ECONOMIC TORTS: A VIEW FROM EXPERIENCE

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INTRODUCTION

Other contributors to this panel have emphasized that economic tort cases are only a very small part of civil litigation in this country. We want to offer a counterweight to that view—true as it is—by discussing the way in which economic tort claims have come to play a large role in a very important and influential form of litigation, to which much of our litigation practice is devoted: class actions, particularly consumer class actions. In our experience, the class plaintiffs in such lawsuits almost always make economic tort claims, and those claims interact with the class-action device in important, systematic ways. In this Article, we will briefly address what happens when economic torts intersect with class actions.

I. THE MULTIPLICATION PROBLEM

Before turning to the substance, let us briefly explain why the confluence of class actions and economic torts may be of interest to the drafters of the forthcoming Restatement of Economic Torts. We recognize that class actions are a procedural device, and that ordinarily class actions are thought of as part of civil procedure, not substantive law. We also recognize that, ordinarily, when a legal treatise addresses a substantive legal field like tort law, the focus is on the traditional situation represented in almost all the tort cases we read in law school: One plaintiff sues one defendant.

But class actions have transformed litigation to some extent. After all, litigation is mostly about money, who pays and who collects, and the power of multiplication means that really big money is at stake in class actions. And because

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the stakes are so high, the impact of class-action litigation, or even the threat of class-action litigation, can enormously impact a defendant's behavior.[1]

Moreover, even when considering the same substantive claim—say, fraud, misrepresentation, or unjust enrichment—questions of justice and efficiency may look very different when, instead of one or at most a handful of parties on either side, there is a plaintiff class of potentially a million or more members. Accordingly, it is important that the Reporter for the new Restatement consider the effects of class actions when outlining the rules that govern economic torts.

II. THE SEDUCTIVENESS OF ECONOMIC TORTS FOR CLASS-ACTION PLAINTIFFS

In our view, the unmistakable fact that economic torts now play a very big role in class actions is the result of certain advantages that economic tort claims provide for potential class-action plaintiffs that are not available with more traditional claims in tort or breach of contract.

A. Lowering the Certification Bar: Causation and Damages

The story begins with the United States Supreme Court's 1997 decision in *Amchem Products, Inc. v. Windsor*, which decertified a class of present and future asbestos injury claimants assembled for the purpose of a comprehensive settlement.[2] The *Amchem* decision rested on a number of grounds, but chief among them was the prevalence of individual issues over common questions: The Supreme Court noted that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods."[3]

The *Amchem* decision effectively ended a trend toward certification of classes in mass-tort cases, because issues of causation and damages in traditional tort actions tend to be highly individualized. The courts have recognized that cases that involve lots of individualized issues really are not handled very well as class actions. Similarly, as we will discuss below, breach of contract cases typically present highly individualized issues. So, like mass-tort actions, breach of contract cases are often very difficult to certify as class actions.

The class-action-plaintiffs bar reacted to *Amchem* in a number of ways. One of them was a turn to state rather than federal courts, particularly state courts that had proven to be receptive to the needs and desires of the class-action-plaintiffs bar.[4] Another way, though, was by turning to economic torts to avoid, or

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1. *Cf. In re* Rhone-Poulenc Rorer Inc., 51 F.3d 1293, 1298 (7th Cir. 1995) (pointing out the "intense pressure to settle" that defendants face in large-scale class actions).

2. 521 U.S. 591 (1997).

3. *Id.* at 624 (quoting Georgine v. Amchem Prods., Inc., 83 F.3d 610, 626 (3d Cir. 1996)).

4. Madison County, Illinois, where many of the cases we defend against have been filed, is one such jurisdiction. The U.S. Chamber of Commerce recently lauded a study describing Madison County as one of the top "judicial hellholes." Press Release, U.S. Chamber of Commerce, Report Spotlights Need for Reform in Jackpot Jurisdictions (Dec.

at least minimize, the problem of individual issues raised in traditional personal-injury tort and contract cases.

B. Lowering the Certification Bar: Shifting the Focus to the Defendant

Economic torts may provide a class with the opportunity to submerge individual issues that ordinarily would prevent certification. For example, perhaps more than traditional torts or breach of contract, economic torts may allow prospective class plaintiffs to focus on the defendant's conduct rather than the plaintiffs' harms. Economic torts may also be more susceptible to the calculation of damages in creative ways that potentially avoid the need to determine issues specific to each individual plaintiff.

There is a common pattern to the class-action plaintiffs' legal strategy in these economic tort cases. The strategy has two parts: First, to characterize the "misconduct" and "injury" as occurring *before* individual events have differentiated members of the plaintiff class from one another; and second, to use purported expert economic testimony to quantify and assign a dollar value to virtually any change in circumstance, whether tangible or not, without any examination of the particular circumstances of individual class members.

