *Id.* The Third Circuit confronted this massive class action suit concerning asbestos exposure just two weeks before the Fifth Circuit Court of Appeals issued the *Castano* opinion. The representatives of both sides of the asbestos controversy had reached a settlement which covered not only "injured" plaintiffs, who alleged to have physical injuries caused by asbestos exposure, but "exposure-only" plaintiffs as well, who feared that they might contract some asbestos-related disease in the future. The court analyzed the case as if the suit were going to be litigated (and not settled), and determined that the class did not meet, among other requirements, the commonality/predominance and superiority requirements of Rule 23. *Id.* at 619.

47. *Id.* at 626.

48. *Id.*

49. *Id.* at 627

The *Georgine* court distinguished itself from *School Asbestos* by noting the latter case involved far fewer individualized questions of law and fact because it concerned property damage suits, and not the more complicated personal injury suits.[50] Furthermore, the personal injury law in *Georgine* could not be broken down into as few a number of patterns as could the law in *School Asbestos*.[51]

2. Superiority

Rule 23(b)(3) requires the court to find that a class action is "superior to other available methods for the *efficient* and *fair* adjudication of the particular controversy."[52] In *Georgine*, the court determined that the suit failed both the efficiency and the fairness prongs of the superiority analysis.

The court found that the class action format would be inefficient for two reasons.[53] First, the class action would be overwhelming because of the many uncommon, individual issues discussed earlier.[54] Second, the tremendous number of potential class members was staggering. As a result, the court concluded the suit could be better litigated on a case-by-case basis.[55]

Concerning fairness, the *Georgine* court determined that the stakes for each plaintiff were simply too high to be decided in a class action case.[56] The class action is certainly a proper vehicle for suit when the potential gains of the plaintiff are outweighed by the costs of an individual adjudication.[57] However, *Georgine* involved personal injury and death claims with potentially huge rewards in the tort system.[58] Therefore, the court determined, out of fairness, that the plaintiffs should not be denied the decision on whether and when to settle out of court.[59]

The court also found inherent unfairness in the inadequacy of notification to potential plaintiffs.[60] The court anticipated that many potential plaintiffs would not be adequately notified of the terms at stake.[61] The "exposure-only" plaintiffs would be especially difficult to notify and inform, because many either

50. *Id.*
51. *Id.* n.13.
52. Fed. R. Civ. P. 23(b)(3).
53. *Georgine*, 83 F.3d at 632.
54. *Id. See supra* Section III.B.1 for a discussion of the individual issues in the context of the commonality and predominance requirement.
55. *Georgine*, 83 F.3d at 632.
56. *Id.* at 633.
57. *Id.*
58. *Id.*
59. *Id.*
60. *Id.* at 633.
61. *Id.*

did not know, did not remember, or did not care that they had previously been exposed to asbestos.[62]

Nevertheless, certain asbestos-related class action suits, in addition to *School Asbestos*, have been certified. For example, in *Jenkins v. Raymark Industries*,[63] the Fifth Circuit Court of Appeals concluded that considerable expense could be saved, both for the litigants and the court, by resolving certain defense-related questions in one class trial.[64] Despite challenges that more effective mechanisms were available,[65] the court maintained that the existence of such alternative methods did not automatically defeat superiority.[66]

The *Jenkins* court determined that the large volume of litigation and the greater frequency of mass disasters were leading the courts in a new direction.[67] Although the use of class actions in the mass tort setting had usually been avoided by courts in the past, the *Jenkins* court resolved to abandon the repetitive hearings with the same witnesses, arguments, exhibits, and issues, and litigate the entire controversy at once.[68]

According to the *Jenkins* court, the class action method would save both litigant and judicial resources.[69] The court's examination of the common issues, such as the defense-related questions of product identification, product defectiveness, gross negligence, and punitive damages would presumably shorten the individual trials. This technique would lower the defendants' attorneys' fees and reduce the court's expenses.[70] Moreover, the court assumed that the plaintiffs' attorneys' fees would be conservatively controlled by the judge.[71] The ultimate result was an indication that the court was embracing, or at least tolerating, the class action method in the arena of complex mass torts.

