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Mark Donald Peters

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Punitive Damages, the Common Question Class Action, and the Concept of Overkill

The assessment of punitive damages has been difficult to reconcile with the imposition of mass civil liability.¹ For instance, the relationship between punitive damages and the common question class action device has yet to be considered by the courts.² In some circumstances, the societal purposes which the class action device serves are remarkably similar to those which punitive damages are designed to serve. This redundancy may result in overkill³ when punitive damages are assessed in a class action.

The most logical and frequently stated rationales for awarding punitive damages are: (1) to provide a plaintiff who has suffered only nominal damages with an incentive to litigate;⁴ (2) to punish the defendant for the transgression;⁵ and (3) to deter the defendant and others from committing similar acts in the future.⁶ These rationales were developed almost entirely in single plaintiff actions.⁷ With the advent of

1. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-39 (2d Cir. 1967); Note, *Mass Liability and Punitive Damages Overkill*, 30 HAST. L.J. 1797, 1798 (1979). "Mass civil liability" refers to the situation in which a single defendant incurs compensatory liability to a large number of plaintiffs.

2. See, for example, *Wilson v. Bank of America*, No. 643,872, proposed statement of decision (Super. Ct. San Francisco, 1982) (copy on file at the *Pacific Law Journal*) [hereinafter cited as proposed statement of decision], in which the court awarded the plaintiff class in excess of 101 million dollars without considering the relationship between punitive damages and the class action device. See also *The Sacramento Bee*, Jan. 28, 1982, at 1, col. 1.

The issue of whether the class action device is an effective instrument for handling mass tort punitive damage cases is slated for consideration by both the Eighth and Ninth Circuit Courts of Appeal. See *The National Law Journal*, March 15, 1982, at 2, col. 2. The issue of the propriety of awarding punitive damages in class actions has become all the more important since, in the case to be reviewed by the Ninth Circuit Court of Appeals, the district court found that the class action device was an appropriate method for protecting the defendant from multiple awards of punitive damages. See *In Re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 898-900 (N.D. Cal. 1981). If this rationale is followed by other courts, it may result in more punitive damage cases being tried as class actions.

3. "Overkill" refers to the situation in which the total award of compensatory damages is much larger than what would be necessary to fulfill the societal purposes traditionally served by an award of punitive damages. See generally note 1 *supra*.

4. See notes 42-57 and accompanying text *infra*.

5. See notes 58-79 and accompanying text *infra*.

6. See notes 58-79 and accompanying text *infra*.

7. See generally note 1 *supra*.

modern permissive joinder rules⁸ and the increased use of the class action device, punitive damages have continued to be awarded without a thorough consideration of their relationship to mass liability.⁹ Similarly, the purposes of the common question class action are in need of reconsideration.

Despite claims that the common question class action was intended to "achieve economies of time, effort, and expense,"¹⁰ and facilitate compensation of individual plaintiffs,¹¹ it has failed to meet these objectives.¹² The common question class action does, however, perform an important role in our judicial system by providing plaintiffs who have only small individual claims with an incentive to seek judicial redress,¹³ and by deterring defendants, and others like them, from engaging in antisocial behavior in the future.¹⁴

This comment will examine the validity of the assessment of punitive damages in selected types of common question class actions¹⁵ and will discern under what circumstances an award of punitive damages should *not* be made. First, the comment will briefly examine the history of punitive damages and the societal purposes for which they are awarded.¹⁶ A discussion of the purposes that the common question class action was designed to fulfill will follow.¹⁷ After concluding that these goals of the class action have not been reached, the comment will discuss the societal purposes that the class action device actually fulfills.¹⁸ Furthermore, the substantial punitive effects that a class action

8. See, e.g., FED. R. CIV. P. 18(a), 20, 21; CAL. CIV. CODE §§1780, 1781; CAL. CIV. PROC. CODE §§379, 382.

9. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-39 (2d Cir. 1967). This was one of the first cases to consider the relationship between punitive damages and mass liability.

10. See FED. R. CIV. P. 23(b)(3) advisory committee note.

11. See notes 103-104 and accompanying text *infra*.

12. See notes 101-121 and accompanying text *infra*.

13. See *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560, 563 (2d Cir. 1968).

14. See *Vasquez v. Superior Court*, 4 Cal. 3d 800, 808, 484 P.2d 964, 968, 94 Cal. Rptr. 796, 800 (1971).

15. The comment will be limited to an analysis of the Rule 23(b)(3) type of class action. Unless otherwise noted, all references to class actions will be of this type. Rule 23(b)(3) provides that:

An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

FED. R. CIV. P. 23(b)(3).

16. See notes 22-79 and accompanying text *infra*.

17. See notes 101-121 and accompanying text *infra*.

18. See notes 122-199 and accompanying text *infra*.

may have upon a defendant will be explored.¹⁹ The comment will conclude that when the societal purposes traditionally served by awarding punitive damages are adequately fulfilled by the class action device itself, punitive damages are an unnecessary and unwarranted measure, and should not be awarded.²⁰ Three factors will be suggested that if present, will show that the purposes of punitive damages are sufficiently served by the class action device.²¹ To begin this inquiry, the history and purposes of punitive damages must briefly be reviewed.

PUNITIVE DAMAGES

Punitive damages are damages, other than compensatory²² or nominal damages,²³ awarded against a defendant to further some societal purpose.²⁴ The purposes for which punitive damages have been awarded have not always remained static. Different jurisdictions have used widely disparate rationales to justify an award over and above what was required to compensate the plaintiff for his injury.²⁵ To determine whether the societal purposes of punitive damages can be adequately served by the class action device, the purposes for which an award of punitive damages is made must be specifically identified.

The practice of awarding punitive damages originated in the common law of England.²⁶ Despite the fact that the use of punitive damages has been severely restricted in England,²⁷ they were readily

19. See notes 200-225 and accompanying text *infra*.

20. See notes 226-228 and accompanying text *infra*.

21. See notes 226-228 and accompanying text *infra*.

22. See *Wade v. Power Co.*, 51 S.C. 296, 299, 29 S.E. 233, 236 (1898) (defining compensatory damages as "such compensation as will make [the plaintiff] whole,—pay for the actual loss they have sustained . . .").

23. See *Seelig v. Missouri, K. & T. Ry. Co.*, 287 Mo. 343, 350, 230 S.W. 94, 102 (1921) (defining nominal damages as "a trifling sum awarded where a breach of duty or an infraction of the plaintiff's right is shown, but no serious loss is proved to have been sustained.").

24. Cf. RESTATEMENT (SECOND) OF TORTS § 908(1) (1977) (the societal purposes identified in the Restatement are punishment and deterrence). See generally Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173 (1931) [hereinafter cited as Morris].

25. See generally Belli, *Punitive Damages: Their History, Their Use and Their Worth in Present-Day Society*, 49 UMKC L. REV. 1 (1980) [hereinafter cited as Belli].

26. In *Wilkes v. Wood*, 98 Eng. Rep. 489 (1763), the first case to specifically discuss "exemplary" damages, the plaintiff brought an action for trespass after the defendant and the King's messengers ransacked his house because of a libelous pamphlet which he had published. *Id.* at 489. The jury awarded one thousand pounds to the plaintiff. *Id.* at 499. The jury deliberated for "near half an hour prior to bringing in the verdict." *Id.* One factor which may have hastened their decision was that the trial began at nine in the morning, and the jury was not sent out until about ten-fifty p.m. See *id.* In reviewing this award, Lord Chief Justice Pratt said:

[A] jury have [*sic*] it in their power to give damages for more than the injury received. Damages are designed not only as a satisfaction to the injured person, but likewise as a punishment to the guilty, to deter from any such preceeding for the future, and as a proof of the detestation of the jury to the action itself.

Id. at 498-99. Accord *Huckle v. Money*, 95 Eng. Rep. 768 (1763).

27. See *Rookes v. Barnard*, [1964] 1 All E.R. 367, 410-11. The assessment of punitive damages is limited to cases involving oppressive conduct by servants of the government and situations

adopted in the United States²⁸ where they continue to flourish.²⁹ Punitive damages generally are awarded only when the plaintiff's injury is caused by extreme or exceptional conduct of the defendant³⁰ and is accompanied by aggravating circumstances such as oppression,³¹ malice,³² fraud,³³ wantonness, willfulness, or gross negligence.³⁴ In most jurisdictions, a plaintiff must prove actual damages or a basis for recovery of nominal damages as a prerequisite to an award of punitive damages.³⁵ The amount of punitive damages awarded is usually required to bear a reasonable relationship to the plaintiff's actual damages.³⁶ There is no fixed ratio between punitive and actual damages, however, for determining the amount of punitive damages to be awarded.³⁷

The currently predominant rationales³⁸ for awarding punitive dam-

when the defendant has persevered in wrongful conduct because it is likely to profit him in excess of any potential compensatory liability. *See id.*

28. *See generally* Day v. Woodworth, 54 U.S. (13 How.) 363 (1851).

29. *See* Belli, *supra* note 25, at 1 (and cases cited therein).

30. *See* Sears v. Holly, 113 Ohio App. 349, 351, 178 N.E.2d 91, 93 (1960).

31. *See* CAL. CIV. CODE §3294(c)(2) (defining oppression as "subjecting a person to cruel and unjust hardship in conscious disregard of that person's rights.").

32. *See id.* §3294(c)(1) (defining malice as "conduct which is intended by the defendant to cause injury to the plaintiff or conduct which is carried on by the defendant with a conscious disregard of the rights or safety of others.").

