

03-7140(L)

03-7141(CON)

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

—
In re SIMON II LITIGATION
—

SIMON II LITIGATION, PLAINTIFFS-APPELLEES,

v.

PHILIP MORRIS USA, INC. (FORMERLY KNOWN AS PHILIP MORRIS INCORPORATED), R.J. REYNOLDS TOBACCO CO., BROWN AND WILLIAMSON TOBACCO CORP. (INDIVIDUALLY AND AS SUCCESSOR BY MERGER TO THE AMERICAN TOBACCO Co.) AND LORILLARD TOBACCO COMPANY, DEFENDANTS-APPELLANTS,

LIGGETT GROUP, INC., DEFENDANT.

—
Appeal from a Class Certification Order of the United States District Court
for the Eastern District of New York
—

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES
AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, *Amicus Curiae* The Chamber of Commerce of the United States, states that it is not a corporation and has no parent corporation.

The Chamber of Commerce of the United States (the Chamber) respectfully submits this amicus brief, which is being filed with the consent of the parties.

INTEREST OF *AMICUS CURIAE*

The Chamber is the world's largest business federation, representing a membership of more than 3,000,000 businesses and organizations of every size. Chamber members operate in every sector of the economy and transact business throughout the United States, as well as in a large number of countries around the world. A central function of the Chamber is to represent the interests of its members in important matters before the courts, Congress, and the Executive Branch. To that end, the Chamber has filed *amicus curiae* briefs in numerous cases that have raised issues of vital concern to the nation's business community.

Because the Chamber's members frequently become defendants in class actions arising from so-called "mass torts," the Chamber has a longstanding interest in the development of the standards governing class certification in such cases. The district court's decision to abandon, as inappropriate to "complex litigation," many of the rules that traditionally have limited class certification threatens to change the course of class action practice. Of particular concern to the Chamber is the court's decision to modify New York's choice-of-law rules to allow certification of a nationwide class action.

Until now, federal courts have consistently refused to certify nationwide class actions in product defect cases because the need to apply the laws of many different states would make such a sprawling class action unmanageable. The decision below suggests that these difficulties can be avoided, and such classes certified, by applying the law of a single state to the claims of all class members. Although seemingly tailored just for tobacco cases, the choice-of-law rule adopted by the district court could be applied in many other cases, prompting a spate of new class action filings against the Chamber's members. Accordingly, the Chamber has a substantial interest in persuading this Court to reverse the district court's novel decision.

ARGUMENT

The federal courts have generally held that liability for harm caused by nationally-marketed products cannot be determined by reference to a single state's law. Applying the choice-of-law regimes of many jurisdictions, these courts have concluded that such cases implicate the law of each and every state in which the challenged product was sold.¹ Often, they have expressly rejected arguments that the

¹ See, e.g., *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 288 F.3d 1012, 1018 (7th Cir. 2002); *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1188 (9th Cir. 2001); *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 674-675 (7th Cir.), *cert. denied*, 122 S. Ct. 348 (2001); *In re Rhone-Poulenc Rorer*, 51 F.3d 1293, 1302 (7th Cir. 1995); *Spence v. Glock, G.m.b.H.*, 227 F.3d 308, 313-14 (5th Cir. 2000); *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1085 (6th Cir. 1996); *Castano v. American Tobacco Co.*, 84 F.3d 734, 741-43, 749-50 (5th Cir. 1996); *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff'd sub nom.*, 521 U.S. 591

law of the defendants' principal place of business should be applied.² Accordingly,

(1997); *Walsh v. Ford Motor Co.*, 807 F.2d 1000, 1017-1019 (D.C. Cir. 1986) (“*Walsh I*”); *In re Rezulin Prods. Liab. Litig.*, 210 F.R.D. 61, 70-71 (S.D.N.Y. 2002) (“*Rezulin*”); *Neely v. Ethicon, Inc.*, 2001 WL 1090204, at *8 (E.D. Tex. Aug. 15, 2001); *Zapka v. Coca-Cola Co.*, 2000 WL 1644539, at *4-5 (N.D. Ill. Oct. 27, 2000); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 194 F.R.D. 484, 487-90 (D.N.J. 2000); *Lyon v. Caterpillar, Inc.*, 194 F.R.D. 206, 211-17 (E.D. Pa. 2000); *Clay v. American Tobacco Co.*, 188 F.R.D. 483, 500-01 (S.D. Ill. 1999); *Dhamer v. Bristol-Myers Squibb Co.*, 183 F.R.D. 520, 532-34 (N.D. Ill. 1998); *Chin v. Chrysler Corp.*, 182 F.R.D. 448, 456-57 (D.N.J. 1998); *In re Ford Motor Co. Vehicle Paint Litig.*, 182 F.R.D. 214, 224 (E.D. La. 1998); *Fisher v. Bristol-Myers Squibb Co.*, 181 F.R.D. 365, 369 (N.D. Ill. 1998); *Tylka v. Gerber Prods. Co.*, 178 F.R.D. 493, 498 (N.D. Ill. 1998); *In re Ford Motor Co. Bronco II Prod. Liab. Litig.*, 177 F.R.D. 360, 369-71 (E.D. La. 1997) (“*Bronco II*”); *In re Ford Motor Co. Ignition Switch Prods. Liab. Litig.*, 174 F.R.D. 332, 341-42, 346-54 (D.N.J. 1997) (“*Ignition Switch I*”); *In re Masonite Corp. Hardboard Siding Prods. Liab. Litig.*, 170 F.R.D. 417, 422-23 (E.D. La. 1997) (“*Masonite I*”); *Harding v. Tambrands Inc.*, 165 F.R.D. 623, 631-32 (D. Kan. 1996); *Martin v. American Med. Sys., Inc.*, 1995 WL 680630, at **4-5, 10 (S.D. Ind. Oct. 25, 1995); *Walsh v. Ford Motor Co.*, 130 F.R.D. 260, 271-75 (D.D.C. 1990).

