THE LAWLESSNESS OF AGGREGATIVE TORTS

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I. INTRODUCTION

Aggregative torts rely on nontraditional theories of liability in which collective, rather than individual, interests are paramount. All legal rules are to some extent aggregative in that they purport to treat all similarly situated persons alike. But traditionally, in most instances involving allegedly tortious conduct, individual rights are deemed to be invaded and the claim for recovery is personal to the individual victim.¹ Some legal actors such as partnerships and corporations embody formal aggregations of interests even though they are treated as singular entities for tort liability purposes. And modern systems of civil procedure allow for the procedural aggregation of individual claims via class actions and other forms of consolidation. But while class actions sacrifice individual autonomy in collective claiming processes to achieve consistent outcomes and economies of scale, the underlying claims remain individual in nature.² Indeed, the elements of most traditional torts are sufficiently unique to individual claimants that they preclude the commonality required for class certification.³

By contrast, aggregative torts involve substantive, as well as procedural, aggregation; collectivity is built into the elements of the torts, themselves. Large, informally defined groups of persons are alleged to be the collective victims of the defendant’s wrongdoing, and the defendant’s conduct is wrongful in part because it adversely affects large numbers of persons. The injuries for which the victim group seeks recovery are typically pure economic losses not necessarily flowing out of tangible harms. And when aggregative tort claims result in recoveries, typically the spokespersons retain the proceeds either for their own benefit, to reimburse them for previous expenditures on the group’s behalf, or for the benefit of the group, as such. Invariably, the plaintiffs’ lawyers are among the major beneficiaries of successful aggregative tort recoveries. A paradigmatic, albeit hypothetical, example of such a claim

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1. See generally PROSSER & KEETON ON THE LAW OF TORTS § 1, at 5-6 (5th ed. 1984).

2. See, e.g., Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693-94 (Tex. 2002) (“The procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions; it does not lessen the quality of evidence required in an individual action . . . .”).

might involve allegations that otherwise lawful industries have unjustly enriched themselves over the years by adversely affecting the health and welfare of the residents of upstate New York. The spokespersons for such a broadly defined victim group might be governmental agencies whose health care costs have allegedly increased because of such commercial activities, or they might be self-appointed class-action representatives. Were the plaintiffs to prevail, the damages awarded might well be measured in the billions of dollars.

Aggregative torts have only recently arrived on the American tort scene. Traditionally, tort law has focused on the rights of individual victims claiming to have been harmed individually. But in recent years, a minority of American courts have utilized a variety of aggregative tort theories in attempting to justify massive judicial reallocations of economic resources. This idea briefly describes these developments and argues that, to a profound degree, they exceed the legitimate bounds of judicial authority and competence. Although a substantial majority of American courts have rejected these aggregative approaches, so long as even a small minority of judges in high places allow plaintiffs to exploit these lawless claims, a plea for judicial restraint is warranted.

II. THE RISE OF AGGREGATIVE TORT THEORIES OVER THE PAST SEVERAL DECADES

Not all aggregative torts are of recent origin. Thus, a remarkable exception to tort law’s traditional emphasis on individual rights (and wrongs) is the common law tort of public nuisance, long considered an anomaly by legal commentators.  

No doubt sensing the potential lawlessness of the tort, courts traditionally constrained the public nuisance concept by allowing actions to be brought only by public representatives seeking to enjoin ongoing activities that unlawfully (almost always criminally) interfere with the rights of the general public.  

Even within these constraints, public nuisance stands out as an unusual common law example of an aggregative tort.