33. *See id.* §3294(c)(3) (defining fraud as "an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury.").

34. *See* Silberg v. California Life Ins. Co., 11 Cal. 3d 452, 462-63, 521 P.2d 1103, 1110, 113 Cal. Rptr. 711, 718 (1974).

35. *See* Contractor's Safety Ass'n v. California Compensation Ins. Co., 48 Cal. 2d 71, 77, 307 P.2d 626, 629 (1957).

36. *See* Zhadan v. Downtown L.A. Motors, 66 Cal. App. 3d 481, 496, 136 Cal. Rptr. 132, 140 (1976). *See generally* Belli, *supra* note 25, at 11-12; Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978).

37. *See* Finney v. Lockhart, 35 Cal. 2d 161, 163, 217 P.2d 19, 21 (1950). *See generally* Comment, *Punitive Damages and the Reasonable Relation Rule: A Study in Frustration of Purpose*, 9 PAC. L.J. 823 (1978).

38. Punitive damages have been referred to by a variety of names, some of which are indicative of the purpose for which the award was made. The term "punitive damages" reflects the retributive rationale of these awards, while "exemplary damages" denotes their deterrent function. The term "vindictive damages" refers to an early justification for requiring the defendant to pay an amount in excess of the actual damages of the plaintiff. *See* O. HOLMES, *THE COMMON LAW*, 39-40 (1881). These awards were made to quell the plaintiff's desire for extrajudicial revenge. *See id.* The idea was to keep the plaintiff from taking the law into his own hands. *See id.*

Some jurisdictions have awarded punitive damages with the purpose of compensating the plaintiff. *See, e.g.,* Erwin v. Milligan, 188 Ark. 658, 67 S.W.2d 592 (1934); Kilgore v. National Life & Accident Ins. Co., 110 Ga. App. 280, 138 S.E.2d 397 (1964); Brause v. Brause, 190 Iowa 329, 177 N.W. 65 (1920). The validity of a compensatory purpose is somewhat dubious since, in most jurisdictions, this is the purpose of actual damages. *See* Long, *Punitive Damages: An Unsettled Doctrine*, 25 DRAKE L. REV. 870, 873-74 (1976). A compensatory rationale for awarding punitive damages could conceivably result in double recovery. *See id.* One possible explanation for this rationale is that it allows plaintiffs to be reimbursed for expenses, such as attorneys' fees, not otherwise recoverable as compensatory damages. *See id.* This rationale is evident in jurisdictions that limit the amount recoverable as punitive damages to the cost of the litigation. *See generally* Craney v. Conovan, 92 Conn. 236, 102 A. 640 (1917). California has expressly rejected this rationale. *See* Brewer v. Second Baptist Church of Los Angeles, 32 Cal. 2d 791, 801-02, 197 P.2d 713, 720 (1948). Punitive damages have also been considered compensatory on the theory that when circumstances are present that would warrant an award of punitive damages, such as malice or

ages are: (1) to serve the interests of public justice by providing the plaintiff with an incentive to bring the action;³⁹ (2) to punish the wrongdoing defendant;⁴⁰ and (3) to deter the wrongdoer, and others as well, from engaging in the proscribed conduct.⁴¹ A closer examination of these rationales is necessary prior to comparing them with the purposes of certain common question class actions.

A. Incentive⁴²

Under the incentive rationale, the possibility of an award of punitive damages serves to promote the public policy of encouraging plaintiffs to assert their rights.⁴³ This is particularly true when the injury to the plaintiff is not adequately compensable in actual damages, yet constitutes a substantial invasion of the individual's rights.⁴⁴ In this situation, a non-compensable injury, or one which warrants only a relatively small recovery, might render litigation economically impracticable.⁴⁵ The defendant's conduct, however, may be sufficiently reprehensible to warrant some type of judicial sanction.⁴⁶ Although societal redress is sometimes available through the criminal justice system, this type of behavior is frequently overlooked by overburdened prosecutors.⁴⁷ In addition, the complaining witness may not feel it is worth his while to endure the inconveniences of a criminal prosecution when he stands to gain no monetary benefit. Often, if the defendant is to be disciplined at all, it must take place in the civil courts. The possibility of an award of punitive damages allows the plaintiff to act in the capacity of a private attorney general, ensuring that anti-social conduct is appropriately

fraud, the plaintiff's injury is aggravated. *See generally* W. PROSSER, LAW OF TORTS 9 (4th ed. 1971) [hereinafter cited as PROSSER]. Thus a larger award is required to adequately compensate him. *See* PROSSER, *supra*, at 9. *See* note 70 and accompanying text *infra*.

39. *See* Belli, *supra* note 25, at 5-6.

40. *See* Gudarov v. Hadjieff, 38 Cal. 2d 412, 417, 240 P.2d 621, 623 (1952).

41. *See id.*

42. The incentive rationale for awarding punitive damages has become so ingrained into the law that courts seldom bother to articulate it. The rationale is observable, however, in many of the rules regarding punitive damages. For instance, a plaintiff may recover punitive damages in an action when only nominal compensatory damages have been awarded. *See* Muller v. Reagh, 150 Cal. App. 2d 99, 101, 309 P.2d 826, 827 (1957). In this situation, the possibility of being awarded punitive damages acts as an incentive to the plaintiff to litigate, thus bringing the defendant before the court where the punitive and deterrent rationales may be effectuated.

43. *See* Belli, *supra* note 25, at 6.

44. *See* Belli, *supra* note 25, at 6. An analogous purpose is found in those statutes that authorize treble damages for violations of certain rights. *See* 15 U.S.C. §15 (1976); *see also* Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972); D. GOULD, STAFF REPORT ON THE CONSUMER CLASS ACTION, Submitted to the National Institute for Consumer Justice 19 (1972) [hereinafter cited as GOULD]; PROSSER, *supra* note 38, at 11. In bringing an action under a treble damage provision the plaintiff is said to act as a private attorney general. *See* 405 U.S. at 262; GOULD, *supra* at 19.

45. *See* Belli, *supra* note 25, at 6. One example of this type of behavior is the tort of assault.

46. *See* Belli, *supra* note 25, at 6.

47. *See* C. MCCORMICK, LAW OF DAMAGES §77, at 276-77 (1935).

punished.⁴⁸

The facts of *Huckle v. Money*,⁴⁹ a landmark English case in which punitive damages were awarded, are illustrative of a situation in which punitive damages may act as an incentive to a plaintiff to seek judicial redress. The plaintiff, a journeyman printer, was taken into custody by one of the King's messengers because he was suspected of publishing *The North Briton*, an allegedly seditious publication.⁵⁰ The plaintiff was held wrongfully for six hours but was treated "very civilly . . . so that he suffered very little or no damages"⁵¹ Fourteen other plaintiffs had previously brought suits against messengers for similar acts and each had recovered a verdict for two hundred pounds.⁵² Although the actual damages sustained by the plaintiff were estimated to be only twenty pounds,⁵³ the jury awarded him three hundred pounds.⁵⁴ The court upheld the award despite the defendant's claim that it was excessive.⁵⁵ The court based this holding, in part, upon the fact that the act of the messenger was a "daring public attack made upon the liberty of the subject . . ." and was in violation of the Magna Charta.⁵⁶ There can be little doubt that the possibility of being awarded punitive damages in an amount fifteen times greater than his actual damages served as an incentive to the plaintiff to seek judicial redress for this attempt "to destroy the liberty of the kingdom."⁵⁷ The possibility of an award of punitive damages gave the plaintiff an incentive to seek judicial redress for minor or noncompensable violations of his rights, thus bringing the defendant before the court where the other societal purposes of punishment and deterrence could be served.

B. Punishment and Deterrence

In addition to providing the plaintiff with an incentive to bring his cause of action, punitive damages are also awarded to further the socie-

48. *But see* Morris, *supra* note 24, at 1183.

49. 95 Eng. Rep. 768 (1763).

50. *Id.*

51. *Id.*

52. *Id.* at 769. Thirteen of the actions were settled out of court after two were tried.

53. *Id.* at 768.

54. *Id.*

55. *Id.*

56. *Id.* at 769.

57. *Id.* The incentive rationale is the only one that justifies allowing the plaintiff to keep the amount of punitive damages awarded. *Cf.* Morris, *supra* note 24, at 1176. Under a strictly retributive or deterrent rationale, the award would more properly be given to the government since it is the function of the government to punish and deter wrongdoers. *Cf.* Morris, *supra* note 24, at 1176. In fact, allowing the plaintiff to keep the award has been criticized as opening the door to "inadvisedly severe admonition." *See* Morris, *supra* note 24, at 1176-83. As far as the plaintiff is concerned, an award of punitive damages is essentially a windfall. *See* Morris, *supra* note 24, at 1177 n.7. He has done nothing to earn it other than being the victim of exceptionally abominable conduct.

tal purposes of punishment and deterrence.⁵⁸ These two concepts are inextricably related, consideration of one leading naturally to the other.⁵⁹ Society punishes the individual defendant by extracting from him monies in excess of what is required to compensate the plaintiff.⁶⁰ Concurrently, the forced payment of punitive damages furthers the societal interest of deterring the defendant and others from engaging in the same socially unacceptable conduct.⁶¹

The retributive and deterrent rationales for awarding punitive damages are readily observable in many of the rules governing these awards. As a general rule, the wealth of the defendant is one factor which may be considered in setting the amount of punitive damages.⁶² Unlike the penal system, in which a certain period of time spent incarcerated will punish all persons more or less equally, one sum of money may financially ruin one defendant while constituting only a slight annoyance to another.⁶³ Knowledge of the wealth of the defendant is therefore necessary to ensure that the award is neither overly punitive nor impotent in effect.⁶⁴

Most jurisdictions do not allow a defendant to insure against the possibility of an award of punitive damages.⁶⁵ This rule precludes a corporate defendant, for example, from avoiding a punitive damages award and passing the cost of the insurance on to the public in the form of higher prices.⁶⁶ The defendant must feel financial pain to be punished.⁶⁷ Similarly, others will not be deterred from committing antisocial conduct if they know that punitive liability will fall upon an insurer. The rule that punitive damages may not be recovered if the wrongdoer dies prior to the making of the award is also based on a punitive rationale.⁶⁸ To be punished, one must be cognizant of the

58. California has expressly adopted this rationale. See CAL. CIV. CODE §3294(a) which states that "the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant;" see also *Neal v. Farmers Ins. Exch.*, 21 Cal. 3d 910, 929, 582 P.2d 980, 990, 148 Cal. Rptr. 389, 399 (1978); *Evans v. Gibson*, 220 Cal. 476, 489-90, 31 P.2d 389, 390 (1934); *Zhadan v. Downtown L.A. Motors, Inc.*, 100 Cal. App. 3d 821, 835, 161 Cal. Rptr. 225, 233 (1979).

