# DAVID MEETS GOLIATH: CONSUMERS UNITE AGAINST BIG BUSINESS

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## I. INTRODUCTION

> Then join hand in hand, brave Americans all, by uniting we stand, by dividing we fall.[1]

Despite the growth of consumerism, individual consumers generally lack the resources to sue big business for their modest losses arising daily from illegal bank charges, unjustified insurance premiums, and product defects. Deterred by the cost of individual suit and the likelihood of winning meagre damages, most consumers do not bother to seek individual justice. In the meantime, banks, insurance companies, and auto manufacturers make millions of dollars in profit by breaching obligations towards masses of their customers. Mandatory class actions can redress such default by consolidating the claims of consumers who otherwise are unlikely to sue individually. A public interest trust can further compensate consumers and deter mass default by allocating the defaulter's profits that are not disbursed to consumers as a class through a trust charged with public responsibility.

Mass default of consumer transactions occurs under three conditions: the mass defaulter has deliberately, recklessly, or ignorantly failed to advise co-contractors about an actual or impending risk of loss arising from its own non- or malfeasance; similarly situated individuals are generally unlikely to detect that risk of loss, or to sue on account of it; the defaulter saves or otherwise profits in not having to compensate consumers fully for the ensuing harm.[2]

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1 John Dickinson, *The Liberty Song*, BOSTON GAZETTE, July 18, 1768.

2 For the relationship between a "mass" and a "relational" contract, see *infra* note 9. For studies on restitution as a method of returning profit derived from breach to the promisee, see generally G.H.L. Fridman, *The Reach of Restitution*, 11 LEGAL STUD. 304 (1991); Geoffrey Mead, *Restitution Within Contract*, 11 LEGAL STUD. 172 (1991); J.R. Maurice Gautreau, *Breach of Contract and Unjust Enrichment*, 12 ADVOC. Q. 1 (1990); Douglas Laycock, *The Scope and Significance of Restitution*, 67 TEX. L. REV. 1277 (1989); *see also* Peter B.H. Birks, *Restitution and the Freedom of Contract*, 36 CURRENT

This article presents two seldom used responses to mass default of consumer transactions: the use of mandatory class actions and the creation of public interest trusts. A mandatory class action allows victims of mass default to proceed as a class, while denying them the right to sue the defaulter individually. A public interest trust disburses unclaimed damages among public interest organizations for consumer use. Together, a mandatory class action and a public interest trust enable mass victims to receive compensation not ordinarily available to them through individual suit, while impeding the defaulter from profiting from mass default.

A class action for mass default is premised upon a communitarian relationship among victims that arises out of the common treatment of victims, their comparable losses, their shared interest in redressing those losses, and the public's interest in deterring mass default.[3] Victims have an interest in securing compensation and the public has an interest in deterring mass default. Parties ordinarily express these communal sentiments through public discussion, by complaining to consumer protection agencies, by boycotting the defaulter's products and services, and by grieving labor contracts. I argue that aggrieved consumers are also justified in acting communally through a mandatory class action[4] that justifies the cost of doing so.[5] In supporting this communitarian response

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LEGAL PROBS. 141 (1983); Henry Mather, *Restitution as a Remedy for Breach of Contract*, 92 YALE L.J. 14 (1982).

[3] *See* Roberto M. Unger, *The Critical Legal Studies Movement*, 96 HARV. L. REV. 563, 600 (1983) (discussing the solidarity rights of mass victims of breach). Unger describes "solidarity rights" as "the legal entitlements of communal life." *Id.*; *see also* Jay M. Feinman, *Critical Approaches to Contract Law*, 30 UCLA L. REV. 829, 840-42 (1983); Robert W. Gordon, *Macaulay, Macneil, and the Discovery of Solidarity and Power in Contract Law*, 1985 WIS. L. REV. 565, 576 (1985).

[4] *See infra* § IV (discussion mandatory class actions). On support for a communitarian approach towards mass consumer litigation, see Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 NW. U. L. REV. 469, 485 (1994). The need to render individual rights compatible with community interests is implicit in modern "communitarian" scholarship. *See* WILLIAM A. GALSTON, LIBERAL PURPOSES: GOODS, VIRTUES, AND DIVERSITY IN THE LIBERAL STATE (1992); MARY ANN GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE (1991); ALASDAIR C. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? (1988); CHARLES TAYLOR, SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY (1989); DEMOCRACY AND THE WELFARE STATE (Amy Gutmann ed., 1988); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, *in* GEOFFREY R. STONE ET AL., THE BILL OF RIGHTS IN THE MODERN STATE 519 (1992).

[5] Some contend that imposing mass liability upon large-scale producers adds to litigation costs, increases the price of goods and services, and reduces their quality. *See, e.g.*, David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 6 (1982); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S.C. L. REV. 1, 43-53 (1982); James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Design: A Proposed Statutory Reform*,

to mass default in consumer transactions, I argue that individual suits do not adequately redress the harm arising from mass default in consumer transactions. The experience of mass default challenges the libertarian assumption that the "common good" derives from the solitary acts of self-motivated private litigants.[6]

In presenting these alternatives, I concentrate on mass breach of consumer contracts giving rise to property damage,[7] as distinct from cases of tort liability for personal injuries.[8] The analysis, however, applies generally to mass default of discrete transactions,[9] in-

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56 N.C. L. REV. 625, 626 (1978). These arguments are spurious. Mass default multiplies the cost of litigation. It raises the price of goods and services. It gives rise to defective goods and services.

6 The classical assumptions underlying the private litigation model are evident in the law of contract: contract law is a private regime, it is founded upon the classical liberal principle of *laissez faire*, this principle is both morally and logically necessary to the symmetrical and harmonious development of the common law, and without it, the common law would fail. *See* I WILLIAM HERBERT PAGE, THE LAW OF CONTRACTS 19 (1905), commenting on Langdell, the founder of this classical approach (C. Langdell, *A Summary of the Law of Contracts, in* CASES ON CONTRACTS 89 (2d ed. 1880)). The falsehood underlying these assumptions was clearly recognized by the neoclassical realist school. *See* GRANT GILMORE, THE DEATH OF CONTRACT (1974); Calvin Woodard, *The Limits of Legal Realism: An Historical Perspective*, 54 VA. L. REV. 689 (1968); KARL N. LLEWELLYN, THE COMMON LAW TRADITION 370 (1960). It is also reflected in the recognition of relational contracts. *See also* Ian R. Macneil, *Contracts: Adjustment of Long-Term Economic Relations Under Classical, Neoclassical, and Relational Contract Law*, 72 NW. U. L. REV. 854 (1978); Harvey Rochman, *Due Process: Accuracy or Opportunity?*, 65 S. CAL. L. REV. 2705, 2710 (1992).

7 *See supra* note 2.

8 The rationale is that a mandatory class action is an appropriate means by which to redress the interests of mass consumers who have each suffered limited property damage. It is inappropriate, however, in redressing liability for personal injuries or death arising in tort. *See, e.g., In re* General Motors Corp. 846 F. Supp. 330 (E.D. Pa. 1993). In *General Motors Corp.*, the court stipulated that the settlement concluded between General Motors and the class claiming damages for defects in the G.M. P/U Truck did not encompass any claims for personal injury or death. *Id.* at 333. See *infra* note 22 for further discussion of the G.M. settlement. On the distinction between liability in contract and tort, see W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS, § 469-70 (5th ed. 1984); WILLIAM L. PROSSER ET AL., CASES AND MATERIALS ON TORTS, 456-58 (7th ed. 1982).

9 This approach develops a distinction already adopted by Ian Macneil. Macneil distinguishes discrete transactions between the same parties from ongoing relationships called "relational contracts." I consider discrete transactions that include a different element of "relationalism." That "relationalism" occurs when one contractor concludes and breaches a mass of similar contracts, when it anticipates having to compensate only some of the parties within that mass, and when it expects to save as a result of under-compensating or not compensating that mass in general. In this sense, the mass contract is "relational," in the "related" treatment accorded mass victims, in the "related" suffering of those who are subject to mass default, and in the "related" profits that the mass defaulter makes from each "related" breach. *See generally* MacNeil, *supra* note 6; Ian R. MacNeil, *Efficient Breach of Contract: Circles in the Sky,*

cluding tort actions.[10] The alternatives presented build upon existing developments in law; they require no statutory amendment, no departure from stare decisis, and no constitutional challenge. Mandatory class suits, in combination with the creation of public trusts, merely broaden the application of mass civil suit by providing an effective means of redressing mass default that until now has eluded legal redress.

## II. AN ILLUSTRATION

Businesses repeatedly subject consumers to mass breach of contract, unreasonable bank surcharges,[11] the deprivation of guaranteed health and welfare benefits,[12] violations of product warranties,[13] and excessive finance charges.[14] Recognizing their victim's failure or reluctance to sue, mass defaulters sometimes breach with impunity. They compensate only aggressive customers and ignore or intimidate the remainder into submission. Often ignorant about the persistent nature of mass default, most consumers fail to protest their ill-treatment. Thus, defaulters not only benefit from the breach, but the inability of consumers to launch a legal challenge fails to deter future breaches.

A settlement arrived at between the Wells Fargo Bank and its customers in 1988 exemplifies the risk that both private litigation and voluntary consumer class actions might allow the defaulter to retain huge profits at the expense of mass consumers. In a California-wide voluntary class action,[15] the customers of Wells Fargo Bank complained, inter alia, that the bank had charged them an unjustified surcharge for checks returned due to insufficient funds. In the settlement agreement filed on April 13, 1987,[16] experts for the claimants estimated that a partial refund of the surcharge was

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68 VA. L. REV. 947 (1982); Ian R. MacNeil, *Power, Contract and the Economic Model*, 14 J. ECON. ISSUES 909 (1980). On solidarity rights, see Unger, *supra* note 3, at 600.

10 On the need to avoid narrow classifications (including the distinction between contract and tort) in cases of mass default that threaten to produce public harm, see, e.g., *In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

11 For example, a dispute arose between Wells Fargo Bank and its customers arising out of the Bank's requirement that customers pay an illegal surcharge for checks returned for insufficient funds. See *infra* note 16 for further discussion of the Wells Fargo Bank dispute.

12 *See, e.g.*, Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994).

13 *See, e.g.*, *In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

14 *See, e.g.*, Durrett v. John Deere Co., 150 F.R.D. 555 (N.D. Tex., 1993).

15 Report of Wells Fargo Bank, N.A. Re: Settlement Implementation, No. 720307, 2-3 (S.F. Super. Ct., Oct. 13, 1988) (hereinafter WELLS FARGO BANK REPORT).

16 Agreement for Settlement of Certain Class Actions Against Wells Fargo Bank, N.A. and Crocker National Bank, No. 720307 (S.F. Super. Ct. filed Apr. 13, 1987).

reasonably valued at between $6,814,399 and $13,628,799. The experts estimated further that between 40% and 80% percent of eligible class members, specifically between 62,916 and 125,831 persons, would make a claim. In fact, 5% or 8,901 persons actually submitted claims and only half of them received compensation in whole or in part. Wells Fargo Bank paid out $481,316.69, well below the $6.5 to $13.5 million of its estimated liability. As a result, the settlement rewarded less than 3% of customers eligible for refunds and Wells Fargo retained the excess not distributed.[17]

This case illustrates the failure of both the private litigation model and the voluntary class action to adequately redress the harm arising from mass default of consumer contracts. First, a bank like Wells Fargo gains financially by retaining the surcharges that were not paid to the under-represented class. An organization like General Motors benefits when a settlement allows it to "pay" for its mass default by supplying $1,000 coupons to a fraction of injured customers to be used to offset the purchase price of further G.M. products.[18] Second, more aggressive customers sometimes are able to reach a private settlement, contrary to the interests of the class and conceivably, the bank itself.[19] Third, settlements in cases like the Wells Fargo dispute often favor the defendant. For example, only a fraction of prospective claimants ultimately participated in the settlement with Wells Fargo. Indeed, a mere 3% of the 5% who filed claims succeeded, and each received a paltry $108.31.[20] Finally, the settlements sometimes bypass the public interest; for instance, the Wells Fargo settlement established no mechanism to redress the general harm that arose from Wells Fargo's default; nor do such settlements likely deter financial insti-

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17 *Id.* at 3-4.

18 *See, e.g., In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

19 *See infra* notes 97-100 (discussing the shortcomings of voluntary class actions).

20 A similar situation occurred in State v. Levi Strauss & Co., 715 P.2d 564, 571 (1986). In that case, a class of almost 7,000,000 consumers provided a maximum recovery of $2.00 for each class member. Understandably, only 14% to 33% of the eligible members of the class actually applied for refunds for clothing price overcharges. Levi Strauss & Co. clearly profited from the small number of claimants. On the requirement that each claimant file a claim in accordance with a claims formula, see 1 HERBERT NEWBERG ON CLASS ACTIONS, § 12.35 at 570 (1977). Newberg confirms, inter alia, that the more complex the requirements for filing the claim, the smaller the number of claims actually made. *Id.* at § 8.40, at 178; *see also In re* Corrugated Container Antitrust Litigation, 659 F.2d 1332 (5th Cir. 1981), *cert. denied*, 456 U.S. 936 (1982); *In re* Folding Carton Antitrust Litigation, 557 F. Supp. 1091 (N.D. Ill. 1983), *aff'd. in part, rev'd. in part*, 744 F.2d 1252 (7th Cir.1984), *cert. denied*, 471 U.S. 1113 (1985). *See generally* MANUAL FOR COMPLEX LITIGATION, SECOND (1985).

tutions from engaging in similar conduct in the future.[21]

The Wells Fargo case is far from an isolated example of problems that arise with mass default settlements. The conspicuous settlement between General Motors and purchasers of its defective P/U Truck illustrates the extent to which a mass defaulter can settle with a class of claimants and still profit from mass default.[22] There, those proposing the settlement estimated that only between 34% and 38% of the 5 million potential claimants would join the class of claimants. General Motors would settle for $2.024 billion out of a possible $5 billion liability, thus saving $2.976 billion. The probability is that claimants would have actually received a far lesser sum, while General Motors, like Wells Fargo Bank, would have profited handsomely from its mass default.[23]

## III. PUBLIC HARM

The case for imposing liability for fault in the public interest is especially cogent in mass consumer transactions for several reasons. The defaulter occupies a position of market dominance. It ordinarily avoids disclosing defects in the quality of its goods and services. It realizes that most consumers are unlikely to sue it successfully. Most are intimidated by the prospect of having to pay exorbitant attorney and court costs. Many fear that, even if they are successful, their damages will fail to offset the costs of litigation. Still others worry about taking on such a powerful opponent.

Instances of mass default are all too evident in consumer practice. Banks add surcharges to the daily transactions of their customers in the interests of accumulating profit in breach of

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21 *See infra* note 153 (describing the ability of a settlement to deter future mass defaults).

22 *See In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993). In that case, the class action litigants owned 1973 to 1988 model year General Motors C/K full size pickup trucks and 1987 to 1991 General Motors R/V pickup trucks. Each of these models had fuel tanks located outside the frame rails. Plaintiffs alleged that this construction represented defective design due to the increased danger of a post collision fire.

The complaint as consolidated and amended alleged that General Motors had violated both federal and state law claims and should be liable for fraud, unfair trade practice and breach of contract. The class sought compensatory damages and punitive damages for economic losses, and injunctive relief. The class's claims *excluded* any recovery for personal injury and wrongful death. *See generally* John M. Van Dyke & Jamie A. Louie, *A Consumer Products Liability Class Action Remedy for Inherently Defective Products*, 19 W. ST. U. L. REV. 119 (1991) (describing consumer class actions brought in products liability cases).

23 *See In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

contract.[24] Large-scale employers reduce the pay of their employees below minimum wage[25] or renege on early retirement packages[26] to reduce corporate costs. Insurance companies consistently underpay valid insurance claims to horde the difference between the amount due to each insured and the amount actually paid.[27] The intent of such mal- or nonfeasance is unmistakable. The mass defaulter, a General Motors[28] or a John Deere,[29] exploits the inability or unwillingness of most consumers to redress mass abuse by private civil suit. The result is equally clear. The mass defaulter saves or profits from such default. The victims, in contrast, bear the cumulative burden of the mass defaulter's failure to fulfill its fiduciary obligations towards them.

Despite the failure of the defaulter to advise mass customers about the presence of defects in its performance, lawyers all too often pay lipservice to the concept of the faultless breach. They base liability simply upon the existence of a series of discrete breaches of contract, regardless of the mal- or nonfeasance of the defaulter. They insist that fault does not arise in contract, however manifest its harmful social effects. They pass over the cumulative profit which the defaulter earns in consequence of its mass breach; and they ignore the extent to which the concept of faultless breach encourages defaulters to breach with impunity.[30]

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24 *See generally* WELLS FARGO BANK REPORT, *supra* note 15.

25 Leo L. Lam, Comment, *Designer Duty: Extending Liability To Manufacturers For Violations of Standards in Garment Industry Sweatshops*, 141 U. PA. L. REV. 623, 633 (1992) (footnote omitted).

26 *See, e.g.*, Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich. 1994).

27 *See* Fletcher v. Western National Life Ins. Co., 89 Cal. Rptr. 78, 95 (App. Ct. 1970) (stating that "[a]n insurer has a special relationship to its insured and has special implied-in-law duties towards the insured.") (citation omitted). On the responsibility of public service companies to the public at large, see Charles K. Burdick, *The Origin of the Peculiar Duties of Public Service Companies*, 11 COLUM. L. REV. 514 (1911); Bruce Wyman, *The Law of the Public Callings as a Solution of the Trust Problem*, 17 HARV. L. REV. 156 (1904). *See generally The New Public Law: A Symposium*, 89 MICH. L. REV. 797 (1991); Leon E. Trakman, *Adhesion Contracts and the Law of Insurance*, 13 MANITOBA L.J. 23 (1983). *See also* David S. Miller, *Insurance as Contract: The Argument For Abandoning The Ambiguity Doctrine*, 88 COLUM. L. REV. 1849 (1988).