Arguably, the purest forms of recently devised aggregative torts are brought by or on behalf of governmental units at the local, state, and federal levels against commercial actors for having increased the costs of administering various public welfare systems including, depending on

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4. See, e.g., F. H. Newark, The Boundaries of Nuisance, 65 L.Q. Rev. 480, 480 (1949) (noting that public nuisance is a “mongrel” that is “intractable to definition”).  

the nature of the defendants’ allegedly antisocial activities, health care payments, general law enforcement, and continuing efforts to maintain beneficial social and economic climates in the relevant geographical areas. The governmental plaintiffs in these cases claim to be adversely impacted by the commercial activities of allegedly harmful, anti-social industries such as asbestos, tobacco, firearms, and lead paint. Although the doctrinal bases of these actions include negligence, fraud, unfair competition, public nuisance, and violations of state and federal statutes, in essence they are rooted in equitable principles of unjust enrichment. And although they are formally couched in terms of the government recovering on its own behalf, they are clearly brought to vindicate the rights of the public generally.

The most spectacular governmental claims of this sort were brought in the 1990s by the attorneys general of various states against members of the tobacco industry, seeking reimbursement of tobacco-related health care expenditures under public welfare programs such as Medicaid. These tort actions were filed after facts were revealed beginning in 1994 that supported claims that the tobacco industry had knowingly misled the public and governmental regulators regarding the levels and addictive qualities of nicotine contained in tobacco products. Although the theoretical soundness of the unjust enrichment theory of recovery in these cases was open to serious question, the states and the tobacco

6. See Ganim v. Smith & Wesson Corp., 780 A.2d 98, 115-16 (Conn. 2001) (“The plaintiffs alleged that the existence of the nuisance [presented by defendant’s gun distribution system] is a proximate cause of injuries and damages suffered by [the city], namely, that the presence of illegal guns in the city causes costs of enforcing the law, arming the police force, treating the victims of handgun crimes, implementing social service programs, and improving the social and economic climate [of the city].”).
10. See, e.g., City of St. Louis v. Lead Indus. Ass’n, No. 002-0245 (Mo. Cir. Ct. Nov. 20, 2002).
11. See generally Robert L. Rabin, The Tobacco Litigation: A Tentative Assessment, 51 DePaul L. Rev. 331, 337 (2001) (characterizing states’ reimbursement actions against the tobacco industry, brought on several doctrinal grounds, as rooted in unjust enrichment) [hereinafter Rabin, Tobacco Litigation].
12. Id. (noting that the state’s legal theories asserted that the industry’s conduct “constituted a wrong against the public, as well as against individual smokers”).
13. See generally id. at 337-42; see also Schwartz & Goldberg, supra note 5 (manuscript at 15-19, on file with author).
15. See Rabin, Tobacco Litigation, supra note 11, at 337-39. (noting that plaintiffs’ theories “rested on a shaky foundation” and on “dubious theoretical premises”).
industry reached a Master Settlement Agreement in 1998, calling for payment of $246 billion to the states and to the plaintiffs’ law firms that had brought and managed the claims on behalf of the states.\textsuperscript{16} Governmental plaintiffs have brought aggregative claims against the manufacturers and distributors of other products. Thus, municipalities have brought tort actions against the firearms industry, alleging that major manufacturers have commercially distributed their products in ways that have encouraged illegal secondary markets that supply weapons for use in violent criminal activities.\textsuperscript{17} The cities base their claims on a variety of tort doctrines including, prominently, open-ended versions of public nuisance. They seek reimbursement for the costs of enforcing the law against violent criminals, treating the victims of weapons-related crimes, and implementing a variety of social service programs. While most courts have denied these claims as a matter of law,\textsuperscript{18} a few have allowed them to proceed to trial.\textsuperscript{19} Municipalities have also brought public nuisance claims based on the health hazards posed by lead-based paint, but so far without success.\textsuperscript{20}

The federal government has pursued aggregative tort theories in an action against the tobacco industry to recover health care expenditures that it has paid or will pay to treat tobacco-related illnesses. The United States brought the action in 1999 under the Racketeer Influenced and Corrupt Organizations Act (RICO),\textsuperscript{21} seeking, \textit{inter alia}, disgorgement of $280 billion allegedly traceable to proceeds from cigarette sales between 1971 and 2001 to smokers who became addicted before the age of twenty-one.\textsuperscript{22} The government argues that the defendants engaged in a fraudulent pattern of concealing the dangers and addictive qualities of their products in connection with marketing efforts directed at minors. In essence, the federal government’s claim, in similar fashion to the claims