² See, e.g., *Bridgestone/Firestone, Inc.*, 288 F.3d at 1018 (reversing decision to apply law of defendants' headquarters to nationwide class action alleging breach of warranty and consumer fraud claims and concluding that “[b]ecause [the] claims must be adjudicated under the law of so many jurisdictions, a single nationwide class is not manageable”); *Spence*, 227 F.3d at 314 (rejecting notion that the law of the state “where the product was manufactured and where it was placed in the stream of commerce” should control warranty claims in nationwide product defect class action); *Rezulin*, 210 F.R.D. at 70 (concluding that New Jersey’s interest in regulating the conduct of resident manufacturer did not outweigh the interests of “every other state in ensuing that its own citizens are compensated for their injuries” and “that the standards it sets for product sales within its borders are complied with”); *Bronco II*, 177 F.R.D. at 370-71 (rejecting plaintiffs’ proposal to apply Michigan law to warranty claims of 650,000 putative class members because that jurisdiction was defendants’ principal place of business and the alleged location of key vehicle design decisions); *Clay*, 188 F.R.D. at 497-98 (rejecting proposed application of law of defendant’s principal place of business in nationwide product defect class action); *Lyon*, 194 F.R.D. at 218 (“the applicable state law may not be limited to the [law]” of the

the vast majority of federal courts have refused to certify nationwide class actions in state-law product liability cases. Most state courts have also rejected such class actions: indeed, just two weeks ago, a Florida appellate court threw out the largest punitive damages verdict in history and ordered a statewide class action against the tobacco companies decertified because, among other reasons, the trial of the claims of the class of all Florida smokers – many of whom previously had lived and suffered injury in other states – would “require examination of numerous significantly different state laws governing the different plaintiffs’ claims.” *Liggett Group, Inc. v. Engle*, 2003 WL 21180319, at *7 (Fla. Dist. Ct. App. May 21, 2003).

The district court here, however, was determined to overcome the accepted wisdom that variations in state law render such nationwide class actions unmanageable. Recognizing “the fact that the law of fraud and other legal bases for recovery varies from state to state,” and acknowledging that this variation stood as an “impediment to the determination of total damages” for all class members, the court concluded that “this problem would be largely obviated” if a single state’s law were

defendant’s principal place of business); *Chin*, 182 F.R.D. at 456-57 (refusing to apply law of manufacturer defendant’s home state to all claims, noting that each class member’s home state “has an interest in protecting its consumers from in-state injuries caused by foreign corporations and in delineating the scope of recovery for its citizens under its own laws”); *Ignition Switch I*, 174 F.R.D. at 347-48 (same); *Masonite I*, 170 F.R.D. at 423 (“the analysis favors application of some law other than that of Masonite’s primary place of business.”).

applied. *In re Simon II Litig.*, 211 F.R.D. 86, 103 (E.D.N.Y. 2002) (“*Simon II*”). Having determined that this outcome was necessary to its goal of certifying the class, the court decided to apply New York law to the claims of smokers from Alabama to Wyoming. As we discuss below, however, both New York’s choice-of-law rules and constitutional principles require rejection of the district court’s approach. Accordingly, as in *Engle*, state-law variation requires decertification of the class.

I. CONTROLLING CHOICE-OF-LAW PRINCIPLES REQUIRE APPLICATION OF THE LAWS OF FIFTY-ONE JURISDICTIONS TO THE CLASS MEMBERS’ CLAIMS

To permit certification of this nationwide class action, the district court decided that New York law would govern both the global determination of compensatory liability and damages and the assessment of defendants’ aggregate liability for punitive damages. To achieve this result, the court invented a new choice-of-law rule for mass torts that flouts both New York’s established choice-of-law regime and constitutional limitations on the application of state law to extraterritorial conduct. The Chamber agrees with appellants that there are many fatal flaws in the decision. But the erroneous choice-of-law analysis is, by itself, enough to require reversal of the decision and decertification of the class.

A. The District Court’s Analysis Violates New York’s Choice-Of-Law Rules

New York courts resolve choice-of-law problems in tort cases through the application of “interest analysis,” pursuant to which the court selects “the law of the state with the most significant interest in the litigation.” *Lee v. Bankers Trust Co.*, 166 F.3d 540, 545 (2d Cir. 1999) (citing *Paduld v. Lilarn Props. Corp.*, 620 N.Y.S.2d 310, 311 (N.Y. 1994)). For conduct-regulating aspects of the law, such as those involved here, New York courts will “almost invariably” apply the law of the place of the tort (“*lex loci delicti*”), because that jurisdiction is presumed to have the greatest interest in regulating conduct that causes harm within its borders. *Cooney v. Osgood Mach., Inc.*, 595 N.Y.S.2d 919, 924 (N.Y. 1993); *see also Schultz v. Boy Scouts of Am., Inc.*, 491 N.Y.S.2d 90, 95 (N.Y. 1985) (“the law of the place of the tort will usually have a predominant, if not exclusive, concern”) (internal quotation marks and citations omitted); *Lee*, 166 F.3d at 545.