59. A detailed analysis of the concepts of punishment and deterrence and their interrelationships is beyond the scope of this comment. For an excellent discussion of this subject, see A. VONHIRSCH, *DOING JUSTICE, THE CHOICE OF PUNISHMENTS* 45-55 (1976).

60. See generally *Day v. Woodworth*, 45 U.S. (13 How.) 534, 536 (1851).

61. See 25 C.J.S. *Damages* §117(1).

62. See *Weisenburg v. Molina*, 58 Cal. App. 3d 478, 490, 129 Cal. Rptr. 813, 820 (1976).

63. Cf. *Bertero v. National Gen. Corp.*, 13 Cal. 3d 43, 65, 529 P.2d 608, 624, 118 Cal. Rptr. 184, 200 (1974) (the court noted that "[t]he vast wealths of the defendants warrant a large award . . .").

64. *Id.*

65. See generally Note, *An Overview of the Insurability of Punitive Damages Under General Liability Policies*, 33 BAYLOR L. REV. 203, 203-04 (1981).

66. Cf. *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 841 (2d Cir. 1967).

67. Cf. 13 Cal. 3d at 65, 529 P.2d at 624, 118 Cal. Rptr. at 200.

68. See *Evans v. Gibson*, 220 Cal. 476, 490, 31 P.2d 389, 395 (1934). If, however, the defend-

punishment.⁶⁹

The requirement of intentional wrongdoing, or at least gross negligence, for an award of punitive damages is also an outgrowth of the twin rationales of punishment and deterrence.⁷⁰ The function of tort law is not to punish unintentional acts.⁷¹ The reason actual damages are awarded in cases of mere negligence is to compensate the injured plaintiff, not to punish the defendant.⁷² Punishment is only appropriate when a culpable mental element such as wrongful intent exists.⁷³ Moreover, the deterrent effect of assessing punitive damages for negligent acts would be dubious. A negligent act is, by definition, unintended.⁷⁴ An award of punitive damages would have little, if any, effect in deterring future negligent acts.⁷⁵ The reason for restricting recovery of punitive damages to cases involving intentional misconduct is that these are the only cases in which punitive damages may function effectively as retribution and as a deterrent.⁷⁶

The traditional purposes for awarding punitive damages—incentive, punishment, and deterrence—were developed in actions involving a single plaintiff and defendant.⁷⁷ Punitive damages do further these traditional societal interests when awarded in single party actions.⁷⁸ The imposition of punitive damages in cases when a defendant has sustained compensatory liability to a large number of individual plaintiffs, however, may result in a total award which is much larger than necessary to fulfill the traditional purposes of incentive, punishment, and deterrence. This situation has been referred to as overkill.⁷⁹ An understanding of the concept of overkill and the resulting unfairness to defendants is required to identify the circumstances in which it may occur.

C. The Concept of Overkill

Punitive damages were born of an era unfamiliar with the phenome-

ant dies after a judgment for punitive damages is entered against him, the right to recover is vested in the plaintiff. See *Simone v. McKee*, 142 Cal. App. 2d 307, 316, 298 P.2d 667, 673 (1956).

69. If the rationale for awarding punitive damages was actually to compensate the plaintiff, however, it would be more sensible to allow the right to recover to survive the defendant. Furthermore, the deterrent effect of punitive damages is not decreased by this rule. Few will commit unlawful acts secure in the knowledge that their estate will not be subject to punitive liability.

70. See generally PROSSER, *supra* note 38, at 9-10.

71. See J. FLEMING, *LAW OF TORTS* 2 (1967) [hereinafter cited as FLEMING].

72. Cf. Fleming, *supra* note 71, at 2.

73. See generally *Evans v. Gibson*, 220 Cal. 476, 489-90, 31 P.2d 389, 389-95 (1934).

74. See generally PROSSER, *supra* note 38, at 250.

75. Cf. PROSSER, *supra* note 38, at 10.

76. Cf. PROSSER, *supra* note 38, at 9.

77. See note 1 *supra*.

78. See notes 42-79 and accompanying text *supra*.

79. See *Roginsky v. Richardson-Merrell, Inc.*, 378 F.2d 832, 838-42 (2d Cir. 1967).

non of mass liability.⁸⁰ Only recently have courts begun to recognize the relationship between punitive damages and mass liability.⁸¹ One of the few cases to recognize the dangers and difficulties of awarding punitive damages in mass liability situations was *Roginsky v. Richardson-Merrell, Inc.*⁸² The plaintiff in *Roginsky* brought an individual action for damages sustained as a result of taking a drug, MER/29, manufactured by the defendant.⁸³ The drug was designed to lower blood cholesterol and was marketed nationally.⁸⁴ As a result of taking the drug, the plaintiff, and many others, developed cataracts.⁸⁵ The jury awarded the plaintiff \$17,500 in compensatory damages and \$100,000 in punitive damages.⁸⁶ *Roginsky* was the first of 75 similar cases against the same defendant then pending in the southern district of New York alone.⁸⁷ Several hundred suits had been filed nationally.⁸⁸ In reversing the award of punitive damages, Judge Friendly observed:

The legal difficulties engendered by claims for punitive damages on the part of hundreds of plaintiffs are staggering We have the gravest difficulty in perceiving how claims for punitive damages in such a multiplicity of actions throughout the nation can be so administered as to avoid overkill.⁸⁹

Among the problems discussed by the court were: (1) the inequity of assessing punitive liability in an amount that far exceeds the applicable criminal penalty for the defendant's act;⁹⁰ (2) the possibility that the first persons to bring suit will "strip [the] cupboard bare . . ." with large punitive awards leaving the defendant insolvent and unable to pay the compensatory damages of subsequent claimants;⁹¹ (3) the inability to limit awards of punitive damages in cases which are brought in different courts;⁹² (4) the ability of the defendant to pass the cost of

80. See generally *id.* at 838-42.

81. See generally *id.* at 838-42.

82. *Id.*

83. *Id.* at 834.

84. *Id.* at 834-35.

85. *Id.* at 835-36.

86. *Id.* at 834.

87. *Id.*

88. *Id.* Eventually over 1500 suits were filed. For a discussion of the intricacies of this litigation see Rheingold, *The MER/29 Story—An Instance of Successful Mass Disaster Litigation*, 56 CALIF. L. REV. 116, 121 (1968).

89. 378 F.2d at 839.

90. *Id.* at 839. If all of the plaintiffs suing Richardson-Merrell received punitive damages, the total award would "run into tens of millions . . ." See *id.* The criminal penalty for the defendant's action was imprisonment for not more than three years or a fine of \$10,000 or both. See *id.* 21 U.S.C. §333(b) (1976).

91. *Id.* at 840.

92. The problems described by the court in (2) and (3) may occur in the class action context when the entire group of injured individuals is not included in the suing class. This exclusion may be a result of the jurisdictional limits of the particular court. See generally H. NEWBERG, *CLASS ACTIONS*, 469-70 (1977) [hereinafter cited as NEWBERG]. Those not included will be forced to bring their action at another time or place.

insuring against punitive liability on to the public, in jurisdictions that allow this type of insurance;⁹³ and (5) the danger that an error as to one product may end the business life of a defendant who has, in the past, been of great social value.⁹⁴ The court held that these dangers justified subjecting the claim for punitive damages to a higher standard of proof than the compensatory claim.⁹⁵ The problems of overkill identified in *Roginsky* are ordinarily present any time that a defendant sustains compensatory and punitive liability to a large number of individual plaintiffs. By allowing a large class of plaintiffs to sue a single defendant in one action, the common question class action device may exacerbate this type of situation.

Today, certain types of common question class actions serve most of the societal purposes that punitive damages are designed to serve, namely those of incentive and deterrence.⁹⁶ Awards of punitive damages have been considered in these types of class actions only because of a failure to compare the interests that punitive damages were created to serve and those currently served by the modern class action device.⁹⁷ To make this comparison, the societal purposes that the class action currently serves must be identified.

CLASS ACTIONS

Determining whether the purposes of punitive damages are adequately fulfilled by the class action device will involve a critical examination of the societal purposes that the class action was designed to fulfill,⁹⁸ and those that it actually does fulfill.⁹⁹ In addition, the unintended punitive effects of the class action device must be considered.¹⁰⁰ The failure to accomplish the purported purposes of the class action is an appropriate place to begin.