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\item \textsuperscript{17} See, e.g., City of Gary v. Smith & Wesson Corp., 801 N.E.2d 1222, 1231-32 (Ind. 2003); City of Cincinnati v. Beretta U.S.A. Corp., 768 N.E.2d 1136, 1141 (Ohio 2002). See generally Schwartz & Goldberg, \textit{supra} note 5.
\item \textsuperscript{19} See, \textit{e.g.}, City of Gary, 801 N.E.2d 1222.
\item \textsuperscript{20} See, \textit{e.g.}, City of Philadelphia v. Lead Indus. Ass’n, 994 F.2d 112 (3d Cir. 1993). The plaintiffs in these cases seek reimbursement for the costs of removing lead paint from public buildings.
\end{itemize}
just described at the state and local levels, is based on unjust enrichment. Using the broad language of RICO as a statutory springboard, the government seeks to vindicate the public interest in response to conduct it deems illegal under the Act. The federal district court, relying on an earlier decision of the Second Circuit, denied the defendants’ motion for summary judgment on the RICO disgorgement claim and certified the case for interlocutory appeal to the U.S. Court of Appeals for the D.C. Circuit.\(^{23}\) In a 2-1 decision, the Court of Appeals reversed the order below and granted summary judgment for the defendants on the ground that the disgorgement sought by the government is not available in a civil proceeding under RICO, which limits relief to forward-looking orders.\(^{24}\) Moreover, the majority reasoned that disgorgement would run the risk of duplicating recoveries that are available to private parties, while unfairly allowing the government to avoid a statute-of-limitations defense applicable to private claims.\(^{25}\)

If these actions by governmental plaintiffs represent pure forms of aggregative tort claims, then class actions for economic losses by nongovernmental plaintiffs may be thought of as hybrids. They are hybrids because, while the class-action format on its face implies that the aggregation is merely procedural and that the underlying claims are substantively individual in nature, in reality the plaintiffs frame the substantive claims aggregatively so as to exclude individualized factual elements such as product defect and proximate causation that either the claimants cannot prove or that might destroy the commonality required for class certification. In truth, these class-action hybrids are public, substantively aggregative claims dressed up rhetorically to resemble private, individual claims that have been aggregated procedurally to achieve economies of scale. An example will reveal what is happening in these cases. In the 1970s, 80s, and 90s, American tobacco companies labeled some brands of cigarettes “light” and “lowered tar and nicotine.” The Federal Trade Commission established criteria for testing and specifically approved the use of these labels on cigarettes passing the tests. The cigarettes so labeled became enormously popular.\(^{26}\) In light of the evidence that came out in the mid-90s regarding the tobacco industry’s fraudulent concealment of the truth regarding the dangers and addictiveness of their products, it appears to have occurred to plaintiffs’

\(^{23}\) See Philip Morris U.S.A., 396 F.3d at 1193.

\(^{24}\) See id.

\(^{25}\) Id. at 1201.

\(^{26}\) See Price v. Philip Morris, Inc., 2005 Ill. LEXIS 2071, No. 96236, at *3-41 (Ill. Dec. 15, 2005) (recounting the history of FTC regulation of the cigarette industry, including use of “lights” and “lower tar and nicotine” labeling).
lawyers that recovery might be obtained by persons smoking cigarettes labeled “light” and “low tar.”