28 *See In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

29 *See* Durrett v. John Deere Co., 150 F.R.D. 555 (N.D. Tex. 1993).

30 "[T]he wicked contract-breaker," Grant Gilmore once observed, "should pay no more in damages than the innocent and pure in heart." GILMORE, *supra* note 6, at 14-15. Gilmore reflected further: "Money damages for breach of contract were to be 'compensatory' never punitive; the contract-breaker's motivation, Holmes explained, makes no legal difference whatever . . . ." *Id.* at 14 (quoting Oliver W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 462 (1897)); *see also* E.A. FARNSWORTH, CONTRACTS, §§ 12.1, 12.8 at 874-75 (2d ed. 1990). *See generally* W. PROSSER, HANDBOOK OF THE LAW OF TORTS, § 92 at 613-14 (4th ed. 1971); Mark Pennington, *Punitive Damages*

Yet, responsibility for fault *is* inherent in the common law of contract.[31] It falls under the rubric of breach of fiduciary obligation in contract,[32] it takes the form of an abuse of standards of decency and fair play,[33] and it grounds the contractual practices of quasi-public institutions like banks in responsibilities owed to consumers at large.[34] Courts embrace these concepts of fault to hold

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*for Breach of Contract: A Core Sample from the Decisions of the Last Ten Years*, 42 ARK. L. REV. 31 (1989). For a philosophical critique of these assumptions, see C.B. Macpherson, *The Rise and Fall of Economic Justice*, *in* THE RISE AND FALL OF ECONOMIC JUSTICE 17 (1985).

31 For example, fault can be a threshold inquiry in determining the presence of an estoppel flowing out of a reliance interest. *See, e.g.*, Stewart Macaulay, *The Reliance Interest and the World Outside the Law Schools' Doors*, 1991 WIS. L. REV. 247 (1991); Robert E. Goodin, *Theories of Compensation*, 9 OXFORD J. LEGAL STUD. 56 (1989); Todd D. Rakoff, *Fuller and Perdue's* The Reliance Interest *as a Work of Legal Scholarship*, 1991 WIS. L. REV. 203 (1991); W. David Slawson, *The Role of Reliance in Contract Damages*, 76 CORNELL L. REV. 197 (1990); Jim Leitzel, *Reliance and Contract Breach*, 52 LAW & CONTEMP. PROBS. 87 (1989); Richard Craswell, *Performance, Reliance, and One-sided Information*, 18 J. LEGAL STUD. 365 (1989); *see also* Richard A. Epstein, *Beyond Foreseeability: Consequential Damages in the Law of Contract*, 18 J. LEGAL STUD. 105 (1989); Stephen J. Ware, Comment, *Critique of the Reasonable Expectations Doctrine*, 56 U. CHI. L. REV. 1461 (1989); Orvill C. Snyder, *Promissory Estoppel as Tort*, 35 IOWA L. REV. 28 (1949); Stanley D. Henderson, *Promissory Estoppel and Traditional Contract Doctrine*, 78 YALE L.J. 343 (1969).

32 On the development of fiduciary obligations in inter alia, the law of insurance, see generally Mary Ann Murphy, Comment, *The Emerging Fiduciary Obligations and Strict Liability in Insurance Law*, 14 CAL. W. L. REV. 358 (1978); Del Stiltner, Note, *Extra-Contractual Damages in Suits on Insurance Policies*, 46 U. CIN. L. REV. 170 (1977); Donald G. Beattie, Note, *First Party Torts - Extra-Contractual Liability of Insurers Who Violate the Duty of Good Faith and Fair Dealing*, 25 DRAKE L. REV. 900 (1976); Phyllis Savage, Note, *The Availability of Excess Damages for Wrongful Refusal to Honor First Party Insurance Claims - An Emerging Trend*, 45 FORDHAM L. REV. 164 (1976). For cases which embody these special fiduciary duties, see Aetna Casualty & Sur. Co. v. Broadway Arms Corp., 664 S.W.2d 463 (Ark. 1984); Employers Equitable Life Ins. Co. v. Williams, 665 S.W.2d 873 (Ark. 1984); Ray Dodge, Inc. v. Moore, 479 S.W.2d 518 (Ark. 1972).

33 For a debate on these standards of decency and fair play, see Linda Curtis, Note, *Damage Measurements To Bad Faith Breach of Contract: An Economic Analysis*, 39 STAN. L. REV. 161 (1986); Sandra Chutorian, Note, *Tort Remedies for Breach of Contract: The Expansion of Tortious Breach of the Implied Covenant of Good Faith and Fair Dealing into the Commercial Realm*, 86 COLUM. L. REV. 377 (1986); Steven J. Burton, *Breach of Contract and the Common Law Duty to Perform in Good Faith*, 94 HARV. L. REV. 369 (1980); Russell A. Eisenberg, *Good Faith Under the Uniform Commercial Code - A New Look at an Old Problem*, 54 MARQ. L. REV. 1 (1971); Robert S. Summers, *"Good Faith" in General Contract Law and the Sales Provisions of the Uniform Commercial Code*, 54 VA. L. REV. 195 (1968); E. Allan Farnsworth, *Good Faith Performance and Commercial Reasonableness Under the Uniform Commercial Code*, 30 U. CHI. L. REV. 666 (1963).

34 *See* Brown v. South Carolina Ins. Co., 324 S.E.2d 641, 644-45 (S.C. Ct. App. 1984); Milcarek v. Nationwide Ins. Co., 190 N.J. Super. 358, 364, 463 A.2d 950, 954 (App. Div. 1983); Sandler v. Lawn-A-Mat Chem. & Equip. Corp., 141 N.J. Super. 436, 449, 358 A.2d 805, 812 (App. Div. 1976), *certif. denied*, 71 N.J. 503, 366 A.2d 658 (1976).

insurance companies liable for a "pattern of unfair practices,"[35] including "nefarious scheme[s] to mislead and defraud thousands of policyholders."[36] They invoke fault to hold employers liable for repeatedly bullying employees into accepting reduced severance pay[37] or for reneging on an agreed early retirement package.[38] On the same grounds, courts could hold banks like Wells Fargo liable for consistently breaching its obligations towards customers who are unable to redress the cumulative effect of mass default.

Courts impute fault to various types of mass defaulters. They hold insurance companies liable for misrepresenting insurance risks,[39] motor vehicle companies liable for not recalling and repair-

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35 Colonial Life & Accident Ins. Co. v. Superior Court, 647 P.2d 86, 89 (Cal. 1982).

36 Delos v. Farmers Ins. Group, Inc., 155 Cal. Rptr. 843, 857 (1979); *see also* Ferraro v. Pacific Fin. Corp., 87 Cal. Rptr. 226, 234 (1970). Williston attributed this expanded duty of insurance companies in part to the increasing tendency of the public to look upon the insurance policy not as a contract but as a special form of chattel. F.S. WILLISTON, WILLISTON ON CONTRACTS 34 (3d ed. 1957). *See* Moore v. American United Life Ins. Co., 197 Cal. Rptr. 878, 895 (Ct. App. 1984); Pacific Mutual Life Ins. Co. v. Haslip, 499 U.S. 1, 23 (1991); Eccobay Sportswear v. Providence Wash. Ins. Co., 585 F. Supp. 1343, 1345 (S.D.N.Y. 1984); Neal v. Farmers Ins. Exch., 582 P.2d 980, 987 (Cal. 1978); *see also* Richard B. Graves III, Comment, *Bad-Faith Denial of Insurance Claims: Whose Faith, Whose Punishment? An Examination of Punitive Damages and Vicarious Liability*, 65 TUL. L. REV. 395, 402 (1990); Theresa Viani Agee, Comment, *Breach of an Insurer's Good Faith Duty to its Insured: Tort or Contract?*, 1988 UTAH L. REV. 135, 142 (1988). *See generally* F.A. KHAVARI, DOCTORS, LAWYERS, HOSPITALS, AND INSURANCE COMPANIES: WHAT'S WRONG, AND WHAT TO DO ABOUT IT (1990); Leon E. Trakman, *The Unharnessed Insurer: A Foreboding Presence*, 31 U. TORONTO L.J. 318 (1981); Leon E. Trakman, *Mysteries Surrounding Material Disclosure in Insurance Law*, 34 U. TORONTO L.J. 421 (1984).

37 However readily courts recognize a special public relationship between insurance companies and their customers, they fail to do so in employment-at-will relationships. For example, they indicate that they "are not convinced that a 'special relationship' analogous to that between insurer and insured should be deemed to exist in the usual employment relationship . . . ." Foley v. Interactive Data Corp., 765 P.2d 373, 395 (Cal. 1988). In *Foley*, the Supreme Court of California refused to apply dictum from *Seaman's Direct Buying Service, Inc. v. Standard Oil Co.*, which suggested that relationships similar to that between insurer and insured may apply to other contexts where a special relationship exists, to an employer's discharge of an employee under an at-will employment. *Foley*, 765 P.2d at 392 (citing Seaman's Direct Buying Service, Inc. v. Standard Oil Co., 686 P.2d 1158, 1166 (Cal. 1984)). One wonders why the *Foley* Court was so emphatic in distinguishing employment from insurance contracts. Clearly, employment-at-will exposes the employee to risks that are comparable to those endured by the average insured. In particular, the employee is subject to an at-will arrangement effected by and in the interests of the employer. Perhaps the real difference lies in the reluctance of courts to impose special obligations upon employers for fear of intruding upon the employment relationship in particular.

38 *See, e.g.*, Sprague v. General Motors Corp., 843 F. Supp. 266 (E.D. Mich 1994).

39 *See, e.g.*, Meirthew v. Last, 135 N.W.2d 353, 355 (1965); Bowler v. Fidelity & Cas. Co., 53 N.J. 313, 328, 250 A.2d 580, 588 (1969). Courts similarly hold insurance companies liable for misrepresentations by insurers or their agents. *See* Stark v. Equitable Life Assur. Society, 285 N.W. 466, 469 (1939) (citation omitted); Peterson v. Great

ing defective vehicles,[40] and employers liable for not advising employees about their rights.[41] Courts contemplate holding mega-companies like General Motors liable for failing to disclose prior knowledge about motor vehicle defects,[42] design flaws,[43] or tire defects.[44]

Judges have refused to allow the formal rules of privity to hamper customers seeking to mount class actions against a mass defaulter that threatens public harm.[45] They have interpreted mass contracts against the defaulter,[46] requiring it to assume special fiduciary obligations towards its customers[47] and through them, to-

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Am. Ins. Co., 52 N.W.2d 479, 482 (1952); Bowers v. Springfield Fire & Marine Ins. Co., 108 S.W.2d 798, 800 (1937).

40 On the implied duty to warn that is imposed upon dominant parties, see James B. Sales, *The Duty to Warn and Instruct for Safe Use in Strict Tort Liability*, 13 ST. MARY'S L.J. 521 (1982); Richard E. Shandell, *Failure to Warn, A Drug Manufacturer's Liability*, 14 TRIAL L.Q. 5 (1982); James A. Jardine, Note, 4 HAMLINE L. REV. 351, 360 (1981). *But cf.* Jordan H. Leibman, *The Manufacturer's Responsibility to Warn Product Users of Unknowable Dangers*, 21 AM. BUS. L.J. 403, 432 (1984); William R. Murray, Jr., *Requiring Omniscience: The Duty to Warn of Scientifically Undiscoverable Product Defects*, 71 GEO. L.J. 1635 (1983).

41 *See* Foley v. Interactive Data Corp., 765 P.2d 373 (Cal. 1988); Jay M. Feinman, *The Development of the Employment-at-Will Rule Revisited*, 23 ARIZ. L. REV. 733 (1991); Elletta Sangerey Callahan, *Employment at Will: The Relationship Between Societal Expectations and the Law*, 28 AM. BUS. L.J. 455 (1990); Joseph Posner, *Yes, There Is Life After* Foley, 18 SW. U. L. REV. 357 (1989); Lawrence E. Blades, *Employment at Will vs. Individual Freedom: On Limiting the Abusive Exercise of Employer Power*, 67 COLUM. L. REV. 1404, 1421-27 (1967); Mark L. Martin, Comment, *Wrongful Discharge of Employees Terminable at Will - A New Theory of Liability in Arkansas*, 34 ARK. L. REV. 729 (1981); Laila Boberg Soares, Comment, Tameny v. Atlantic Richfield Co.: *Wrongful Discharge, A New Tort to Protect At-Will Employees*, 8 W. ST. U. L. REV. 91 (1980). *See generally*, Andrew Phang, Note, *Termination of Employment Contracts and Taking Advantage of One's Wrong*, 20 INDUS. L.J. 214 (1991).

42 Scanlon v. General Motors Corp., 65 N.J. 581, 326 A.2d 673 (1974).

43 *See, e.g., In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

44 Shramek v. General Motors Corp., 216 N.E. 244, 247 (1966).

45 *See, e.g., In re General Motors Corp.*, 846 F. Supp. at 336; Durrett v. John Deere Co., 150 F.R.D. 555, 563 (N.D. Tex. 1993).

46 On the judicial resort to the *contra proferentum* rule, see, e.g., Sprague v. General Motors Corp., 843 F. Supp. 266, 307 (E.D. Mich. 1994) (citations omitted), which explains that the rule of *contra proferentum* requires courts to construe ambiguities in employee benefit plans in the employees' favor.

47 In an adhesive relationship, lawyers for the dominant party usually draft a standardized contract in its favor to which the other party is required to "adhere." For classical commentary, see Friedrich Kessler, *Contracts of Adhesion - Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 633-34 (1943); Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 43 COLUM. L. REV. 1072 (1943); Edwin W. Patterson, *The Delivery of a Life-Insurance Policy*, 33 HARV. L. REV. 198 (1919); Nathan Isaacs, *The Standardizing of Contracts*, 27 YALE L.J. 34 (1917); HAROLD C. HAVINGHURST, THE NATURE OF PRIVATE CONTRACT (1961); Karl N. Llewellyn, *What Price Contract: An Essay in Perspective*, 40 YALE L.J. 704, 751 (1931). Frederick Kessler highlighted the adhesive nature of unbargained agreements in which one party—an employer, an insurance

wards society at large.[48] As the court stated in *Jones v. Abriani*:[49]

> [i]t is hard to imagine where the public interest . . . is more important than in consumer matters, especially where the consumer is in an inferior bargaining position and forced to either sign an adhesion contract or do without the item desired.[50]

In summation, courts render default into a public responsibility.[51] They preserve good faith dealings in mass contracts by hold-

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company, a public carrier, a utility or manufacturer—dictated the terms to which the other "adhered." An adhesion contract, by itself, merely defines the nature of the contractual relationship: one party to the contract dictates the terms, the other "adheres" to those terms. However, the relationship created by such an adhesion contract does give rise to legal consequences when the adhering party lacks "meaningful choice." In that case, the contract may be construed as unconscionable. *See* Williams v. Walker-Thomas Furniture Co., 350 F.2d 445, 449 (D.C. Cir. 1965). *See generally* Michael I. Meyerson, *The Reunification of Contract Law: The Objective Theory of Consumer Form Contracts*, 47 U. MIAMI L. REV. 1263 (1993) (proposing a solution to problems associated with form contracts).

48 On mass consumer contracts that are adhesive in nature, see, e.g., Burris v. First Financial Corp., 928 F.2d 797 (8th Cir., 1991). *See also* Gray v. Nationwide Mut. Ins. Co., 223 A.2d 8 (1966); Southern Fire & Cas. Co. v. Norris, 250 S.W.2d 785, 790 (1952); Kerry L. Macintosh, *Gilmore Spoke Too Soon: Contract Rises From the Ashes of the Bad Faith Tort*, 27 LOY. L.A. L. REV. 483, 502 (1994); Forrest Booth and Lynn Haggerty King, *"Bad Faith" - Legal Trends in Suits Against Insurers*, 4 U.S.F. MAR. L. REV. 1, 9 (1992); Eric M. Holmes, *Is There Life After Gilmore's Death of Contract? - Inductions From a Study of Commercial Good Faith in First-Party Insurance Contract*, 65 CORNELL L. REV. 330, 349 (1980); Murphy, *supra* note 32; Donlad A. Orlovsky, *Torts*, 32 U. MIAMI L. REV. 1259 (1978); John G. Holinka, Note, *Damages for Mental Suffering Caused by Insurers: Recent Developments in the Law of Tort and Contract*, 48 NOTRE DAME LAW. 1303, 1303 (1973); Arthur Allen Leff, *Injury, Ignorance and Spite - The Dynamics of Coercive Collection*, 80 YALE L.J. 1 (1970). *See generally* Gary T. Schwartz, *New Products, Old Products, Evolving Law, Retroactive Law*, 58 N.Y.U. L. REV. 797 (1983) (exploring the relationship between product age and manufacturer liability).

49 350 N.E.2d 635 (Ind. Ct. App. 1976).

50 *Id.* at 650; *see also* Kugler v. Romain, 58 N.J. 522, 535, 279 A.2d 640, 647 (1971); Jones v. Star Credit Corp., 298 N.Y.S.2d 264 (1969). The belief that contract law regulates discrete transactions between consenting parties, not social relationships beyond them, has long been attacked as unrealistic in a world that is dominated by standardized or boiler-plated agreements phrased in the most convoluted and complex of terms. *See, e.g.*, Macneil, *Power, Contract and the Economic Model*, *supra* note 9. For classical commentary to similar effect, see also Kessler, *supra* note 47; Edwin W. Patterson, *Compulsory Contracts in the Crystal Ball*, 43 COLUM. L. REV. 731 (1943). *But see* WOLFGANG GASTON FRIEDMAN, LAW IN A CHANGING SOCIETY, 91-94 (1959); STEWART MACAULAY, THE LAW AND THE BALANCE OF POWER: THE AUTOMOBILE MANUFACTURERS AND THEIR DEALERS 23-26, 78-80 (1966).

