The End of the Defendant Advantage in Tobacco Litigation

Howard M. Erichson
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I. INTRODUCTION

Years from now, when we look back at the history of mass tort litigation, it will not surprise me if we are able to speak sensibly of mass torts as being either pre-tobacco or post-tobacco. The current wave of tobacco litigation marks an important period in the development of mass torts, particularly regarding the balance of power between plaintiffs and defendants.

The tobacco litigation has established, above all, that the systematic defendant advantage in mass tort litigation is dead. The tobacco mass tort litigation is both the strongest proof of the demise of the defendant advantage, and a contributing cause of that demise. The death of the defendant advantage results largely from four developments. First, the financial resources of the elite plaintiffs' bar have reached a point where plaintiffs' lawyers can fund large-scale litigation at the highest level. Second, coordination among plaintiffs' lawyers has developed so that it rivals or exceeds strategic organization and information-sharing on the defense side. Third, state attorneys general and other government actors have entered the mass tort fray on the plaintiffs' side. Fourth, plaintiffs' lawyers have found ways to pursue mass tort class actions, despite a long reluctance by courts to certify them and a string of appellate decisions in the 1990s that appeared to squelch any remaining hope for class actions in mass toxic exposure cases.

All four of these developments figured prominently in the emergence of tobacco claims as viable mass tort litigation after decades of industry invincibility. The first important signs of the shift came in 1994, although several more years would pass before any plaintiff successes were registered. It was 1994 when leading plaintiffs' lawyers began in

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earnest to coordinate their efforts and pool their substantial resources to take on the tobacco defendants. It was also 1994 when the state attorneys general began filing actions against cigarette makers to recoup money spent treating tobacco-related illnesses. This new wave of tobacco litigation demonstrated that plaintiffs' lawyers were able to coordinate their efforts to rival the concentration of power on the defense side. It also demonstrated that a segment of the plaintiff bar had accumulated the resources to pursue and sustain massive litigation at the highest level. It showed, as well, that under the right circumstances government lawsuits can shift the balance of power between plaintiffs and defendants. In combination with new evidence from corporate insiders, these features were responsible for the turnaround in the tobacco litigation. These developments were so interdependent and so intertwined with a shift in public attitudes toward smoking that it can be hard to distinguish causes and effects. Without these developments, however, and especially the elimination of the systematic defendant advantage, it is difficult to imagine the tobacco settlements and verdicts of the past several years.

II. DAVID AND GOLIATH

The traditional model of personal injury tort litigation against corporate defendants looks like this: individual plaintiffs represented by solo or small-firm lawyers with limited resources versus giant corporate defendants represented by major national law firms. It is a model that has woven its way into our national consciousness and popular culture. Think of Jan Schlichtmann driving his tiny firm into financial ruin representing the plaintiffs in the Woburn contaminated water litigation against the forces of Hale & Dorr and Foley, Hoag & Eliot, and their Fortune 500 clients, in Jonathan Harr's non-fiction bestseller, A Civil Action. In fiction, think of John Grisham's The Rainmaker, in which young lawyer Rudy Baylor fights for his dying client against the Great Benefit Insurance

1 On the lawyer consortium that pooled its resources to bring the Castano nationwide class action, see infra text accompanying notes 37-40.
2 On the government recoupment lawsuits, see infra text accompanying notes 48-71.
3 Most notably, whistleblower tobacco scientist Jeffrey Wigand and paralegal Merrell Williams exposed critical information and documents concerning the tobacco industry's knowledge of the dangers and addictiveness of cigarettes. See Peter Pringle, Cornered: Big Tobacco at the Bar of Justice 56-71, 177-93 (1998); Dan Zegart, Civil Warriors: The Legal Siege on the Tobacco Industry 77-81, 129-33, 181-93 (2000).
Company's legal team. In film, picture Paul Newman in David Mamet's *The Verdict*, scrappily representing his injured client against a hospital and its imposing law firm.

The image the traditional litigation model brings to mind, more than any other, is the biblical story of young David facing the Philistine giant, Goliath of Gath. Goliath stood six cubits and a span. His spearhead weighed 600 shekels of iron. At the sound of Goliath's voice, the armies of Israel "were dismayed and greatly afraid." Countless plaintiffs and their lawyers have felt similar dismay when squaring off against six-cubit corporate defendants represented by 600-shekels law firms. The David-and-Goliath model not only applies to individual litigation, but also applied to much mass tort litigation until the last decade or two, as evidenced most clearly by the tobacco litigation. Even if there were many similarly situated plaintiffs, each of those plaintiffs faced a massive defendant in a litigation mismatch, and like the Israelite armies, each felt outsized by the giant.