However, if these claims were brought to recover for personal injuries caused by smoking light cigarettes, the uniqueness of each individual smoker’s circumstances—whether a given class member relied on defendants’ misrepresentations or would have suffered the same physical harm if the cigarettes had conformed to the labels—would very probably have destroyed the factual commonality required for class certification. Moreover, the claimants might not have been able to prove the elements of reliance and causation. So the plaintiffs’ lawyers came up with an alternative approach: they brought statewide class actions, based mostly on existing consumer protection statutes, seeking to recover for the economic losses allegedly suffered by light-cigarette smokers due to the cigarette companies’ misleading marketing.\(^\text{27}\) Simply stated, these smokers argued that they had not received what they had paid for—safer cigarettes—and that they should get all, or most, of their money back. Substantively aggregating the claims on a class-wide basis avoided the necessity of proving the elements of reliance and proximate causation, which would have been difficult to establish on an individual basis. Those elements could be assumed or more easily demonstrated from a group-wide perspective.\(^\text{28}\) Any doubts regarding the legitimacy of drawing these collective inferences are arguably eliminated by the consumer protection statutes themselves, which openly declare that they are to be liberally construed so as to give consumers every benefit of the doubt.\(^\text{29}\)

Although several of the courts that have considered these light-cigarette class actions have refused to certify,\(^\text{30}\) some have agreed to hear the claims on their merits.\(^\text{31}\) In one such case in Illinois, the trial judge


\(^{28}\) In effect, plaintiffs’ lawyers may approach these issues epidemiologically, showing that, as a group, consumers demanded more “low tar” cigarettes in response to the labeling, cf. supra note 25 and accompanying text, and that, as a group, they spent more on those cigarettes than they would have if the cigarettes had not been labeled in that manner. A majority of courts rejected plaintiffs’ attempts to collectivize the issues of reliance and causation in this manner. See, e.g., Henry Schein, Inc. v. Stromboe, 102 S.W.3d 675, 693-94 (Tex. 2002) (denying certification for a class of office management software purchasers).

\(^{29}\) See, for example, the Illinois Consumer Fraud Act involved in the Price decision: “This Act shall be liberally construed to effect the purposes thereof.” 815 ILL. COMP. STAT. 505/11a (2005).


awarded an estimated 1.14 million members of the state-wide class compensatory and punitive damages, attorney’s fees, and prejudgment interest totaling $10.1 billion. In December 2005, the Supreme Court of Illinois in a 3-2 decision reversed the judgment below, ruling that, because the FTC had authorized use of the “light” and “lower tar and nicotine” labels, the action is barred by the terms of the Illinois Consumer Fraud Act. Although its reading of the Consumer Act moots the other issues in the case, the majority opinion seriously questions whether the record at trial supported class certification on the issues of reliance, causation, and measurement of damages. Again, several trial courts have refused to certify classes in these light-cigarette cases. But a few other state courts have certified state-wide classes, and the final outcomes in those jurisdictions remain in doubt.

Consumer protection statutes of the sort involved in the light-cigarette litigation have provided a basis for plaintiffs to seek class certification of hybrid aggregative tort claims in other contexts. Besides the statutes, which exist in every state, the necessary ingredients for bringing such actions are quite simple: large industries that might be found to have exaggerated the benefits to consumers of their products and activities, including playing down in their marketing the concomitant risks to consumer health and welfare; and large victim groups that might be found to have incurred economic losses from purchasing and consuming products that were not as efficacious, or as safe, as their marketing had led the public to believe. Upon reflection, virtually every major industry in this country might be found to satisfy these criteria. Wisely, the plaintiffs’ bar has chosen to begin by going after what might be called “politically incorrect” industries—defendants upon whom, they hope, judges and juries will be comfortable shifting the blame for major public health problems plaguing the country. Thus, hybrid class actions aimed at recovering pure economic losses have been brought against members of the alcoholic beverages industry, for implicitly encouraging minors to drink; members of the fast-food industry, for encouraging eating habits that cause obesity and other

33. See Price, 2005 Ill. LEXIS 2071.
34. Id. at *137-42.
35. See generally Schwartz & Silverman, supra note 27.
health problems;\textsuperscript{37} and members of the pharmaceutical industry, for over-promoting prescription drugs that may be harmful when used as directed.\textsuperscript{38}