When the alleged misconduct and the alleged injury occur in different states, “the place of the wrong is considered to be the place where the last event necessary to make the actor liable occurred.” *Schultz*, 491 N.Y.S.2d at 94 (citations omitted). In fraud claims, the “last event necessary to make the actor liable” is the injury to the plaintiff, which occurs “where the plaintiff is located.” *Odyssey Re (London) Ltd. v. Stirling Cooke Brown Holdings Ltd.*, 85 F. Supp. 2d 282, 292 (S.D.N.Y. 2000)

(internal quotation marks and citation omitted). *See also, e.g., Rosenberg v. Pillsbury Co.*, 718 F. Supp. 1146, 1150 (S.D.N.Y. 1989); *Sound Video Unlimited, Inc. v. Video Shock Inc.*, 700 F. Supp. 127, 134 (S.D.N.Y. 1988). Because the class members were injured in every state in the nation, the application of New York’s traditional interest analysis to this case clearly would require their claims to be decided under the laws of 51 different jurisdictions.

The district court, however, posited that “rules designed for one-on-one disputes may require modification” when applied to “mass delicts — with many plaintiffs, complex causation questions, and transitory goods.” *Simon II*, 211 F.R.D. at 169. In its view, “a tort class action of the magnitude and scope of the Tobacco litigation” called for a “hand-tailored application of [New York’s interest analysis].” *Id.* at 168. And, in general, it believed that “the wheel has turned to a period of equity and natural law with regard to modern, complex tort problems” – a new regime in which “notions of individual justice” would “trump[] sovereign interests in affairs that by their nature have a supranational or suprastate scope.” *Id.* at 171-72 (internal quotation marks omitted). In support of this view, the court claimed that “[m]ost modern scholarship concludes that choice of law rules can, and should, lead to the application of a few state laws, a single state law, federal common law, national

consensus law, or abandoning *Klaxon* analysis altogether in complex litigation.” *Id.* at 172.

The district court’s radical theory that normal choice-of-law rules should be set aside in “complex litigation” flatly violates settled New York law. New York courts have consistently applied their normal choice-of-law rules even in cases raising allegations of complex and widespread conduct. In *Ackerman v. Price Waterhouse*, for example, a New York appellate court refused to certify a “global class” encompassing residents of 38 states and four foreign countries because “the plaintiffs [had] not met their burden of establishing that the relevant [New York] choice of law principles will not ultimately require application of widely divergent laws of multiple jurisdictions concerning the claims and defenses in this action.” 683 N.Y.S.2d 179, 189-90 (App. Div. 1998) (citation omitted). *See also Lewis Tree Serv., Inc. v. Lucent Techs., Inc.*, 211 F.R.D. 228 (S.D.N.Y. 2002) (refusing to certify nationwide class action because “the alleged fraud * * * took place in all fifty states” and “New York choice of law rules would require” the laws of those states to be applied); *Rezulin*, 210 F.R.D. at 70-71 (refusing to certify nationwide class action because New York choice-of-law rules would require application of law of each state in which the class members were injured).

Because New York law does not recognize a special choice-of-law rule for “mass torts,” a federal court sitting in diversity is not authorized to create one. *See Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 496 (1941). As the district court admitted, choice-of-law rules are *substantive*, in that they determine “the nature and specific contours of a party’s rights.” *Simon II*, 211 F.R.D. at 178; *see also Klaxon*, 313 U.S. 487. Accordingly, the choice-of-law analysis mandated by state law cannot be altered in the interest of certifying a class action. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997) (“Rule 23’s requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure ‘shall not abridge, enlarge or modify any substantive right’”).

Defending its decision to apply New York law to the claims of all class members, the district court emphasized that “the gravamen, focus, center of activity and prominence of defendants’ misconduct converged in New York.” *Simon II*, 211 F.R.D. at 175. But New York’s interest analysis affords little weight to the locus of the defendants’ activities. *See, e.g., Rosenberg*, 718 F. Supp. at 1150 (finding it “immaterial” that alleged misrepresentations occurred in New Jersey or were transmitted from New Jersey to New York when plaintiffs suffered injury in another state, and holding that “[t]he locus of the fraud” was the state of injury); *Burke v. Dow Chem. Co.*, 797 F. Supp. 1128, 1132 (E.D.N.Y. 1992) (where New York residents

sued “for alleged torts whose locus was also New York[,] * * * it makes no difference where the product was manufactured or where the manufacturers were domiciled”); *Kramer v. Showa Denko K.K.*, 929 F. Supp. 733, 741 (S.D.N.Y. 1996) (rejecting argument that defendant’s “place of incorporation and principal place of business as well as the location of manufacture and testing of the product at issue” was “the situs of defendant’s allegedly tortious conduct”) (internal quotation marks and citation omitted); *Magnus v. Fortune Brands, Inc.*, 41 F. Supp. 2d 217, 221 (E.D.N.Y. 1999); *Frink Am. Inc. v. Champion Road Mach. Ltd.*, 48 F. Supp. 2d 198, 205 (N.D.N.Y. 1999); *Hamilton v. Accu-Tek*, 47 F. Supp. 2d 330, 340 (E.D.N.Y. 1999). The location of the defendants’ activities does not become more important because many plaintiffs, whose own contacts are dispersed throughout the nation, have been joined together in a nationwide class action.³