III. HOW IT WORKS IN PRACTICE

The preceding discussion may be somewhat abstract, so let us give some concrete examples of how this plays out in real cases.

A. Going After Tobacco Companies

Millions of people smoke, or used to smoke, cigarettes, and there's a general understanding that smoking is not good for you, so at first blush it might seem that a suit against a cigarette manufacturer could serve as the basis for a strong class-action suit.

But class-action plaintiffs' lawyers have found it very difficult to convert traditional personal injury tort cases against cigarette manufacturers into class actions. The reason is simple: There are lots and lots of individual issues. Nothing bad happens to many people who smoke. And if bad things happen, there's a lot of variety in those bad things. So, in every individual case, the court has to determine whether the plaintiff smoked the defendant's brand, whether the plaintiff has a disease, such as lung cancer or heart disease, and most importantly, whether that disease was caused by smoking the defendant's cigarettes. Many courts have held

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13, 2005), *available at* http://www.uschamber.com/press/releases/2005/december/05-200.htm. It has frequently appeared at the top of that list. One of our partners sometimes refers to places like Madison County as "third world jurisdictions." It's difficult to fully appreciate the phenomenon until you've actually seen the courts in action. We sometimes hear people say that these jurisdictions are pro-plaintiff because of the jury pool. But it isn't that. In most courts around the country, if you have a case in which an individual is suing a big company, the plaintiff, the little guy, wants the case decided by a jury, and the company wants the case decided by a judge. But in Madison County, the situation is completely reversed: Big business defendants ask for a jury, and the plaintiff wants the case tried by the judge.

that these individual questions and others like them make it impossible to combine traditional cigarette cases into a class action.[5]

One way class-action plaintiffs' lawyers got around this problem was to join forces with state attorneys-general, who were able to bring suits that were not required to meet the traditional requirements for a class action. The massive settlements with the states a few years ago reflect that effort.

The other way class-action lawyers responded—relevant to the current Restatement project—is to try to convert these personal injury claims into economic tort claims. A prominent recent case is *Price v. Philip Morris*, which was tried in Madison County, Illinois, and until it was reversed by the Illinois Supreme Court, had resulted in a verdict of more than $10 billion against Philip Morris.[6]

Price v. Philip Morris was about "light" cigarettes. The plaintiffs' theory was that light cigarettes not only are not any healthier than regular cigarettes, but by some measures are even more dangerous.[7] Because of the difficulty of bringing a "lights" personal injury suit as a class action, however, the class-action lawyers that filed *Price* expressly renounced any personal injury claims and instead pursued an economic torts theory. They sued on behalf of a class of all consumers

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5. *See, e.g.*, Barnes v. Am. Tobacco Co., 161 F.3d 127 (3d Cir. 1998) (denying certification to 23(b)(2) class of Pennsylvanian smokers seeking medical monitoring); Castano v. Am. Tobacco Co., 84 F.3d 734 (5th Cir. 1996) (decertifying a class of "[a]ll nicotine-dependent persons in the United States" who had smoked the defendants' cigarettes); Clay v. Am. Tobacco Co., Inc., 188 F.R.D. 483 (S.D. Ill. 1999) (denying certification to nationwide class of all persons in United States who purchased and smoked cigarettes as children); Barreras Ruiz v. Am. Tobacco Co., 180 F.R.D. 194 (D.P.R. 1998) (denying certification to class of Puerto Rican smokers); Emig v. Am. Tobacco Co., 184 F.R.D. 379 (D. Kan. 1998) (denying certification to class of Kansas smokers alleging addiction); Insolia v. Philip Morris Inc., 186 F.R.D. 535 (W.D. Wis. 1998) (denying certification to class of Wisconsin smokers with lung cancer); Arch v. Am. Tobacco Co., 175 F.R.D. 469 (E.D. Pa. 1997) (denying certification to class of Pennsylvania smokers alleging addiction); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90 (W.D. Mo. 1997) (denying certification to class of Missouri residents alleging personal injury caused by smoking); Walker v. Liggett Group, Inc., 175 F.R.D. 226 (S.D. W. Va. 1997) (withdrawing preliminary certification of nationwide settlement class); Tijerina v. Phillip Morris Inc., No. Civ.A. 2:95-CV-120-J, 1996 WL 885617 (N.D. Tex. Oct. 8, 1996) (denying certification to class of Texas residents alleging injury by cigarette filters and chemicals); Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921 (D.C. Super. Ct. Aug. 18, 1997) (denying certification to class of D.C. residents alleging nicotine dependence or injury caused by smoking cigarettes), *reconsidered and aff'd*, No. 96-5070, 1999 WL 33714707 (D.C. Super. Ct. July 23, 1999); Philip Morris Inc. v. Angeletti, 752 A.2d 200 (Md. 2000) (decertifying statewide class of all persons injured by or addicted to defendants' cigarettes); Geiger v. Am. Tobacco Co., 969 N.Y.S.2d 345 (Sup. Ct. 1999) (denying certification to class of New York smokers with lung or throat cancer).