51 For evidence of the extent to which big business knows of the risks of harm to their employees and customers, see *In re* General Motors Corp., 846 F. Supp. 330, 335 (E.D. Pa. 1993) and Sears, Roebuck & Co. v. Haven Hills Farm, Inc., 395 So. 2d 991, 995 (Ala. 1981). On the culling of such evidence from the defendant's own records, see Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361-62 n.2 (1981); Rimer v. Rockwell Int'l Corp., 641 F.2d 450, 455 (6th Cir. 1981); MOIRA JOHNSTON, THE LAST NINE MINUTES: THE STORY OF FLIGHT 981 234-37 (1976). *See also* Kathleen M. Doyle,

ing defaulters accountable for bad faith breach[52] and impose public obligations upon them for violating their fiduciary obligation towards consumers at large.[53] They create de facto public trusts by disbursing total savings or profits arising from mass breach to multiple claimants, and sometimes, by passing the residue on to public interest organizations.[54]

## IV. MANDATORY CLASS ACTION

This section argues for extended use of the class action in mass default cases and for greater resort to the mandatory class action in consumer transactions. The purpose is twofold: to demonstrate that class actions are vastly preferable to individual suit in consumer transactions, and that the mandatory class action is far fairer to the parties and more beneficial to the public interest than a voluntary class action. The conventional private litigation model assumes that all individuals have the inherent right to sue privately. Individuals are free to choose whether, when, and how to proceed, including the right to select a legal counsel, to decide upon the nature of the action or defense, and to proceed without intervention by others. Three assumptions underlie this model: that the freedom of individuals to settle their differences through separate suits promotes a democratic society, that this freedom inheres in liberty itself, and that it facilitates both justice and effi-

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Survey, *Relevance of Industry Custom in Strict Product Liability*, 60 WASH. L. REV. 195 (1984).

52 On liability for bad faith breach of contract, see generally Marvin F. Milich, *The Evolution of the Tort of Bad Faith Breach of Contract: Contract Trends and Future Trepidation*, 94 COM. L.J. 418 (1989); Linda Curtis, Note, *Damage Measurements for Bad Faith Breach of Contracts: An Economic Analysis*, 39 STAN. L. REV. 161 (1986). *See also* Sidney W. Delong, *The Efficiency of a Disgorgement as a Remedy for Breach of Contract*, 22 IND. L. REV. 737 (1989); Saul Levmore, *Probabilistic Recoveries, Restitution, and Recurring Wrongs*, 19 J. LEGAL STUD. 691 (1990).

53 Liability for mass default resembles, but is not identical to, liability for the breach of an adhesive relationship. An adhesive relationship arises when a dominant party, like a bank, imposes terms of a contract that it devises upon another party, the customer, while the other party adheres to those terms. In both mass default and adhesion contracts, the dominant party engages in a relationship of unequal bargaining between it and others. Trained and skilled in contracting, it is able to breach in relation to a mass of others who are commonly disadvantaged by a lack of technical, economic, and legal sophistication. The bank is able to breach simply because most customers are unsophisticated in matters of banking practice and are trusting of banks. They seldom read the fine print in contracting with "reputable" banks. Those who do read fine print seldom fully understand; and banks can buy off trouble-maker customers with favorable settlements. On such adhesive relationships, see *supra* notes 32 and 47.

54 *See infra* notes 137-40 and 222-26 and accompanying text.

ciency.[55] However, each assumption is overstated. The individual's right to sue privately does not invariably promote the interests of a democratic society. Individuals who cannot afford to sue privately lack true liberty. Moreover, mass defaulters who default without regard to the well-being of the individual victim defeat the ends of a liberal democracy. In pursuing their own ends at a high social cost, they ignore the interests of the largely oblique individual.[56]

In the context of consumer transactions, the private litigation model often proves inadequate. It provides ineffective remedies for those who are deterred by the cost of suit and the prospect of receiving limited damages. It also gives the defaulter the incentive to default en masse. The defaulter well appreciates that only a small percentage of consumers are likely to sue on an individual basis.[57] As a result, the defaulter usually benefits from the use of the private litigation model. It declines to compensate consumers who are unaware of their losses and undercompensates other consumers who are aware of the default but cannot afford to bring suit.[58] Illustrating these propositions in personal injury cases, a survey conducted by the Department of Transportation demonstrates that claimants receive payment for only 20% of total losses arising from fatal motor vehicle accidents.[59] Similarly, a study of claims in

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55 On the source of democratic rights in natural law thought, see JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY 130 (1979). *See also* H.L.A. Hart, *Are There Any Natural Rights?*, 64 PHIL. REV. 179 (1955). On rights as privileges or empowerments, falling short of natural or inherent rights, see Lawrence Kohlberg, *Education for Justice: A Modern Statement of the Platonic View*, *in* MORAL EDUCATION 57, 69 (1970).

56 *See, e.g.*, Henry Kalven, Jr. & Maurice Rosenfield, *The Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 686 (1940).

57 These apparent failings of private litigation are further evidenced in the manner in which large-scale defaulters effectively whittle down each plaintiff's claim through the use of financial, personal and legal pressure.

58 Individuals who *freely* choose to sue privately ordinarily anticipate receiving a significant award at an affordable cost. This is especially so when individuals remove themselves from a class action because they anticipate making more by suing individually than through the class. *See, e.g.*, AM. LAW. INST., PRELIMINARY STUDY OF COMPLEX LITIGATION 5 (Report March 31, 1987); *see also* Frank I. Michelman, *Forward: Traces of Self-Government*, 100 HARV. L. REV. 4 (1986). On collateral estoppel, see, e.g., Parklane Hoisery Co. v. Shore, 439 U.S. 322 (1979); Bernhard v. Bank of Am., 122 P.2d 892 (Cal. 1942); William Sam Byassee, Note, *Collateral Estoppel Without Mutuality: Accepting the* Bernhard *Doctrine*, 35 VAND. L. REV. 1423 (1982); Bryan J. Maedgen & Sheree Lynn McCall, *Current Problems, Tools and Theories in Multiparty Products Liability Claims*, 18 FORUM 117 (1982); Gray, Comment, *Collateral Estoppel: One Full and Fair Opportunity to Litigate Common Facts*, 39 J. MO. B. 405 (1983). *But cf.* Andrew C. Rose, Comment, *Federal Mass Tort Class Actions: A Step Toward Equity and Efficiency*, 47 ALB. L. REV. 1180 (1983).

59 *See* DEPARTMENT OF TRANSPORTATION, ECONOMIC CONSEQUENCES OF AUTOMOBILE ACCIDENT INJURIES 38 (1970).

aviation disaster cases reveals that claimants ordinarily receive only 26% of the full economic loss.[60]

In short, companies profit from mass default under the private litigation model whenever a sizable number of prospective claimants fail to sue or accept only partial compensation for their losses. So long as the defaulter's profits arising from mass default exceed its costs, it is likely to continue defaulting en masse. As the California Supreme Court once noted, in the absence of a class action "[d]efendants may be permitted to retain ill-gotten gains simply because their conduct harmed large numbers of people in small amounts instead of small numbers of people in large amounts."[61]

Class actions have a number of advantages over individual suits. They reduce each class member's cost, inconvenience, and stress in bringing a class action.[62] No individual need sustain all attorney's fees and court costs. Rather, each member of the class need bear only proportionate responsibility for the cost and conduct of the action. No one need endure work disruption during the course of suit or be dissuaded from suing by an often intimidating defaulter. As Kalven and Rosenfield emphasized in 1941, class actions vindicate *both* society's interests in efficiency *and* the equitable interests of individual claimants.[63] Mass actions are socially efficient because they recompense a mass of worthy claimants whom the state otherwise might have to subsidize or support, and because they can avoid bankrupting an otherwise productive defaulter.[64] Class actions can ensure that the result is "fair and adequate to all

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60 *See* ELIZABETH M. KING & JAMES P. SMITH, ECONOMIC LOSS AND COMPENSATION IN AVIATION ACCIDENTS 55-58 (1988).

61 On the extent to which a mass defaulter is able to accumulate huge profits by withholding payment to a large number of consumers, see, e.g., State v. Levi Strauss & Co., 715 P.2d 564, 571 (Cal. 1986).

62 For debate on the virtues and deficiency of the class action, see generally Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the "Class Action Problem,"* 92 HARV. L. REV. 664 (1979); William Simon, *Class Actions - Useful Tool or Engine of Destruction*, 55 F.R.D. 375 (1972); Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 YALE L.J. 745 (1990); Jon Koslow, Note, *Estimating Aggregate Damages in Class-Action Litigation under Rule 10b-5 for Purposes of Settlement*, 59 FORDHAM L. REV. 811, 826-30 (1991); William J. Landers & B. Wayne Vance, Comment, *Federal and State Class Actions: Developments and Opportunities*, 46 MISS. L.J. 39 (1975); Note, *State Class Action Statutes: A Comparative Analysis*, 60 IOWA L. REV. 93 (1974).

63 Kalven & Rosenfield, *supra* note 56, at 691.

64 *See generally* David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 565 (1987); David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 900-05 (1984).

concerned,"[65] that the defaulter does not retain "illegal profit" at the expense of mass victims,[66] and that the action does not bankrupt the defaulter.[67] They can avoid duplicating individual actions that waste both public and private resources.[68] Class actions also can provide a remedy that takes account of the cumulative effect of mass default[69] or offer a viable remedy in cases of complex litigation.[70] The case for a consumer class action is aptly summarized in *Durrett v. John Deere Co.*,[71]

> that one who has incurred de minimis damages might otherwise go unrecompensed because the economics of litigation militated against bringing suit, but instead could band together with others similarly situated and corporately seek redress because the *en masse* nature of the class overcomes the countervailing economic concerns.[72]

The right of consumers to bring a voluntary class action is well established in civil litigation and is protected by legislation.[73] Rule

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65 Norman v. McKee, 431 F.2d 769, 774 (9th Cir. 1970), *cert. denied*, 401 U.S. 912 (1971).

66 Liebman v. J.W. Peterson Coal & Oil Co., 73 F.R.D. 531, 536 (N.D. Ill. 1973).

67 The best examples of such bankruptcies are the Johns-Manville and Dalkon Shield cases. *See In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984); *In re* A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd sub nom.* Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988), *cert. dismissed sub nom.* Joynes v. A.H. Robins, 487 U.S. 1260 (1988); *see also* Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 101 (1990); Marianna S. Smith, *Resolving Asbestos Claims: The Manville Personal Injury Settlement Trust*, 53 LAW & CONTEMP. PROBS. 27 (1990).

68 *See generally* Christopher H. Schroeder, *Corrective Justice and Liability for Increasing Risks*, 37 UCLA L. REV. 439 (1990); Jon O. Newman, *Rethinking Fairness: Perspectives on the Litigation Process*, 94 YALE L.J. 1649 (1985); Robert G. Bone, *Personal and Impersonal Litigative Forms: Reconceiving the History of Adjudicative Representation*, 70 B.U. L. REV. 213 (1990).

69 On corrective justice in relation to class actions, see generally Roger H. Trangsrud, *Mass Trials in Mass Tort Cases: A Dissent*, 1989 U. ILL. L. REV. 69 (1989); MARK A. PETERSON & MOLLY SELVIN, RESOLUTION OF MASS TORTS: TOWARDS A FRAMEWORK FOR EVALUATION OF AGGREGATE PROCEDURES 6 (1988); Kenneth S. Abraham, *Individual Action and Collective Responsibility: The Dilemma of Mass Tort Reform*, 73 VA. L. REV. 845 (1987). On the economic rationale for corrective justice in the private litigation model, see generally Richard A. Posner, *The Concept of Corrective Justice in Recent Theories of Tort Law*, 10 J. LEGAL STUD. 187 (1981).

70 This is readily apparent in the case of litigation involving complex economic data and significant political implications, such as the 1980's saving and loans disaster. *See, e.g., In re* American Continental Corp./Lincoln Sav. and Loan Sec. Litig., 130 F.R.D. 475, 476 (JPML 1990).

71 150 F.R.D. 555 (N.D. Tex. 1993).

72 *Id.* at 561; *see also* HERBERT B. NEWBERG, CLASS ACTIONS § 5.13 (2d ed. 1975) (stating that "an important objective of Rule 23 is to allow plaintiffs to vindicate small claims.").

73 FED. R. CIV. P. 23(a).

23(a) of the *Federal Rules of Civil Procedure* establishes four pre-conditions to bringing a voluntary class action:

> (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.[74]

Class actions are especially appropriate under three conditions: class membership is uniform, the class is united by common issues of law and fact, and individual claims are representative of the claims of the class as a whole.[75] The *Manual for Complex Litigation* states under subsection 23(b)(3) that a class action is most appropriate "when damages are the only or primary appropriate relief."[76]

In contrast, a class action ordinarily is inappropriate when mass default arises in different jurisdictions and when each jurisdiction applies different laws and legal standards to otherwise similar fact patterns.[77] It is also ill-advised when claimants seek vastly

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74 *Id.*

75 The requirements governing adequacy of class representation under Rule 23(a)(4) are twofold: first, class counsel must be "qualified, experienced and generally able" to conduct the litigation. FED. R. CIV. P. 23(a)(4); second, the class members must not be "antagonistic" to one another. *Id.*; *see also* Eisen v. Carlisle & Jacquelin, 391 F.2d 555, 562 (2d Cir. 1968). For decisions certifying a class action, see Durrett v. John Deere Co., 150 F.R.D. 555 (N.D. Tex.1993); Shipes v. Trinity Indus., 987 F.2d 311, 316 (5th Cir. 1993); Feinberg v. Hibernia Corp., No. CIV.A.90-4245, 1992 WL 176119 (E.D. La. July 14, 1992); *In re* Drexel Burnham Lambert Group Inc., 960 F.2d 285, 290 (2nd Cir. 1992) (certifying a class action because the existence of nearly 850 claimants dispersed throughout the United States rendered joinder of the plaintiffs impracticable). *But see* Burris v. First Financial Corp., 928 F.2d 797, 806 (8th Cir. 1991) (finding that the plaintiffs, who purchased mobile homes using retail installment sales contracts, could not serve as class representatives in a suit against two lenders due to the lack of any cognizable individual claim of relief against them).

76 FED. R. CIV. P. 23(b)(3). Fed. R. Civ. P. 23(b)(c), in turn, requires that common questions of law and fact "predominate" over individual issues, and that the class action be the "superior" method of litigating. Rule 23 of the Federal Rules of Civil Procedure is silent with respect to the global assessment of damages. However, the Uniform Class Actions Act §§ 15c(5) & (6) does provide for it. For use of this method of assessing damages, see Samuel v. Univ. of Pitt., 538 F.2d 991, 997-99 (3rd Cir. 1976). On restitutionary damages for breach of contract in general, see generally Snepp v. United States 444 U.S. 507 (1980); Peter Birks, *Restitutionary Damages for Breach of Contract:* Snepp *and the Fusion of Law and Equity*, 1987 LLOYD'S MAR. & COM. L.Q. 421 (1987).

77 *See, e.g.*, William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689, 1695 (1992); *see also* Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency and Control*, 52 FORDHAM L. REV. 37, 69 (1983); Benjamin Kaplan, *Continuing*

disparate amounts of damages, ranging from minimal property losses to extensive damages for wrongful death. A class action is unsuitable when plaintiffs pursue different remedies, such as specific performance and injunctive relief.[78]

Antagonists argue that class actions give rise to exorbitant damages: they over-compensate mass plaintiffs and over-deter default; they encourage class lawyers to settle prematurely in the hope of securing sizable contingency fees with the least effort;[79] they lead to bureaucratic justice in which free riders gain as much as worthy claimants.[80] However, these arguments apply even more cogently to individual litigation. Many consumers lack the capacity or resources to sue. Manipulated by their lawyers, they pay exorbitant contingency fees. Victims of duplicative suit, they pay for the same legal services which their lawyers provide to others.[81] Judge Carl B. Rubin encapsulated the wasteful attributes of the private litigation model in relation to 700 Bendectin cases pending in 1984.[82] Judge Rubin calculated that hearing all 700 cases individually would consume 21,000 trial days, or roughly 105 judge years, whereas unifying them in a single class action would reduce the administrative cost of litigation and limit economic waste.[83] Similar desire to avoid economic waste surrounded the Wells Fargo

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*Work of the Civil Committee: 1966 Amendments of the Federal Rules of Civil Procedure (1)*, 81 HARV. L. REV. 356, 393 (1967); Jack B. Weinstein, *Revision of Procedure: Some Problems in Class Actions*, 9 BUFF. L. REV. 433, 438-46 (1960).

78 It is possible to separate causes of action in one case. For example, in *In re General Motors Corp.*, the court allowed a class action settlement for property damage, but excluded any personal injury claims from the settlement. *In re* General Motors Corp., 846 F. Supp. 330, 332, 344 (E.D. Pa. 1993).

79 *See, e.g.*, MURRAY L. SCHWARTZ, LAWYERS AND THE LEGAL PROFESSION, CASES AND MATERIALS 448 (2d ed. 1985); John P. Dawson, *Lawyers and Involuntary Clients: Attorney Fees from Funds*, 87 HARV. L. REV. 1597, 1601 (1974); Stephen C. Yeazell, *Collective Litigation as Collective Action*, 1989 U. ILL. L. REV. 43 (1989). *But cf.*, John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L. REV. 625, 628 (1989); C.W. BROOKS, PETTYFOGGERS AND VIPERS OF THE COMMONWEALTH: THE "LOWER BRANCH" OF THE LEGAL PROFESSION IN EARLY MODERN ENGLAND (1986); *see also* Yeazell, *supra*, at 52.

80 *See, e.g.*, JERRY L. MASHAW, BUREAUCRATIC JUSTICE: MANAGING SOCIAL SECURITY DISABILITY CLAIMS (1983). *But see* Kenneth E. Scott, *Two Models of the Civil Process*, 27 STAN. L. REV. 937 (1975); Kalven and Rosenfield, *supra* note 56, at 713.

81 *See supra* note 79.