The defendant's litigation advantage, in this traditional model, is threefold: resources, information, and organization. Large corporate defendants have the resources to fund litigation at the highest level, and to hire lawyers who, in turn, have the resources and experience to litigate at the highest level. Not only does this give defendants the advantage that comes from top-quality legal work, but more troublingly, it can allow defendants to outspend and outlast plaintiffs in a litigation war of attrition. In addition to greater resources, defendants generally have an information advantage. Defendants often possess information essential to proving liability, and it is each plaintiff's struggle to get that information. Moreover, a single defendant has information about the full scope of the litigation, whereas plaintiffs may be ignorant of what is happening in cases other than their own. Finally, defendants have the organizational advantage of being able to implement a coherent strategy, either as a single defendant or as a relatively small group engaged in a joint defense, in contrast to plaintiffs represented by multitudes of competing independent lawyers.

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6 *The Verdict* (Twentieth Century Fox 1982).
7 See 1 Samuel 17:1-58.
8 Id. at 17:4.
9 Id. at 17:7.
10 Id. at 17:11.
Of course, a defendant advantage does not guarantee a defendant victory. Plenty of individual and mass tort plaintiffs have succeeded in their claims against large corporate defendants, despite the defendants’ litigation advantage. Indeed, some mass tort defendants have been bankrupted by mass tort claims. Even young David, after all, defeated Goliath with a well-aimed slingshot. But a party with superior resources, information, and organization has a systematic advantage in litigation. In tort litigation—or more precisely, in settlement negotiations that occur in the shadow of tort litigation—an advantageous litigation position is what matters most.

For forty years, from 1954 to 1994, the tobacco litigation provided the perfect example of David and Goliath litigation. Plaintiff after plaintiff was crushed by the tobacco defendants. Hundreds of claims were filed during those decades. The vast majority of the claims were dismissed before trial. Of those that went to trial, nearly all of the cases were won by defendants. The rare plaintiffs’ verdicts were reversed on appeal. Author Peter Pringle summed up well the tobacco defendants’ record during this period: “Eight hundred and thirteen claims filed against the industry, twenty-three tried in court, two lost, both overturned on appeal. Not a penny paid in damages.”

An important part of the tobacco defendants’ strategy during this period was to encourage voluntary dismissals by plaintiffs by making litigation so burdensome and expensive that many plaintiffs and their lawyers chose to drop their claims rather than pursue them to trial. In a now-infamous 1988 internal memo, one R.J. Reynolds defense lawyer wrote:

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11 The asbestos litigation alone has driven twenty-six major companies into bankruptcy. See Queena Sook Kim, Asbestos Claims Continue to Mount, WALL ST. J., Feb. 7, 2001, at B1; Queena Sook Kim, Firms Hit by Asbestos Litigation Take Bankruptcy Route, WALL ST. J., Dec. 21, 2000, at B4.

12 See 1 Samuel 17:49-51.

13 In 1954, the first products liability lawsuit was filed against a tobacco company for illness attributed to cigarettes. See INSTITUTE OF MEDICINE, CLEARING THE SMOKE: ASSESSING THE SCIENCE BASE FOR TOBACCO HARM REDUCTION 595 app. c (Kathleen Stratton et al. eds., 2001), available at http://books.nap.edu/books/0309072824/html/95.html#pagetop (last visited Nov. 20, 2001).

14 In 1994, two critical events signaled a turnaround in the tobacco mass tort litigation. In March, a major consortium of leading plaintiffs’ lawyers filed the Castano nationwide tobacco class action in federal court in Louisiana. In May, Mississippi filed the first of the state attorney general lawsuits against the tobacco industry. See Emily Barker, Tobacco Litigation: Guide to the Players, AM. LAW., Mar. 1996, at 108-109, 116.

15 PRINGLE, supra note 3, at 7.
[T]he aggressive posture we have taken regarding depositions and discovery in general continues to make these cases extremely burdensome and expensive for plaintiffs' lawyers, particularly sole practitioners. To paraphrase General Patton, the way we won these cases was not by spending all of [R.J. Reynolds'] money, but by making that other son of a bitch spend all of his.16

The strategy worked. Tobacco plaintiffs voluntarily dismissed numerous claims during those forty years, and given the expense of pursuing the claims, and the low odds of success, it is difficult to call their decisions irrational.

In recent years, however, the defendant advantage has largely disappeared. Prior to 1994, the outlook for tobacco plaintiffs was bleak: no class actions were certified and every individual plaintiff lost. But just a few years later, the dynamics had changed entirely, as had the results. In 1997, a second-hand smoke class action of flight attendants17 resulted in a $349 million settlement.18 In 1997-98, the tobacco defendants agreed to pay over $240 billion to settle the claims of the state attorneys general.19 In 2000, a Florida statewide tobacco class action20 went to jury trial and resulted in a punitive damages verdict of $145 billion, the largest monetary verdict in history.21 Several individual smokers have won jury verdicts, including one verdict in June 2001 awarding $3 billion in punitive damages.22 Earlier in 2001, an individual plaintiff was paid

$1,087,191 by Brown and Williamson, the first time a tobacco company had actually paid damages to a smoker pursuant to a verdict.\textsuperscript{23}

Tobacco plaintiffs are bound to face setbacks. Some of the recent verdicts undoubtedly will be reduced or reversed on post-trial motions or appeal,\textsuperscript{24} and commentators debate whether the attorney general settlements were really as unfavorable to the tobacco companies as they first appeared.\textsuperscript{25} Cigarette makers continue to win most of the lawsuits brought by smokers.\textsuperscript{26} Nevertheless, the turnaround in the tobacco litigation has been nothing short of remarkable. Verdicts, settlements, and payments in the millions and billions of dollars would have been unthinkably during the decades when the tobacco Goliaths still enjoyed the full force of their litigation advantage.