6. 848 N.E.2d 1 (Ill. 2005).We should disclose that several of our partners at Mayer, Brown, Rowe & Maw LLP, led by our partner Michele Odorizzi, represented Philip Morris in the successful appeal. But we don't have any inside information; what we know comes from the briefs and court opinions.

7. *Id.* at 20.

who had ever purchased certain Philip Morris brands of "light" cigarettes in Illinois.[8] Their theory, in a nutshell, was that calling the cigarettes "light" was an economic tort—consumer fraud—because the "light" label made the cigarettes sound safer than they actually were, and if the people who bought light cigarettes had known that were not really safer, they would only have purchased the light cigarettes at a very, very steep discount.

The plaintiffs could have pursued claims for common-law fraud as well as consumer fraud, but the consumer-fraud claim, which is a special statutory fraud claim many states have established, grants certain advantages to plaintiffs. For instance, common-law fraud usually requires proof of "reliance," which is often an individual issue that makes class certification challenging. However, consumer fraud statutes in many states (including Illinois) do not require proof of reliance.[9] By suing for consumer fraud rather than common-law fraud, the plaintiffs hoped to avoid addressing the reliance issue. Most likely, though, the main reason the plaintiffs pursued a consumer-fraud claim is that under Illinois law, consumer-fraud claims are decided by a judge rather than a jury. If you are a class-action plaintiffs' lawyer, there is no one you would rather have deciding your case than a judge in a plaintiff-friendly jurisdiction like Madison County.

The "lights" litigation is a good example of how economic torts can be used in class-action litigation. The plaintiffs focused on the defendant's use of the term "light cigarettes," which purportedly constituted a class-wide misrepresentation. The plaintiffs then presented expert testimony and internet survey data. The expert testimony supposedly proved that everyone in the class was tricked and confused by the term "light cigarettes." The internet survey data was offered to prove that the "light" cigarettes were actually worth about 90% less than the price class members paid.[10] And on that theory, the expert testimony purported to calculate class-wide damages of $7.1 billion.[11] The Madison County judge accepted plaintiffs' theory, added $3 billion in punitive damages for good measure, and entered judgment against Philip Morris for a total of more than $10 billion.[12]

As we said, the Illinois Supreme Court overturned the $10-billion verdict last December. But it did so on somewhat idiosyncratic grounds: A provision of the Illinois Consumer Fraud Act precludes liability for actions authorized by federal law, and the Court held that FTC regulations authorized the use of "light" on the cigarette label.[13]

The Court did not reach the question of whether it was proper to certify a class of more than one million smokers based on expert opinions that each and every one of those smokers had the exact same understanding about what the term

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8. *Id.* at 21.
9. Connick v. Suzuki Motor Co., 675 N.E.2d 584, 593 (Ill. 1996).
10. *Price*, 848 N.E.2d at 29.
11. *Id.* at 29.
12. *Id.* at 31.
13. *Id.* at 50.

"light" meant.[14] The Illinois Supreme Court also did not address the plaintiffs' expert's calculation of class-wide damages, which focused on the defendant's alleged overcharges.[15] A concurring opinion, however, rejected the damages calculation, pointing out that if consumers had known that light cigarettes weren't healthier, they would simply have switched to regular cigarettes, which didn't cost any less than lights.[16]

The lessons of *Price* are thus somewhat ambiguous. The verdict was overturned, but only on a narrow ground. The fact that a $10-billion judgment made it all the way to the state supreme court based on what was, at best, highly debatable expert economic testimony shows how large an effect the use of economic torts can have when magnified by the class-action lens.[17]

B. Auto Insurance and Medical Expenses

Let us give another example in which an economic tort theory has been used to try to convert cases into big class actions. Unlike the light cigarette case, which involved an underlying personal injury claim, this time the underlying claims concern a breach of contract. These cases involve automobile insurance, specifically the part of auto insurance policies that cover "reasonable and necessary" medical expenses.