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62. The danger of the "opt-out" procedure, which presumes individuals to be *in* the settlement, unless they opt out of it, is especially high in this case because even slight exposure to asbestos can lead to mesothelioma, a fatal lung disease. Those contracting the disease in the future may have little or no memory of being exposed to asbestos. Therefore, the *Georgine* court found it unrealistic that every individual could 1) learn about the class action; 2) realize he was exposed to asbestos and might one day contract a deadly disease; and 3) make a reasoned decision about whether to stay in the class action. *Georgine*, 83 F.3d at 633.

63. 782 F.2d 468 (5th Cir. 1986), *reh'g and reh'g en banc denied*, (5th Cir. 1986).

64. *Id.* at 473. In *Jenkins*, the common issues would be heard by a class jury, and the individual issues concerning the unnamed members would be litigated in a number of "mini-trials" of eight to ten plaintiffs. *Id.*

65. *Id.* For example, the class action opponents argued that the better alternative was resolution of claims by a particular center created by the asbestos manufacturers. They also suggested using "reverse bifurcation." Under this plan, each plaintiff would be allowed to attempt to prove asbestos exposure and damage causation in one trial, and if successful, have his case settled or otherwise resolved in a subesequent trial.

66. *Id.*

67. *Id.*

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.*

IV. THE COURT'S ANALYSIS IN *CASTANO*

With this jurisprudential background, the Fifth Circuit Court of Appeals confronted the *Castano* Frankenstein's monster. The question was whether the court would apply its own "class action friendly" analysis from *Jenkins*, or whether it would adopt the recent hostility toward class actions as did its brother circuit in *Georgine*. Unfortunately for the class proponents, the Fifth Circuit opted for the latter.

In *Castano*, the court decertified the class for a number of reasons within the context of Rule 23. More specifically, the court found fault with the district court's analysis of the commonality/predominance and superiority requriements.

A. Variations in State Law

The commonality/predominance requirement was unsatisfied, because the district court had neglected to analyze how differences in each jurisdiction's laws would affect the various litigants.[72] Had the district court conducted such an analysis, it would have found that the variations in state law would create mass confusion.

The *Castano* plaintiff class was to consist of members from all fifty states and other United States territories.[73] Therefore, the debate centered around whether each member's causes of action would be so generic that the common issues would predominate over them, or whether the differences engendered by such state-to-state variations would be unmanageable.[74]

The Fifth Circuit Court of Appeals stated that in order to certify a class in a multiple jurisdiction action, a court must make the conflicts-of-law determinations before analyzing the commonality/predominance requirements, regardless of the difficulty of such a task.[75] It also noted that the burden of proof is on the class action proponents, not on the challenger.[76]

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72. Castano v. American Tobacco Co., 84 F.3d 734, 741, 744 (5th Cir. 1996).

73. *Id.* at 737.

74. *Id.* at 739. Although it conceded that manageability of the individual issues might prove to be difficult, the district court concluded that such difficulties would "pale in comparison" to those caused by thousands of similar trials throughout the country. *Id.* at 740.

75. *Id.* at 741. The district court had wrongly reasoned that the jurisprudence shows issues of fraud, breach of warranty, negligence, intentional tort and strict liability do not vary so much from state-to-state as to prevent common issues from predominating. It added that the defendants made no showing to the contrary, either for the aforementioned issues, or for the issue of variations in the consumer protection statutes. It also deemed it impossible to decide the commonality and predominance questions because it had not yet made a conflict-of-laws determination. Castano v. American Tobacco Co., 160 F.R.D. 544, 554-55 (E.D. La. 1995).