82 *In re* "Bendectin" Prod. Liab. Litig., 102 F.R.D. 239, 240 n.3 (S.D. Ohio 1984), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984). Judge Rubin is Chief Judge of the United States District Court of the Southern District of Ohio, Western Division. *Id.* at 239.

83 *Id.* at 240, 240 n.3. Merrell Dow Pharmaceuticals Inc. sold Bendectin, a prescription drug, to offset morning sickness during pregnancy. *In re* Bendectin Prod. Liab. Litig., 749 F.2d 300, 301-02 (6th Cir. 1984). Plaintiffs alleged that the ingestion of Bendectin gave rise to an array of birth defects. *Id.* at 302.

Bank case, in which potential litigants exceeded 150,000.[84] The General Motors P/U Truck litigation, in which potential litigants exceeded 5 million, contained an even more ominous threat of economic waste.[85]

The resort to class actions is evident in a series of tort cases. Class actions were mounted in cases involving mass asbestos inhalation[86] and Agent Orange poisoning.[87] They have redressed intrauterine damage caused by the Dalkon Shield IUD[88] and the side effects of the drug Bendectin,[89] among other losses.[90] In establishing a workable schedule of damages, each class action has served as an effective measure of public risk management.[91] Each has sought to avoid the ill-effects of time-consuming and costly individual suit[92] and at the same time, to relieve defaulters of the duplicative costs of private suit.[93] Moreover, class actions have attempted to counter "the deliberate policies of businesses [to] . . . tailor safety investments to profit margins."[94] The superiority of class actions over private litigation is summarized by Judge Easterbrook in *Rand v. Monsanto Co.*:[95]

> Class actions assemble small claims—usually too small to be worth litigating separately, but repaying the effort in the aggregate.[96]

While the voluntary class action is significantly more effective

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84 *See supra* notes 15-17 (discussing the *Wells Fargo* case).

85 *In re* General Motors Corp., 846 F. Supp. 330, 334 (E.D. Pa. 1993).

86 *See, e.g.*, Waldron v. Raymark Indus., Inc., 124 F.R.D. 235 (N.D. Ga. 1988), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984); Jenkins v. Raymark Indus., Inc., 782 F.2d 468 (5th Cir. 1986). *See generally* DEBORAH R. HENSLER ET AL., ASBESTOS IN THE COURTS: THE CHALLENGE OF MASS TOXIC TORTS (1985) (RAND CORPORATION'S INSTITUTE FOR CIVIL JUSTICE).

87 *In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718 (E.D.N.Y. 1983).

88 *In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171 (1983).

89 *In re* Bendectin Prods. Liab. Litig., 102 F.R.D. 239 (S.D. Ohio), *mandamus granted*, 749 F.2d 300 (6th Cir. 1984); *see also In re* Federal Skywalk Cases, 93 F.R.D. 415 (W.D. Mo.), *vacated*, 680 F.2d 1175 (8th Cir.), *cert. denied*, 459 U.S. 988 (1982).

90 *See In re* Beverly Hills Fire Litig., 695 F.2d 207 (6th Cir. 1982), *cert. denied sub nom.* Bryant Electric Co. v. Kaiser, 461 U.S. 929 (1983).

91 *See* Peter Huber, *Safety and the Second Best: The Hazards of Public Risk Management in the Courts*, 85 COLUM. L. REV. 277, 331 (1985); Spencer R. Williams, *Mass Tort Class Actions: Going, Going, Gone?*, 98 F.R.D. 323 (1982).

92 *See* Klamberg v. Roth, 473 F. Supp. 544 (S.D.N.Y. 1979).

93 *See, e.g.*, Sherman, *Class Actions and Duplicative Litigation*, 62 IND. L.J. 507 (1987); 7A C.A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1780 (1986).

94 Rosenberg, *supra* note 64, at 855.

95 926 F.2d 596 (7th Cir. 1991).

96 *Id.* at 599; *see also* Cutler v. 65 Sec. Plan, 831 F. Supp. 1008 (E.D.N.Y. 1993).

than private litigation in redressing mass default, the right to opt out of a voluntary class can replicate the problems associated with individuated suit.[97] As a lineage of asbestos cases makes apparent, a voluntary class suit assures neither mass participation in the class nor an equitable remedy.[98] The class may include only a minute proportion of prospective claimants or fail to deplete the defaulter's windfall arising from mass default, allowing the defaulter to continue to breach with impunity.

There is also the risk that duplicative class actions will be brought in a variety of jurisdictions. Claimants in different actions will be treated unequally, while aggressive claimants will sue separately, in conflict with the interests of both the voluntary class and the defendant. In *Durrett v. John Deere Co.*,[99] the court stated:

> The court is therefore in the unfortunate posture [in light of the large number of opt out notices issued by plaintiffs] of dealing with reams of briefs regarding certification issues, holding a certification hearing and certifying a class only to be left with the well-founded concern that the Court's new, copiously wrought and filled basket will empty itself of its own accord. Redundant suits would be legion and the defendants would be left to fight a thousand front war. [100]

Unlike a voluntary class action, a mandatory class action prohibits individuals from suing separately with respect to the same cause of action.[101] A mandatory class action arises in two situations under the *Federal Rules of Civil Procedure*.[102] First, the rules require a

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97 Durrett v. John Deere Co., 150 F.R.D. 555, 560 (N.D. Tex. 1993). The *Durrett* Court stated that "[b]ecause of Rule 23(b)(3)'s opt out component, certification under that rule will compel patently inefficient results, both in terms of court time and effort and of party—especially defendant—time and effort, not to mention money." *Id.*

98 *See, e.g.*, David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-up, and Litigation*, 99 HARV. L. REV. 1693, 1701 (1986) (book review); Christopher F. Edley & Paul C. Weiler, *Asbestos: A Multi-Billion-Dollar Crisis*, 33 HARV. J. ON LEGIS. 383, 384 (1993).

99 150 F.R.D. 555 (N.D. Tex. 1993).

100 *Id.* at 561.

101 *See infra* note 106.

102 *See* FED. R. CIV. P. 23(b)(1)(A), 23(b)(1)(B), and (b)(2). Rule 23 (b)(1) states:

> An action may be maintained as a class action if (1) The prosecution of separate actions by or against individuals members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incomparable standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of other members not parties to the adjudications or substantially impair or impede their ability to protect their interests.

mandatory class action when "individual actions create a risk of incompatible standards of conduct for the party opposing the class . . . ."[103] For example, in the absence of a mandatory class action, one court might enjoin the party from acting while another might permit such an action. Second, the rules demand a mandatory class action when "individual actions threaten the disposition or impairment of other claimant's interests not joined in the action."[104] This arises when a series of individual actions are likely to reduce the defendant's limited fund, satisfying some claimants while leaving others uncompensated.[105]

A mandatory class action ordinarily unites an otherwise dispersed class, ensuring that mass consumers with comparable losses can proceed more equitably and more efficiently against the defendant than in voluntary class actions.[106] It prohibits sub-classes of plaintiffs from suing the mass defaulter separately, in disregard

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FED. R. CIV. P. 23(b)(1).

Rule 23(b)(2) relates to injunctive relief through a class action, as distinct from "money damages." As this article deals with money damages, it will not address Rule 23(b)(2).

103 FED. R. CIV. P. 23(b)(1)(A).

104 FED. R. CIV. P. 23(b)(1)(B).

105 As the court stated in *In re Drexel Burnham Lambert Group,* Inc.:

> [S]ome members of the putative class might attempt to maintain costly individual actions in the hope and, perhaps, the belief that their claims are more meritorious than the claims of other class members. A mandatory class action . . . is thus necessary . . . to prevent claimants with such motivations from unfairly diminishing the eventual recovery of other class members.

*In re* Drexel Burnham Lambert Group, Inc., 960 F.2d 285, 292 (2nd Cir. 1992). On the exhaustion of the defendant's limited fund, see Cutler v. 65 Sec. Plan, 831 F. Supp. 1008, 1022 (E.D.N.Y. 1993); *In re* Drexel Burnham Lambert Group, Inc., 960 F.2d at 292.

106 In issue is not whether claimants seek certification as a voluntary or a mandatory class, nor whether the court deems the action a mandatory class action. The point is, simply, that a mandatory class action is generally more efficient and fairer to litigants than a voluntary class action in mass consumer disputes. *See* Comment, *In re Joint Eastern and Southern Districts Asbestos Litigation: Bankrupt and Backlogged—A Proposal for the Use of Federal Common Law in Mass Tort Class Actions,* 58 BROOK. L. REV. 553, 596-601 (1992); Kevin H. Hudson, Comment, *Catch-23(b)(1)(B): The Dilemma of Using the Mandatory Class Action to Resolve the Problems of the Mass Tort Case,* 40 EMORY L.J. 665, 696, 697 (1991); H.B. NEWBERG, CLASS ACTIONS, § 409 *et seq.* (2d ed. 1985); 7 C.A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE § 1774 (2d ed. 1986); *In re* Joint E. and S. Dist. Asbestos Litig. 134 F.R.D. 32, 36 (E.D.N.Y. 1990) (mandatory class action instituted in asbestos manufacturing context); Zeffiro v. First Pennsylvania Banking & Trust Co., 96 F.R.D. 567, 573 (D.C. Pa. 1983) (certifying a mandatory class action consisting of investors of bankrupt corporation); Bradford Trust Co. v. Wright, 70 F.R.D. 323, 326 (E.D.N.Y. 1976) (class created consisting of employees who participated in defendant corporation's profit-sharing plan).

of the interest of the class of victims as a whole,[107] and prevents aggressive claimants from exhausting the defendant's limited fund through first-come first-served individual suits or voluntary class actions. It also allows plaintiffs to proceed in a single locus. As a result, a mandatory class action promotes substantive justice both among claimants and between the defaulter and mass claimants. For example, in taking account of the total loss incurred, it ensures that no one plaintiff is compensated proportionately less or more than any other.[108] While prohibiting opt out claimants from suing separately, it also disrupts the defendant's business less than a multitude of voluntary and private class actions mounted in multiple locations.[109] As the court stated in *Durrett v. John Deere Co*, "multicourt adjudication would be like death by 10,000 cuts to any defendant, win or lose."[110]

The *Federal Rules of Civil Procedure* demonstrate the advantage of proceeding by mandatory class action. Rule 23(b)(1)(A) specifically provides that the defendant need not pay damages in one jurisdiction when another jurisdiction grants a decree of specific performance.[111] A mandatory class action also frees society from the burden of multiple suits that ultimately cripple the defendant, to the loss of employees, creditors, and customers at large.[112] One

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107 For example, aggressive customers can undermine a voluntary class action in a manner which they could not accomplish through mandatory action. Motivated by the prospect of a quick fix at a low cost, aggressive complainants could secure a respectable settlement through a separate deal with the defaulter. In addition, they could divert the defaulter's energies away from the class and also drain its coffers. This separate deal could also have an adverse psychological and financial impact upon the class, further reducing its numbers and sources of financing.

On the extent to which voluntary class actions benefit the educated and pecuniary, see, e.g., THOMAS C. BARTSH ET AL., A CLASS-ACTION SUIT THAT WORKED 57 (1978); Jonathan M. Landers, *Of Legalized Blackmail and Legalized Theft: Consumer Class Actions and the Substance-Procedure Dilemma*, 47 S. CAL. L. REV. 842 (1974).

108 *See* Rose, *supra* note 58, at 1214-15 (1983); *cf.*, The Proposed Uniform Class Action Act: The Special Committee on Uniform Class Actions Act, National Conference of Commissioners on Uniform State Laws, C.A.R. Comment, 4 CLASS ACTION REP. 190 (1975).

109 *See, e.g.*, Judith Resnik, *From "Cases" to "Litigation"*, 54 LAW & CONTEMP. PROBS. 5, 49 (1991); Bone, *supra* note 68, at 232; Yeazell, *supra* note 79, at 52.

110 150 F.R.D. 555, 560 (N.D. Tex. 1993).

111 On the rules governing where a mandatory class action can be brought, see Kaplan, *supra* note 77, at 389-94; Weinstein, *supra* note 77, at 457-60; Seltzer, *supra* note 77, at 63-71. *See also* Schwarzer et al., *supra* note 77, at 1695.

112 The demise of the defendant's business has diverse social effects. For example, it can force the state to assume some of the defendant's obligations, notable, to find alternative work for, or to otherwise support, the defendant's employees. It can also lead to the increased prices of comparable goods and services in the marketplace. On the history and social significance of defendant bankruptcies arising out of mass class

need merely contemplate the calamity that would have arisen had the five million purchasers of General Motors' defective pickup truck each sued General Motors independently. Such suits by each purchaser would have resulted in duplicative litigation ad infinitum, or worse still, would have brought civil litigation to a grinding halt.[113]

Despite its virtues,[114] courts traditionally have construed mandatory class actions as undue restrictions on the right of the individual to sue separately from the class.[115] Some judges have maintained that class certification hearings and notice requirements are time consuming and involve undue expense.[116] Others have insisted that inconsistent decisions do not give rise to the risk of incompatible standards of conduct under Rule 23(b)(1)(A).[117] Whatever their reasons, courts generally have refused to mandate class actions in either contract or tort.[118]

Some judges, however, have mandated class actions under

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litigation, see the discussion of the Johns-Manville and Dalkon Shield case, *supra* note 67.

113 *See In re* General Motors Corp., 846 F. Supp. 330, 346 (E.D. Pa. 1993).

114 *See supra* notes 105-08 and accompanying text.

115 *See, e.g.*, 1 H.B. NEWBERG, CLASS ACTIONS, § 5.05 *et seq.* (2d ed. 1985); 7B C.A. WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE, §§ 1785 to 1787 (2d ed. 1986).

116 *See* NEWBERG, *supra* note 115; WRIGHT, *supra* note 115.

117 *See, e.g.*, McDonnell Douglas Corp. v. U.S. Dist. Ct., C.D. of Cal., 523 F.2d 1083, 1086 (9th Cir. 1975). There, the court held that the risk of inconsistent judgements awarded to 335 people killed in an airplane crash did not constitute a risk of incomparable standards of conduct under Fed. R. Civ. P. 23 (b)(1)(A). *Id.* As a result, it declined to certify the class. *Id.* at 1087.

118 On the reasons for denying mandatory class actions in mass tort litigation, see Yandle v. PGG Indus., Inc., 65 F.R.D. 566, 571-72 (E.D. Tex. 1974). In *Yandle*, the court stated:

> The policy reasons for the disallowance of class actions in mass tort cases generally fall into three categories. First of all there is the general feeling that when personal injuries are involved that each person should have the right to prosecute his own claim and be represented by the lawyer of his choice. Secondly, that the use of this procedure may encourage solicitation of business by attorneys. And finally that individual issues may predominate because the tortfeasor's defenses may depend on facts peculiar to each plaintiff.

*Id.* at 569 (citing 7A. WRIGHT AND MILLER, FEDERAL PRACTICE AND PROCEDURE, § 1783 (1972)); *see also* Cutler v. 65 Sec. Plan, 831 F. Supp. 1008, 1021 (E.D.N.Y. 1993); Kaplan, *supra* note 77, at 393. Although not specifically articulated, comparable reasons for denying mandatory class actions likely apply to mass contract cases. Contracts, supposedly, are personal to each consumer; each has her own discrete cause of action and each should be free to sue independently of all other consumers. Conversely, the defendant should not have to defend a class action when it has different defenses to each discrete claim against it. Finally, lawyers should be discouraged from soliciting mass contract business, just as they are discouraged from soliciting mass tort business.

Rule 23(b)(1)(B).[119] Where the defaulter has a limited fund or where a series of individual suits would exhaust that fund, courts have stated that allowing such suits would bankrupt the defendant.[120] Others have recognized that a mandatory class action is less costly than a multiplicity of individual and voluntary class suits.[121] Still others have noted that a mandatory class action avoids the crippling effect of duplicative punitive damages awarded against the defaulter.[122] The result has been to combine private suit with public interest litigation. The individual has sacrificed the right to sue privately that few ordinarily could enjoy in return for a greater benefit that many could share.

This is not to suggest that mandatory class actions are inherently superior to both individual suit and voluntary class actions. Mandatory class actions *can* be cumbersome, costly, fractious and ineffective. They can fail to respond to the call for "substantial modifications in traditional court processes," producing few improvements in the "efficiency and equity of the mass claims resolution process."[123] However, suitably utilized, mandatory class actions can succeed where both individual actions and voluntary class actions have failed; they can compensate mass victims equita-

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119 On FED. R. CIV. P. 23(b)(1)(B), see *supra* note 102.

120 *See, e.g., In re* "Agent Orange" Prod. Liab. Litig., 100 F.R.D. 718, 724-28 (E.D.N.Y. 1983); *In re* Northern Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig., 693 F.2d 847, 850 (9th Cir. 1982) (citation omitted); Green v. Occidental Petrol. Corp., 541 F.2d 1335, 1340 n.9 (9th Cir. 1976); *see also* Matthew K. Phillips, Comment, *Mandating Mass Tort Class Actions: Litigating Catastrophes Without Creating Litigation Catastrophes*, 19 J. MARSHALL L. REV. 91, 93-114 (1985); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 HARV. L. REV. 1143, 1159 (1983). The best examples of bankruptcies arising in the wake of class actions are the Johns-Manville and Dalkon Shield cases. *See In re* Johns-Manville Corp., 36 B.R. 743 (Bankr. S.D.N.Y. 1984); *In re* A.H. Robins Co., 63 B.R. 986 (Bankr. E.D. Va. 1986), *aff'd sub nom.* Grady v. A.H. Robins Co., 839 F.2d 198 (4th Cir. 1988); *cert. dismissed sub nom.* Joynes v. A.H. Robins 487 U.S. 1260 (1988); *see also* Georgene M. Vairo, *The Dalkon Sheild Claimants Trust: Paradigm Lost (or Found)?*, 61 FORDHAM L. REV. 617, 626-31 (1992); Feinberg, *supra* note 67, at 101; Smith, *supra* note 67.