It will be observed that in all of these hybrid class actions, the way to convert traditional, uncertifiable personal injury claims into arguably certifiable consumer fraud claims is somehow to translate traditional elements of recovery for individual personal injuries into pure economic losses that members of the victim groups may be presumed to share in common. As indicated, consumer protection statutes appear to some observers to provide the means for making these translations,\textsuperscript{39} but they are not the only means available to plaintiffs’ lawyers. In the context of asbestos litigation, for example, plaintiffs who have already developed exposure-related cancers present the same individuality problems that prevent class certification of tort claims in other contexts. But when plaintiffs who have been exposed to asbestos fibers have not yet manifested physical symptoms, they often bring class actions to recover for their statistically increased risk of cancer,\textsuperscript{40} or for their emotional upset,\textsuperscript{41} or for the costs of medical monitoring aimed at detecting cancers if and when they appear.\textsuperscript{42} Unlike traditional personal injury claims, these claims take on the same fungible, aggregative qualities just described in connection with class actions for pure economic losses under consumer protection statutes. As in the consumer fraud contexts, most courts have refused to recognize these anticipatory claims based merely on exposure to asbestos.\textsuperscript{43} But some courts have allowed such claims and have certified class actions based upon them, especially in connection with claims for medical monitoring.\textsuperscript{44}

\textsuperscript{37} See, e.g., Pelman ex rel. Pelman v. McDonald’s Corp., 237 F. Supp. 2d 512 (S.D.N.Y. 2003), vacated in part and remanded, 396 F.3d 508 (2d Cir. 2005); see also Schwartz & Silverman, supra note 27 (manuscript at 38-41, on file with author).

\textsuperscript{38} See, e.g., West Virginia Rezulin v. Hutchinson, 585 S.E.2d 52 (W.Va. 2003); see also Schwartz & Silverman, supra note 27 (manuscript at 48-49, on file with author).

\textsuperscript{39} Some of these statutes provide specified dollar amounts as minimum recoveries per consumer, regardless of whether actual damages can be proven. These amounts range from $25 in Massachusetts to $2,000 in Utah. See Schwartz & Silverman, supra note 27 (manuscript at 22 & n.113, on file with author).

\textsuperscript{40} See generally James A. Henderson, Jr. & Aaron D. Twerski, Asbestos Litigation Gone Mad: Exposure-Based Recovery for Increased Risk, Mental Distress, and Medical Monitoring, 53 S. CAR. L. REV. 815, 822-23 (2002).

\textsuperscript{41} Id. at 823-36.

\textsuperscript{42} Id. at 836-49.

\textsuperscript{43} Id. at 828-31.

\textsuperscript{44} Id. at 838-41; see also Victor E. Schwartz et al., Medical Monitoring: The Right Way and the Wrong Way, 70 MO. L. REV. 349 (2005).
III. WHY AGGREGATIVE TORTS ARE LAWLESS TO THEIR CORE

Make no mistake about it, aggregative torts are inherently lawless and unprincipled. Even if the defendants in these cases deserve to be on some critics’ lists of anti-social industries, what is happening in the minority of American jurisdictions that have allowed these claims to proceed is most definitely not in the long-range best interests of this country. The end-objective of financially punishing “bad guys” does not begin to justify the means by which that end is being pursued. All but the most ardent anti-business advocates cannot help but wince, way down inside, at the prospect of courts reallocating potentially billions of dollars in the name of physically uninjured consumers, many of whom continue to demand the very same products and services paternalistically deemed by judges and juries to be against consumers’ best interests. The only interest group that would clearly benefit from the wide acceptance of aggregative torts would be those plaintiff’s lawyers who are conceiving, funding, and bringing these actions on a contingency-fee basis. Surely their clients, many of whom never receive anything from the recoveries and most of whom end up paying higher prices for consumer goods and services, are not benefiting in the same way as their lawyers.