76. *Id.* The district court had wrongly placed the burden on the challenger to show that predominance will be defeated by such variations. Nevertheless, the instant defendants had provided an extensive analysis of the numerous variations in state laws on a number of issues bound to arise

After *Castano*, it is clear that *School Asbestos* does not stand for the proposition that state laws do not vary on issues of negligence, strict liability, or fraud; rather, it demonstrates to what lengths class action proponents in a multiple jurisdiction case must go to have the class certified.[77] Proponents are required to extensively analyze state law variations and subsequently make a showing which overcomes the presumption of the class action's inferiority.[78]

Finally, a district court must determine whether the class action will be manageable in light of such state law variations.[79] The district court had concluded, as in *Jenkins*, that a class jury's findings on the common issues would significantly advance the resolution of thousands, if not millions, of similar issues in pending individual cases.[80] However, the court found that the sheer magnitude of *Castano*'s class significantly distinguished it from the class in *Jenkins*.[81]

In addition, the court criticized the district court for failing to analyze the manageability problem on a case-specific basis.[82] Rather than simply analogizing the case to a previous one, the court stated that Rule 23(b)(3)(D) requires a court to make a fact-specific finding of manageability.[83]

B. Consideration of the Alternative

A district court must consider how the trials of the individual plaintiffs would otherwise be litigated, so that it can know which issues will be most significantly contested, and therefore common and predominating.[84] A mere conclusion that common issues will play a part in every trial, and therefore, such common issues are significant and predominating, is inadequate.[85]

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in litigation of the suit. However, in ruling for the class action proponents, the district court relied on nothing more than two state law surveys: the *School Asbestos* decision and a similar district court opinion. *Id.* at 742-43.

77. *Id.*

78. *Id.*

79. *Id.* at 743.

80. *Id.* at 744.

81. *Id.* While the *Jenkins* plaintiffs alleged one ordinary cause of action, the instant case's plaintiffs alleged eight novel causes of action. Although *Jenkins* involved the law of only one state, the instant case faced the problem of distinguishing the laws of all the states. Finally, *Jenkins* involved only 893 plaintiffs, but the number of plaintiffs in the instant case was expected to reach the millions. *Id.*

82. *Id.*

83. *Id.*

84. *Id.* at 744-45.

85. *Id.* at 745. The district court had determined that, like in *Jenkins*, class treatment of common issues would "significantly advance" individual trials. *Id.* at 744. In *Jenkins*, however, the district judge was quite experienced in dealing with similar asbestos cases and knew exactly how such individual trials would be conducted. On the other hand, *Castano*'s district judge was struggling with a unique case consisting of several novel causes of action. In *Jenkins*, the district court certified a particular defense issue for class litigation because it had proven to be the most significant

The court stated that blind acceptance of the predominance of the common issues can also affect the superiority analysis.[86] The complex mass tort, which involves individuals claiming various degrees of injuries over a period of time, has much more difficulty satisfying the superiority requirment than the single disaster mass tort, because of the greater number of individual issues in the former.[87]

C. *Consideration of the Disadvantages in Litigating a Class Action Suit*

A district court's failure to consider the disadvantages in litigating such a class action can produce a faulty superiority analysis.[88] For the following reasons, the *Castano* court concluded that the district court abused its discretion in determining that a class action was the superior method of adjudication.

First, the district court failed to consider the class action's inherent unfairness to defendants.[89] Class certification of mass torts magnifies the potential amount of damages, because it allows both legitimate and illegitimate plaintiffs to initially join the class.[90] This inflated number of plaintiffs places incredible pressure on the defendants to settle, even if there is a high probability of their being successful at trial.[91]

Second, the district court failed to properly analyze the problems of the class' manageability.[92] These problems include variations in state law, the existence of several uncommon issues (discussed earlier),[93] the difficulty of giving proper notice to the millions of potential plaintiffs, and the difficulty of determining which plaintiffs were actually nicotine-dependent.[94]

Third, while the district court speculated that the class action would prevent millions of expensive individual trials, the court did not point to any hard evidence that a judicial crisis was pending.[95] The court determined that superiority was lacking without proof of a management crisis.[96]

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contested issue in similar cases. However, the *Castano* district court had no judicial track record. *Id.* at 745 n.18.

86. *Id.* at 745 n.19.

87. *Id.*

88. *Id.* at 746.

89. *Id.*

90. *Id.* (citing In re "Agent Orange" Prod. Liab. Litig., 818 F.2d 145, 165 (2d Cir. 1987)).