A. Purported Purposes of the Common Question Class Action

In determining what societal purposes the common question class action actually serves, it is important to distinguish the justifications for

93. See *id.* at 841.

94. See *id.*

95. *Id.* at 842, 851.

96. See notes 125-199 and accompanying text *infra*.

97. See, e.g., *Richmond v. Dart Indus., Inc.*, 29 Cal. 3d 462, 477, 629 P.2d 23, 32, 174 Cal. Rptr. 515, 524 (1981); *Vasquez v. Superior Court*, 4 Cal. 3d 800, 815, 484 P.2d 964, 973, 94 Cal. Rptr. 796, 805 (1971); *Wilson v. Bank of America*, No. 643,872 (Super. Ct. San Francisco, 1982) (a currently pending class action in which the court has proposed to award \$47,002,000 in compensatory, and \$54,000,000 in punitive damages). See proposed statement of decision *supra* note 2.

98. See notes 101-121 and accompanying text *infra*.

99. See notes 122-199 and accompanying text *infra*.

100. See notes 200-225 and accompanying text *infra*.

the device that have little or no basis in reality. Two of the purported purposes of the common question class action are facilitating the compensation of individual plaintiffs under substantive theories of law,¹⁰¹ and promoting judicial economy.¹⁰² In the sixteen years since the amendment of Federal Rule of Civil Procedure 23, creating the common question class action, neither of these rationales has been shown to be consistent with the use and effects of the device.

1. Compensation

The paramount function of tort law is to afford compensation to the plaintiff for an injury sustained through the wrongful conduct of another.¹⁰³ The common question class action is merely a procedural device for administering the substantive law of torts. Thus, one of the purposes of the common question class action is to facilitate the compensation of plaintiffs under substantive theories of law for injuries caused by the defendant's wrongful conduct.¹⁰⁴ Although most class actions do facilitate the recovery and distribution of damages, some class actions obviously do not have compensation of the plaintiffs as their primary goal.¹⁰⁵ For instance, class actions based on antitrust violations or actions on behalf of a large class of consumers may involve a comparatively small amount of actual damage to each member of the class.¹⁰⁶ After the costs of administration, notice to class members, attorneys' fees, and distribution of the judgment are deducted, the individual share of a class member, minute to begin with, may well be nonexistent.¹⁰⁷ When the class members do receive their shares of the judgment or settlement, the amount of each share may be so small that one may well ask whether fulfilling the compensatory goal was worth

101. See notes 103-113 and accompanying text *infra*.

102. See notes 114-121 and accompanying text *infra*.

103. See FLEMING, *supra* note 71, at 1; PROSSER, *supra* note 38, at 6; 47 CAL. JUR. 2d *Torts*, §2 (1959).

104. See Bruno v. Superior Court, 127 Cal. App. 3d 120, 127, 179 Cal. Rptr. 342, 348 (1981); *Hearings on reform of class action litigation procedures before the Subcommittee on Judicial Machinery of the Committee on the Judiciary*, 95th Cong., 2d Sess. 21 (1978) (remark of Daniel J. Meador: "A major flaw in Rule 23(b)(3) . . . is that it is constructed wholly on a compensatory premise.").

105. See generally GOULD, *supra* note 44, at 39-49.

106. See Daar v. Yellow Cab Co., 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967). In Daar the plaintiff was suing for overcharges made by a taxi company. Although the plaintiff claimed that he had expended \$100, the actual amount of the overcharge was uncertain. *Id.* at 703, 433 P.2d at 738, 63 Cal. Rptr. at 730.

107. See American College of Trial Lawyers, Report and Recommendations of the Special Committee on Rule 23 of the Federal Rules of Civil Procedure 22-23 (1972) [hereinafter cited as ACTL]; GOULD, *supra* note 44, at 44; Handler, *The Shift to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 COLUM. L. REV. 1, 9-10 (1971) [hereinafter cited as Handler].

the substantial investment in time, effort, and judicial resources.¹⁰⁸

By way of specific example, suppose a taxicab company in a large metropolitan area unlawfully overcharged its passengers in the amount of three cents a mile¹⁰⁹ over the course of two years.¹¹⁰ Several million people become victims of this illegal conduct. While the average individual damages are approximately fifty cents, the total amount of money wrongfully gained by the cab company is roughly \$1.5 million. The goal of a class action brought on behalf of these unfortunate individuals cannot be to recover and return the fifty cents lost by each or whatever fraction thereof remains after the various costs of litigation are deducted. The miniscule individual recovery would certainly not justify the enormous expenditure in time, effort, expense, and judicial resources.¹¹¹ Thus, when the amount of individual recovery in a class action is minute, compensation is not a paramount consideration.¹¹² In these instances, the maintenance of the class suit must be justified by another rationale.¹¹³ One rationale which merits exploration is the promotion of judicial economy.

2. Judicial Economy

The advisory committee note to Federal Rule of Civil Procedure 23(b)(3), which created the common question class action, states that the purpose of the provision is to "achieve economies of time, effort, and expense, and promote uniformity of decision as to persons similarly situated, without sacrificing procedural fairness or bringing about other undesirable results."¹¹⁴ In fact, the promotion of judicial economy has been a goal of the class action device since its inception.¹¹⁵ The effect of Rule 23(b)(3), however, has not been consistent with the stated goals of economy of time, effort, and expense.

The common question class action has allowed plaintiffs to bring actions which otherwise would never have been litigated because the po-

108. See ACTL, *supra* note 107, at 22-23; GOULD, *supra* note 44, at 44; Handler, *supra* note 107, at 9-10.

109. The facts of this example bear some resemblance to *Daar v. Yellow Cab Co.*, 67 Cal. 2d 695, 433 P.2d 732, 63 Cal. Rptr. 724 (1967).

110. The applicable (fictional) statute of limitations.

111. See ACTL, *supra* note 107, at 22-23; GOULD, *supra* note 44, at 44; Handler, *supra* note 107, at 9-10.

112. Thus, it is not surprising to find observations such as "[b]eyond question only lawyers benefit from such cases." Simon, *Class Actions—Useful Tool or Engine of Destruction*, 55 F.R.D. 375, 376-77 (1972) [hereinafter cited as Simon].

113. See D. JONES & C. WELDON, *LAWYERS' READY REFERENCE TO CLASS ACTIONS* 9 (1972).

114. FED. R. CIV. P. 23(b)(3) advisory committee note. The question of whether the rule has sacrificed procedural fairness or brought about other undesirable results will be discussed *infra* at 1294.

115. See generally NEWBERG, *supra* note 92, at 16.

tential amount of individual recovery was far too small to finance an individual lawsuit.¹¹⁶ The common question class action actually increases the workload of the courts by permitting a plaintiff to bring his cause of action on behalf of all those who have been injured in similar circumstances and aggregate the damages of the entire class, thereby rendering the lawsuit economically feasible.¹¹⁷ Although the plaintiff will gain no more than his individual damages if the action is successful, the costs of litigation may be deducted from the aggregate recovery of the class.¹¹⁸

In the taxicab hypothetical above, none of the individual plaintiffs would consider individual litigation an economically reasonable means of redressing their injuries. The miniscule amount of potential recovery would not begin to offset the expenses of litigation. The common question class action device, however, allows any of them to sue on behalf of the entire class, thereby making litigation economically feasible and adding to the already crowded court calendar another case which, but for the use of the representative suit, would never have reached the courtroom.¹¹⁹ A device that encourages lawsuits that otherwise would not have been initiated, cannot be said to have achieved economies of time, effort, and expense.¹²⁰

The maintenance of class actions in which the potential individual recovery is minute cannot be justified under either the compensatory or judicial economy rationales. Yet, courts continue to certify these types of classes despite the knowledge that the purported rationales behind the maintenance of the representative lawsuit break down when applied to the small individual recovery class action.¹²¹ To determine whether the purposes of punitive damages have been adequately served

116. One study, after analyzing all the civil dockets of the United States District Court in the Southern District of New York from July 1, 1966 to December 1, 1971, found that the number of class actions instituted in 1971 was almost *four times* the number instituted in 1967. The study also found that of the class actions which were commenced in 1966, more than fifty-three percent were still pending five years later. The study posited "judicial chaos rather than judicial economy . . ." as the end product of the rule. See ACTL, *supra* note 107, at III, 13. The procedural methods used were, in fact, underinclusive. To appear on the docket as a class action, a motion relating to class action status must have been made. If no motion was made, the class action was not counted. See ACTL, *supra* note 107, at III, 13.

117. See ACTL, *supra* note 107, at III, 13. But see *Snyder v. Harris*, 394 U.S. 332, 336 (1969), which held that separate and distinct claims may not be added together to meet the amount in controversy requirement in a diversity action.

118. See Handler, *supra* note 107, at 9-10.

119. See ACTL, *supra* note 107, at III, 13.

120. See Note, *The Rule 23(b)(3) Class Action: An Empirical Study*, 62 GEO. L.J. 1123, 1130 (1974). This study, which supports the use of the 23(b)(3) class action, found that the increase in class action filings since 1966 was far greater than the increase in *all other* civil actions. "In 1972, when the number of civil actions filed in the District of Columbia decreased by nearly 18 percent, over the previous year, class action filings increased by 58 percent . . ." *Id.*

121. See notes 103-120 and accompanying text *supra*.

by the class action device, the *actual* purposes which the class action serves must be specifically identified.