Aggregative torts are not lawless simply because they are nontraditional, or court-made, or because they increase the liabilities of commercial enterprises. Liability law is evolving constantly, and courts legitimately expand on existing bases of recovery from time to time. Nor are aggregative torts lawless merely because they suggest that tort law has a public-law dimension, or that civil liability plays a regulatory role in helping to make our society marginally safer. Deterrence theorists and courts have long recognized these very real possibilities. Nor are these new torts lawless merely because the monetary stakes are high. When courts traditionally determine that the design of a popular model of automobile is dangerously defective, the stakes for the manufacturer in terms of future liability costs can be very high indeed.


46. See JAMES A. HENDERSON, JR. ET AL., THE TORTS PROCESS 35 (6th ed. 2003) (“For most ‘instrumentalists,’ the central social goal to be furthered by tort law is to maximize total wealth in society by deterring wasteful injuries and accidents.”).

47. See JAMES A. HENDERSON, JR. & AARON D. TWERSKI, PRODUCTS LIABILITY: PROBLEMS AND PROCESS 159 (5th ed. 2004) (“[A] manufacturer can wake up one morning and find itself confronted with the very real possibility that all the products it has sold for the last 20 years (all 450 billion of them) are legally defective.”).
Instead, the lawlessness of aggregative torts inheres in the remarkable degree to which they combine sweeping, social-engineering perspectives with vague, open-ended legal standards for determining liability and measuring damages. In effect, these new torts empower judges and triers of fact to exercise discretionary regulatory power at the macro-economic level of such a magnitude that even the most ambitious administrative agencies could never hope to possess. In exercising these extraordinary powers, courts arguably exceed the legitimate limits of both their authority and their competence. Regarding the limits of judicial authority, it is commonly understood that, in a representative democracy, macro-economic regulation is accomplished most appropriately by elected officials and their lawful delegates. Of course, traditional tort law unavoidably involves economic regulation to some extent. But these new aggregative torts involve self-conscious judicial regulation on such a breathtaking scale, abstracted from any commitment to the individual rights of individual victims, that they clearly exceed the political boundaries of judicial authority.

The second way in which these aggregative torts clearly exceed the boundaries of the judicial franchise concerns limits of the institutional competence of courts to address open-ended problems of economic planning and resource allocation. Like other processes of governmental decisionmaking, adjudication assures that affected parties will be allowed to participate in affecting outcomes. Thus, litigants are afforded the opportunity before a neutral arbiter to offer factual evidence and to invoke legal norms so that each side may respectfully insist upon a favorable decision as a matter of right. For this to be possible, the applicable legal rules governing a controversy must be specific enough to arrange the constituent elements into linear chains of logic so that each element may be considered more or less in isolation from the others and resolved, even if sometimes only tentatively, before moving on to the next. Only when the rules of decision are sufficiently specific to

48. See Robert B. Reich, Don’t Democracies Believe in Democracy?, WALL ST. J., Jan. 12, 2000, at A22 (“Excessive judicial lawmaking is faux legislation, which sacrifices democracy.”).

49. This analysis firmly rejects any “ends justify the means” arguments along the lines that “if tort courts don’t punish the bad guys, who will?”

50. The legislature and the executive are accountable to the electorate, who participate in lawmaking indirectly through the voting mechanism. Parties to contracts that create a form of private legislation participate by bargaining.

51. See generally James A. Henderson, Jr., Expanding the Negligence Concept: Retreat from the Rule of Law, 51 IND. L.J. 467, 469-77 (1976).

52. The law of contracts, for example, breaks down the issues in a contract dispute into subcategories such as contract formation, interpretation, adequacy of performance, and measure of recovery, with further subdivisions under each major heading. Traditionally, the law of torts breaks disputes into issues of duty, breach, causation, harm, and plaintiff’s fault, also with subdivisions.
support these logical structures can each party take the judge or jury through the elements of the case to the conclusion indicated by that party’s positions on the relevant facts and law.