The district court reasoned that the action’s focus on punitive damages made New York’s interest in the case particularly dominant, finding that “New York’s interest in punitive damages appears more significant in this action than that of any other state.” *Simon II*, 211 F.R.D. at 176. According to court below, “[p]unitive

³ The district court also stated that “major investors have been based in New York,” “[d]ominant industry lawyers were also based in New York,” and “substantial amounts of cigarettes are sold in New York.” *Simon II*, 211 F.R.D. at 175. But none of these facts give New York a greater interest than other states in applying its law to the claims of individuals who suffered injury elsewhere.

damage issues bear directly on the regulation of dangerous conduct within [New York's] borders" and, "[a]s the place of incorporation and business of the major actors in the conspiracy New York also has an interest in seeing that they, as its wards, are not unduly punished by excessive punitive damages imposed in other states." *Ibid.*

In fact, however, New York has *no* legitimate interest in punishing conduct that took place outside its borders. As the Supreme Court recently emphasized in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 123 S. Ct. 1513 (2003), "as a general rule," a state does not "have a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the state's jurisdiction." *Id.* at 1522. "[E]ach State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *Id.* at 1523. Even if the district court were correct that the "gravamen" of the alleged misconduct "converged" in New York, there would be no doubt that a California smoker who purchased cigarettes in California, was exposed to tobacco advertising there, and fell ill in that State was injured by conduct committed in California, *not* New York, and that California has the paramount interest in deciding whether and how severely to punish the defendants for that conduct.

Indeed, under the district court's plan, New York law might well be used to punish conduct that was *lawful* where it occurred. As we explain in more detail below,

because of differences in state law, conduct that in New York constitutes actionable fraud giving rise to punitive liability might not even be tortious in other states. But as the Supreme Court stated unequivocally in *State Farm*, “[a] State *cannot* punish a defendant for conduct that may have been lawful where it occurred.” *Id.* at 1522 (emphasis added). “A basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders * * *.” *Id.* at 1523. The district court took no account of this limitation on its right to set punishment for the defendants’ nationwide conduct.

Finally, the district court concluded that the uniform application of New York law was justified by the need for “nationally applicable effective remedies” for the tobacco companies’ alleged wrongdoing. *Simon II*, 211 F.R.D. at 178; *see also id.* at 177 (“a state’s policy interest in allowing * * * redress for its citizens in another forum may outweigh an interest in strict application of its own law – particularly if the result is a lack of an effective remedy for its residents”). The classwide determination of punitive damages is not necessary to provide plaintiffs with “an effective remedy.” If no class action is certified, class members will be free to bring their own suits for both compensatory and punitive damages. The court’s desire to regulate the apportionment of punitive damages nationwide does not justify ignoring New York’s choice-of-law rules.

B. Constitutional Constraints Also Preclude Application Of New York Law To The Claims Of Every Class Member

Even if New York choice-of-law principles allowed the application of New York law to the claims of the entire class, constitutional limitations would prevent that result. The law of a single state cannot be applied to the claims of all plaintiffs in a nationwide class action unless there is a “significant contact or significant aggregation of contacts to the claims asserted by *each* member of the plaintiff class” which demonstrate that “the choice of [that state’s] law is not arbitrary or unfair.” *Phillips Petroleum v. Shutts*, 472 U.S. 797, 821-22 (1985) (emphasis added) (internal quotation marks and citation omitted).

In *Shutts*, the defendant carried on substantial business activities in the forum state, but that alone did not constitute a “significant contact or significant aggregation of contacts” with the claims of each plaintiff across the country. *Ibid.* The same is true here. No matter how much activity allegedly occurred in New York, it is undisputed that most of the putative class members purchased the defendants’ cigarettes in another state, formed whatever beliefs they had regarding the health effects of cigarettes in another state based on information available to them in that state, and incurred whatever injury they allege in another state. For such plaintiffs, there is no “significant contact” — there is barely any contact at all — between their claims and the State of New York. *See, e.g., Engle*, 2003 WL 21180319, at *6 n.14

("[one plaintiff] started smoking in Colorado, became a regular smoker in Colorado, and suffered his alleged smoking-related problems in Colorado. [His] only connection with Florida was that he moved here a few months before suit was filed."). If one of these plaintiffs sued the defendant who manufactured his or her brand of cigarettes in an individual action, it would plainly be "arbitrary and unfair" to decide such a case according to the law of New York (especially if the manufacturer involved was not one of the two defendants in this case with its principal place of business in New York). Even though such plaintiffs are anonymously "buried" within the national class action certified in this case, using New York law to resolve their claims is no less improper. The fact that participation in this class action is mandatory makes the uniform application of New York law even more troubling. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (recognizing "the tension between the limited fund class action's pro rata distribution in equity and the rights of individual tort victims at law").