121 *See, e.g., In re "Agent Orange" Prod. Liab. Litig.*, 100 F.R.D. at 720.

122 *Id.*; *see also In re N. Dist. of Cal, Dalkon Shield Prods. Liab. Litig.*, 693 F.2d at 852. The scope of this article does not permit discussion of choice of jurisdiction and law issues, including the method of ensuring that, in bringing a mandatory class action in one jurisdiction, another action is not joined elsewhere. *See generally* Schwarzer et al., *supra* note 77 (concluding that informal coordination between jurisdictions can advance judicial economy, fairness and efficiency when the underlying litigation spans state and federal courts).

123 Deborah R. Hensler, *Resolving Mass Torts: Myths and Realities*, 1989 U. ILL. L. REV. 89, 90 (1989); *see also* Albert W. Alschuler, *"Close Enough for Government Work": The Exclusionary Rule after* Leon, 1984 SUP. CT. REV. 309, 345 (1984); Albert W. Alschuler, *Mediation With a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 HARV. L. REV. 1808, 1812 (1986).

bly and deter mass default as well as reduce the waste of both private and public resources.[124]

Mandatory class actions are especially useful in mass consumer contracts. As the Wells Fargo dispute illustrates, individual consumers have little incentive to sue on their own when their individual claims are small. Moreover, they have little to lose by having their right to private litigation restricted by a mandatory class suit. The mandatory action ensures that they share in both the costs and the fruits of their collective labor. In addition, the mandatory action protects the defendant from the crippling effects of defending against different private and voluntary suits arising out of comparable causes of action.

In summary, the private litigation model ordinarily fails in mass consumer transactions. Most consumers lack the resources to sue the defaulter privately. Either they cannot afford to hire high-priced lawyers to match those available to the defaulter, or they cannot fund a protracted suit. Those who proceed privately risk becoming victims of lawyers who profit from their client's lack of legal and market sophistication. Those who win are likely to lose more in court costs, attorney's fees, and aggravation than they gain. Given these limitations, the private litigation model fails to promote social justice when the public cost of private suit is significant and when duplicative suits lead to economic waste.[125]

In expanding upon the private litigation model, a class action reduces the social cost of replicated litigation. It encourages consumers with comparable causes of action to mount a united front in place of a plethora of private actions. It provides consumers in general with a shared means of redressing a recurrent threat and impedes lawyers from charging multiple contingency fees in multiple private suits.

However, a mandatory class action surpasses the benefits provided by class actions in general. Not only does it avoid deficiencies associated with the private litigation model in mass consumer cases. It also transcends the voluntary class action in redressing those deficiencies.

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124 *See, e.g.*, John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 679 (1986); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 STAN. L. REV. 1183 (1982); *see also* Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281, 1283 (1976).

125 *See supra* § IV.

## V. THE PUBLIC INTEREST TRUST

A mandatory class action is especially effective when coupled with a public interest trust.[126] A public interest trust holds the defendants' excess savings or profits arising from mass default that are not disbursed among claimants in trust for specific public interests.[127] This excess arises when mass victims of default fail to claim their proportionate share of the mass award because they are unaware of their losses, are disinterested in making a claim, have left the jurisdiction, or are deceased. The public interest trust disburses the difference between mass damages that are awarded against the defaulter and the total quantity of claims that are made by legitimate claimants.

A public interest trust is especially appropriate in consumer class actions. In such actions, mass default likely impacts upon consumers in general; members of the class action are usually underrepresentative of the victims of mass default, and the return of the excess to the defaulter would not deter the defendant from future default.[128] In addition, claimants who might otherwise have declined to join the class action because of the prospects of receiving only a limited award might now join because they associate the class action with a public interest endeavor with which they identify.

The Wells Fargo Bank and the General Motors P/U Truck cases both illustrate the case for a public interest trust. In the Wells Fargo dispute, the Bank paid only $1.5 million out of a possible $6.5 to $13.5 million in claims to only 3% of potential claimants.[129] In the General Motors case, experts estimated that General Motors would pay only $2.024 billion out of a possible $5 billion to only 34% to 38% of potential claimants.[130] A public interest trust could have ensured that both Wells Fargo Bank and General Motors pay their excess savings arising from mass default to the trust for public

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126 Arguably, this problem arises in relation to legal action in general. Individuals are unlikely to sue when they anticipate receiving scant reward from suit. Their disincentive to sue, however, is offset by the extent to which they believe that they will benefit collectively from suit. For example, they are more likely to join a class when they believe that doing so likely will minimize their individual costs, while maximizing their individual benefits. They are also more likely to favor a mandatory class action that redresses public concerns that reinforce their own interests.

127 FED. R. CIV. P. 23 (b)(1)(A).

128 On the risk that the defendant will save or profit from mass default, see *infra* note 153.

129 *See supra* note 16 and accompanying text.

130 *See supra* note 22.

disbursement. The result would have been both to benefit consumers at large and to deter comparable default in the future.

Coupling the remedies of class claimants with public interest trusts also offers enormous private and public benefit. For example, claimants can receive compensation in the first instance in proportion to their actual losses,[131] or failing that, equally.[132] Thereafter, the court can require the defaulter to contribute to the well-being of specific consumers or consumers in general. This can be accomplished retroactively or prospectively, through escheat,[133] the rollback of consumer prices,[134] consumer price discounts, or

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131 The intention here is to limit the benefit which free-rider claimants receive from suit or settlement. However, by itself, this is an inadequate means of accomplishing that end. Free riders may be quite happy to pay their proportionate share. They may join because success appears to be imminent, and the cost of joining is small. One method of dealing with free-riders is to require parties who join late to contribute back-costs to the class, or alternatively, to discount their benefit from suit according to the time at which or the condition under which they joined.

The allocation of funds pro rata among claimants is also of limited value when claimants who join discourage others from joining the class action in the interests of maximizing their proportionate shares of existing class members. This concern is especially problematic when class members represent an elite, and when that elite devises barriers to exclude others from joining the class. These barriers to entry are all the more troubling in consumer class actions in which there are a few claimants. This occurs when these are well educated and financially secure, and when they use their education and resources to exclude others who are less well endowed from joining suit, or alternatively, when they sabotage the class suit by securing a private settlement at its expense. *See generally* NEWBERG, *supra* note 20, Appendix 8-4, at 206; BARTSH ET AL., *supra* note 107.

132 This equal distribution occurs because courts and tribunals are reluctant to evaluate the merits of each individual claim, because doing so would give rise to a trial within a trial, and because the result would be costly. *See, e.g.*, Lagakos & Mosteller, *Assigned Shares in Compensation for Radiation-Related Cancers*, 6 RISK ANALYSIS 345 (1986); Rosenberg, *The Uncertainties of Assigned Shares Tort Compensation: What We Don't Know Can Hurt Us*, 6 RISK ANALYSIS 363 (1986). The problem with this egalitarian approach is that it can lead to both inefficiencies and injustice. This is especially so when the interests of claimants with significant losses are marginalized by the significantly lesser interests of other claimants. The alternative is to award damages in proportion to each claimant's loss, subject to that claimant's reasonable capacity to prove it at a reasonable cost. *See generally infra* note 197.

133 Under the principle of escheat, property reverts to the state on the grounds that no individual or other legal entity is reasonably entitled to it. *See* NEWBERG, *supra* note 20, § 10.19. I do not favor resort to escheat on the grounds that a state that is interested in the outcome of a class action is less likely to provide institutional support for such an action. In addition, property that reverts to the state by escheat ceases to redress the interests of specific consumers, unless the state itself so decides. Finally, other interested groups, such as consumer and public interest groups, are both usually identifiable and more worthy recipients of *cy pres* funds. *See also infra* note 135.

134 *See, e.g.*, 1 NEWBERG, *supra* note 20, § 10.17 to 10.19; *see also* Michael Malina, *Fluid Class Recovery as a Consumer Remedy in Antitrust Cases*, 47 N.Y.U. L. REV. 477, 482 (1972).

other consumer services.[135] The court can also require the trust to contribute to public works programs, hospitals, schools, and tenancy organizations.[136]

A public interest trust can redress both the interests of the class and the interests of society at large. The court can allocate to it the profits or savings that the defendant otherwise might continue to horde at the public's expense. The public trust thereafter can disburse trust funds in the public interest to avoid the effects of comparable default in the future. For example, in the Wells Fargo dispute, the bank paid claimants less than $1.5 million of an estimated $6.5 to $13.5 million in total claims. A public interest trust could have disbursed the unclaimed funds in the public interest. This would have prevented the bank from benefitting from its default and likely would have deterred similar action in the future.

The flexible remedies associated with a public interest trust can protect the defaulter by not requiring it to face an overbearing financial threat immediately and by according it positive publicity. For example, the trust can construct a scheme, in consultation with a mass defaulter like General Motors, to disburse coupons or other benefits to a full class of injured consumers.[137] It can also benefit class members who are assured of receiving something *in futuro*, rather than nothing, should a current award exhaust the limited fund of the defaulter. At the same time, it can benefit a consuming public that often bears the residual burden of mass default.

This resort to a public interest trust in mass consumer disputes is not a mere flight of fancy. Mass consumer disputes in both tort and contract use public interest trusts. For example, following the Three Mile Island nuclear accident, the court-approved settlement created a public health fund to finance scientific studies of the biological impact of radiation exposure.[138] Similarly, an energy con-

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135 *See, e.g.*, Butowsky v. Prince George's County Bd. of Realtors, C.A. No. 71-1086K (D. Mass. filed 1975).

136 *See, e.g.*, West Virginia v. Chas. Pfizer & Co., 314 F. Supp. 710 (S.D.N.Y. 1970), *aff'd*, 440 F.2d 1079 (2d Cir.), *cert. denied sub nom.* Cotler Drugs, Inc. v. Chas. Pfizer & Co, 404 U.S. 871 (1971); People v. Parkmerced Co, 244 Cal. Rptr. 22, 26 (1988); Lindy Bros. Builders, Inc. v. American Radiator & Standard Sanitary Corp., 382 F. Supp. 999 (E.D. Pa. 1974).

137 *See In re* General Motors Corp., 846 F. Supp. 330, 332 (E.D. Pa. 1993). The defaulter likely gains positive publicity in being identified with the public interest objectives of the trust. Initially, that publicity acts as a counterbalance to the negative publicity arising from the class action. In time, however, while consumers continue to associate the continuing benefits derived from the public interest trust with the defendant, they are likely to forget that the defendant's initial default gave rise to the trust. As a consequence, the defaulter gains net positive publicity in the long term.

138 *See, e.g., In re* Three Mile Island Litigation, 557 F. Supp. 96, 97 (M.D. Pa. 1982).

servation trust assumed responsibility to disburse damages secured from an oil company that overcharged its customers.[139] Somewhat more celebrated, the United States District Court ordered A.H. Robins Company, the manufacturer of the Dalkon Shield intrauterine device, to contribute almost $2.5 million to a public interest trust for distribution among approximately 200,000 users of its product.[140]

The California case of *People v. Parkmerced Co.*[141] illustrates this resort to a public interest trust. There, the California Court of Appeals approved the trial court's order which resulted in a residue of security deposits wrongfully withheld by lessors from their tenants.[142] The order disgorged the defaulter's savings arising from mass default by placing the residue in a trust with designated tenants' organizations.[143] The court reduced its own supervision and administration costs by disbursing the residue not paid to claimants to reputable public interest organizations. Finally, the order benefitted a class of tenants that might otherwise have been subject to comparable default had the public interest trust not been applied to their common ends.[144]

In summation, the mandatory class action coupled with the public interest trust can effectively compensate mass victims and deter mass default of consumer contracts. This communitarian approach stresses the need for those who are similarly situated to join

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139 United States v. Exxon Corp., 561 F. Supp. 816, 856 (D.D.C. 1983), *aff'd*, 773 F.2d 1240 (T.E.C.A. 1985), *cert. denied sub nom.* Marathon Petroleum Co. v. United States, 474 U.S. 1105, *reh'g denied*, Exxon Corp. v. United States, 474 U.S. 1112 (1986). On the Petroleum Violation Escrow Account (PVEA) cases, including the use of such funds, see generally Susan E. Nash, Note, *Collecting Overcharges from the Oil Companies: The Department of Energy's Restitutionary Obligation*, 32 STAN. L. REV. 1039 (1980).

140 *See In re* N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig., 526 F. Supp. 887 (N.D. Cal. 1981), *vacated*, 693 F.2d 847 (9th Cir. 1982), *cert. denied sub nom.* A.H. Robins Co., Inc. v. Abed, 459 U.S. 1171 (1983).

141 People v. Parkmerced Co, 244 Cal. Rptr. 22 (Ct. App. 1988).

142 *Id.* at 27.

143 *Id.*

144 *Id.* In passing on control over residuary funds to public interest organizations, courts still can ensure the reasonable and proper liquidation of trust funds by imposing reasonable requirements upon those organizations. For example, they can establish a monitoring committee to scrutinize the organization's financial statements and audited balance sheets. They can create special conditions governing the use of the funds. Typical among these is the requirement that trust funds be placed in special interest bearing accounts, and further, that public interest officers responsible to administer trust funds not benefit directly from them. *See, e.g.*, NEWBERG, *supra* note 20, § 12.05, at 527 n.30, § 12.25, at 565 (citing Alpine Pharmacy, Inc. v. Chas Pfizer & Co., 481 F.2d 1045, 1048 n.2 (2d Cir. 1973)). *See generally* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747, 769 (1988).

together to protect themselves from an otherwise dominant foe. The remainder of the article discusses the workings of this proposed system.

## VI. Applying The Proposed Alternatives

The private interest of each victim in receiving compensation and the public's interest in deterring mass default aim at achieving several objectives: the defaulter should relinquish savings or profits arising from mass default; the settlement should allocate these savings or profits among those who are subject to, or adversely affected by, that default, including public interest organizations; and the court should effect this allocation equitably in the interests of harmonious and stable consumer relations.[145] The public interest trust combined with a mandatory class action accomplishes these objectives by disgorging and allocating savings or profits: first, among customers who join the mass suit; second, among customers who are unable to join it initially,[146] but make a claim against it later;[147] third, among incidental claimants who mitigate losses or damages caused to mass victims;[148] and fourth, by passing the residue on to a public interest trust for specific or general consumer benefit.[149] Specific principles govern this ascending order of distribution. This method leaves no claimant free to sue independently of the class if he or she satisfies the requirements to join the class.[150] No claimant sustains the full, or undue, burden of attorney's fees, court costs, work disruption, and the dilatory tactics of the defaulter.[151] Claimants who lack the legal and financial resources to sue discretely are encouraged to join the class.[152]

The section below proposes practical ways to disgorge the defaulter's savings or profits arising from mass default and to allocate

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145 *See generally supra* note 144 and *infra* note 147.

146 On such claimants, see *infra* § VI, C.

147 *See generally Colloquy: An Administrative Alternative to Tort Litigation to Resolve Asbestos Claims*, 13 CARDOZO L. REV. 1817 (1992) (discussing resort to distribution funds for the distribution and allocation of mass damage awards among claimants in general).

148 On such incidental claimants, see *infra* note 199.

149 Applied to a defaulting bank, incidental claimants might be public housing authorities who subsidize mortgages to the extent of the bank's surcharge in breach of contract. On such incidental claimants, see *infra* § VI, C, 1.

150 *See supra* note 101.

151 *See supra* note 62.

152 Not raised here, but supportable in fact, mass claimants who are contributorily at fault in causing their own loss should not be compensated to the extent of that fault. Such contributory liability arises, for example, when a plaintiff anticipates the risk of loss arising from mass default, when that plaintiff is able to avert or mitigate that loss, and when he fails to do so in fact. *See infra* § VI, C, 1.

these among mass victims. The overall goal is to redress private and public harm, including harm to the defaulter, in an equitable and efficient manner.[153] The functional end is to arrive at a viable solution in cases of mass default. This is accomplished in consumer transactions by assessing the quantum of savings arising from mass default, the class of persons affected by it, and the proportionate award of the savings or profits to each member of the class.[154] The beneficiaries of the class action are the mass victims and the public at large. Finally, the goal is neither to replicate the criminal justice system,[155] nor deny punitive damages in cases of

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153 The distribution of savings or profit acquired from mass default has a deterrent design: the fact that the promisor must give up savings or profits acquired from breach both compensates mass victims and deters breach. For an historical perspective see Rene Demogue, *Validity of the Theory of Compensation Damages*, 27 YALE L.J. 585, 589 (1918).

154 *See generally* Leon E. Trakman, *Winner Take Some: Loss Sharing and Commercial Impracticability*, 69 MINN. L. REV. 471 (1985) (discussing the appointment of a special master to assist in determining the nature of loss). *But see* John P. Bermingham, *Extending Good Faith: Does the U.C.C. Impose a Duty of Good Faith Negotiation Under Changed Circumstances?*, 61 ST. JOHN'S L. REV. 217, 220 (1987). *See generally* E. ALLAN FARNSWORTH, CONTRACTS § 9.9 n.33 (2d ed. 1990); Michael D. Lieder, *Constructing a New Action for Negligent Infliction of Economic Loss: Building on Cardozo and Coase*, 66 WASH. L. REV. 937 (1991) (explaining the calculation of economic loss in negligence cases); For a discussion of claims procedures in class actions, see Hillebrand & Torrence, *supra* note 144, at 748-51. On the influence of expert testimony on jurors' assessments of damage, see generally Allan Raitz et al., *Determining Damages: The Influence of Expert Testimony on Jurors' Decision Making*, 14 LAW & HUM. BEHAV. 385 (1990).