How did it happen? To some extent, it may simply be another story of a maturing mass tort, shifting from an extended phase of defense dominance to a transitional phase of occasional plaintiff victories.\textsuperscript{27} Or perhaps it is a narrower story of a particular litigation turnaround based on new evidence from corporate whistleblowers. But I think the main story behind the tobacco litigation turnaround is neither particular to tobacco,

\textsuperscript{23} See Ron Word, Ex-Smoker Collects from Cigarette Co., ASSOC. PRESS, Mar. 8, 2001, available at 2001 WL 15178482 (reporting on payment to plaintiff Grady Carter after Florida Supreme Court rejected Brown & Williamson’s request to avoid payment pending appeal to U.S. Supreme Court). See also Gordon Fairclough, Justices Decline to Hear Appeal by Tobacco Maker, WALL ST. J., July 2, 2001, at B9 (reporting on U.S. Supreme Court’s denial of certiorari in the Grady Carter case).

\textsuperscript{24} See Gordon Fairclough, Buying “Insurance,” Tobacco Firms Agree to Pay $709 Million Into Escrow Account, WALL ST. J., May 8, 2001, at A3 (reporting on analyst’s prediction that the defendants will win their Engle appeal); Fairclough, supra note 22, at A3 (reporting analyst’s prediction that Boeken punitive damage award will be reduced substantially); Anthony Sebok, What Big Tobacco Did Wrong, FINDLAW, July 18, 2000, at http://writ.news.findlaw.com/sebok/20000718.html (last visited Jan. 27, 2002) (arguing that the Engle verdict probably will be reversed for failure to require proof of plaintiffs’ reliance on defendants’ misrepresentations); James Sterngold, A Jury Awards a Smoker With Lung Cancer $3 Billion From Philip Morris, N.Y. TIMES, June 7, 2001, at A14 (quoting analyst’s prediction that Boeken verdict will not stand).

\textsuperscript{25} See Ian Ayres, Using Tort Settlements to Cartelize, 34 VAL. U. L. REV. 595 (2000) (arguing that the attorney general settlements create barriers to entry and allow the tobacco companies to charge monopoly-like prices); see also Tobacco Control Res. Ctr., Inc., Conflict of Interest for States?, at http://www.tobacco.neu.edu (last visited Nov. 20, 2001) (“One of the major criticisms of the settlements between the states and tobacco companies in 1997 and 1998 has been that these settlement agreements tie states’ revenues to tobacco sales.”).

\textsuperscript{26} See Fairclough, supra note 22; Sterngold, supra note 24.

nor simply a tale of mass tort maturation. Rather, I think the main story behind the tobacco turnaround is the increasing power of plaintiffs’ lawyers, and the concomitant decline of the systematic defendant advantage. The tobacco story, seen in this light, may say something important about the future of mass tort litigation.

III. PLAINTIFFS’ BAR: RESOURCES

In the early years of tobacco litigation, individual lawyers and firms representing tobacco plaintiffs squared off against the tobacco industry and were outgunned. Two developments within the plaintiffs’ bar altered the balance of power: the plaintiffs’ bar’s willingness and ability to coordinate, which I will take up in the next section, and the plaintiffs’ bar’s increasing wealth, which I will briefly address here.

As mass tort litigation became a lucrative business for plaintiffs’ lawyers, and as that field came to be dominated in the 1970s and 1980s by a relatively small segment of the bar, that core group of plaintiffs’ lawyers and firms accumulated sufficient wealth to be able to invest substantial resources from the last mass tort into prosecuting the next one. Fees from Agent Orange, Dalkon Shield, and various other matters, but above all, asbestos, filled the war chests of the mass tort plaintiffs’ bar.\(^2\)

Of course, not all plaintiffs’ lawyers have the resources to pursue complex, large-scale litigation. These resources are concentrated in an elite cadre of mass tort lawyers who have taken the experience and fees accumulated in earlier mass tort litigation and continued to invest it in subsequent matters. Many of the same names would show up on lists of the key players in multiple mass torts, including asbestos, DES, Dalkon Shield, breast implants, diet drugs, and of course, tobacco. There has been a concentration of power within the mass tort plaintiffs’ bar. It makes sense that such a concentration of power would be essential to a leveling of the litigation playing field, as major corporate defendants already enjoy the concentration of power that is inherent in a capitalist economy.

This concentration of economic power within the plaintiffs’ bar has been critical to the success of plaintiffs in the tobacco litigation. The resources of the elite mass tort bar made it possible for the Castano group

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to collect a substantial litigation war chest to pursue a nationwide smokers' class action, and allowed many of the state attorneys general to rely on private, contingent-fee lawyers to prosecute the states' recoupment lawsuits against the tobacco companies.