B. Actual Purposes

Since it is clear that in some instances the class action device does not achieve the purported goals of compensating plaintiffs or promoting judicial economy,¹²² the question arises: What societal purposes, if any, does it promote? The answer to this question lies not in the purported justifications for the device, but in its application to actual litigants in the courtrooms of the country. Two societal purposes that the class action device is actually serving are: (1) providing an incentive to plaintiffs to seek judicial redress for their minor injuries,¹²³ and (2) deterring defendants, and others like them, from committing unlawful acts in the future.¹²⁴ Not all class actions serve these purposes effectively, however. The ability to determine which types of class actions do further these societal purposes is required to decide whether a particular class should be certified for the recovery of punitive damages.

1. Incentive

There is substantial authority in the federal system for the proposition that one of the basic objectives of Rule 23(b)(3) is to provide parties who have small claims with a method of obtaining redress.¹²⁵ This incentive to litigate is of two types: (1) incentive to the individual plaintiff provided by the ability to redress the violation of a right, and (2) monetary incentive to the plaintiff's attorney.

As in the case of punitive damages,¹²⁶ a plaintiff whose potential recovery is too small to warrant resort to the courts is provided with an incentive to litigate.¹²⁷ The aggregate potential recovery of the class may then render litigation economically feasible.¹²⁸ Although at first

122. See ACTL, *supra* note 107, at 6.

123. See generally AMERICAN ENTERPRISE INSTITUTE FOR PUBLIC POLICY RESEARCH, CONSUMER CLASS ACTIONS, 7-8 (1977) [hereinafter cited as AEI].

124. See generally AEI, *supra* note 123, at 8-9; GOULD, *supra* note 44, at 13-34; Homburger, *State Class Actions and the Federal Rule*, 71 COLUM. L. REV. 609 (1971) [hereinafter cited as Homburger]. The incentive and deterrent functions of the common question class action both stem from the ability to aggregate the damages of the class. Although these purposes are closely related, for purposes of clarity, they will be discussed separately here. See notes 125-199 and accompanying text *supra*.

125. See, e.g., *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560, 563 (2d Cir. 1968); *Hohmann v. Packard Instrument Co.*, 399 F.2d 711, 715 (7th Cir. 1968); *Rutherford v. United States*, 429 F. Supp. 506, 508 (W.D. Okla. 1977); *Steinmetz v. Bache & Co.*, 71 F.R.D. 202, 205 (S.D.N.Y. 1976); *Dolgow v. Anderson*, 43 F.R.D. 472, 484-485 (E.D.N.Y. 1968).

126. See notes 42-57 and accompanying text *supra*.

127. See note 125 *supra*.

128. See 391 F.2d at 560, 563. See generally AEI, *supra* note 123, at 7-8. This incentive, however, does not make individual compensation of the plaintiff class feasible. See notes 103-113

glance the incentive rationale may appear similar to the compensation rationale,¹²⁹ there is a distinction. The goal of the compensation rationale is to allow the wronged individual to recover damages.¹³⁰ Class actions with small individual recoveries do not further the goal of compensation because the minute amount of individual benefit does not justify the large expenditure in time, effort, and judicial resources.¹³¹ The incentive rationale, on the other hand, is aimed at providing a plaintiff, whose potential individual recovery is small, with a method of gaining access to the courts regardless of whether he is adequately compensated.¹³² By allowing the costs of litigation to be imposed on the potential aggregate damages of the class, the class action device renders feasible a lawsuit which, if brought on behalf of the plaintiff alone, would not be economically practicable. The small amount of potential individual recovery involved in an action brought solely on behalf of the plaintiff would not be worth the investment in litigation costs. Although the plaintiff may not be compensated for his injury,¹³³ the class action device allows him to bring the defendant before the court and redress a violation of his rights. The incentive to the plaintiff, then, is not a matter of economics but one of principle.

The incentive to the plaintiff provided by the common question class action should be distinguished from that provided by the possibility of receiving an award of punitive damages. The incentive to the plaintiff in seeking an award of punitive damages is the result of the practice of giving the punitive award to the plaintiff.¹³⁴ In other words, the action is brought because the plaintiff stands to gain a windfall.¹³⁵ In a successful class action, however, the aggregate damages of the plaintiff class *are not* awarded to the party who brought the suit. The damages must be given to the members of the class or be distributed through some fluid recovery mechanism.¹³⁶ Thus, the incentive to bring a class action in which the potential individual recovery is small emanates not from the individual benefit to be gained, but from the ability to redress the violation of a right. The injured plaintiff's opportunity to participate in the deterrent function of the modern class action¹³⁷ also contributes to this incentive.

and accompanying text *supra*. As discussed above, compensation is not a viable goal of the small individual recovery class action. See notes 103-113 and accompanying text *supra*.

129. See notes 103-113 and accompanying text *supra*.

130. See notes 103-104 and accompanying text *supra*.

131. See notes 103-113 and accompanying text *supra*.

132. See note 125 and accompanying text *supra*.

133. See notes 103-113 and accompanying text *supra*.

134. See note 57 *supra*.

135. See note 57 *supra*.

136. See notes 178-182 and accompanying text *infra*.

137. See notes 154-199 and accompanying text *infra*.

The incentive function of the class action furthers the public policy of encouraging the enforcement of rights. The class action, in this context, has been designated a " 'semi-public remedy administered by the lawyer in private practice'—a cross between administrative action and private litigation."¹³⁸ The plaintiff who brings an action to enforce the rights of a class is acting in the capacity of a private attorney general.¹³⁹

The plaintiff's ability to redress a violation of his rights is not the only existing incentive to bring a class action when individual litigation is impractical. The attorneys who bring class actions have a distinct monetary interest in their maintenance and proliferation.¹⁴⁰ Attorneys' fees in large class actions may be quite substantial.¹⁴¹ Some critics of the class action device have claimed that lawyers, attracted by the possibility of a contingent fee assessed against the aggregate damages of the entire class, have initiated meritless class action claims.¹⁴² Regardless of the validity of these criticisms, in the past lawyers have not been hesitant to file class actions suits,¹⁴³ nor are they likely to be in the future.

In addition, the holding of the Supreme Court in *Mills v. Electric Auto-Lite Co.*,¹⁴⁴ allowing recovery of attorneys' fees in certain class actions, offers a further incentive to the plaintiff and his attorney to seek judicial enforcement of violated rights.¹⁴⁵ In *Mills*, the Court recognized an exception to the general American rule barring recovery of attorneys' fees and allowed the plaintiff to recover attorneys' fees when he successfully maintained a class suit that benefited a group of others in the same manner as himself.¹⁴⁶ The practice of awarding attorneys' fees in class actions will increase the benefit to the individual class members¹⁴⁷ and to the plaintiff's counsel.¹⁴⁸ Thus, the possibility of

138. *Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968) (quoting Kalven & Rosenfield, *Contemporary Function of the Class Suit*, 8 U. CHI. L. REV. 684, 717 (1941)).

139. See Homburger, *Private Suits in the Public Interest in the United States of America*, 23 BUFFALO L. REV. 343, 345 (1973).

Class actions are but a logical extension of the notion that self-interest normally may be relied upon to develop the truth in an adversarial context. We may trust a man to help his fellow men if, by helping them, he helps himself.

See *id.*, at 345; see also GOULD, *supra* note 44, at 18-19.

140. See 43 F.R.D. at 494-95. See generally ACTL, *supra* note 107, at 36.

141. See, e.g., *Alpine Pharmacy, Inc. v. Chas. Pfizer & Co., Inc.*, 481 F.2d 1045, 1052-53 (2d Cir. 1973), *cert. denied*, 414 U.S. 1092 (\$1,960,000); *In re King Resources Co. Sec. Litig.*, 420 F. Supp. 610, 638-40 (D. Colo. 1976) (\$2,656,401.26).

142. See ACTL, *supra* note 107, at 36. See generally Homburger, *supra* note 124, at 650-51. See notes 220-222 and accompanying text *infra*.

143. See ACTL, *supra* note 107, at III, 13.

144. 396 U.S. 375 (1970).

145. See *id.* at 392.

146. See *id.* at 391-92.

147. Attorneys' fees will not be deducted from the recovered damages, allowing individual plaintiffs to take a greater share.

148. Plaintiff's counsel will not have to run the risk of a judgment that is less than the amount of attorneys' fees.

recovering attorneys' fees will increase the incentive to bring a class action in circumstances when the potential individual recovery is minimal.

Ironically, the plaintiff's ability to aggregate the damages of the class, which has precluded the common question class action from fulfilling its goals of facilitating compensation and promoting judicial economy,¹⁴⁹ has allowed the class action to fulfill an entirely different societal purpose. By giving the plaintiff the ability to aggregate the damages of the class and thus finance litigation which otherwise would be impracticable, the class action acts as an incentive to seek judicial redress when only small individual recoveries are possible. By providing the individual plaintiff with an opportunity for recourse to the courts for infringements that would warrant only a minimal amount of damages, the class action device assumes a role similar to the incentive function of punitive damages.¹⁵⁰ Diminutive invasions of rights, perpetrated upon large numbers of people, no longer need go unanswered.

The incentive function does not exist in all common question class actions. In many class actions the potential individual recoveries of the plaintiff class are large enough to warrant individual litigation.¹⁵¹ In these cases, the class action device is used to achieve the intended goals of compensation and judicial economy.¹⁵² The distinguishing features of class actions in which the compensation and judicial economy rationales fail and the incentive rationale succeeds are: (1) an amount of potential individual recovery too insignificant to warrant individual litigation,¹⁵³ and (2) an aggregate amount of potential recovery that is sufficient to finance the lawsuit. Courts should consider whether the incentive purpose of punitive damages is fulfilled by the class action device prior to certifying a class for the recovery of punitive damages. Another factor that should be considered is whether the specific class action effectively serves the deterrent function of punitive damages.