As noted above, applying a single state's law to the claims of a nationwide class also raises federalism concerns. The district court contended that "notions of individual justice" should "trump [] sovereign interests" whenever "affairs * * * by their nature have a supranational or suprastate scope." *Simon II*, 211 F.R.D. at 171. But differences among state laws "are what a federal system is all about." Larry

Kramer, *Choice of Law in Complex Litigation*, 71 N.Y.U.L. REV. 547, 579 (1996). “[D]ifferent states with legitimate interests have made different judgments about how to handle tort problems.” *Ibid.* Thus, to apply the law of a single state to the claims of a nationwide class interferes with the legitimate interests of other states touching the litigation. See Robert A. Sedler, *The Complex Litigation Project’s Proposal for Federally-Mandated Choice-of-Law in Mass Tort Cases: Another Assault on State Sovereignty*, 54 LA. L. REV. 1085, 1086 (1994).⁴ These principles “must be respected even in a nationwide class action.” *Shutts*, 472 U.S. at 823.

II. THE DIFFERENCES IN SUBSTANTIVE LAW BETWEEN JURISDICTIONS MAKE A CLASS-WIDE TRIAL OF THE PLAINTIFFS’ CLAIMS IMPOSSIBLE

As the Florida court of appeals recently held, “choice-of-law problems present an insuperable roadblock to smokers’ class actions, even where the class is limited to one state’s residents.” *Engle*, 2003 WL 21180319, at *6. Where the putative class includes smokers in every state in the nation, the barriers to class treatment presented by differences in state law are even more insurmountable.

Although Rule 23(b)(3)’s requirement that the action be manageable does not technically apply to class actions certified under Rule 23(b)(1)(B), the practical

⁴ Of course, it is precisely such respect for the policy choices of other jurisdictions with an interest in a particular plaintiff’s claims that motivates New York’s interest analysis.

difficulties of trying the case surely must be considered before approving the “creative” use of a limited fund class action to resolve a “mass tort” – as the trial court recognized. *See Simon II*, 211 F.R.D. at 178 (discussing “manageability of state subclasses or other techniques to accommodate the variations that do exist among state laws”). As noted above (at pages 2-4), it is nearly a truism that nationwide class actions in which the claims are subject to varying state laws cannot be certified because they are simply unmanageable. The district court acknowledged that “[t]here are many nuances, both substantively and procedurally, in law from state to state” (*Simon II*, 211 F.R.D. at 177) – and even subtle differences in legal standards can create intractable manageability problems at trial. *See In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995). In fact, the legal standards that govern both compensatory liability and punitive damages are riddled with fundamental and irreconcilable differences that would hopelessly confuse any jury that tried to apply them to the claims of a nationwide class.

A. Fraud

Ignoring the fact that the plaintiff class also raised claims for negligence and strict liability, the district court stated that “[p]laintiffs’ central theory sounds in fraudulent concealment.” *Simon II*, 211 F.R.D. at 166. Even assuming that the court

properly limited its attention to plaintiffs' fraud claims, state-law variation in the law governing those claims alone precludes certification of the class.

As other courts have recognized, “[t]he common law of fraud is materially different in the fifty states.” *Lewis Tree Serv., Inc.*, 211 F.R.D. at 236. *See Bridgestone/Firestone*, 288 F.3d at 1015; *Castano*, 84 F.3d at 743 n.15. Significantly in this case, the state-law standards for proving the element of reliance are varied and sometimes contradictory. “In a fraud claim, some states require justifiable reliance on a misrepresentation, while others require reasonable reliance.” *Castano*, 84 F.3d at 742-43 n.15 (citations omitted).⁵ California mandates a subjective standard for determining whether reliance was reasonable, based in part on the plaintiff’s “knowledge, education and experience,” while Colorado has adopted an objective standard that excludes consideration of such factors.⁶ Under New York law, “[r]eliance on defendants’ misrepresentations will not be presumed where plaintiffs

⁵ *See generally Foremost Ins. Co. v. Massey*, 693 So. 2d 409, 421 (Ala. 1997) (characterizing change in Alabama law from a “justifiable reliance” standard to a “reasonable reliance” standard as “a fundamental change in the law of fraud”).

⁶ *Compare Guido v. Koopman*, 2 Cal. Rptr. 2d 437, 440-41 (Cal. Ct. App. 1991), with *Golf Shots, Inc. v. Time Warner, Inc.*, 1991 WL 321026 at *2 (D. Colo. Jan. 10, 1991).

had a reasonable opportunity to discover the facts about the transaction beforehand by using ordinary intelligence.”⁷

Furthermore, the contours of the defendants’ “duty to disclose,” which plaintiffs must establish as a element of their fraudulent concealment claim, *Simon II*, 211 F.R.D. at 169, vary greatly from state to state. Some jurisdictions impose a duty to disclose only when a fiduciary or confidential relationship exists between the parties;⁸ others require a defendant to correct earlier misstatements or incomplete statements;⁹ some (including New York) impose a duty when the defendant has superior knowledge;¹⁰ and some adopt various combinations of these, and other, standards.¹¹

⁷ *Small v. Lorillard Tobacco Co., Inc.*, 679 N.Y.S.2d 593, 600 (N.Y. Ct. App.), *aff’d* 720 N.E.2d 892 (N.Y. 1999) (finding “[p]laintiffs’ claim of ignorance” to be “implausible in light of years of * * * press coverage [and] the well-known difficulty of quitting smoking”).