Not only was the mass tort bar's wealth instrumental in the success of tobacco plaintiffs, that wealth has been magnified by the plaintiffs' success in the tobacco cases. From the state attorney general settlements alone, plaintiffs' lawyers stand to collect more than ten billion dollars in fees over the next two decades. If the Engle and Boeken verdicts stand, they may yield billions of dollars in fees as well, and of course, additional large verdicts or settlements may be yet to come. The tobacco litigation has both demonstrated and reinforced the fact that mass tort litigation now can be financed on the plaintiffs' side at a high level, just as it has always been financed at a high level by the defense.

Interestingly, several notable tobacco victories have been achieved on more limited budgets by lawyers outside the mass tort regulars. Richard Boeken, the smoker who was recently awarded a three billion dollar verdict, for example, was represented by Michael Piuze, a Los Angeles lawyer with his own small firm. Piuze handled the case reportedly on a "shoestring budget." However, it was the resource-intensive path-breaking work of other lawyers that enabled Piuze to pursue his successful "trial-in-a-box" strategy of using only a small number of witnesses and several dozen documents unearthed during the attorney general lawsuits. For the Boeken trial, Piuze relied on documents that were unearthed and made available by the lawyers handling the attorney general cases, and that were narrowed down by lawyers handling earlier tobacco trials.

\[\text{For a discussion of the Castano group, see infra text accompanying notes 37-40.}\]
\[\text{For a discussion of the role of private lawyers in the state recoupment lawsuits, see infra text accompanying notes 64-71.}\]
\[\text{See Milo Geyelin, California May Be Hazardous to Big Tobacco's Health, WALL ST. J., June 8, 2001, at B1.}\]
\[\text{Id.}\]
\[\text{Id.}\]
\[\text{See id.}\]
\[\text{See id.; Harriet Chiang, Taking on Big Tobacco: Lawyers Team Up to Win Smoker Suits, S.F. CHRON., July 1, 2001, at A4.}\]
Not only has the mass tort plaintiffs' bar acquired the resources to invest in pursuing large-scale litigation at the highest level, it has also become increasingly willing to pool those resources, to share information, and to coordinate on strategy. There is undoubtedly some truth to the contrasting popular images of the personal injury plaintiffs' lawyer as an independent-minded, entrepreneurial-spirited lone wolf, and the defense lawyer as a more establishment-oriented corporate personality. But perhaps even lone wolves can see the benefit of hunting in packs when the opportunity arises. By working together, plaintiffs' lawyers neutralize the defendants' litigation advantage. Coordination by counsel addresses all three aspects of the systematic defendant advantage: resources, information, and organization. By pooling resources, the plaintiffs' bar counters defendants' ability to wear down plaintiffs merely by outspending them. By sharing information, the plaintiffs' bar reduces the inherent information advantage defendants generally enjoy. Information-sharing does not eliminate plaintiffs' need to obtain the information through investigation and discovery, but it reduces plaintiffs' disadvantage by facilitating the rapid spread of information among plaintiffs' counsel. By coordinating on matters of strategy, the plaintiffs' bar eliminates the disadvantage it faces against the coherent strategy of a single defendant, and can even surpass the organizational coherence of some joint defense groups in multi-defendant litigation. Working together, plaintiffs' counsel informally aggregate their clients' claims, even in the absence of formal judicial aggregation of the lawsuits.36

Coordination was critical to the turnaround in the tobacco litigation. The Castano group, a coalition of plaintiffs' lawyers who joined forces in 1994 to pursue a nationwide class action against the tobacco industry, was the first tobacco litigation effort in which plaintiffs came forward with power to match that of the defense. The lawyers, led by Wendell Gauthier, amassed a huge litigation war chest as well as a vast amount of legal talent and mass tort experience. The team grew to include over sixty firms, each of which contributed at least $100,000 toward expenses.37 The nationwide class action was certified by the district
court, but decertified by the Fifth Circuit during a wave of appellate rejections of mass tort class actions. Despite the ultimate failure of the Castano class action, the creation of such a formidable power on the plaintiffs’ side helped shift the momentum and set the stage for the success of the government lawsuits and individual and class suits a few years later.

The Castano group is but one example of lawyer coordination on the plaintiffs’ side in the tobacco litigation. Members of the Tobacco Trial Lawyers Association (“TTLA”), a group headed by Florida lawyer Woody Wilner, share information and documents to enhance their effectiveness on behalf of tobacco plaintiffs. The TTLA describes its mission as supporting lawyers “who fight on behalf of consumers injured or killed by tobacco.” Michael Piuze was helped by the TTLA on his way to winning the three billion dollar Boeken verdict. Similarly, the Association of Trial Lawyers of America (“ATLA”) sponsors a Tobacco Litigation Group, which facilitates coordination and information-sharing among tobacco plaintiffs’ lawyers. Other organizations encourage such coordination as well, notably including Professor Richard Daynard’s Tobacco Control Resource Center and Tobacco Product Liability Project.