155 Courts that grant punitive damages in tort sometimes emphasize the limitations of the criminal justice system. *See, e.g*, Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 389 (1981); *cf.* Malcolm E. Wheeler, *The Use of Criminal Statutes to Regulate Product Safety*, 13 J. LEGAL STUD. 593 (1984); John C. Coffee, Jr., *Making Punishment Fit the Corporation: The Problem of Finding An Optimal Criminal Sanction*, 1 N. ILL. U. L. REV. 3 (1980). On congressional authorization of both criminal sanctions and punitive damages see, inter alia, 17 U.S.C. § 504 (1976) (violation of copyright laws); I.R.C. § 7213 (unauthorized disclosure of tax returns); 15 U.S.C. § 15 (1976) (violation of antitrust laws); 35 U.S.C. § 284 (1976) (violation of patent laws); the Landrum-Griffin Act, 29 U.S.C. §§ 411, 412 (1976); the Federal Aviation Act, 49 U.S.C. §§ 1374(b), 1472(a) (1976). *See generally* Richard Marcus, *Punitive Damages Under Federal Statutes: A Functional Analysis*, 60 CAL. L. REV. 191 (1972) (examining the different purposes of punitive damages awards under federal statutes). For similar authorization to impose both criminal and civil sanctions in relation to racial discrimination in terms of 42 U.S.C. § 1982, see Morales v. Haines, 486 F.2d 880 (7th Cir. 1973); in relation to contract rights under 42 U.S.C. § 1983, see Okeson v. Tolley School Dist. No. 25, 570 F. Supp. 408 (D.N.D. 1983); Brown v. Pullard Independent School Dist., 640 F.2d 651 (5th Cir. 1981); City of Newport v. Facts Concerts Inc., 453 U.S. 247 (1981). On occasions, courts have invoked punitive damages in order to support a statute. For instance, the Supreme Court of Nevada stated that "the threat of punitive damages may be the most effective means of deterring conduct which would frustrate the purpose of our workmen's compensation laws." Hansen v. Harrah's, 675 P.2d 394, 397 (Nev. 1984)). *See* Kelsay v. Motorola, Inc., 384 N.E.2d 353, 358 (Ill. 1978). *But see*, Barr/Nelson, Inc. v. Tonto's Inc., 336 N.W.2d 46 (Minn. 1983). *See generally* Charles R. Pengilly, *Restitu-*

wilful or malicious default.[156]

### A. *Mass Profits*

A mass award aims to remove the defendant's profits arising from mass default under two conditions: the defendant defaults wilfully and recklessly and/or disgorging its savings is insufficient to deter it from mass default.[157] For example, a mass defaulter knowingly fails to avert a risk of harm or injury to mass victims.[158] The defaulter compensates some victims. However, it continues to default in respect of others because doing so remains profitable.[159]

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*tion, Retribution, and the Constitution*, 7 ALASKA L. REV. 333 (1990) (assessing the present state of the law of restitution).

156 Arguably, despite the emphasis that punitive damage awards place on punishment, they are more truly deterrent in design. *See, e.g.*, Davis v. Gage, 682 P.2d 1282 (Idaho Ct. App. 1984). In *Davis*, the court stated that "the primary purpose [of punitive damages] is to eliminate the financial incentive that otherwise would exist for continued future bad conduct if the defendant were required only to compensate the aggrieved party for his probable losses while retaining any net benefits from the prohibited acts." *Id.* at 1287.

157 *See, e.g.*, Boise Dodge v. Clark, 453 P.2d 551 (Idaho 1969).

158 This language resembles the language used in punitive damage cases in which emphasis is given to the defendant's malicious or wanton default. However, the primary intention here, to disgorge the defendant's profits, is compensatory and deterrent, not punitive. On punitive damage awards, see generally Stephen H. Sneiderman, Note, *The Future of Punitive Damages after* Browning-Ferris Industries v. Kelco Disposal, 51 OHIO ST. L.J. 1031 (1990); Thomas C. Galligan, *Augmented Awards: The Efficient Evolution of Punitive Damages*, 51 LA. L. REV. 3 (1990). On the virtue of punitive damage awards in contract, see generally Timothy W. Bjorkman, Comment, B & M Homes, Inc. v. Hogan: *A Breakthrough in the Law's Reluctance to Award Damages in Contract for Mental Anguish and Other Non-Economic Detriments*, 26 S.D. L. REV. 48 (1981); Jane Mallor & Barry Roberts, *Punitive Damages: Towards a Principled Approach*, 31 HASTINGS L.J. 639 (1980); Steven H. Reisberg, Note, *In Defense of Punitive Damages*, 55 N.Y.U. L. REV. 303 (1980); Timothy J. Sullivan, *Punitive Damages in the Law of Contract: The Reality and the Illusion of Legal Change*, 61 MINN. L. REV. 207 (1977); Note, *The Expanding Availability of Punitive Damages in Contract Actions*, 8 IND. L. REV. 668 (1975); Michael Carlton Garrett, Note, *Allowance of Punitive Damages in Products Liability Claims*, 6 GA. L. REV. 613 (1972). *But see* Charles M. Louderback & Thomas W. Jurika, *Standards for Limiting the Tort of Bad Faith Breach of Contract*, 16 U.S.F. L. REV. 187, 205, 206 (1981).

159 Such assertions are most appropriate in products liability cases. *See, e.g.*, Leichtamer v. American Motor Corp., 424 N.E.2d 568, 580 (Ohio 1981); Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 361 (Ct. App. 1981); American Motors Corp. v. Ellis, 403 So. 2d 459, 469 (Fla. Dist. Ct. App. 1981); Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727, 740 (Minn. 1980), *cert. denied sub nom.* Reigel Textile Corp. v. Gryc, 449 U.S. 921 (1980); Wussow v. Commercial Mechanisms, Inc., 293 N.W.2d 897, 906 (Wis. 1980); Rinker v. Ford Motor Co., 567 S.W.2d 655 (Mo. Ct. App. 1978); Gillham v. Admiral Corp., 523 F.2d 102, 107 (6th Cir. 1975), *cert. denied* 424 U.S. 913 (1976). *See generally* Twerski et al., *Shifting Perspectives in Products Liability: From Quality to Process Standards*, 55 N.Y.U. L. REV. 347 (1980) (recommending that to determine liability for a defective product, courts should scrutinize the process by which companies make product design decisions); James A. Henderson, Jr., *Manufacturers' Liability for Defective*

Redressing this continuing default is especially appropriate in mass consumer cases when the defendant uses its position of market dominance to profit at the expense of a mass of trusting customers.[160] Disgorging its mass profits is also appropriate when the defaulter denies both its victims and the public at large the productive use of its goods and services.[161]

A court that implements a mandatory class action needs to estimate and disburse the defaulter's savings or profits arising from mass default. This requires that it establish the size of the mandatory class, the extent of the mass defaulter's liability, and a reasonable method of disbursing funds among class members and in the public interest. To protect both private and public interests, it also needs to determine when claimants are deserving or contributorily at fault and the extent to which they are entitled to share in the award.

The court must first formulate a method of determining the defendant's profits or savings arising from mass default. Expressed as a formula, the defendant's profits consist of the difference between the market value of non-defective and defective goods or services, multiplied by the volume of defective goods or services sold to mass plaintiffs.[162]

In practice, both consumer class actions[163] and personal injury cases[164] evidence the capacity of common law courts to determine the nature of savings or profits arising from mass default. Medical and pharmaceutical experts have estimated mass harm arising out

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*Product Design: A Proposed Statutory Reform*, 56 N.C. L. REV. 625 (1978) (proposing a product liability statute designed to limit manufacturers' liability); Robert L. Rabin, *Dealing with Disasters: Some Thoughts on the Adequacy of the Legal System*, 30 STAN. L. REV. 281 (1978) (assessing the effectiveness of the administrative and judicial process preventing mass disasters and providing relief after they occur).

160 On such dominance in contractual relations, see generally *infra* notes 184-88.

161 *See* Hansen v. Harrah's, 675 P.2d 394, 397 (Nev. 1984); Davis v. Gage, 682 P.2d 1282, 1287 (Idaho Ct. App. 1984); Jones v. Abriana, 350 N.E.2d 635, 650 (Ind. Ct. App. 1976).

162 Let $P_D$ = Profit From Defective Goods

$M_G$ = Market Value of a Non-Defective Unit (Goods or Services)

$M_D$ = Market Value of a Defective Unit (Goods or Services)

$$\text{Excess Gain from Defective Units} = P_D = \sum_{i=1}^{n} (M_G - M_{Di}).$$

163 *See supra* text accompanying note 3.

164 *See, e.g.*, Koslow, *supra* note 62; *see also* F.H. Buckley, *Three Theories of Substantive Fairness*, 19 HOFSTRA L. REV. 33 (1990). *But see* William Bishop & John Sutton, *Efficiency and Justice in Tort Damages: The Shortcomings of the Pecuniary Loss Rule*, 15 J. LEGAL STUD. 347 (1986).

of toxic-shock syndrome (TSS) caused by defective tampons,[165] mass uterine infections, and perforations arising from the use of the Dalkon Shield IUD.[166] Defendants also have enabled courts to assess mass damages. Johns-Manville projected the extent of its liability arising from future asbestos-related injuries.[167] Ford Motor Company prepared an internal memorandum outlining the profitability to it of mass default in *Grimshaw v. Ford Motor Co.*[168]

While *Grimshaw* arose as a personal injury case in tort, not as a property damage case in contract, it usefully illustrates the extent to which a mass defaulter can profit from default at the expense of a mass of others.[169] The inferences that arise from *Grimshaw* apply equally to other cases, such as the dispute between General Motors and the purchasers of its defective P/U Truck.[170] In both cases, the defendant secured a windfall because it compensated only some prospective claimants for their losses.

According to the *Grush-Saunby Report*, an internal document prepared by Ford Motor Company, Ford anticipated that it would profit considerably by not recalling and repairing the Ford Pinto.[171] In particular, it anticipated a cost of $137 million were it to recall all 11 million Pinto cars and 1.5 million Pinto light trucks and repair them at a cost of $11 per vehicle.[172] However, it estimated a much lower total cost of $49.5 million arising from suit or settlement were it to decline to recall and defend each claim against it.[173] It estimated, further, that it would need to compensate only 180 persons for death or injury, and 2,100 persons for the loss of their vehicles.[174] As a result, Ford anticipated an overall sav-

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165 On TSS, (toxic-shock syndrome), see Leanne Crane Castafero, Comment, *Coping With the Particularized Problems of Toxic Tort Litigation*, 28 VILL. L. REV. 1083 (1983); David Ranii, *Male Files Suit Over Toxic Shock*, NAT'L L.J. 3 (July 4, 1983); Center for Disease Control, U.S. Dep't of Health & Human Services, *Follow-up on Toxic-Shock Syndrome - United States*, 29 MORBID. & MORTAL. WEEK. REP. 297 (1980).

166 *See supra* notes 87 and 119 (discussing the Dalkon Shield litigation).

167 *See* Jackson v. Johns-Manville Sales Corp., 727 F.2d 506, 524 (1984).

168 *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 369-70 (Ct. App. 1981).

169 While *Grimshaw*, is founded in tort, it arises out of a series of discrete transactions between Ford Motor Company, its dealers, and a mass of parties who purchased the Ford Pinto or were injured as a result of a defect in the gas tank. *Id.* at 359. In addition, it readily demonstrates the problem that occurs when defaulters intend neither to perform adequately, nor to compensate the end-users of their products.

170 *See supra* note 18.

171 *See Grimshaw*, 174 Cal. Rptr. at 376.

172 This table is reproduced in W. PAGE KEETON ET AL., PRODUCTS LIABILITY AND SAFETY: CASES AND MATERIALS 490-91 (1980).

173 *Id.*

174 *Id.*

ing of $87.5 million.[175]

In the *Grush-Saunby Report*, originally intended as an internal memorandum, Ford estimated its savings on costs arising out of not recalling the Pinto.[176]

BENEFITS AND COSTS RELATING TO FUEL LEAKAGE ASSOCIATED WITH THE STATIC ROLLOVER TEST PORTION OF FMVSS 208

| | | |
|---|---|---|
| BENEFITS: | Savings: | 180 burn deaths, 180 serious burn injuries, 2100 burned vehicles. |
| | Unit Cost: | $200,000 per death, $67,000 per injury; $700 per vehicle. |
| | Total Benefits: | 180 x ($200,000), 180 x ($67,000), 2100 x ($700) = $49.5 million. |
| COSTS: | Sales: | 11 million cars, 1.5 million light trucks. |
| | Unit Cost: | $11 per car, $11 per truck. |
| | Total Cost: | 11,000,000 x ($11), 1,500,000 x ($11) = $137 million.[177] |

Ford based this report on several assumptions. Most Ford Pinto users would *not* sustain personal or property damage. An even smaller minority would die or be injured. Persons who suffered personal loss likely would sue Ford. Persons who sustained limited property damage likely would not. As a result, Ford anticipated savings in having to compensate only some, but not all, victims for their losses.

Ford's knowledge about the default and its intention not to compensate mass victims for their losses justifies forcing companies like Ford to disgorge their profits arising from mass default, as proposed in this article. The actual or prospective losses incurred by the consumers warrant forcing Ford to compensate mass victims. Placing Ford's excess profits in a public interest trust is both equitable and efficient. Such a trust can compensate prospective claimants; it can contribute to consumer awareness and safety programs and educate the public about consumer protection.[178] Finally, the proposal does not penalize Ford by forcing it to disgorge its mass profits.[179] Ford's liability remains compensatory,[180] not punitive.[181]

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175 *Id.*

176 *Id.*

177 *Id.* On the American Motors litigation, see Leichtamer v. American Motors Corp., 424 N.E.2d 568 (Ohio 1981) (award of $1.1 million punitive damages). *See also* Ford Motor Co. v. Nowack, 638 S.W.2d 582 (Tex. Ct. App. 1982).

178 *See infra* notes 222-25.

179 *See supra* note 162.

The method of calculating Ford's exact profits arising from mass default is not self-evident. For example, it is difficult to assess the precise extent to which the value of Ford's vehicles might have decreased had the public known about the defective Pinto at the outset. It is also difficult to determine the exact loss of business which Ford would have incurred had it not repressed information about the defect in the Pinto. However, these difficulties in assessing damages are not insurmountable. Class action lawyers *can* examine expert witnesses to identify the existence of mass default and the extent of loss arising from it, including the risk of depleting the defendant's limited fund. They can estimate the defendant's profit or savings from business records, memoranda, balance sheets, and other accounting documentation.[182] They can also impose the burden of proof on the defendant on grounds that it is unfair to require plaintiffs to adduce evidence about profits and savings that is more accessible to the defendant.[183] They can issue

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180 Courts frequently restrict the imposition of punitive damages to instances of fraudulent, deceitful or malicious conduct. *See* United Euram Corp. v. Occidental Petrol. Corp., 474 N.Y.S.2d 372, 375 (Sup. Ct. 1984); Le Mistral, Inc. v. Columbia Broadcasting System, 402 N.Y.S.2d 815, 817 (App. Div. 1978), *appeal dismissed*, 46 N.Y.2d 904 (1978). *But cf.* Walker v. Sheldon, 179 N.E.2d 497, 498 (N.Y. 1961). Arguably, deceit is relevant in mass restitution cases. In addition, conscious indifference towards the well-being of others is likely to be reflected in both punitive damage and mass restitution cases. *See* Quedding v. Arisumi Bros., Inc., 661 P.2d 706 (Haw. 1983) (justifying punitive damages "where the defendant's conduct evinced a high degree of moral turpitude and demonstrated such wanton dishonesty as to imply a criminal indifference to civil obligations"); Walsh v. Alfidi, 448 So. 2d 1084, 1086-87 (Fla. Dist. Ct. App. 1984) (justifying punitive damages "where there is evidence that the defendant acted with malice, moral turpitude, wantonness, willfulness, or reckless indifference to the rights of others"); *see also* Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516, 1527 (11th Cir. 1985); Nichols v. State Farm Mut. Auto. Ins. Co., 306 S.E.2d 616, 620 (S.C. 1983); Armstrong v. Republic Realty Mortgage Corp., 631 F.2d. 1344, 1352 (8th Cir. 1980); Pollock v. Brown, 569 S.W.2d 724, 733 (Mo. 1978) (en banc); Adams v. Whitfield, 290 So. 2d 49, 51 (Fla. 1974); Evans v. Philadelphia Transp. Co., 212 A.2d 440, 443 (Pa. 1965). For authority which downplays vindictive or vengeful punishment as the foundation of punitive damages, see Wedeman v. City Chevrolet Co., 366 A.2d 7 (Md. 1976); Jolley v. Puregro Co., 496 P.2d 939 (Idaho 1972).

181 *See* Grimshaw v. Ford Motor Co., 174 Cal. Rptr. 348, 359 (Ct. App. 1981); Frank W. Allen, *Product Liability Law and Motor Vehicle Design*, 14 U. TOL. L. REV. 301 (1983); David G. Owen, *Crashworthiness Litigation and Punitive Damages*, 4 J. PROD. LIAB. 221 (1981); Malcolm E. Wheeler, *Product Liability, Civil or Criminal - The Pinto Litigation*, 17 FORUM 250 (1981).

182 *See supra* notes 176-77 and accompanying text.

183 However, this burden of disproof should only shift to the defaulter once mass default has been proven; and it should be less stringently applied when evidence is adduced that the defaulter lacked reasonable access to information about the nature and extent of the risk of loss. *See generally* Matthew Horn, Ontai v. Straub Clinic & Hospital: *Who Carries The Burden of Proving Design Defects*, 6 U. HAW. L. REV. 635 (1984)

patterned instructions to juries deciding the issue.[184] Finally, they can take account of the comparative market share of Ford's competitors both before and after public awareness of defects in their products.[185]

None of this supposes that Ford inevitably should have given up all conceivable its profits on account of the mass default. No motor vehicle is perfectly safe and manufacturers continually evaluate the cost of accidents in the use of their products.[186] However,

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(discussing a decision by the Hawaii Supreme Court dealing with strict liability in tort, negligence, and breach of warranty); Caryn Beck-Dudley, *Shifting the Burden of Proof in a Products Liability Case:* Anderson v. Somberg, 18 IDAHO L. REV. 539 (1982) (focusing on the policy reasons for placing the burden of proof on the defendant in products liability actions); Jay H. Henderson, *Policy and Proof: Shifting the Burden of Proof in a Products Liability Case,* 34 BAYLOR L. REV. 83 (1982). Courts can also create rules to govern discovery. *See, e.g.,* Linda S. Mullenix, *Hope Over Experience: Mandatory Informal Discovery and the Politics of Rulemaking,* 69 N.C. L. REV. 795 (1991).