⁸ *See, e.g., Brae Asset Fund, L.P. v. Adam*, 661 A.2d 1137, 1140 (Me. 1995) (“absent a fiduciary or confidential relationship, there is no duty to disclose information.”); *Berkeley Pump Co. v. Reed-Joseph Land Co.*, 653 S.W.2d 128, 134 (Ark. 1983) (“the law imposes a duty to speak” when “special circumstances * * * such as a confidential relationship” give rise to it).

⁹ *See, e.g., Gregory v. Novak*, 855 P.2d 1142, 1144 (Or. Ct. App. 1993) (“[O]ne who makes a representation that is misleading because it is in the nature of a ‘half-truth’ assumes the obligation to make a full and fair disclosure of the whole truth.”) (citation omitted).

¹⁰ *See, e.g., Ceribelli v. Elghanayan*, 990 F.2d 62, 64 (2d Cir. 1993) (“New York law recognizes a duty to disclose, absent any fiduciary relationship, when one party has superior knowledge not readily available to the other party”) (citation omitted). *But see Urman v. South Boston Sav. Bank*, 674 N.E.2d 1078, 1081 (Mass. 1997)

Because of these differences, conduct that is unlawful (and can give rise to punitive damages) in one state might be perfectly legal in another – making it crucial that each class member’s fraud claim be decided under the appropriate state’s substantive law.

The burden of proof that must be satisfied to establish fraud also varies from state to state. Many states require proof of fraud by clear and convincing evidence,¹² but others allow proof by only a preponderance of the evidence.¹³ In California, evidence of conduct that occurred between 1988 and 1998 must be excluded from any

(“Silence does not constitute a basis for claiming fraud and misrepresentation, even where a seller may have knowledge of some weakness in the subject of the sale and fails to disclose it.”) (citation omitted).

¹¹ See, e.g., *Lubore v. PPM Assoc., Inc.*, 674 A.2d 547, 555-56 (Md. App. 1996) (duty to disclose may arise from “a fiduciary or confidential relationship,” or from a situation where “[o]ne * * * conceals facts that materially qualify affirmative representations”); *Amundson v. Wortman*, 777 P.2d 315, 317 (Mont. 1989) (“[S]pecial circumstances’ surrounding some transactions * * * give rise to the duty to disclose. One such set of circumstances [is a] * * * pattern of repeated concealments”) (internal quotation marks omitted); *Streeks, Inc. v. Diamond Hill Farms, Inc.*, 605 N.W.2d 110, 117-18 (Neb. 2000) (“[T]he law does not attempt to define occasions when the duty to speak arises, but, instead, has adopted the proposition that whether a duty to speak exists is determined by all the circumstances of the case.”) (citation omitted).

¹² See, e.g., *Miller v. Sloan, Listrom, Eisenbarth, Sloan & Glassman*, 978 P.2d 922, 932 (Kan. 1999); *Gross v. Sussex Inc.*, 630 A.2d 1156, 1161 (Md. 1993); *Singing River Mall Co. v. Mark Fields, Inc.*, 599 So. 2d 938, 945 (Miss. 1992).

¹³ See, e.g., *Kopeikin v. Merchants Mortgage & Trust Corp.*, 679 P.2d 599, 601 (Colo. 1984); *Barrett v. Holland & Hart*, 845 P.2d 714, 717 (Mont. 1992); *Nelson v. Cheney*, 401 N.W.2d 472, 476 (Neb. 1987).

determination of the tobacco company defendants' liability because, during that period, a state statute shielded tobacco companies from liability for personal injuries that their products caused to voluntary consumers.¹⁴ Finally, statutes of limitations for fraud vary widely between jurisdictions.¹⁵

B. Punitive Damages

Although the trial court suggested that any punitive award would simply be set at the highest amount consistent with due process (*Simon II*, 211 F.R.D. at 167, 174), defendants are, of course, entitled to argue for lower punitive damages under the applicable state laws. *See, e.g., Gasperini v. Center for Humanities, Inc.*, 116 S. Ct. 2211, 2221 n.12 (1996) (“For rights that are state created, state law governs the amount properly awarded as punitive damages, subject to an ultimate federal constitutional check for exorbitancy.”). And, with respect to punitive damages, “[t]he voices of the quasi-sovereigns that are the states of the United States sing * * * with a different pitch.” *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d at 1301.¹⁶

¹⁴ *See Myers v. Phillip Morris Cos.*, 50 P.3d 751, 763 (Cal. 2000) (now-repealed immunity statute still grants immunity for conduct that occurred while it was in effect).

¹⁵ *Compare* Cal. Code Civ. Proc. § 338(d) (3 years), *with* N.Y.C.P.L.R. § 213(8) (6 years), *and* La. Civ. Code Ann. art. 3492 (1 year).