Tobacco is not the first mass tort litigation in which plaintiffs’ lawyers have coordinated their efforts. Indeed, the history of informal aggregation in mass torts dates back at least to 1963, in the MER/29 pharmaceutical litigation. But the combination of serious coordination plus very substantial pooled resources, rivaling the coordination and litigation spending power of defendants, is largely a post-asbestos

39 Castano v. American Tobacco Co., 84 F.3d 734, 752 (5th Cir. 1996).
40 See infra text accompanying notes 73-79.
41 See Milo Geyelin, Behind Giant Tobacco Verdicts, a Legal SWAT Team, WALL ST. J., Apr. 12, 1999, at B1; Erichson, supra note 36, at 390-91.
42 See Tobacco Trial Lawyer’s Assoc., at http://www.ttlaonline.com (last visited Nov. 20, 2001).
43 See Geyelin, supra note 33 (“Mr. Piuze also got help from the Tobacco Trial Lawyers Association, a loose network of tobacco plaintiffs’ lawyers who pioneered the [trial-in-a-box] concept and have been honing tactics and exchanging information for four years.”).
development. The current tobacco litigation is the first large-scale test of
the power of the post-asbestos mass tort plaintiffs' bar, and it has shown
that power to be formidable.

Looking to the future, there is every reason to believe that the
power of the plaintiffs' bar will continue in future mass tort litigation. The
concentration of resources is unlikely to disappear, as the business of
litigation often allows the rich to get richer. As to coordination,
experience has shown the value of teamwork in mass tort litigation.
Moreover, the institutions and processes are in place to enable mass tort
plaintiffs' lawyers to organize. Most significantly, ATLA sponsors
dozens of litigation groups, as well as an Internet-based information-
sharing network known as the ATLA Exchange. Advances in
information technology, especially the Internet, have facilitated
coordination among lawyers pursuing related claims. In future mass tort
litigation, plaintiffs' lawyers will continue to enjoy the benefits of
coordination and information-sharing, as well as the resources to invest in
litigation at the highest level, just as they have benefited from those
resources and coordination in the tobacco litigation.

V. GOVERNMENT LAWSUITS

In the tobacco litigation, government lawsuits played an enormous
role not only in their own right, but also as a force in advancing private
claims. This is a familiar phenomenon in antitrust and securities litigation,
in which it is common for government civil or criminal prosecutions to
trigger the filing of private claims against the targeted defendants, but
prior to tobacco, it was not a familiar phenomenon in mass torts.

Mississippi filed the first state suit against cigarette makers in
1994, and over the next three years most of the states followed. The
states sought to recoup money spent treating tobacco-related illnesses. A
similar lawsuit filed by the federal government is proceeding. The state
government recoupment suits, rather than any individual or class lawsuit,

\[47\] See ATLAExchange, at http://exchange.atla.org (last visited Nov. 20, 2001); Erichson,
supra note 36, at 396.

\[48\] See Howard M. Erichson, Coattail Class Actions: Reflections on Microsoft, Tobacco,
and the Mixing of Public and Private Lawyering in Mass Litigation, 34 U.C. DAVIS L.

\[49\] See Hanoch Dagan & James J. White, Governments, Citizens, and Injurious Industries,

\[50\] See Tobacco Control Res. Ctr., Inc., supra note 19, at ch. 1.

proved to be the real breakthrough litigation against the tobacco industry, because the government suits had at least two advantages over the earlier wave of private actions. First, the state governments were not outsized by the tobacco defendants in terms of resources or power, especially when those state attorneys general joined forces and pursued their claims collectively. Second, as a practical matter, the government suits sidestepped the cigarette makers’ favorite defense—that individual smokers should accept personal responsibility for choosing to smoke. The state lawsuits drove the defendants to the negotiating table, where they eventually reached multi-billion dollar settlements with all of the states.

The government lawsuits not only resulted in sizable settlements for the states, but they facilitated the prosecution of tobacco claims by private plaintiffs. The state suits, especially Minnesota’s, were instrumental in spreading useful information to tobacco plaintiffs. Minnesota established a publicly accessible document depository, and many of the documents were made available on the Internet via a Minnesota plaintiffs’ firm website. Since then, those documents have formed the foundation for the trial presentations of a number of private tobacco plaintiffs’ lawyers.

The state suits may well have resulted in a change in public attitudes about tobacco liability. State governments seeking reimbursement, particularly as a group, carry a certain moral authority that private plaintiffs lack. More significantly, once the defendants agreed to

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52 Professor Richard Cupp makes this point well:
One of the keys to the states’ success was combining their efforts. Even when acting alone, a state seeking reimbursement for Medicare expenditures has greater litigation resources and moral authority than is typically present in mass tort actions initiated by private attorneys. When large numbers of states combine to bring such actions, their resources and moral authority are even more powerful.