In connection with these recently derived aggregative torts, the applicable law is so vague as to make no attempt logically to separate the relevant aspects for decision. Instead, vague standards leave it to the discretion of triers of fact to “do what is right” in factual contexts that juxtapose large numbers of putative victims against affluent groups of commercial actors. Because most of the elements relevant to these social-engineering decisions simultaneously relate to most of the other elements, the litigants cannot work their way through linear chains of logic and insist on outcomes as a matter of right. Instead, the parties become supplicants, begging for enough of the tribunal’s sympathy to cause it to bless them with a favorable exercise of its unreviewably boundless discretion. Thus, the lawlessness that inheres in aggregative torts resides not simply in courts exceeding the bounds of their political authority by functioning as politically unaccountable legislative bodies, but also in courts exceeding the limits of their institutional competence by effectively denying litigants a meaningful opportunity to have their day in court.

This notion of being denied one’s day in court obviously applies to the defendants in these aggregative tort actions, whose only hope is to appeal to the instincts of juries regarding the unfairness of potentially crushing liability for otherwise lawful conduct that might somehow be found to be economically detrimental to segments of the American public. Less obvious, but true nonetheless, is the fact that many of the putative victims in these cases are also denied meaningful representation of their interests by being lumped into amorphous classes of consumers of particular products. Certainly, the consumers who have suffered tangible personal injuries are disadvantaged when courts allow large numbers of uninjured claimants to move ahead of them in the queue of those seeking compensation via tort. The plaintiffs’ lawyers are rewarded when this distortion of priorities occurs because a successful aggregative tort can generate billions of dollars in contingency fees that are out of all proportion to levels of effort required. Moreover, given

53. This has been especially true in the context of asbestos litigation, where allowing thousands of uninjured claimants to recover jeopardizes the chances of badly injured claimants to recover. See James A. Henderson, Jr., Asbestos Litigation Madness: Have the States Turned a Corner?, 20 Mealey’s Litig. Rep.: Asbestos 3-4 (Jan. 10, 2006).

54. The point is not that the plaintiffs’ lawyers don’t work hard—many of them do. It is that they often are paid extravagantly well. See Robert A. Levy, Hired Guns Corral Contingent Fee Bonanza, LEGAL TIMES, Feb. 1, 1999, at 27. Plaintiffs’ lawyers earned $105,022 an hour per lawyer working on the states’ aggregative claims against the tobacco industry. Id.
the ways in which these mass claims are structured in order to achieve
class certification and success on the merits, the remedies that courts
provide often confer no direct benefits\(^{55}\)—and sometimes impose real
detriments\(^{56}\)—on the uninjured victims on whose behalf the actions
purport to have been brought.

That something quite unprincipled is occurring in the litigation
described in this Idea is further suggested by the fact that when courts
recognize these aggregative tort actions, allowing recovery for economic
losses and occasionally for emotional upset, they are acting contrary to
long-standing precedents that have denied such recoveries in the absence
of personal injury or property damage.\(^{57}\) To be sure, many of the claims
for pure economic losses sound in misrepresentation and fraud, for
which pure economic losses are traditionally recoverable.\(^{58}\) But these
aggregative claims are fraud-based in name only; the traditional
elements of fraud have been strategically eliminated to support class
certification and provability.\(^{59}\) Moreover, to the extent that the liability
imposed in these cases resembles strict enterprise liability aimed at
internalizing the social costs of undesirable commercial activities, many
of those liabilities are manifestly uninsurable by the commercial
enterprises on which they are imposed. Given the high degree of control
over the relevant risks exercised by the insureds—the victim classes—
moral hazard and adverse selection would combine to destroy any hope
of achieving the social insurance objectives that enterprise liability
purports, in theory, to achieve.\(^{60}\)

IV. CONCLUSION

Accepting for the sake of discussion that these aggregative torts are
unprincipled and lawless in the ways described, what can one expect in
the future? For one thing, it is certain that more of these claims will be

\(^{55}\) In connection with many of these aggregative torts, the plaintiffs’ lawyers seek funding
for scientific research foundations and facilities to conduct medical monitoring and research. See
Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994), reh’g denied, 654 So. 2d 919
(Fla. 1995); John Heilprin, DuPont Hit with $5 Billion Suit Over Teflon Risks, Assoc. Press, July 20,
2005. The lawyers are paid handsomely in cash but their clients often receive little or no direct
benefit.