¹⁶ *See, e.g., In re N. Dist. of Cal. Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 850 (9th Cir. 1982) (“[T]he 50 jurisdictions in which these cases arise do not apply the same punitive damages standards.”); *In re Stucco Litig.*, 175 F.R.D. 210,

First, “every state has a different way of characterizing and defining what form of conduct” gives rise to liability for punitive damages. Kimberly A. Pace, *Recalibrating the Scales of Justice Through National Punitive Damages Reform*, 46 AM. U. L. REV. 1573, 1618 (1997). Several states do not permit punitive damages at all in common-law cases.¹⁷ Some states permit the award of punitive damages upon a showing that the defendant was reckless¹⁸ or grossly negligent,¹⁹ while in other states a showing of malicious or intentional misconduct is required.²⁰ In some states, a

216 (E.D.N.C. 1997) (denying class certification because “[a]ny instructions attempting to account for” variation in state law on punitive damages “would surely baffle a jury”); *Mack v. General Motors Acceptance Corp.*, 169 F.R.D. 671, 678 (M.D. Ala. 1996) (denying class certification because “treatment of punitive damages varies from state to state”).

¹⁷ See, e.g., *International Harvester Credit Corp. v. Seale*, 518 So. 2d 1039, 1041 (La. 1988); *Santana v. Registrars of Voters*, 502 N.E.2d 132, 135 (Mass. 1986); *Miller v. Kingsley*, 230 N.W.2d 472, 474 (Neb. 1975); *Fisher Props., Inc. v. Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash 1986); N.H. Rev. Stat. § 507:16.

¹⁸ See, e.g., Conn. Gen. Stat. Ann. §52-240b (“[p]unitive damages may be awarded if the claimant proves that the harm suffered was the result of the product seller’s reckless disregard for the safety of product users”).

¹⁹ See, e.g., Fla. Stat. Ann § 768.72(2) (“A defendant may be held liable for punitive damages only if the trier of fact * * * finds that the defendant was personally guilty of intentional misconduct or gross negligence.”).

²⁰ See, e.g., Kan. Stat. Ann. § 60-3702(c) (plaintiff must prove “that the defendant acted toward the plaintiff with willful conduct, wanton conduct, fraud or malice.”); Cal. Civ. Code Ann. § 3294(a) (punitive damages are available upon proof “that the defendant has been guilty of oppression, fraud, or malice”); Mont. Code Ann. § 27-1-221 (1) (requiring “guilt[] of actual fraud or actual malice” to sustain exemplary damages); *Bismarck Realty Co. v. Folden*, 354 N.W.2d 636, 643 (N.D. 1984)

finding that the defendant has committed fraud automatically gives rise to punitive liability, while in other states particularly egregious fraud is necessary.²¹ In California, punitive damages cannot be based on conduct that occurred between 1988 and 1997, when the conduct of tobacco companies in manufacturing and distributing tobacco products was statutorily immunized.²²

Second, states have adopted different standards for setting the amount of punitive damages. New York requires only that punitive damages be “reasonable” in amount.²³ But some states have imposed fixed caps on the amount of punitive damages;²⁴ other states limit punitive damages to the amount (if any) needed to ensure

(requiring “a specific finding of oppression, fraud, or malice” to support punitive damages) (citations omitted).

²¹ Compare, e.g., *Stein v. Lukas*, 823 S.W.2d 832 (Ark. 1992) (evidence of deliberate misrepresentation or deceit meets plaintiff’s burden for punitive damages) with *BWZ Elecs., Inc. v. Control Data Corp.*, 929 F.2d 707 (D.C. Cir. 1991) (under District of Columbia law, proof of fraud without aggravating circumstances is not sufficient to justify punitive damages).

²² See *Myers*, 50 P.3d at 763.

²³ See, e.g., *Byrd v. New York City Transit Auth.*, 568 N.Y.S. 2d 628, 630 (App. Div. 1991).

²⁴ Me. Rev. Stat. Ann. tit. 18-A § 2-804(b) (capping punitive damages in wrongful death actions at \$75,000); Tex. Civ. Prac. & Rem. Code Ann. § 41.008 (capping punitive damages at twice the economic damages plus the greater of either \$200,000 or the non-economic damages, not to exceed \$750,000); Va. Code § 8.01-38.1 (capping punitive damages at \$350,000).

that the plaintiff has been made whole;²⁵ several states set the maximum punitive award at a specific ratio to compensatory damages;²⁶ and, in one state, the maximum punitive award depends on specific jury findings regarding the defendant's conduct.²⁷ States also differ as to whether a compensatory damage award is a necessary prerequisite for awarding punitive damages²⁸ – a state-law variation that is extremely significant in light of the trial court's conclusion that it could distribute punitive damages to individual plaintiffs without any showing that they would be entitled to

²⁵ See, e.g., *Berry v. Loiseau*, 614 A.2d 414, 434-35 (Conn. 1992) (punitive damages limited to expenses of litigation less taxable costs); *Thompson v. Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (in Michigan, punitive damages are unavailable if actual damages are sufficient to make plaintiff whole).

²⁶ See, e.g., Conn. Gen. Stat. Ann. 52-240b (capping punitive damages at two times the compensatory damages awarded); Colo. Rev. Stat. § 13-21-102(1)(a),(3) (capping punitive damages at amount of compensatory damages); Fla. Stat. § 768.73(1) (generally capping punitive damages at three times compensatory damages); Ind. Code § 34-51-3-4 (capping punitive damages at the greater of three times compensatory damages or \$50,000).