91. *Id.* (citing Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995)). This incredible pressure results in what the court calls "judicial blackmail." *Id.*

92. *Id.* at 747.

93. *See supra* Section IV. Part A. Variations in State Law.

94. *Castano*, 84 F.3d at 747.

95. *Id.*

96. *Id.* at 748 (citing In re American Medical Sys., 75 F.3d 1069, 1085 (6th Cir. 1996)). The court contended that only 10% to 20% of potential plaintiffs actually file tort suits against the alleged wrongdoers. *Id.* at 748 n.26 (citing Francis E. McGovern, *Analysis of Mass Torts for Judges*, 73 Tex. L. Rev. 1821, 1834-35 (1995)). Reasons for not filing suit include fear or disdain of litigation,

Fourth, the district court should have determined whether it was dealing with a negative-value suit.[97] The court stated that the class action is most justified in the context of a negative-value suit, in which plaintiffs are discouraged from bringing suit because the expense of litigating the individual trials would outweigh the potential gains.[98] However, the plaintiffs in the instant case faced the prospect of receiving large damage awards, which could easily pay the costs of litigation.[99] In addition, many states have attorneys' fees provisions built into their consumer protection statutes to prevent such negative-value problems.[100] The court concluded that without such negative-value prospects, the court should avoid allowing a single panel of jurors to determine the fate of an entire American industry.[101]

Finally, the court was skeptical as to whether the district court's pronouncement that class certification would preserve vital judicial resources was correct.[102] Certain common issues, such as comparative negligence and reliance, because of their individual nature, might require subsequent adjudication at the individual level.[103] This re-litigation would require the same repetition of evidence and wasting of judicial resources which the class certification was designed to avoid.[104]

V. ANALYSIS OF THE *CASTANO* OPINION

In *Castano*, a discerning appellate court prevented a judicial disaster by keeping a well-intentioned, but short-sighted district court in check. The court correctly concluded that immature, complex mass torts should not be litigated as class actions. The case demonstrates that the commonality/predominance and superiority requirements can be effective tools in defeating such Frankenstein's monsters.

A. Complex Mass Torts

Castano indicates that, when determining certification of complex mass torts, courts should strictly apply the commonality/predominance and superiority requirements. A simple mass tort, such as an airplane crash, is not ordinarily

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privacy concerns, high degrees of comparative negligence, and access to medical alternatives, such as Medicaid. *Id.* (citing McGovern, *supra*, at 1827-28).

97. *Id.* at 748.

98. *Id.*

99. *Id.* Depending on the choice-of-law determinations, some plaintiffs could receive both compensatory and punitive damages. *Id.*

100. *Id.*

101. *Id.* (citing In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1300 (7th Cir.), *cert. denied*, 116 S. Ct. 184, 133 (1995)).

102. *Id.* at 749.

103. *Id.*

104. *Id.*

appropriate for class action determination because of the likely presence of significant individual questions of liability, damages, and defenses.[105] However, courts have justified class certification of these torts, presumably, because at least the cause of the accident is the same for each plaintiff.[106]

In a complex mass tort suit, however, such as a nationwide products liability action, there is no one accident causing the damage.[107] As a result, there is no one set of facts establishing liability, no one set of laws, and there is the potential for numerous affirmative defenses.[108] For these reasons, the complex mass tort class action should be certified, if at all, in very limited situations, such as when there is little state law variation and the plaintiffs face negative-value prospects.

B. Unfairness to Defendants

The *Castano* opinion openly criticizes the class action's inherent unfairness toward defendants.[109] The court has made an about face from its *Jenkins* decision, in which it determined that "[class action] defendants enjoy all of the advantages, and the plaintiffs incur all the disadvantages."[110] The analysis in *Castano* is more accurate, because it factors in more than just the amount of judicial resources and attorneys' fees. The inflated number of litigants, combined with the prospects of an "all-or-nothing" proposition submitted to a single jury, dramatically raises the financial stakes and places on the defendants an incredible amount of pressure to settle.[111] The *Castano* court correctly concluded that defendants need not be subjected to such unfairness when there are feasible alternatives.