149. See notes 103-124 and accompanying text *supra*.

150. Compare notes 42-57 and accompanying text *supra* with notes 125-149 and accompanying text *supra*.

151. For example, in the *Dalkon Shield* litigation, the average individual damages were in excess of \$300,000. See *In re N. Dist. of Cal. "Dalkon Shield" IUD Prods. Liab. Litig.*, 526 F. Supp. 887, 893 (N.D. Cal. 1981).

152. See notes 101-124 and accompanying text *supra*.

153. This will be a difficult standard to set and will probably have to be determined on a case by case basis. One possible standard is set forth in the Kennedy Bill, which was introduced in 1978 in the Senate but was never enacted into law. The bill proposed to create a "civil public action for redress of small monetary injuries to numerous members of the public." The relevant standards were: "(1) such conduct injures two hundred or more named or unnamed persons, each in an amount not exceeding \$300.00; (2) the combined amount of the injury to such persons exceeds \$60,000" See S. 3475, 95th Cong., 2d Sess. (1978).

2. Deterrence

Closely related to the incentive function of the common question class action is its role in modern society as a deterrent.¹⁵⁴ This function is apparent in the field of consumer class actions.¹⁵⁵ The California Supreme Court said in *Vasquez v. Superior Court*:¹⁵⁶ "Protection of unwary consumers from being duped by unscrupulous sellers is an exigency of the utmost priority."¹⁵⁷ Contemporary mass marketing techniques facilitate price fixing and other consumer abuses.¹⁵⁸ Manufacturers are able to increase their profits by unlawfully depriving large numbers of consumers of relatively small amounts of money.¹⁵⁹ Since individual litigation is not an economically feasible method of redressing this type of activity, the wrongdoer or prospective wrongdoers are not deterred.¹⁶⁰ The individual consumer's potential recovery is usually far too small to justify the substantial expenditures involved in conducting a lawsuit.¹⁶¹ Criminal sanctions have also proved to be impotent in deterring this type of activity.¹⁶² Fines that are dwarfed by the advertising budgets of the defendants against whom they are imposed cannot hope to be an effective deterrent.¹⁶³ The possibility of actual incarceration of defendants convicted of antitrust violations is practically nil.¹⁶⁴

154. See generally AEI, *supra* note 123, at 8-9; GOULD, *supra* note 44, at 13-34.

155. See generally GOULD, *supra* note 44, at 13-34; *Hearings on S. 2246, S. 3092, and S. 3201 before the Consumer Subcommittee of the Committee on Commerce*, 91st Cong., 1st and 2d Sess. (1969-1970).

156. 4 Cal. 3d 800, 484 P.2d 964, 94 Cal. Rptr. 796 (1971).

157. *Id.* at 808, 484 P.2d at 968, 94 Cal. Rptr. at 800.

158. See generally Nader & Green, *Crime in the Suites*, THE NEW REPUBLIC, April 29, 1972, at 36 [hereinafter cited as Nader & Green]. A 1961 survey asked businessmen: In your industry, are there any accepted business practices which you regard as unethical? Four-fifths responded in the affirmative. See Nader & Green, *supra*, at 35.

159. For example, in 1964, the average American consumer could buy a loaf of bread for about twenty cents, while in Seattle, the price was about twenty-four cents. This twenty percent difference was caused by a local price-fixing conspiracy. The amount that the Seattle consumers were overcharged was in the neighborhood of \$35 million. See Nader & Green, *supra* note 158, at 35.

160. See notes 127-128 and accompanying text *supra*.

161. See *Bruno v. Superior Court*, 127 Cal. App. 3d 120, 123, 179 Cal. Rptr. 342, 343 (1981). This case involved a price-fixing conspiracy in which approximately 1.5 million people were wrongly deprived of \$125 each. For a discussion of the relationship between the amount of potential recovery and the decision to seek judicial redress, see *Eisen v. Carlisle & Jacqueline*, 417 U.S. 156, 162 (1974).

162. See Nader & Green, *supra* note 158, at 35.

163. The maximum fine for a violation of the Sherman Act was raised in 1977 from \$50,000 to \$1,000,000. 15 U.S.C. §1 (Supp. I 1977). Compare this to Procter & Gamble's 1972 Advertising Budget of \$230 million. See Nader & Green, *supra* note 158, at 35. See also DuVal, *The Class Action as an Antitrust Enforcement Device: The Chicago Experience*, 1979 Amer. Bar. Foundation Res. J. 1023, 1025 n.9 [hereinafter cited as DuVal].

164. In the entire history of the Sherman Act, only three businessmen have gone to jail. One possible explanation for this phenomenon is the reluctance of judges and juries to send white collar criminals to jail. See Nader & Green, *supra* note 158, at 35. See also Posner, *A Statistical Study of Antitrust Enforcement*, 13 J. LAW & ECON. 365, 388-91 (1970).

The class action device, however, provides the individual consumer with what may be the *only* viable method of deterring large corporate manufacturers from taking unfair advantages in the marketplace.¹⁶⁵ By aggregating the damages of the entire class, a lawsuit in which the plaintiff's potential individual recovery is inconsequential can nonetheless be rendered economically feasible.¹⁶⁶ If the action is successful, the defendant is deterred from future transgressions by being forced to disgorge his ill-gotten gains. In addition, all others who would be prone to commit the type of activity which caused the suit are deterred by the threat of a similar lawsuit. Furthermore, the therapeutic effect is enhanced by the social stigma attached to the defendant's status in a class action.¹⁶⁷ The publicity inherent in a large class action may be severely detrimental to the business relationships of a corporate or private defendant.¹⁶⁸ The loss of revenues caused by damage to the defendant's business reputation¹⁶⁹ will further deter him and others from engaging in unlawful behavior.

Under a deterrent rationale, the primary focus is upon confiscation from the defendant of any wrongfully gained monies.¹⁷⁰ The identity of the recipient of this money, once confiscated, is irrelevant.¹⁷¹ Just as in the case of punitive damages,¹⁷² the societal purpose of deterring the defendant and making an example of him is effectuated merely by depriving him of his ill-gotten gains. Class actions that deprive the defendant of unlawfully gained money further this deterrent purpose despite the fact that they fail altogether to advance their intended purposes of compensation and promotion of judicial economy.¹⁷³

Another area of law in which the *in terrorrem*¹⁷⁴ rationale of class actions has become prevalent is securities regulation.¹⁷⁵ Similar to consumer class actions, the potential individual recovery in these cases is likely to be insufficient to warrant litigation.¹⁷⁶ The class action device,

165. One writer has even gone as far as to suggest that the main purpose of the consumer class action should be to act as a deterrent against mass consumer abuses. See GOULD, *supra* note 44, at 34. *Contra*, ACTL, *supra* note 107, at 21; Handler, *supra* note 107, at 9; Simon, *supra* note 112, at 375.

166. See notes 126-128 and accompanying text *supra*.

167. Loss of goodwill due to stigmatization is discussed at notes 203-207 and accompanying text *infra*.

168. See generally notes 203-207 and accompanying text *infra*.

169. See generally notes 203-207 and accompanying text *infra*.

170. See GOULD, *supra* note 44, at 21.

171. See GOULD, *supra* note 44, at 21.

172. See notes 58-79 and accompanying text *supra*.

173. See notes 103-121 and accompanying text *supra*.

174. "In fright or alarm or terror. In terror or warning; by way of threat . . ." BLACKS LAW DICTIONARY, 735 (5th ed. 1979).

175. See, e.g., *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); *Dolgow v. Anderson*, 43 F.R.D. 472 (E.D.N.Y. 1968).

176. See, e.g., 417 U.S. at 164; 43 F.R.D. at 485.

however, provides an effective means of deterring defendants and others like them from engaging in proscribed behavior by enhancing the threat of public exposure and compensatory civil liability to a large group of plaintiffs.¹⁷⁷

One relatively recent innovation supporting the deterrent function of class actions is the increasing use of fluid recovery.¹⁷⁸ Fluid recovery is a method of distributing the award that is used when the identities of the members of the plaintiff class cannot be ascertained.¹⁷⁹ The award is most commonly distributed to a class which resembles in some manner the class of plaintiffs.¹⁸⁰ The primary goal of fluid recovery is to separate the defendant from the money he wrongfully acquired.¹⁸¹ Returning the award to the actual injured party is of lesser, if any, importance.¹⁸² The use of fluid recovery is indicative of society's abandonment of the compensatory purpose of class actions and the adoption of the class action device as a means of deterring unlawful conduct. Neither the compensation nor the judicial economy rationale can support maintaining a lawsuit on behalf of a class of unknown plaintiffs and distributing the award to a class which, although admittedly similar, may be entirely distinct.¹⁸³

A class action will not perform as a deterrent to wrongful behavior unless the amount of potential aggregate recovery is large in relation to the defendant's net assets.¹⁸⁴ A wealthy defendant will not be deterred by a small amount of potential compensatory liability.¹⁸⁵ Some wealthy defendants may be able to include small amounts of compensatory civil liability in the everyday costs of doing business. Thus, cases in which the amount of aggregate compensatory recovery liability is small will not serve the deterrent purpose of punitive damages sufficiently to invalidate a punitive award.¹⁸⁶ Determining whether the particular defendant is actually going to be deterred from engaging in

177. See 43 F.R.D. at 487; DuVal, *supra* note 163, at 1346-49. The therapeutic effect of class actions brought under securities regulations has been analogized to that of a stockholder's derivative suit. See 43 F.R.D. at 487.