184 *See,* Council of Superior Court Judges of Georgia, Suggested Pattern Jury Instructions: Civil Cases, 91 (1980); Committee on Standard Jury Instructions, Civil, of the Superior Court of Los Angeles County, California, California Jury Instructions, § 14.71 (6th ed. 1977 & Supp. 1981); Illinois Pattern Jury Instructions: Civil § 35.01 (2d ed. 1973) *in* KENNETH REDDEN, PUNITIVE DAMAGES Appendix A, § 1.4(E) (1980); Wisconsin Jury Instructions: Civil - Part III, § 1707 (1962) *in* REDDEN, *supra,* Appendix A, § 1.4(J). On the value or otherwise of jury trials in mass civil litigation, see generally Joseph M. Hassett, *A Jury's Pre-Trial Knowledge in Historical Perspective: The Distinction Between Pre-Trial Information and "Prejudicial" Publicity,* 43 LAW & CONTEMP. PROBS. 155 (1980); Thomas M. Jorde, *The Seventh Amendment Right to Jury Trial of Antitrust Issues,* 69 CAL. L. REV. 1 (1981); Morris S. Arnold, *A Historical Inquiry Into the Right to Trial by Jury in Complex Civil Litigation,* 128 U. PA. L. REV. 829 (1980); Patrick Devlin, *Jury Trial of Complex Cases: English Practice at the Time of the Seventh Amendment,* 80 COLUM. L. REV. 43 (1980); David J. Edquist, *The Use of Juries in Complex Cases,* 3 CORP. L. REV. 277 (1980); Note, *The Right to a Jury Trial in Complex Civil Litigation,* 92 HARV. L. REV. 898 (1979); Note, *Preserving the Right to Jury Trial in Complex Civil Cases,* 32 STAN. L. REV. 99 (1979); Publishers' Ass'n v. Newspaper & Mail Deliverers' Union, 114 N.Y.S.2d 401, 404 (App. Div. 1952) (per Mr. Justice Bergan). *But see* Willoughby Roofing & Supply Co. v. Kajima Int'l, 598 F. Supp. 353, 364 (N.D. Ala. 1984); James L. Flannery, Note, *Complex Civil Litigation: Reconciling the Demands of Due Process with the Right to Trial by Jury,* 42 U. PITT. L. REV. 693 (1981); Annot., 54 A.L.R. Fed. 733 (1981); School City of E. Chicago, Indiana v. East Chicago Fed'n of Teachers, 422 N.E. 2d 656 (Ind. Ct. App. 1981); Edward T. O'Donnell, *Design Litigation and Strict Liability: The Problem of Jury Instructions Which Do Not Instruct,* 56 U. DET. J. URB. L. 1051 (1979).

185 The court can also determine the defendant's profits or savings from its sales record. For example, Ford's profits could reasonably have been calculated in light of Ford's actual and projected car sales and the impact which the Pinto dispute had upon those sales. On comparable cases involving, among others, the General Motors Corporation, see *supra* notes 42-44 and 171.

186 This assertion, that accidents have costs which cannot be avoided, is well evidenced in the literature. *See, e.g.,* GUIDO CALABRESI, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (1970). While it is difficult to imagine producers developing hazard-free goods and services, it is equally difficult to accept Owen's proposition that death was economically justified in the Ford Pinto litigation because "feasible technology simply does not exist to reduce many such collision risks." Owen, *supra* note 5, at 30. The fact is that Ford Motor Company foresaw the probability of

the *Grimshaw* case identifies situations in which mass defaulters ought not to profit from known and dangerous risks that cause indeterminate harm to a mass of victims. Such damages remain compensatory; their purpose is to deter mass default, not ruin the defaulter. The goal is to arrive at a coherent measure of damages, rather than an arbitrary determination, as occurs with punitive damage awards.[187]

### *B. Disgorging Mass Savings*

A defaulter also hordes savings when it fails to compensate mass consumers for their property losses. The dispute involving the Wells Fargo Bank best reveals the method of disgorging such savings.[188] The aim here is twofold: to determine the extent of Wells Fargo's savings arising from mass default, and to establish a formula for disgorging those savings.

Expressed as a formula, the Wells Fargo Bank gained unfairly when the sum of its savings arising from mass default exceeded the sum of its costs in defending actions against it, as well as the damages it had to pay successful customers.[189] Wells Fargo could have saved by forcing each customer's costs of suit to increase, thereby inhibiting each customer from proceeding against it and enabling it to settle for less than full compensation.[190] For example, it could have delayed proceedings by resorting to lengthy discovery procedures, requests for summary judgment, persistent interlocutory

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real and substantial harm arising from the use of the Pinto and did not try to warn about or avert such risks in the interest of profit-making. However frequently corporations make economic decisions at the expense of human life, that fact does not render those decisions either morally praise-worthy or legally defensible. *But see* Symposium, *The Passage of Time: The Implications for Product Liability*, 58 N.Y.U. L. REV. 734 (1983).

187 This need to deter personal injury through civil action is echoed in Greenman v. Yuba Power Products, Inc., 27 Cal. Rptr. 697, 701 (Cal. 1962). However, such deterrence is accomplished wholly through punitive damages. As the court stated in *Greenman*, "[t]he purpose of [punitive] liability is to ensure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* On punitive damages, see *supra* note 155.

188 *See supra* note 16.

189 Let $G_U$ = Unfair Gains
$S_B$ = Savings from Breach
$C_D$ = Cost of Defending Actions
D = Damages Paid
$G_U$ occurs when -> $S_B > (C_D + D)$.

190 The defendant can cause the costs of plaintiffs to increase selectively. For example, it can cause an increase in the costs of plaintiffs who are likely to capitulate on account of those costs. It can refrain from increasing the costs of other plaintiffs whom it is willing to compensate in full.

motions, and successive appeals.[191] It could thereby have insulated itself from liability by ensuring that each customer's costs of suit exceeded its benefit to them.[192]

Wells Fargo could also have discouraged private claims against it by erecting civil barriers to liability. For example, it could have insulated itself from liability by assigning selected rights and duties in dispute to its subsidiaries within a complex corporate infrastructure.[193] It also could have argued against unravelling interlocking corporate relationships on grounds that this would undermine public confidence in, among other institutions, the banking system.[194]

Finally, Wells Fargo could have dissuaded customers from suing it en masse by selectively improving upon its performance. For example, it could have performed fully in respect of some customers, partially in relation to others, and not at all in respect of yet others.[195] More subtly, it could have settled the claims of aggressive customers and ignored or denied the claims of others. In each case, it could have reduced its savings by the extent to which it improved upon the quality of its performance. However, in compensating only some customers for their losses, it would have horded savings not paid to others.[196]

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191 Protracting litigation is a well used tactic when the defendant wishes to evaluate the extent to which the plaintiff has shallow pockets, and once having done so, threatens to empty them by raising the cost of suit prior to the exhaustion of plaintiff's legal remedies. The defendant's ultimate aim is nonpayment of the claim or at least settlement for a lesser amount than the amount claimed. *See* J. MOORE & J. KENNEDY, MOORE'S FEDERAL PRACTICE, § 23.01 (2d ed. 1982); ARTHUR R. MILLER, AN OVERVIEW OF FEDERAL CLASS ACTIONS: PAST, PRESENT, AND FUTURE (1977); *Punitive Damages in Mass Tort Cases: Recovery on Behalf of a Class*, 15 LOY. U. CHI. L.J. 397, 410-13 (1984); Francis R. Kirkham, *Complex Civil Litigation - Have Good Intentions Gone Awry?*, 70 F.R.D. 199 (1976); Landers & Vance, *supra* note 62; *State Class Action Statutes: A Comparative Analysis, supra* note 62.

192 The higher each customer's costs of suit, $C_S$, the less likely is that customer to sue. The likely result is that each customer will refrain from suing when $C_S > W_i D_i$, where $W_i$ is the $_i$ plaintiff's chance of winning and $D_i$ is the amount of damages that the $_i$ plaintiff is likely to recover from suit.

193 *See supra* note 15.

194 Public exposure doubtless will reveal that other banks employ similar practices. Public regulators are likely to be reluctant to crack down on banks publicly, for fear of disturbing their image as bastions of the public's trust. In addition, a generally deferential public is generally disinclined to view bank default as a deliberate or reckless course of conduct.

195 Most customers of banks likely lack the financial, legal and social resources to sue it for breach of contract. Most also assume that banks generally can unbalance their foes, or alternatively, buy them off with privileged treatment, such as improved interest rates, extended lines of credit, and the like. *See supra* note 190.

196 In so doing, the defendant would effectively reduce the total number of parties who are able or entitled to bring suit for compensation to a lesser number of plain-

### C. *The Class of Complainants*

Courts that disgorge savings or profits arising out of mass default are constrained in two respects: first, by the need to allocate savings or profits among deserving claimants, and second, by the responsibility to determine the manner in which a public interest trust disburses the residue. As both functions are in the interest of class members and the public at large, each is dealt with below.

#### 1. Deserving Claimants

Only deserving plaintiffs who have suffered an identifiable loss or injury for which they have received inadequate or no compensation should share in the savings or profits arising from mass default.[197] Deserving plaintiffs, in disputes like Wells Fargo, are best identified in apposition to claimants who are undeserving. Undeserving claimants include those whose claims are adventitious or are otherwise speculative. Applied to the Wells Fargo illustration, claims are adventitious when claimants are aware of the bank's illicit surcharges, but fail to question them, and when they do so *ex post* in the belief that they now can embarrass the bank into giving them a favorable settlement.[198] Claims are also adventitious when

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tiffs. As a result, it would further increase its savings earned from mass default. *See supra* text accompanying notes 178-82.

197 This real and substantial harm test is often reflected in the judicial requirement that the "actual" damages must be established before restitution will be awarded. This requirement parallels those cases in which the plaintiff must establish real and substantial harm in order to receive non-pecuniary damages. *See, e.g.*, Seasons Coal Co. v. City of Cleveland, 461 N.E.2d 1273 (Ohio 1984); Welch v. Cooper, 670 S.W.2d 454 (Ark. Ct. App. 1984); Klinicki v. Lundgren, 678 P.2d 1250 (Or. Ct. App. 1984); Kimmey v. Peek, 678 P.2d 1021 (Colo. Ct. App. 1983); Morrill v. Becton, Dickinson & Co., 564 F. Supp. 1099 (E.D. Mo. 1983); Purcell Co. v. Spriggs Enterprises, Inc., 431 So. 2d 515 (Ala. 1983); Winkle v. Grand Nat'l Bank, 601 S.W.2d 559, *cert. denied*, 449 U.S. 880 (1980); Skipper v. South Cent. Bell Tel. Co., 334 So. 2d 863 (Ala. 1976); Belleville v. Davis, 498 P.2d 744 (1972); Crouter v. United Adjusters, Inc., 485 P.2d 1208 (Ore. 1971); Carnation Lumber Co. v. McKenney, 356 P.2d 932 (Or. 1960); Richard v. Hunter, 85 N.E.2d 109 (Ohio 1949). The defaulter may be entitled to retain savings, Si, when the risk of opportunistic claims is significant and requiring such payment would likely increase rather than reduce social costs.

198 For cases in which the risk of default was "obvious" to claimants, or the subject of "widespread knowledge" prior to the mass loss, see Sturm, Ruger & Co. v. Day, 594 P.2d 38 (Alaska 1979), *on rehearing*, 615 P.2d 621 (1980), *cert. denied* 454 U.S. 894 (1981) (plaintiff "obviously" knew of risk when he dropped a loaded gun and was shot in the knee); Hegwood v. General Motors Corp., 286 N.W.2d 29, 30 (Iowa 1979) (plaintiff bore responsibility for tire blowout that occurred while driving at 110-120 m.p.h.). *See also* Turney v. Ford Motor Co., 418 N.E.2d 1079, 1087 (Ill. 1981); Sabich v. Outboard Marine Corp., 131 Cal. Rptr. 703, 706 (Ct. App. 1976). *But cf.* Gryc v. Dayton-Hudson Corp., 297 N.W.2d 727 (Minn.), *cert. denied sub nom.* Riegel Textile Corp. v. Gryc, 449 U.S. 921 (1980); Wussow v. Commercial Mechanisms, Inc., 293

plaintiffs are contributorily at fault. For example, they are aware of, or partly responsible for, defects in the defendant's performance, but fail to remedy or otherwise mitigate the ensuing losses.

A deserving claimant needs to establish an identifiable loss. Loss can include a loss of life, health, and income in personal injury cases like *Grimshaw*, or a loss of salary, sick days, or severance pay in employment cases. It can also cover excessive premiums, or a refusal to pay a legitimate claim in insurance cases. Finally, in the Wells Fargo Bank illustration, the identifiable loss can refer to a surcharge, or other penalty extracted from customers en masse, in breach of contract.[199]

Plaintiffs who *are* deserving and who suffer an identifiable loss ought to share in mass costs and savings proportionate to the extent of their losses. While equal sharing is sometimes necessary,[200] pro rata sharing of litigation costs and mass damages is preferable because it impedes free riding on that class by preventing claimants with proportionately less loss from sharing equally with other class members. Deserving claimants are entitled to share pro rata under these specific conditions: they sustain different degrees of loss which they are reasonably able to establish; their interests are comparable to the interests of other claimants; and the cost of pro rata sharing is not prohibitive or inequitable to other class members. For example, had some claimants sustained more significant losses than others in the Wells Fargo dispute, but received equal shares with those others, they would have been prejudiced had they been forced to join a mandatory class. Similarly, had those other claimants sustained limited losses, they would have been disadvantaged had they been required to pay an equal share of litiga-

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N.W.2d 897 (Wis. 1980). *See also* David E. Gardels, Note, *Overuse in Products Liability*, 57 NEB. L. REV. 817, 833 (1978); Howard C. Klemme, *The Enterprise Liability Theory of Torts*, 47 U. COLO. L. REV. 153, 163 (1976); David G. Owen, *The Highly Blameworthy Manufacturer: Implications on Rules of Liability and Defense in Products Liability Actions*, 10 IND. L.J. 769, 777-87 (1977). *But see* G. Richard Shell, *Opportunism and Trust in the Negotiation of Commercial Contracts: Towards a New Cause of Action*, 44 VAND. L. REV. 221 (1991).

199 Using the Wells Fargo Illustration, each claimant is required to identify his or her loss at the time of filing the claim so that it reasonably be verified. Identifying the size of a claim ordinarily occurs when customers of banks who are surcharged for checks returned for insufficient funds verify the number of checks involved through personal, or failing that, bank records.

200 Equal sharing in the distribution of a mass award is applied in mass consumer cases when plaintiff losses are roughly comparable, when requiring each plaintiff to prove the precise extent of a loss is unduly costly, and when equal payment to each is equitable. On such equal payment, see *supra* note 132.

tion costs of the class.[201]

2. Other Claimants

Deserving claimants are identified when they file their claims, asserting that they have suffered an identifiable loss on account of the defendant's default and that they have the right to benefit from the award as class members. Ordinarily, such claimants are restricted to those to whom a defendant like Wells Fargo Bank has assumed a contractual or other legal obligation and who join the class at the outset. However, three further categories of claimants are reasonably entitled to share in the mass award: subsequent claimants, incidental claimants, and public interest organizations who are justified in sharing in surplus funds. These three categories are discussed below.

3. Subsequent Claimants

By definition, all persons who are subject to mass default, who suffer loss or harm as a result of it, and who do not receive adequate compensation are justified in sharing in savings and profits arising out of mass default.[202] Included within this group are persons who sustain a direct loss because of mass default, but who do not participate in the mass claim at the time it is filed. Such subsequent claimants typically include those who are unaware of, or are unable to prove, their losses at the time of suit, or who cannot afford to join the class at the outset. This occurs, in the Wells Fargo illustration, when customers are unaware of the bank's default, when they have not retained records of such default, and when they lack resources to join the class action when it is instituted. Subsequent claimants ordinarily are justified in sharing in the mass award when they suffer loss or harm in consequence of the default.

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201 *See supra* note 130.

202 A distinction can readily be drawn between those who do not seek, by reason of intimidation or lack of resources, pro rata shares and those who decide not to because of disinterest or a belief that the defendant's prior conduct was not wrongful. However, in principle, it would be inappropriate for the court or tribunal to exclude the latter class out of hand. First, they did sustain a loss. Second, judges and arbitrators can speculate about their motive erroneously. Third, non-claimants may have been "conned" into believing in a defendant's virtue. Finally, why should non-claimants not change their minds and seek recompensation? They would still be required to contribute to the costs of suit after-the-fact. The downside to this approach is that parties may be encouraged to do nothing, allowing others to sue on their behalf, with the intention of sharing in the fruits of successful litigation. To remedy this problem, non-claimants are appropriately subject to an administrative charge for the cost of the suit, not charged plaintiffs who join in the suit at the outset.

They are also worthy members of the class when they help to fund it, when they would be denied a remedy were they excluded from it, and when they promote its credibility by enlarging it.[203]

Courts can discourage subsequent claimants from free riding on a class action or from not joining it until its success appears to be assured. For example, they can require class members to pay a premium to offset the costs of suit and/or permit subsequent claimants to share in the surplus only after first order claims have been satisfied.[204]

4. Incidental Claimants

Incidental claimants are those who provide benefits to parties who are subject to mass default and who incur costs or suffer losses as a result of providing those benefits. Authorities that subsidize the mortgages of customers in consequence of mortgage surcharges by a bank are incidental claimants to the extent of that subsidization. Hospitals that provide services to patients without charge, or at a reduced rate, in consequence of mass default, are incidental claimants. Family members who provide loans or other services to victims of mass default are also incidental claimants.[205]

Despite the incidental benefit rule,[206] prospective public harm arising from mass default reasonably justifies incidental claims.[207]

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203 On the mandatory class action, see *supra* § IV.