C. Individual Adjudication for Non-Negative Value Suits

In *Castano*, one feasible alternative was the most obvious: each plaintiff could litigate his own case. This traditional method of adjudication was proper under the circumstances, because the plaintiffs were not faced with the prospect of negative-value suits. The primary justification for the class action is to provide legal recourse for those who would not otherwise be financially inclined

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105. *Id.* at 745 n.19 (citing Fed. R. Civ. P. 23(b)(3), Advisory Committee's Notes to 1966 Amendment).

106. *Id.* at 747 n.23 (citing Sterling v. Velsicol Chem. Corp., 855 F.2d 1188, 1197 (6th Cir. 1988)).

107. Georgine v. Amchem Prods., Inc., 83 F.3d 610, 628 (3d Cir. 1996).

108. *Id.*

109. *Castano*, 84 F.3d at 746.

110. Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986), *reh'g and reh'g en banc denied*, (5th Cir. 1986). The *Jenkins* court found that common issues won by the defendants would mean elimination of such at the individual trials, saving trial time and attorneys' fees. *Id.*

111. Castano v. American Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996).

to pursue it.[112] However, when the plaintiffs have the potential for large gains, the class action method is simply not required, and is certainly not the superior method of adjudication.

The *Castano* opinion stops short of banning all non-negative value suits from being litigated as class actions. However, it appears that proponents of such suits may have difficulty maneuvering around the superiority requirement in the future.

D. Immature, Complex Mass Torts

After *Castano*, the question remains whether an immature, complex mass tort will ever meet the requirements of Rule 23. The *Castano* opinion implies that class litigation of an immature tort is like drinking a young bottle of wine: better results are achieved by waiting for the aging process to take its course.

The immature nature of a tort can lead a district court to certify a class prematurely, because it is impossible to properly address the commonality/predominance and superiority requirements in the tort's early stages.[113] Proper application of the commonality/predominance test is impossible, because determination of whether certain common issues would be significant parts of the individual trials is impossible without a judicial track record on which to rely.[114] In addition, the immature nature of the tort prevents an adequate superiority analysis, because it is impossible to determine whether the judicial situation will be manageable at the individual level or whether such suits will create a judicial crisis.[115] Also, class litigation may not be superior, because certification of an immature tort brings unique and unforeseen problems which may consume more judicial resources than those saved by class certification.[116]

The court correctly concluded that a more favorable plan of action in confronting immature, complex mass torts is to deny class certification at first, providing only a window for individual state court adjudication of claims.[117] Such a window allows both the parties and the courts an opportunity to gain experience with the novel causes of action.[118] After the tort is given a chance to mature, a district court can properly reconsider whether common issues actually predominate, whether the class action method is actually superior, and ultimately, whether the case should be litigated as a class action.

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112. *Id.* at 748.
113. *Id.* at 749.
114. *Id.* at 745.
115. *Id.* at 747.
116. *Id.* at 749.
117. *Id.*
118. *Id.* at 750. During this window, state courts can address and properly apply its own law to the novel theories, aggressively weed out untenable theories, and use management techniques to avoid discovery abuses. Meanwhile, the parties can experiment with mediation or arbitration. *Id.* at 747 n.24 (citing Allgood v. R.J. Reynolds Tobacco Co., 80 F.3d 168, 172 (5th Cir. 1996)).

E. Choice-of-Law Problems

Complicated nationwide products liability cases like *Castano* renew the call for federal choice-of-law rules. In *Castano*, the commonality/predominance requirement was unsatisfied, because the district court had neglected to make the difficult choice-of-law determinations and, therefore, did not know which law would apply.[119] The district court's oversight was reasonable, considering the magnitude of such a task.[120] Class certification of such complex nationwide cases may be impossible without a uniform set of choice-of-law rules. Several commentators, as well as the American Law Institute's Complex Litigation Project, have called for the creation of federal common law choice-of-law rules to be used in these situations.[121] However, neither the federal courts nor Congress have adopted such a proposal.[122]

F. Substantive Federal Common Law

Other commentators have called for the creation of a substantive federal common law in the context of complex mass torts.[123] Such a creation would certainly make the district court's commonality/predominance inquiry much easier, because it would no longer need to consider the numerous variations in state law.