178. See, e.g., Colson v. Hilton Hotels Corp., 59 F.R.D. 324, 325-26 (N.D. Ill. 1972); 52 F.R.D. at 264. See generally Note, *An Economic Analysis of Fluid Recovery Mechanisms*, 34 STAN. L. REV. 173, 185 (1981).

179. See NEWBERG, *supra* note 92, at 1425; DuVal, *supra* note 163, at 1329-30.

180. See NEWBERG, *supra* note 92, at 1425. See generally Note, *An Economic Analysis of Fluid Recovery Mechanisms*, 34 STAN. L. REV. 173.

181. See NEWBERG, *supra* note 92, at 1425.

182. See NEWBERG, *supra* note 92, at 1425.

183. See generally notes 103-121 and accompanying text *supra*.

184. Cf. MacDonald v. Joslyn, 275 Cal. App. 2d 282, 293-94, 79 Cal. Rptr. 707, 713-14 (1969) (setting forth a similar principle while upholding an award of punitive damages). See notes 62-64 and accompanying text *supra*.

185. Cf. 275 Cal. App. 2d at 293-94, 79 Cal. Rptr. at 713-14.

186. Cf. *id.*

lawless behavior requires a balancing of: (1) the size of the potential aggregate recovery of the class, and (2) the net worth of the defendant.

Many common question class actions are not motivated by a desire to compensate the injured parties, or to promote judicial economy. Class actions in which the potential individual recovery is large are being used by courts to provide plaintiffs with an incentive to litigate and to deter defendants from engaging in wrongful conduct. An example of the practical application of the incentive and deterrent functions of the common question class action may be helpful at this point.

3. *Application of the Incentive and Deterrent Functions*

A brief discussion of the facts of *Dolgow v. Anderson*¹⁸⁷ will help to illustrate both the incentive and deterrent functions of the modern class action device and the manner in which they interact. In *Dolgow*, the plaintiffs brought a class action on behalf of all 100,000 purchasers of Monsanto stock.¹⁸⁸ The plaintiffs contended that the defendants had unlawfully manipulated the price of Monsanto stock to their own benefit.¹⁸⁹ The defendants also allegedly concealed information that would have indicated that Monsanto was in fact experiencing financial difficulty.¹⁹⁰ The damages to individual defendants were, for the most part, miniscule.¹⁹¹ The court noted that were it not for the ability to aggregate the potential recovery of the class provided by the class action device, the plaintiffs would have been effectively precluded from pursuing their claims.¹⁹² In addition, the court discussed the incentive to the attorney in bringing the action:

In some areas of the law, society is dependent upon the "initiative of lawyers for the assertion of rights . . ." and the maintenance of desired standards of conduct. The prospect of handsome compensation is held out as an inducement to encourage lawyers to bring such suits.¹⁹³

The *Dolgow* case is, therefore, one example of the way in which a class action may serve as an incentive both to the plaintiff and his attorney to litigate a small claim. By allowing the plaintiff to spread the costs of litigation over the aggregate damages of the class, the action is rendered economically feasible. In addition, "[t]he prospect of handsome

187. 43 F.R.D. 472 (E.D.N.Y. 1968).

188. *Id.* at 475.

189. *Id.* at 479.

190. *Id.*

191. *Id.* at 494.

192. *Id.* at 494-95.

193. *Id.*, (quoting *Escott v. Barchris Constr. Corp.*, 340 F.2d 731, 733 (2d Cir. 1965), *cert. denied sub. nom.*, *Drexel & Co. v. Hall*, 382 U.S. 816 (1965)).

compensation" to the attorney bringing the suit creates a powerful incentive to litigate.

Finally, the court discussed the therapeutic value of the class action.¹⁹⁴ Without the benefit of the class action device, the unlawful activity of the defendants would have been allowed to continue unchecked.¹⁹⁵ Thus, the litigation made possible by the use of the class action device may provide the only potent deterrent against this type of antisocial conduct. Moreover, the threat of a class action acts as a deterrent to those who would imitate the acts of the defendant.¹⁹⁶

The class action device has, in some instances, forsaken the goals of compensation and judicial economy and assumed a role not intended by its creators.¹⁹⁷ Through the incentive and deterrent functions, the class action has shed the cocoon of a mere procedural device and has become the protector of the little man. The message of Rule 23(b)(3) is clear: no longer are the masses an easy mark for those who would wrongfully deprive them of a few cents each, in the hopes that these insignificant individual injuries will not warrant redress. The class action has given the individual plaintiff the incentive to act as a private attorney general, performing a function normally reserved to governmental bodies, namely that of deterring wrongdoers from engaging in unlawful conduct.¹⁹⁸ In many cases the common question class action performs precisely the same incentive and deterrent functions that the possibility of punitive liability does in single plaintiff suits.¹⁹⁹

At this point, the rationales behind awarding punitive damages and the common question class action diverge. Although both may serve the interests of society by providing plaintiffs with an incentive to litigate and deterring unlawful conduct, only punitive damages are intended as punishment. In certain circumstances, however, the class action device may have effects that, although not intended to be retributive, are, in fact, punitive in character.

PUNITIVE EFFECTS OF A CLASS ACTION

The purpose of a representative suit does not include punishing the defendant.²⁰⁰ Critics of the class action have maintained, however, that

194. 43 F.R.D. at 487-88.

195. *Id.* at 486.

196. See notes 154-186 and accompanying text *supra*.

197. See notes 125-196 and accompanying text *supra*.

198. See notes 154-186 and accompanying text *supra*.

199. Compare notes 122-196 and accompanying text *supra* with notes 38-79 and accompanying text *supra*.

200. With the exception of the imposition of punitive damages, the concept of retribution is absent in tort law. See PROSSER, *supra* note 38, at 6-7; CAL. JUR. 2d *Torts* §2; Wright, *Introduction to the Law of Torts*, 8 CAMBRIDGE L.J. 238 (1944).

the device may have substantial punitive *effects* on defendants.²⁰¹ Although the class action is a procedural device, many of its effects are more closely akin to criminal sanctions than to civil remedies. One example of these punitive effects may be found in the pressure brought to bear on a defendant to settle out of court because of: (1) the potential damage to the defendant's reputation caused by the amount of adverse publicity inherent in some class actions; (2) the extremely high cost and difficulty in managing the defense of a class action; and (3) the potential for a large adverse judgment should the defendant not prevail at trial.²⁰²

Respectable, well-known companies can be severely damaged by bad publicity.²⁰³ Loss of goodwill among business associates, as well as among the public, can be the consequence of a detrimental change in the image a business puts forth.²⁰⁴ The mere filing of a large class action can damage the reputation of a well-known company.²⁰⁵ The possibility of lost business due to the large amount of adverse publicity inherent in many class actions puts tremendous pressure on a defendant to settle regardless of whether a settlement is warranted on the merits.²⁰⁶ The amount of a substantial settlement may still be less than the revenues which would be lost because of bad publicity.²⁰⁷ Additional pressure to settle arises from the cost of defending against a large class action.²⁰⁸ The expense of this variety of litigation is beyond the means of most small defendants.²⁰⁹ Even large defendants may decide that the expense of providing a defense and the loss of executive time is more costly than a settlement agreement.²¹⁰ Furthermore, the size of the final award, should the defendant decide to go to court and be found liable, may be so large as to force a defendant to actively pursue settlement negotiations no matter what the equities of the situation suggest.²¹¹ Even a slight chance of incurring compensatory civil liability to millions of individual plaintiffs is far too dangerous a risk for the aver-

201. See generally AEI, *supra* note 123, at 19-21; Handler, *supra* note 107, at 8-9; Simon, *supra* note 112, at 388-90.

202. See AEI, *supra* note 123, at 19-21. But see DuVal, *supra* note 163, at 1344-46 (in this study of antitrust class actions, no significant pressure to settle was found prior to trial).

203. See AEI, *supra* note 123, at 19-21.

204. See AEI, *supra* note 123, at 19-21.

205. See AEI, *supra* note 123, at 19-21.

206. See AEI, *supra* note 123, at 19-21.

207. See AEI, *supra* note 123, at 19-21.

208. See AEI, *supra* note 123, at 19-21; GOULD, *supra* note 44, at 284-306.

209. See AEI, *supra* note 123, at 19-21.

210. See GOULD, *supra* note 44, at 287, in which the author quotes from a confidential letter from a business executive:

Our decision to settle was dictated by the inordinate expense to us for attorney's [*sic*] fees and in the loss of executive time and not because we believe any damage was done to the plaintiffs or to persons similarly situated.

211. See AEI, *supra* note 123, at 19-21.

age defendant to take, given other available alternatives.²¹²

Although a certain amount of pressure to settle prior to trial is inherent in all lawsuits, the amount of potential compensatory civil liability in a large class action, in conjunction with the direct and indirect disadvantages of litigation, often renders pretrial settlement the only economically practicable alternative.²¹³ After an evaluation of the loss of business likely to ensue because of damage to the defendant's reputation, the high cost of presenting a defense to a representative suit, and the enormous potential liability facing a class action defendant, it is not surprising to find that the vast majority of large class actions *never* receive a trial on the merits.²¹⁴ Courts often augment this pressure by certifying inherently unmanageable classes, relying on the probability of pretrial settlement to keep from clogging the courts.²¹⁵ The immense pressure on a defendant to forgo the right to trial and settle out of court has led one writer to remark that the class action device is no longer "a rule of procedure—it is a form of legalized blackmail."²¹⁶ This inherent pressure to settle represents an unbridled form of trial by filing.²¹⁷ Once the plaintiff has commenced a large class action, the defendant may have no choice other than to purchase peace as cheaply as possible.²¹⁸ A procedure, the end result of which is the de facto deprivation of the defendant's right to trial, functions more as a punishment to the defendant than as a rule of procedural convenience.²¹⁹

212. For example, the settlement offer accepted by 43 states in the antibiotic antitrust actions was in the amount of \$85 million. *See* T. BARTSH, F. BODDY, B. KING & P. THOMPSON, *A CLASS ACTION SUIT THAT WORKED* 6 (1978).