²⁷ See, e.g., Okla. Stat. tit. 23, §§ 9.1 (B)-(C) (capping punitive damages at greater of \$100,000 or actual damages, if jury finds defendant guilty of reckless disregard for others' rights, and at greatest of \$500,000, twice actual damages, or the financial benefit derived by defendant, if jury finds that defendant has acted intentionally and with malice).

²⁸ Compare N.D. Cent. Code § 32-03.2-11 (1995 Supp) (exemplary damages can be awarded only if compensatory damages are given), with *The Booth, Inc. v. Miles*, 567 So. 2d 1206 (Ala. 1990) (when there is sufficient evidence to support a compensatory damage award, an actual award of compensatory damages is not required to uphold punitive damages).

compensatory damages. The relevance of the defendants' wealth in setting punitive damages also varies from state to state: for example, in Colorado wealth may not be considered as a factor in setting punitive damages, but in Kansas the permissible punishment is explicitly tied to the defendant's income and net worth.²⁹

Furthermore, states differ on the roles of the court and jury in adjudicating punitive damages. In most states, the jury both determines liability for punitive damages and sets the amount of damages,³⁰ but in other states the court sets the amount of the award after the jury has found punitive liability.³¹ The burden of proof applicable to punitive damages also differs: some jurisdictions require plaintiffs to

²⁹ See Kan. Stat. Ann. § 60-3702(e)-(f) (“[No] award of exemplary * * * damages * * * shall exceed the lesser of: (1) The annual gross income earned by the defendant * * * unless the court determines such amount is clearly inadequate to penalize the defendant, then the court may award up to 50% of the net worth of the defendant * * * or (2) \$5 million.” If, however, “the profitability of the defendant’s misconduct exceeds * * * th[is] limitation * * * the court may award * * * an amount equal to 1 1/2 times the amount of profit.”).

³⁰ See, e.g., Mont. Code Ann. § 27-1-221(7)(a) (“When the jury returns a verdict * * * the amount of punitive damages must then be determined by the jury”); see also Cal. Civ. Code Ann. § 3295(d) (after first phase of bifurcated trial, “the same trier of fact” shall determine size of punitive-damage award).

³¹ See, e.g., Kan. Stat. Ann. § 60-3702(a) (“If [punitive] damages are allowed [by the trier of fact], a separate proceeding shall be conducted by the court to determine the amount of such damages to be awarded.”); Conn. Gen. Stat. Ann. § 52-240b (“[i]f the trier of fact determines that punitive damages should be awarded, the court shall determine the amount of such damages”).

prove their entitlement to punitive damages by clear and convincing evidence,³² some states require proof by a preponderance of the evidence,³³ and one requires proof beyond a reasonable doubt.³⁴ And, finally, several jurisdictions require plaintiffs to share any punitive damages award with the state.³⁵

C. This Case Cannot Be Tried As A Class Action

The myriad differences in state laws of fraud and punitive damages could never be accommodated in a single set of jury instructions. Nor could counsel realistically hope to make closing arguments that would assist the jury's simultaneous application of 51 different standards to the evidence. In any attempt to litigate this sprawling

³² See, e.g., Tex. Civ. Prac. & Rem. Code § 41.003(b)-(c); *Rodriguez v. Suzuki Motor Corp.*, 936 S.W.2d 104, 111 (Mo. 1996); see also Iowa Code Ann. §§ 668A.1(1)(a), (2) (requiring proof by “clear, convincing, and satisfactory evidence”) (emphasis added).

³³ See, e.g., *Galjour v. General Am. Tank Car Corp.*, 764 F. Supp. 1093, 1100-01 (E.D. La.1991); *Freeman v. Alamo Mgmt. Co.*, 607 A.2d 370, 372-73 (Conn. 1992).

³⁴ See Colo. Rev. Stat. Ann. § 13-25-127(2).

³⁵ See, e.g., Iowa Code Ann. § 668A.1 (2)(b) (requiring that “after payment of all applicable costs and fees, an amount not to exceed twenty-five percent of the * * * exemplary damages awarded may be ordered paid to the claimant, with the remainder [paid to the state]”); Or. Rev. Stat. § 18.540(1) (a)-(b) (“Upon the entry of a verdict including an award of punitive damages * * * [f]orty percent shall be paid to the prevailing party [and] * * * [s]ixty percent shall be paid to the [state].”).

nationwide lawsuit without violating New York and constitutional choice-of-law principles, confusion would surely reign.

It is equally clear that subclassing, which the district court proposes as an alternative, is not a realistic solution to the manageability problems with the proposed class action. The axes along which the laws of fraud and punitive damage vary cut across jurisdictions. For example, while it may be possible to group together states with the same burden of proof for punitive damages, there would be differences among them on the type of conduct that merits punitive damages. And if the states that found the same type of conduct worthy of punitive damages were grouped together, there would be differences between them on the appropriate burden of proof. The situation becomes even more complex when one adds to the mix the need to determine compensatory liability and damages as a predicate to any punitive award. In short, in this case as in other putative nationwide class actions, choice-of-law issues present an insuperable obstacle to class certification.

CONCLUSION

The Court should vacate the district court's order and direct that the class be decertified.

Respectfully submitted.

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