53 See Erichson, supra note 48, at 10.


56 See Erichson, supra note 48, at 11-14.

57 See Cupp, supra note 52, at 689.
settle with the attorneys general, the idea of tobacco liability no longer seemed like an impossibility.\textsuperscript{58} Moreover, given the size of the state attorney general tobacco settlements, jurors felt empowered to think in terms of billions of dollars.\textsuperscript{59}

When state attorneys general and other government actors enter the mass tort fray on the side of the plaintiffs, pursuing discovery to prove defendants’ tortious conduct, they substantially erode any power advantage of corporate defendants. Looking to future mass torts, it appears likely that government entities will continue to file lawsuits to recover money spent on preventing or treating harm caused by the tortious conduct of corporate defendants. Such suits have been filed involving handguns\textsuperscript{60} and lead paint,\textsuperscript{61} and others are likely to follow.\textsuperscript{62} The National Association of Attorneys General provides a forum for coordination of such litigation and received a $50 million infusion for its enforcement fund as part of the 1998 tobacco settlement.\textsuperscript{63}

In considering the impact of government lawsuits on future mass tort litigation, we must take account of the role of private lawyers in the government suits. In the tobacco litigation, most of the states retained private lawyers on contingent fees to handle the litigation, rather than relying on lawyers within their own attorney general offices.\textsuperscript{64} In fact, many of the lawyers retained by the states had been members of the Castano class action group.\textsuperscript{65} Similar contingent fee arrangements were used to hire private lawyers in government actions against lead paint and gun makers.\textsuperscript{66} New Orleans Mayor Marc Morial’s explanation for hiring

\begin{itemize}
\item \textsuperscript{59} See W. Kip Viscusi, \textit{A Postmortem on the Cigarette Settlement}, 29 CUMB. L. REV. 523, 543-44 (1999).
\item \textsuperscript{62} See Dagan & White, supra note 49, at 354; Viscusi, supra note 59, at 544.
\item \textsuperscript{63} See Cupp, supra note 52, at 687.
\item \textsuperscript{65} See Barker, supra note 14, at 108-13, 116.
\end{itemize}
top plaintiffs' lawyers for the city's handgun lawsuit is telling: "You want lawyers who can take on giants."67

Had the government plaintiffs been unable to retain top lawyers on contingent fees, it is quite possible that they would never have filed their recoupment lawsuits, much less won sizable settlements. As long as attorneys general and other government actors can use contingent fee lawyers to pursue recoupment actions, they will want to do so. Such arrangements allow government actors to raise revenue and right wrongs without expending the resources of their offices. Contingent fee arrangements by government plaintiffs, however, raise serious policy concerns.68 First, they give government legal authority to persons with a direct financial stake in a matter, which can skew the incentives for the government's lawyers.69 Second, they allow government entities to pursue litigation without the usual checks and balances provided by legislative control over purse-strings.70 If state legislatures respond to these concerns by restricting or prohibiting government retention of contingent fee lawyers,71 then the role of government lawsuits in mass tort litigation may diminish considerably.

VI. CLASS ACTIONS

In recent mass tort litigation, defendants have sometimes sought to use class actions as a tool for achieving global resolutions, particularly through settlement class actions.72 Generally, however, class actions remain a tool for plaintiffs. To the extent class actions can be used for mass tort litigation, they aggregate power on the plaintiffs' side and tend to cut away at defendants' litigation advantage.

Mass tort class actions got off to a rocky start. The Advisory Committee Notes to the 1966 federal class action rule stated:

67 Van Voris, supra note 66, at A15.
68 See Erichson, supra note 48, at 35-40.
69 See id. at 36-38.
70 See id. at 38-39.
71 See Cupp, supra note 52, at 698 (suggesting, as an appropriate legislative response, the elimination of contingent fees for government lawsuits).
72 See, e.g., Amchem Prods., Inc. v. Windsor, 521 U.S. 591 (1997). As Professor Richard Nagareda explains, the 1990s "saw a rethinking of the class action as not so much a procedural device for actual trial of similar claims but primarily as the means by which to bind class members to a resolution of their claims negotiated out of court." Richard A. Nagareda, Punitive Damage Class Actions and the Baseline of Tort, 36 WAKE FOREST L. REV. 943, 944 (2001).
A "mass accident" resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways. In these circumstances, an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried.73

Numerous courts cited the Advisory Committee Note in rejecting class actions for not only "mass accidents" such as air crashes and hotel fires, but also for mass toxic torts. Then, in the 1980s and early 1990s, district courts began to certify some mass tort class actions, only to be reversed by a string of appellate decisions decertifying the class actions, often with strong language suggesting skepticism about the viability of mass tort class actions. These decisions were handed down by a number of federal courts of appeals in mass tort cases involving tobacco,74 penile implants,75 pick-up trucks,76 and blood products,77 as well as by the U.S. Supreme Court in two asbestos settlement class actions, Amchem Products v. Windsor78 and Ortiz v. Fibreboard Corporation.79

Plaintiffs' lawyers responded to these federal appellate class decertifications primarily by turning their attention to the state courts. As Professor Mark Weber points out, until recently the federal courts were viewed as the natural forum for mass tort class actions, both because multidistrict litigation ("MDL") transfer80 facilitates consolidated handling of cases, and because federal courts seemed a more sensible forum for thorough nationwide resolution of mass tort claims.81 However, the Supreme Court's recent decisions on both Rule 23 and MDL have made