204 While these requirements can adversely impact upon the "right" of subsequent claimants to join the class, it is necessary to discourage them from sitting on the sidelines, waiting to see if the class is likely to win the action before joining it. *See infra* notes 215-16.

205 The incidental beneficiary is readily identified, by analogy, in tort litigation involving the hormonal drug DES (diethylstilbestrol). In increasing the likelihood of causing cancer in the offspring of pregnant women ingesting DES, the cost of illness necessarily extended to persons beyond the pregnant women ingesting it. For example, that cost inevitably was borne by the family, friends and public organizations who cared for, or otherwise supported infected victims. In addition, that cost likely increased over time with the spiralling growth of medical and related treatment costs. *See generally* Kathleen M. Brahn, Note, *Diethylstilbestrol: Extension of Federal Class Action Procedures to Generic Drug Litigation*, 14 U.S.F. L. REV. 461 (1980) (describing the challenges posed by the DES litigation and proposing a solution based upon the use of a class action).

206 As applied in contract law, the rule regarding incidental beneficiaries, excludes claims by third parties, that is, those who are not parties to a contract, from claiming a benefit under the contract. *See, e.g.*, Shubitz v. Consolidated Edison Co., 301 N.Y.S.2d 926 (Sup. Ct. 1969). However, the incidental benefit rule, a byproduct of classical contract law governing privity, is no longer stringently applied in contracts. In particular, incidental beneficiaries are entitled to satisfaction of their claims on grounds of, among others, the protection of their reliance interests. *See generally* FARNSWORTH, *supra* note 30, § 10.3, at 756.

207 For attempts by judges to bypass the formal division between contract relations

First, public and private interest organizations sometimes subsidize victims of mass default. For example, consumer agencies or charitable organizations subsidize multiple victims of mass default. Second, such subsidization reduces private or public interest funds that would otherwise have been available for other purposes. For example, public housing authorities that subsidize consumers who are unjustifiably surcharged on their mortgages have proportionately less funds available to finance alternative housing projects.[208]

As indicated above, incidental claimants ordinarily ought to receive compensation only after the first order claims of immediate and subsequent claimants have been satisfied, and only if there is a surplus. This surplus occurs, for example, in the Wells Fargo illustration, when immediate or subsequent customers of the Bank cannot be located or are unwilling to join the class or otherwise share in the award. Incidental claimants are not entitled to mass damages when their losses are not reasonably attributable to mass default, when compensating them duplicates the award to immediate or subsequent claimants, or when damages exceed the defendant's mass savings or profits. For example, a public interest authority that subsidizes the surcharged customer of a bank like Wells Fargo has no claim on the surplus when the bank has already recompensed that customer for that same loss.[209]

The award of damages to parties with whom the defaulter did not contract directly is not punitive. A defaulter like Wells Fargo Bank still sacrifices no more than its total savings or profit arising from failing adequately to compensate mass victims. In addition, it ordinarily has no justifiable right to any surplus itself, given that it breached wrongfully and en masse.[210]

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on the basis of privity of contract, see *In re* General Motors Corp., 846 F. Supp. 330 (E.D. Pa. 1993).

208 *See supra* note 141.

209 *See supra* note 16.

210 No doubt, there will be both formal and substantive objections to allowing non-immediate parties to claim for their losses. First, they are not direct parties to the specific contract in respect of which recompensation is being sought. Second, their claims are too remote from losses ordinarily awarded in contract. These objections, however, are surmountable. In particular, it is inappropriate to overstate their disinterest in the well-being of those whom they support as a result of mass default. Nor is it justifiable for the mass defaulting party to avoid responsibility for the consequences of its actions, particularly when third parties support those whom the defaulter, knowingly, has left destitute. Indeed, these claims resemble, at least in principle, the "special damages" that are identified in Hadley v. Baxendale, 9 Ex. 341, 156 All E.R. 145 (1854). Finally, the assertion that non-immediate claimants should be disentitled to claim because they are not parties to the contract overstates the formal character of privity and consideration. Privity *in the contract*, as distinct from privity *between the parties*, surely encompasses those who act in terms of it, including

Finally, the award to incidental claimants is principled: the legal system ought to compensate parties who suffer a loss on account of mass default and deter the defaulter from mass default. These dual ends are private; they promote an equitable remedy between the defendant and the specific victims of its default, including incidental claimants. They are also public; they disperse the undistributed surplus to consumers at large in the social interest.

### *D. Distribution of Primary Funds*

Under a scheme of proportionate liability, plaintiffs share pro rata in the award until the payments fully recompense all deserving plaintiffs or exhaust the defendant's limited fund.[211] Pro rata sharing is justified because it ensures that no class member is under- or over-compensated *vis à vis* other class members. In addition, it promotes greater involvement in the action by claimants with a greater interest in the award and reduces ex post conflict among them over their respective shares of it.[212]

The disbursement of damages to plaintiffs ordinarily is justified at two stages: during the course of litigation and when the award is rendered. The first pro rata payment is warranted when claimants have incurred ongoing costs in bringing suit, when protracted litigation is likely, when the defendant has paid part damages into court, and when the absence of part payment would dissuade claimants from proceeding further. The second pro rata payment is justified when the court has established: the full size of the class, the quantum of damages, and a formula by which to share those damages among class members. These damages are disbursed pro rata to all deserving plaintiffs.[213] Applied to the Wells Fargo dispute, the overall goal is to ensure that no deserving

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those who support the destitute victims of mass default. *See, e.g.*, La Mourea v. Rhude, 295 N.W. 304 (Minn. 1940); *see also supra* note 206.

211 On such pro rata sharing in the award, *see supra* note 131.

212 Arguments against the pro rata allocation of damages are several: pro rata losses are difficult and costly to determine; claimants are not always justified in receiving pro rata payment; and pro rata payment to all claimants somehow would cripple the defendant. For courts that reject the requirement of proportionality in relation to losses in civil suit, see, e.g., Moore v. American United Life Ins. Co., 197 Cal. Rptr. 878, 895 (Ct. App. 1984); Wackenhut Corp. v. Canty, 359 So. 2d 430, 436 (Fla. 1978); Fisher v. Carrousel Motor Hotel, Inc., 424 S.W.2d 627, 630-31 (Tex. 1967).

213 Plaintiffs who receive the first pro rata payment are justified in receiving a reduced second pro rata payment when both payments would over-compensate them for their losses. This reduction is warranted when the first pro rata payment exceeds the costs incurred by those plaintiffs compared to the costs incurred by other plaintiffs who do not receive that first payment.

claimant contributes proportionately more or less to the costs of suit against the Bank, or receives proportionately more or less of the total disbursement paid to claimants.

No perfect formula exists by which a court or tribunal can determine the amount of the first pro rata payment to make to deserving plaintiffs. As a general rule, the payment should suffice to ensure the ongoing involvement of the class action. However, it should not be so vast as to impede pro rata disbursement to other deserving plaintiffs who subsequently join the class.[214]

### *E. Distribution of Surplus Funds*

In the event that some savings arising from not compensating or under-compensating victims of mass default remain undisbursed after compensating both non- and incidental claimants, that residuary is held in a trust fund for three purposes. First, the trust can apportion the residue among prospective claimants who are unaware of, or unable to prove their losses at the time of suit,[215] but who subsequently become aware of, or are able to prove, them.[216]

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214 *See generally infra* note 216.

215 Correspondingly, such non-claimants would be required to participate in the costs of suit and therefore, would be assessed, retroactively, to cover their proportionate share of the same.

216 Decision-makers need to determine both the size of the trust and the amount to allocate to each claimant. For example, judges need to establish whether the trust fund should consist of $1 million, and whether each claimant should receive $100, $50, or some other amount. However, they cannot know with certainty at the outset the total number of claimants; and it follows that they cannot know the amount to award each claimants until they determine that total number. Should they estimate 10,000 claimants seeking shares in a $1 million award, each claimant would be entitled to $100. Should they estimate 20,000 claimants, each would be entitled to only $50. Their problem is to anticipate *ex ante* the number of prospective claimants so as to avoid either exhausting the trust prematurely, or ending up with a surplus. For example, should they estimate that the number of claimants is 10,000 and award each claimant $100, they will exhaust the fund prematurely should the actual number of claimants be 20,000. Conversely, they will be left with a surplus should they estimate 20,000 claimants, pay each $50, and then be faced with only 10,000 claims.

There is no instant solution to these problems. As was indicated above, courts can estimate the total number of claimants in light of historical experience. For example, they can reasonably anticipate few claims when the amount allocated to each claim is small, when the class action is not well publicized, when the claims process is complicated, and when potential claimants are uneducated. They can assume, too, that prospective claimants have little incentive to claim when they anticipate receiving a trivial amount, when claims forms are complex, and when prospective claimants anticipate the rejection of their claims on ground that they are not completed in full. In addition, claims are likely to be fewer when existing claimants discourage claims, for example, by declining to publicize the trust or claims process, in the interests of increasing their own share of it. However, despite these historical facts, the number of claims remains an estimate only.

Second, the trust can use the residue to offset the ongoing administration costs of the fund, including the cost of managing and disbursing unallocated moneys.[217] Third, the trust can disburse any residue among public interest organizations in the interest of consumers in general. Applied to the Wells Fargo illustration, the trust residue can be used for the benefit of a banking public in the common interest.[218]

This disbursement of surplus funds is ordinarily accomplished

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Courts have several possible ways of solidifying these estimates. They can determine the amount to pay each claimant only after all claims are filed. However, it can take years before all claims are filed: claimants need to be identified, claimants require the chance to file their claims, and claims need to be processed. To deny all payments until every claimant is identified is also to trivialize both claimants' losses and the need to deter default. It is also likely to add to the costs of supervising and administering the claims process. More simply, courts can pay an estimated less-than-full-compensation *ex ante*, increasing that amount *ex post* in light of more accurate information subsequently received about the class size. For example, they can pay claimants an estimated $50 initially, assuming that the number of claimants in the above example are 20,000. They can pay such claimants a further $50 after all claims are filed and on discovering that total claimants number only 10,000. This method is likely to satisfy the immediate demands of claimants, at least in part, and avoid leaving a surplus in the trust. However, it is also likely to raise administration costs in requiring claims to be processed twice, once *ex ante* and again, *ex post*. Another possible way of estimating is to leave a surplus in the trust and thereafter disburse that surplus to a public interest organization. This is the method adopted here. *See infra* note 225. Again, the estimated number of claimants may be incorrect. In addition, leaving the surplus in a public interest organization may be unfair to claimants, since each will receive less by the extent of that surplus. In addition, leaving the surplus to a public interest organization means rewarding a class of persons beyond the victims themselves.

These alternative methods of disbursing funds all have some currency in practice. For example, the court in Ohio Public Interest Campaign v. Fisher Foods, 546 F. Supp. 1, 7 (D.C. Ohio 1982), estimated the number of claimant householders in an affected geographic area who were subject to mass abuse: it mailed $20s worth of grocery coupons to each of them and paid the residue to a trust fund directed at buying food for the needy. Finally, it increased the trust fund by the amount of unredeemed grocery coupons. *Id.* This method ensured, inter alia, that prospective claimants had the opportunity to make a claim and also provided a method of disbursing the residue to a determinative class of persons. While all claimants received less than that which they would have received had there been no surplus, the surplus was used for a worthy consumer end. On a consumer class action in which claimants exhausted the surplus fund, see *In re* Coordinated Pretrial Proceedings in Antibiotics Antitrust Actions, 410 F. Supp. 659 (D. Minn. 1974). However, even there, the total number of claimants were less than one million, while the class included 12 million. On the estimation of consumer class awards, see generally Kerry Barnett, Note, *Equitable Trusts: An Effective Remedy in Consumer Class Actions*, 96 YALE L.J. 1591, 1600 (1987); Natalie A. DeJarlais, Note, *The Consumer Trust Fund: A Cy Pres Solution to Undistributed Funds in Consumer Class Actions*, 38 HASTINGS L.J. 729, 755 (1987).

217 These costs include, inter alia, the costs of appointing special officers to hear, investigate, and award claims, the costs of administering the trust itself, and ancillary expenses associated with maintaining it.

218 On the *cy pres* trust, see *infra* notes 220-24.

through a *cy pres* trust, administered by a board of directors or trustees.[219] The trust distributes funds in three stages: it places residuary funds recovered by suit or settlement into escrow; it notifies beneficiaries under the trust of its existence, of their entitlements under it, and of the manner in which they should file their claims; and it distributes the trust to them as directed by the *cy pres* instrument.[220]

As stated above, the trust can be used to disburse funds to claimants who are not reasonably aware of their losses at the time of the damage award. This occurs, in cases like Wells Fargo, when customers of the bank are widely dispersed geographically, when the class action is not extensively advertised in their region, and when their claims against the bank are valid. The trust can also be used to offset the administrative costs of suit. For example, it can pay costs incurred in appointing a special master to hear, investigate, and award claims. It can offset the cost of maintaining the trust. It can also subsidize expenses incurred in scrutinizing the activities of public interest organizations charged with administering the trust.[221]

Finally, the trust can be given to a public interest organization for a specific purpose. For example, the trust can help to educate consumers about their legal rights,[222] by establishing consumer complaint centers,[223] by providing advocacy skills to consumers,[224] or by extending services to consumers in general.[225] This disburse-

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219 On the appointment of a special master in mass disaster cases, see, e.g., Feinberg, *supra* note 67, at 101-02. For a strong endorsement of such an appointment in "big cases," see Irving R. Kaufman, *Use of Special Pre-Trial Masters in the "Big" Case in Proceedings of the Seminar on Protracted Cases*, 23 F.R.D. 572 (1959); Irving R. Kaufman, *Masters in the Federal Courts: Rule 23*, 58 COLUM. L. REV. 452, 465-68 (1958). *See also* David Rosenberg, Comment, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695 (1989).

220 On resort to the *cy pres* and other categories of equitable trust in consumer class actions, see Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 SANTA CLARA L. REV. 747 (1988); Barnett, *supra* note 216.

221 *See supra* note 142.

222 *See, e.g., In re* the Application of Pacific Bell, No. 87-12-067 (Dec. 22, 1987) (Application 85-01-034; I.85-03-078; O1184; C.86-11-028); Stern v. U.S. Sprint, No. 000933 (L.A. Super. Ct. filed Oct. 10, 1986); Vasquez v. Arco Financial Services, No. NCC119338 (L.A. Super. Ct. filed May 9, 1984); Sturdevant v. Hibernia Bank, No. 814105 (S.F. Super. Ct. filed Oct. 10, 1986).

223 *See, e.g.*, Stern v. U.S. Sprint, No. 000933 (L.A. Super. Ct. filed Apr. 4, 1988).

224 *See, e.g.*, Vasquez v. Arco Financial Services, No. NCC119338 (L.A. Super. Ct. filed May 9, 1984); Sturdevant v. Hibernia Bank, No. 814105 (S.F. Super. Ct. filed Oct. 10, 1986).

225 Most often, a *cy pres* trust does use moneys, secured through judgement or settlement of a consumer class action, to educate, aid, or otherwise service consumers, not

ment of trust moneys can be accomplished imaginatively. For example, the court can mandate a bank like Wells Fargo to provide customers with a kit explaining how to conduct banking transactions.[226] The court can order a company that deals primarily with consumers to establish fellowships for academic work on consumer protection.[227]

## VII. CONCLUSION

The private litigation model has failed to redress the interests of mass consumers. Too costly to mount and unduly slow to unfold, it has reduced the average consumer to the compliant prey of big business. Preoccupied with the autonomy of individual litigants, many courts have steadfastly refused to modify the private litigation model to protect consumers from such mass abuse. They have ignored the inability of most consumers to mount an effective individual suit against big business, allowing banks, insurance companies and auto manufacturers, among others, to profit from the litigious inaction of a consuming public.

The alternative is to develop a more socially responsible method of redressing the public harm that mass default of consumer transactions causes. Enabling consumers to proceed in unison against big business accomplishes this desire. The goal is to provide consumers with a communal free choice that is effective and fair, in place of an individual free choice that is neither. As one judge with weighty experience in mass litigation recently declared:

> Our legal system highly values individual interests and prerogatives. But just as individualism run riot can be damaging in social matters, so too may it need checking in mass litigations.[228]

This article has sought two primary ends: to deter such mass default in consumer transactions; and to compensate both private and public victims of such default. These ends are accomplished

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limited to the default in issue. On the history and development of the *cy pres* remedy in the law of charitable trusts, see, e.g., *In re* Estate of Gatlin, 94 Cal. Rptr. 295, 296 (1971); GEORGE BOGERT, THE LAW OF TRUST AND TRUSTEES, §§ 431-42 (Rev. 2d ed. 1977); NEWBERG, *supra* note 20, § 11; Barnett, *supra* note 216, at 1595-96; DeJarlais, *supra* note 216.

[226] Considering the potential size of a damage award, the defendant's saving in being able to perform part of its obligations in an instructive manner in the future can be significant. In addition, the defendant likely gains goodwill in demonstrating to its customers its willingness to improve the quality of its performance in relation to them.

[227] *See* Stern v. U.S. Sprint, No. 000933 (L.A. Super. Ct. filed Apr. 4, 1988).

[228] Weinstein, *supra* note 4, at 485.

by resort to two seldom used institutions: a mandatory class action, and a public interest trust. A mandatory class action allows a mass of consumers to sue a defaulter in an organized and equitable manner; it also avoids forcing a mass defaulter to incur huge costs in defending multiple private actions. A private interest trust ensures that any surplus remaining after compensating mass claimants benefits classes of consumers that otherwise might be victimized by mass default in the future. These two institutions, not restricted to consumer groups, aim to protect mass victims from recurrent breach by an otherwise dominant defaulter. The design is to eliminate replicated suit, to compensate a mass of plaintiffs with comparable causes of action, and to deter like default in the public interest.