Here's the situation, which essentially describes dozens of putative class-action cases (including—full disclosure—several cases in which we represent the defendant). The plaintiff says he or she was injured in a car crash and incurred medical expenses, but was not fully reimbursed by the insurance company. The plaintiff also suspects that in order to save money, it's the insurer's plan to illegitimately deny or reduce lots of claims.

The most straightforward claim in these situations is breach of contract. An insurance policy is a contract for insurance. If you're in a car crash, and the insurer refuses to pay your reasonable and necessary medical bills, or doesn't pay

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14. *Id.* at 54 ("We have resolved the present case entirely on the basis of state law by construing and applying an exemption clause in a state statute.").

15. *Id.*

16. *Id.* at 56–57 (Karmeier, J., specially concurring).

17. On September 25, 2006, Senior District Judge Jack Weinstein certified a nationwide "lights" class action brought on a RICO theory. *Schwab v. Philip Morris USA, Inc.*, No. 04-CV-1945, 2006 WL 2726102 (E.D.N.Y. Sept. 25, 2006). Judge Weinstein stated that by bringing a nationwide RICO claim, plaintiffs "seek to avoid one of the serious difficulties with national cigarette class actions: The tort law in the fifty states is not uniform." *Id.* at *2. He also noted that plaintiffs hoped to "avoid the other main problem with smokers' class actions: conduct and motive differences among members of the class" through the use of expert testimony. *Id*. at *3. Judge Weinstein acknowledged, however, that "[c]andor impels recognition of the fact that the Courts of Appeals have not been kind to massive claims against tobacco companies" and that "defendants make a strong case that this suit, too, must founder on that appellate predilection for individual suits." *Id*. at *6. The defendants have petitioned the Second Circuit Court of Appeals for review of Judge Weinstein's order, and on November 8, 2006, the Second Circuit stayed proceedings pending its review of defendants' petition. *See* McLaughlin v. Philip Morris USA, Inc., No. 06-4666 (2d Cir. Nov. 8, 2006) (order staying proceedings).

enough of them, then you can sue for breach of contract. In some states, an insured even has a claim for bad-faith denial of an insurance claim.[18]

But from a class-action plaintiffs' perspective, there are a lot of problems with a breach of contract claim. One problem is that with a breach of contract claim, a plaintiff usually can't get punitive damages. Another problem is that the class is limited to people whose insurance claims were reduced or rejected, but the plaintiffs would prefer to count all *purchasers* of insurance in its class membership.

The biggest problem, though, is that if the plaintiffs' claim is for breach of contract, it's often hard to convert the case into a class action because there will be too many individual issues. For each policyholder whose claim was denied or reduced, the court would have to determine, at a minimum, whether the insured person was injured in an auto accident, whether the accident and injuries were covered by the insurance policy, whether the plaintiff incurred necessary medical expenses, and whether the insurance company reimbursed the plaintiff for all reasonable charges. Many courts would look at those questions and conclude that those individual issues, which would have to be explored for each and every class member, would swamp any possible common issues, so that class certification would make no sense.

But by converting the contract claim to an economic tort claim, such as fraud or unjust enrichment, plaintiffs might have a better chance of transforming an individual case into a class action. The key move, which may be possible for an economic tort claim, but rather difficult for a breach of contract claim, is to situate the injury not at the moment when a claim is denied, but at an earlier time, when the policy is purchased.

Here's how the plaintiffs' argument goes: When policyholders bought the insurance policy, and when they paid premiums, they paid with the understanding that the insurance company would pay in certain circumstances. But if policyholders had known of the insurance company's alleged secret plan to deny lots of claims, then policyholders would not have been willing to pay the same price. Under this economic tort theory, the plaintiffs' damages—which the plaintiffs sometimes refer to as "date-of-transaction losses and damages"—can be defined as the difference between the value of the insurance contract under a perfect system of review and the contract's value given the biased review procedures that allegedly exist. In essence, the plaintiffs' theory converts a claim for breach of an insurance contract into an economic tort akin to a securities fraud claim.

The advantages for a class-action plaintiff's lawyer of using an economic tort theory are apparent. First, the individual issues are minimized, because it does not matter whether any individual claim was properly or improperly denied or approved: All that matters is that someone purchased the policy for more than he would have paid had he known all the facts. Second, the class expands to include all policyholders, whether or not they ever submitted a claim, or even if they

18. *See*, *e.g.*, Gruenberg v. Aetna Ins. Co., 510 P.2d 1032 (Cal. 1973); Universe Life Ins. Co. v. Giles, 950 S.W.2d 48 (Tex. 1997).

submitted numerous claims that were approved and paid in full. Third, because the allegations sound in tort—likely some combination of consumer fraud, misrepresentation, and unjust enrichment—punitive damages may be available. And finally, like the light cigarette cases, the economic tort theory presents the opportunity to calculate a massive amount of damages based on an expert's calculation of the difference between what was paid for the insurance and its supposed "true" value. Thus, by converting a breach of contract claim into an economic tort claim, and by focusing on the defendant's gain, rather than the plaintiff's loss, a plaintiff may be able to obviate the need to evaluate each plaintiff's individual circumstances and thus transform an individual breach of contract claim into a sprawling class action.