73 FED. R. CIV. P. 23(b)(3) advisory committee's note (1966).
74 Castano v. American Tobacco Co., 84 F.3d 734 (5th Cir. 1996).
75 In re American Med. Sys., Inc., 75 F.3d 1069 (6th Cir. 1996).
76 In re General Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768 (3d Cir. 1995).
77 In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293 (7th Cir. 1995).
While federal courts have become less attractive for mass tort resolution, and the federal appellate courts in particular appear hostile to mass tort class actions, some state courts have been more hospitable. After the Castano nationwide tobacco class action was decertified by the federal court of appeals, the plaintiffs' lawyers changed tack and pursued a number of statewide class actions, some of them in state courts. Most federal and state courts have refused to certify tobacco class actions, but some state courts have allowed them to proceed. The Engle class action, with its historic $145 billion punitive damage verdict, was in Florida state court, as was the Broin flight attendants second-hand smoke class action. A cigarette class action has gone forward in Louisiana state court, as well. In a West Virginia state court, a medical monitoring class action proceeded to trial, although it resulted in a mistrial. Professor Weber notes that "the Florida tobacco litigation should increase the momentum stateward, and legislation is not likely to change that condition, at least with regard to dispersed product injuries." Although

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88 Weber, supra note 81, at 101. Professor Weber goes on to argue that the shift of mass tort litigation from federal to state court is a good thing. See id. at 100-03.
some states have recently given class actions a cooler reception,\(^9\) it appears that mass tort class actions have met with greater success in state court than in federal court.

In addition to learning to avoid federal court, tobacco plaintiffs' lawyers have learned to define classes more narrowly. Unlike the Castano effort, which sought certification of a class including essentially all nicotine-addicted persons in the United States,\(^9\) more recent class actions have been defined on a statewide basis, or have been defined more narrowly in other ways, such as the class of flight attendants exposed to second-hand smoke.\(^9\) Interestingly, in the Engle class action in Florida, the plaintiffs initially sought certification of a nationwide class of smokers, but the appellate court on interlocutory appeal narrowed the class to include only Florida plaintiffs.\(^9\)

There is one type of class action that, rather than empowering plaintiffs, tends to give defendants greater negotiating leverage. That is the settlement class action, in which a class settlement is negotiated prior to the motion for class certification, and plaintiffs and defendants then jointly seek class certification conditioned on the settlement. The potential problems of settlement class actions have been discussed at length elsewhere.\(^9\) It suffices to repeat here that in a settlement class action, plaintiffs lose a significant piece of the bargaining leverage they would have in a class action certified for purposes of litigation. Significantly, the settlement class action is the type of class action most emphatically discouraged by the Supreme Court's decisions in Amchem\(^9\) and Ortiz.\(^9\) Thus, to the extent class actions serve to empower plaintiffs, they are continuing, albeit with narrower class definitions and decidedly mixed success. But to the extent class actions could reinvigorate the defendant advantage, they have been sharply restricted. This is not to say that mass tort settlement class actions have disappeared. The Supreme


Court left the door open for such settlements under the right circumstances. As evidenced by the recent settlement class action in the diet drugs litigation, however, the newer brand of settlement class action appears to include greater protections of class members’ interests than did the settlements in Amchem, Ortiz, and earlier cases.

**CONCLUSION**

While each mass tort litigation has its own properties, they are not so different as to make it impossible to spot trends in the way the litigation is handled by the lawyers. Thus, while the tobacco litigation is a rather extraordinary story by virtue of its magnitude and the rapidity of its momentum shift, that story helps us get a clearer picture of how future mass torts are likely to be approached. It is a story that bodes well for plaintiffs.

In the future, as in the past, defendants facing emerging mass tort litigation will hire prominent lead counsel, as well as local counsel, and will devote substantial resources to the defense. As always, mass tort defendants will strive for a coherent strategy based on thorough information-gathering. But instead of facing individual plaintiffs and counsel with limited budgets and no strategic organization, mass tort defendants will face something quite different. They will face well-established, well-funded plaintiffs’ lawyers playing leading roles in the litigation, willing to invest substantial resources to pursue the plaintiffs’ claims. They will face an organized plaintiffs’ bar, in the form of ATLA litigation groups and other coalitions, able to share information, coordinate strategy, and in some instances pool resources. Sometimes, they will face state attorneys general or other government actors pursuing recoupment claims based on defendants’ tortious conduct, and some of those government entities may be represented by leading private lawyers on contingent fees. The defendants will see class actions filed, and some of those class actions will likely be certified, especially statewide class actions in state courts.