\(^{56}\) See supra note 53 and accompanying text.

\(^{57}\) Some of the Consumer Protection Acts allow recovery for emotional upset as “actual
App. 1997). For the traditional rules denying recovery, see generally HENDERSON ET AL., THE
TORTS PROCESS, supra note 46, at 293-314 (emotional upset), 338-53 (pure economic loss).

\(^{58}\) HENDERSON ET AL., THE TORTS PROCESS, supra note 46, at 785-87.

\(^{59}\) See supra note 30 and accompanying text.

\(^{60}\) See generally James A. Henderson, Jr., Why Negligence Dominates Tort, 50 U.C.L.A. L.
REV. 377 (2002).
forthcoming. For example, if the alcoholic beverage and fast-food industries appear to be fair game to the plaintiffs’ bar, then can the soft-drink industry be far behind?\(^{61}\) Consistent with the viewpoint reflected in those cases, surely the Coca-Cola and Pepsi Cola companies, with all of their success in marketing products loaded with caffeine and refined sugar, must be misleading the American public into patterns of over-consumption that, in the aggregate, could be found by a jury of disgruntled consumers to be detrimental not only to the physical health of children, but also to the economic health of their parents. As indicated earlier, most courts before whom claims of these sorts are being brought can be expected to reject them.\(^{62}\) However, given the potential for multi-billion-dollar verdicts, even a relative handful of successful claims are sufficient to embarrass the judiciary and damage the economy. Why do even a few judges take these trumped-up, lawless claims seriously? And what can be done about it?

Regarding the question of “why?,” at the trial level the answer must lie, in part, in the reality that among the many thousands of competent trial judges in this country, a small minority simply lack the maturity and good sense to tell the difference between tort claims that seek redress for real injuries to the physical well-being of individual victims, on the one hand, and pseudo-tort claims cobbled together by aggregating the interests of large groups of so-called victims, on the other. Genuine tort claims primarily seek to benefit the victims of wrongdoing; aggregative tort claims seek primarily to benefit the political ambitions of public prosecutors and the financial ambitions of private lawyers. And some trial judges apparently are unable to tell the difference. More disturbing is the possibility that some judges, who realize well enough what is happening, have political agendas that allow them self-consciously to exceed the obvious limits of their institutional authority and competence in order to serve those agendas. Of course, all judges are unavoidably influenced to some extent by their politics.\(^{63}\) But some judges may allow their personal agendas to dominate excessively.

What, if anything, can be done to minimize the chances that a few appellate courts, notwithstanding these serious threats to judicial integrity, will recognize aggregative torts as legitimate extensions of liability law? Confusion and misunderstanding can be reduced by

\(^{61}\) Aaron D. Twerski, Dean of the Hofstra University School of Law, told the author in December 2005, that he had heard a rumor to this effect. In fact, he was accurate. See Walter K. Olson, *Taking Cola to Court*, CITY J., Winter 2006, at 9.

\(^{62}\) See supra notes 3, 19, 25, 31 & 37, and accompanying text.

\(^{63}\) See generally HENDERSON ET AL., *THE TORTS PROCESS*, supra note 46, at 154 & n.15, and accompanying text.
educational efforts by the parties directly affected, amicus groups, and legal commentators. Regarding the possibility of self-conscious judicial activism by some judges who envision themselves participating in a tort-based, pro-consumer movement, one can hope that those judges will come to appreciate that aggregative tort claims are designed to benefit the claimants’ lawyers more than consumers and that they threaten judicial integrity to a profound degree. And when reason runs out, one’s last hope is that judges will realize how embarrassing their approvals of these claims will prove to be, both to them individually and to their courts, in the longer run. Peer pressure may operate in this context, especially when combined with the possibility, in state jurisdictions in which members of the high courts are elected to office, of being turned out at the next election. When judges act like politicians, they deserve the politician’s fate.

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