This is not to say that such arguments should, or necessarily do, prevail in court. Indeed, outside the most plaintiff-friendly jurisdictions, they have not generally prevailed. The forthcoming Restatement, however, may shape the next generation of litigation by supporting or rejecting such arguments, either tacitly or explicitly. We hope that the Reporter will look closely at the circumstances in which the law should permit what is essentially a breach of contract to also constitute an economic tort, recognizing that the answer they provide will affect not only one-off cases but enormous class actions with serious economic consequences as well.

IV. THE FUZZY CONTOURS OF UNJUST ENRICHMENT

One point remains to discuss. As we mentioned earlier, in addition to opening the door for creative economic analysis of injury and damages, economic torts are a haven for the class-action bar because they often focus on the defendant's conduct, rather than on whether, and to what extent, that conduct injured the plaintiff. Foremost in this regard are claims for "unjust enrichment."

Unjust enrichment is a hard concept to pin down. It is often described as a quasi-contractual form of action. But it has long been recognized that the contractual nature of an unjust enrichment claim is a legal fiction, and that in many cases unjust enrichment claims have a tort-like quality.[19] We mention unjust enrichment claims here because virtually every consumer class action involving economic torts like fraud, consumer fraud, misrepresentation, or breach of fiduciary duty also has an "unjust enrichment" claim.

The elements of such an unjust enrichment claim are not always clear; indeed, its contours are sufficiently fuzzy—not only between states but even within individual jurisdictions—that in some complaints it appears that the plaintiff assumes that it is sufficient to plead that the defendant has money and the plaintiff wants some of it. Professor Dobbs observes in his treatise on the law of remedies that the substantive and remedial aspects of unjust-enrichment law are very difficult to disentangle.[20] He notes that judges "may be willing to expand substantive liabilities [for unjust enrichment] when they are limited to mild forms

19. *See, e.g.*, 1 GEORGE E. PALMER, THE LAW OF RESTITUTION § 1.1, at 1–2 (1978) ("Restitution based upon unjust enrichment cuts across many branches of the law, including contract, tort, and fiduciary relationship . . . .").

20. 1 DAN B. DOBBS, LAW OF REMEDIES § 4.1(4), at 568 (2d ed. 1993).

of restitution but may desire to constrict those liabilities when large damages might result."[21] That sounds sensible and may well lead to just results in individual cases. But once the cases permitting expansive unjust-enrichment claims in low-damage cases are on the books, they are available as precedent for class actions, where a vast number of low-damage claims can add up to millions or even billions of dollars.

We understand that "unjust enrichment" has not traditionally been considered an economic tort. But there is at least a species of unjust enrichment that appears to be not a quasi-contract claim but an economic tort that overlaps in practice with many of the traditional economic torts. So we hope the drafters of the Restatement will consider trying to nail down its elements, or, at the very least, keep its existence firmly in mind as they consider the rest of the universe of economic torts.

CONCLUSION

Our experience is that economic torts play a large role in consumer class actions. They have allowed plaintiffs to try to convert mass-tort cases, which do not qualify for class treatment, into economic tort cases like the light cigarettes litigation, which perhaps can be class actions. They have allowed plaintiffs to try to convert breach of contract cases, such as the insurance coverage cases, which clearly cannot be class actions, into economic tort cases, which perhaps can be class actions. They allow the focus to shift from the individual claims of plaintiffs—which, when they must be evaluated one at a time, are not suitable for class treatment—to the alleged misconduct of the defendant, which potentially makes class treatment easier to obtain. And unlike more traditional tort and contract claims, they may be particularly susceptible to "flaky" expert testimony.

As the drafters work through the issues presented by the prospective Restatement of Economic Torts, we urge them to keep in mind the large impact economic torts may have in class-action cases. It is essential to recognize that the principles they set down may end up looking rather different once they are magnified by the lens of the class-action form. When the elements of a tort are vague or focus heavily on the defendant's behavior without plaintiff-focused elements such as actual reliance, or when expansive principles of economic liability open the door for highly questionable calculations of damages, the effects may be felt in the class-action arena. Those effects may be neither in the interest of justice nor efficiency.

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21. *Id.* § 4.1(4), at 569.