If this accurately describes what defendants are likely to face in the post-tobacco world of mass tort litigation, is there a systematic advantage for defendants? Is it David-and-Goliath litigation? It seems to me that

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these developments wipe out nearly all of the advantage large corporate
defendants formerly had over plaintiffs in mass tort litigation. This brings
us back to the idea of dividing mass tort litigation into pre-tobacco and
post-tobacco eras. For pre-tobacco mass tort litigation, it seems plausible
to think in terms of David and Goliath, or a systematic defendant
advantage. For post-tobacco mass tort litigation, the playing field appears
more level. Goliath has not shrunk, but David has grown.

I see this mostly as a healthy development. I take it as axiomatic
that in an adversary system of dispute resolution, a level playing field is
better than a tilted one. That is not to say that the end of the defendant
advantage has no downside. First, as plaintiffs’ lawyers acquire greater
resources, there is a risk of over-investment. In other words, plaintiffs’
lawyers looking to invest fees in the next mass tort litigation may pursue
claims that are less well-founded than claims they would pursue with
scarcer resources. Thus, the end of the defendant advantage in mass tort
litigation naturally leads to an increase in the filing of mass tort claims.
An increase in litigation imposes costs in lawyers' fees and expenses as
well as the public costs of the court system. It also increases the
likelihood that non-meritorious claims will be asserted, or that defendants
will feel compelled to settle despite valid legal defenses.99 Second, as the
plaintiffs’ bar becomes more powerful, its role in public policy issues—
including, for example, the issue of who should bear the public health
costs of smoking—becomes greater. Some commentators have expressed
the concern that litigation is not an effective or appropriate way to make
broad public policy.100 These are legitimate concerns, worthy of attention.
It does not seem to me, however, that these concerns are appropriately
addressed by maintaining a dispute resolution system in which plaintiffs
are systematically disadvantaged based on a power imbalance.

The end of the systematic defendant advantage does not mean that
plaintiffs will necessarily prevail in the litigation. In any given mass tort
litigation, it remains perfectly plausible that defendants will win on the
law or facts, or in the dynamics of litigation and negotiation. Defendants

99 This argument has been advanced on the editorial page of the Wall Street Journal,
which has described a “tilting of the system to favor the plaintiffs,” and argued that
“[s]omething has gone seriously wrong when defendants with solid, legally compelling
arguments no longer feel safe taking their chances in a courtroom.” Editorial, The
100 See, e.g., Robert A. Levy, Turning Lead Into Gold, LEGAL TIMES, Aug. 23, 1999, at
21; Cohen, supra note 28, at 22. But see Robert B. Reich, Regulation Is Out, Litigation Is
In, USA TODAY, Feb. 11, 1999, at 15A (arguing that when legislatures and regulatory
agencies fail to protect the public interest, “perhaps regulating through lawsuits is better
than not regulating at all”).
may still have advantages over plaintiffs as a matter of tort law or evidence law. Indeed, as tort plaintiffs enjoy greater litigation success, the law of torts, procedure, or evidence may shift in favor of defendants, just as an earlier wave of tort reform followed a perception that tort plaintiffs had become too successful. *The Wall Street Journal*, for example, recently editorialized in favor of tort reform legislation as a response to the growing power of the “ impresarios of the plaintiffs bar.”

In individual tort litigation, as opposed to mass torts, defendants retain many advantages over plaintiffs. The developments addressed in this Article simply do not apply to tort cases in which the stakes are insufficient to justify heavy investment, and in which the number of plaintiffs is too low to produce coordinated strategy, government involvement, or class certification. Without the benefit of the substantial investment and coordination that plaintiffs’ lawyers bring to modern mass tort litigation, tort plaintiffs in individual cases may face a daunting challenge litigating against defendants with greater resources and information.

Nor does the end of the systematic defendant advantage mean that all is well in the world of mass tort litigation. There is plenty of reason to remain pessimistic about finding ways to resolve mass torts efficiently and justly. But it does mean that mass tort defendants are less likely to

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101 Several commentators have observed that the standard for admissibility of expert testimony enunciated by the Supreme Court in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), gives defendants an advantage over plaintiffs in civil litigation. See Ned Miltenberg, *Out of the Fire and into the Frying Pan or Back to the Future*, TRIAL, Mar. 2001, at 19 (“[T]he Daubert-Joiner-Kumho trilogy has had a devastating effect on civil plaintiffs, at least in federal courts and in those states that have fully adopted *Daubert*.’’); D. Michael Risinger, *Navigating Expert Reliability: Are Criminal Standards of Certainty Being Left on the Dock?*, 64 ALB. L. REV. 99, 110 (2000) (reporting empirical finding that in civil cases, “nearly two-thirds of challenged plaintiff expertise [is] rejected, whereas in the small number of cases where plaintiffs have challenged defense-proffered expertise, less than half the defense proffers have been rejected”).


103 As Professor Richard Cupp puts it, “the torts landscape presents a picture comparatively favorable to defendants in most respects, but featuring truly enormous spikes in select mass tort claims.” Cupp, *supra* note 52, at 687.

prevail out of the sheer litigation advantage that comes from superior resources, information and organization. It means that plaintiffs are less likely to abandon their claims as casualties of a war of attrition. To that extent, the end of the systematic defendant advantage strikes me as good news.