However, the *Castano* court's refusal to adopt such an approach must be seen as a deliberate refusal to devise such a nationwide scheme. This position has been taken by federal courts in the past, especially when Congress has failed to enact a federal legislative policy on the subject.[124] Previous reasons for such a refusal include the practical problems inherent in displacing state law and the absence of a unique federal interest.[125]

The *Castano* court's refusal to fashion a federal common law on nicotine addictivity was in line with these prior decisions. The adoption of a federal common law in this context would open the floodgates to litigation of hundreds of other so-called "national" problems. However, the federal courts will simply

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119. *Id.* at 741.

120. *Id.* at 741 (citing *Georgine*, 83 F.3d at 618). Both courts decertified the classes because "legal and factual differences in the plaintiffs' claims, when exponentially magnified by choice of law considerations, eclipsed any common issues . . . ." *Id.*

121. Richard H. Fallon, Jr. et al., The Federal Courts and The Federal System 805 (4th ed. 1996).

122. *Id.*

123. Fallon et al., *supra* note 121, at 805 (citing Linda S. Mullenix, *Class Resolution of the Mass-Tort Case: A Proposed Federal Procedure Act*, 64 Tex. L. Rev. 1039, 1077-79 (1986)).

124. *See* In re "Agent Orange" Prod. Liab. Litig., 635 F.2d 987 (2d Cir. 1980) (refusing to enact federal common law for veterans' personal injuries against herbicide suppliers) and Jackson v. Johns-Manville Sales Corp., 750 F.2d 1314 (5th Cir. 1985) (refusing to develop common law for asbestos-related injuries).

125. *Jackson*, 750 F.2d at 1327.

not allow, nor should they allow, the federal courthouse to become the place to solve all of the nation's problems.

VI. CONCLUSION

America has gone class action crazy. The *Georgine* and *Castano* cases alone could have included millions of American citizens. Recently, lawyers for crack cocaine addicts,[126] Hooters restaurant waitresses,[127] marijuana-prescribing doctors,[128] and America Online internet users[129] have filed or have threatened to file separate class action lawsuits.

Undoubtedly, some of these suits will involve novel causes of action. Such immature torts should not be litigated in the class action context, especially those which involve significant variations in state law or which would result in non-negative value suits. Courts facing the class certification of immature, complex mass torts should follow the leads of *Castano* and *Georgine* and apply strict commonality/predominance and superiority analyses. A court should force plaintiffs to individually litigate immature torts until the court, after extensive analysis of how these torts are litigated, is confident that the requirements of Rule 23 will be met.

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126. Nation of Islam leader Louis Farrakhan has threatened to file a class action on behalf of all crack-cocaine addicts, their families, and victims of crimes committed by crack-cocaine addicts, against the United States government concerning alleged CIA distribution of crack cocaine into the nation's minority communities. Vern. E. Smith, *On "thugs" and theology: Farrakhan defends his ties to Libya, attacks the press and muses about crack and the CIA*, Newsweek, Oct. 21, 1996, at 44.

127. The Hooters restaurant chain is facing a class action suit led by a former waitress alleging widespread sexual harassment. Lisa Backman, *Ex-Hooters worker suing firm*, Tampa Tribune, Jan. 22, 1997, at 7.

128. In San Francisco, a group advocating the medical use of marijuana has filed a federal class action suit against the Clinton Administration alleging violation of their First Amendment rights. Jennifer Warren, *Suit Seeks to Bar U.S. Sanctions for Prescribing Pot Courts: Doctors and patients fight federal attempt to nullify Proposition 215, saying that not allowing physicians to discuss marijuana violates 1st Amendment*, L.A. Times, Jan. 15, 1997, at A3.

129. The class action device has even reached the realms of cyberspace. Many of internet access provider America Online's eight million users are joining several state court class actions, alleging a number of consumer protection statute violations against the company. *2 South Floridians Sue America Online; The Action Follows Lawsuits Filed in New York, Los Angeles and Chicago*, Orlando Sentinel, Jan. 19, 1997, at B1.