213. *See* Simon, *supra* note 112, at 390. Some may argue that the question of whether punitive damages should be awarded is unimportant since the vast majority of large class actions settle prior to trial. By certifying a class for the recovery of punitive damages, however, a court may geometrically increase the amount for which a defendant may settle since settlement negotiations may be based on potential liability at trial.

214. *See* Simon, *supra* note 112, at 390.

215. *See generally* GOULD, *supra* note 44, at 285; Handler, *supra* note 107, at 388-90. This judicial preference for out of court settlement has even achieved the status of legislative intent. *See* Handler, *supra* note 107, at 8 n.42.

216. *See* Handler, *supra* note 107, at 8.

217. *Cf.* Handler, *supra* note 107, at 9:

Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits. The distinctions between innocent and guilty defendants and between those who have done little if any harm become blurred, if not invisible. The only significant issue becomes the size of the ransom to be paid for total peace.

218. The role of the judiciary in this form of justice is minimal. Although Rule 23(b)(3) requires the approval of the court prior to any compromise of a class action, *see* FED. R. CIV. P. 23(e), the additional requirement of notice of the compromise to all members of the class, *see id.*, indicates that the judicial focus is upon the rights of the plaintiff class and not upon the fairness of the settlement to the defendant.

219. *See* Handler, *supra* note 107, at 8-10.

In the nearly half century of my practice, I have never seen a single other circumstance which has created the cynicism at the bar that has arisen from the settlement negotiations

Critics of the class action have claimed that because of the immense pressure on a defendant to settle out of court, the device is subject to abuse by plaintiffs.²²⁰ Unscrupulous individuals may file meritless strike²²¹ or harassment²²² suits.²²³ The defendant is then placed in the unenviable position of having to decide whether to expend large sums to prevail at trial, or to settle for some lesser amount. Only a highly principled defendant, indeed, would choose to suffer the larger economic blow required to clear his name, rather than forgo trial and quietly settle out of court.

In addition to increasing the pressure on a defendant to settle out of court, the size of the defendant's liability may be so large as to assume punitive characteristics. This liability may take the form of an adverse judgment at trial or a settlement based on potential liability at trial. In either case, when a large class of plaintiffs suffers even minor economic injury, the amount of compensatory liability can be staggering.²²⁴ Undeniably, this liability represents no more than the amount of the injury caused by the defendant. A defendant faced with enormous compensatory potential liability, however, cannot help but feel punished. In this situation, the retributive societal purpose of awarding punitive damages may be adequately served by the effects of the class action device.

Plaintiffs may argue that the class action device cannot be punitive because punishment requires a punitive intent. Punitive intent is not, however, required for the existence of a punitive *effect* that would adequately serve the retributive purpose of punitive damages. Both the de facto deprivation of the right to trial and the enormity of the amount of potential liability, when present, are the unintended punitive effects of

in these cases and the accompanying maneuvering for fees. Nor have I ever seen anything equal to the consternation of unbelieving businessmen, large and small, when told that the law literally does not provide them with a process for determining the merits of their defense; that any settlement within their purse, as a practical matter, may be their only chance for survival.

Kirkham, *Complex Civil Litigation—Have Good Intentions Gone Away?*, address delivered at the National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice (April 7-9, 1976). The address appears in full at 35 F.R.D. 273.

220. "Actions may be based more upon the defendant's ability to answer a money judgment than upon the seriousness of any offense." Remark of Senator Marlow W. Cook, Republican of Kentucky, *quoted in* AEI, *supra* note 123, at 19.

221. "A strike suit is a *meritless* suit brought by a plaintiff merely to coerce a quick and generous pay-off from a defendant who, does not want to contest even the meritless suit." GOULD, *supra* note 44, at 286.

222. A harassing suit, unlike a strike suit, is not filed with personal compensation in mind, though it too is usually without merit. A harassing suit is usually filed to 'get' someone, to bring adverse publicity to the defendant (or favorable publicity to the plaintiff), to attack the 'big boys,' to get media coverage for some point, etc. . . .

GOULD, *supra* note 44, at 298.

223. See GOULD, *supra* note 44, at 284-306.

224. For example, the bread price fixing conspiracy mentioned in note 159 *supra*. The individual consumers were overcharged four cents per loaf of bread. The total amount of damages was in the neighborhood of \$35 million. See note 159 *supra*.

an otherwise nonpunitive device.²²⁵ When these circumstances are present, they may serve to fulfill the societal purpose of punishing the defendant for his behavior. Prior to certifying a class for the recovery of punitive damages, the presence or absence of these punitive effects should be considered.

When the purposes and effects of the common question class action device amount to a virtual duplication of the purposes of punitive damages, the resulting redundancy may cause an award of punitive damages to be unnecessary. This is not to say, however, that the defendant is to be relieved of the retributive factor inherent in an award of punitive damages nor is society to be deprived of the deterrent effect that punitive damages has upon those who would otherwise commit antisocial acts. Neither is the individual plaintiff, with an injury so small that it renders litigation economically infeasible, to be denied an incentive to seek judicial redress. The common question class action device itself can, in many instances, adequately serve these interests. In class actions that do promote these interests, the burden visited upon the defendant in the form of an unwarranted and unnecessary award of punitive damages, is not justified by the corresponding societal interests of incentive, punishment, and deterrence. For these reasons, punitive damages should not be awarded when the purposes behind the award have already been fulfilled.

CONCLUSION

The modern common question class action has much in common with the practice of awarding punitive damages. Both function to provide an incentive to seek judicial redress in situations when the plaintiff's potential recovery would not justify litigation. In a single plaintiff action the possibility of punitive damages in excess of the amount necessary to compensate the plaintiff for the sustained injury provides the incentive to litigate. Similarly, the method by which the plaintiff is encouraged to litigate in the class action device is the ability to aggregate the damages of the entire class. In addition, the plaintiff's attorney is given an incentive by the prospect of a handsome fee if successful. Both methods may render feasible an otherwise economically impracticable lawsuit.

Both the class action device and the assessment of punitive damages serve a deterrent purpose. Punitive damages have been used to deter both the defendant and others from the commission of antisocial acts such as those involving oppression, malice, fraud, or gross negligence.

225. See notes 200-224 and accompanying text *supra*.

The *in terrorrem* effect of the class action device, however, has not been limited to such exceptional conduct. The common question class action has operated to deter defendants and others from virtually any antisocial behavior for which a large representative suit may be brought. The combination of the incentive and deterrent effects has transformed the plaintiff who brings a class action into a private attorney general. The device has allowed a single plaintiff, by suing on behalf of a class, to redress minor violations of the rights of the public at large, rights that would otherwise be left defenseless.

On the issue of retribution, the rationales behind class actions and punitive damages diverge. The effects, however, do not. The rationale of punitive damages is to punish the defendant for his act. The class action, on the other hand, was not designed as a retributive measure. Some of the effects on defendants in large class actions, however, have been so severe as to border on punishment. Two of these effects are: (1) the tremendous pressure on defendants to settle prior to trial because of adverse publicity, high cost of litigation, and fear of potential liability; and (2) the huge amounts of compensatory liability to which a large class action may subject a defendant. A defendant who is subject to these rigors may be justified in claiming that the class action device has substantial punitive effects upon those against whom they are filed. When the defendant feels he has been punished, the retributive societal purpose of punitive damages has been served.

Not all class actions share these similarities in purpose and effect with the assessment of punitive damages. Therefore, prior to certifying a class action for the recovery of punitive damages, a court should consider the societal purposes that punitive damages were designed to promote, the purposes and effects of the modern common question class action device, and the purposes that will inhere to the particular class action in question. The purposes of punitive damages are sufficiently served by the class action device itself when:

- (1) The amount of individual compensatory recovery is insufficient to warrant litigation by the injured party alone and the aggregate potential damages are sufficient to finance the lawsuit;²²⁶
- (2) The amount of aggregate compensatory recovery is large in relation to the net worth of the defendant;²²⁷ and
- (3) Some retributive effects upon the defendant exist, such as pressure to settle without trial due to adverse publicity, cost of de-

226. These circumstances effectuate the purpose of providing an incentive to litigate to plaintiffs with small claims. See notes 125-153 and accompanying text *supra*.

227. A large amount of aggregate recovery will further the societal purpose of deterring the defendant and others from similar conduct in the future. See notes 154-186 and accompanying text *supra*.

fending against a class action, or fear of a massive judgment; or the imposition of an enormous amount of compensatory liability in the form of judgment at trial or pretrial settlement.²²⁸

When all of the above factors are present, the assessment of punitive damages in a common question class action, in addition to the defendant's compensatory liability, is an unnecessary and unwarranted measure from which society derives no benefit. The presence or absence of these factors should therefore be considered by a court prior to certifying any class for the recovery of punitive damages.

Mark Donald Peters

228. These punitive effects will serve the retributive societal purpose. See notes 200-225 and accompanying text *supra*.