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Comments: Smokers' Chances of a Fair Fight against the Tobacco Companies Go up in Flames: A Study of Philip Morris Inc. v. Angeletti and Its Effect on the Viability of Class Action Lawsuits in Maryland Tobacco Litigation

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SMOKERS' CHANCES OF A FAIR FIGHT AGAINST THE TOBACCO COMPANIES GO UP IN FLAMES: A STUDY OF *PHILIP MORRIS INC. v. ANGELETTI* AND ITS EFFECT ON THE VIABILITY OF CLASS ACTION LAWSUITS IN MARYLAND TOBACCO LITIGATION

I. INTRODUCTION

The use of class action as a litigation device has proven to be the most efficient and effective method of adjudicating certain kinds of claims.[1] However, many courts at both the state and federal levels have expressed great reluctance in certifying class action lawsuits involving mass tort claims.[2] Mostly because of the potential for predominance of individual issues, many courts hold that class actions in such suits generally do not provide the most judicially economical means by which to settle the claims.[3]

Maryland courts are no exception.[4] Recently, in a four to three decision, the Court of Appeals of Maryland decided *Philip Morris Inc. v. Angeletti*,[5] a class action tobacco lawsuit brought against several tobacco manufacturers and related companies.[6] Judge Edward J. Angeletti of the Circuit Court for Baltimore City originally certified the class action.[7] However, because no statute existed in Maryland allowing interlocutory appeal of a class action certification order,[8] the defendants requested that the court of appeals grant the extraordinary relief of mandamus and order Judge Angeletti to decertify the

1. *See* Richard A. Nagareda, *Autonomy, Peace and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747 (2002) (noting that class action litigation is common in the areas of antitrust, consumer, and securities litigation).
2. *See In re* Rhone-Polenc Rorer Inc., 51 F.3d 1293, 1304 (7th Cir. 1995) (explaining that most federal courts have refused to allow the use of class actions in mass tort cases); *see also In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 164 (2d Cir. 1987) (denying class certification and stating that class actions are inappropriate due to the individualistic nature of the causation issues); Philip Morris Inc. v. Angeletti, 358 Md. 689, 769, 752 A.2d 200, 244 (2000) (denying class certification based on a lack of a predominance of issues); Pollokoff v. Md. Nat'l Bank, 288 Md. 485, 501, 418 A.2d 1201, 1210 (1980). See also *infra* notes 4-12 and accompanying text for a discussion of the court of appeals' decision in *Philip Morris Inc. v. Angeletti.*
3. *See infra* Part IV.
4. *See Angeletti*, 358 Md. at 787-88, 752 A.2d at 1210; *Pollokoff*, 288 Md. at 501, 418 A.2d at 1210; Snell v. Geico Corp., No. CIV. 202160, 2001 WL 1085237 (Md. Cir. Ct. Aug. 14, 2001).
5. 358 Md. 689, 752 A.2d 200 (2000).
6. *Id.* at 699-700, 700 n.2, 752 A.2d at 205, 205 n.2; *see also infra* Part III.
7. *Angeletti*, 358 Md. at 699 n.1, 752 A.2d at 205 n.1.
8. *See id.* at 706-07, 752 A.2d at 210-11.

class.[9] Generally in Maryland, an order certifying a class action is only appealable on final judgment.[10] However, in this case, not only did the court of appeals order Judge Angeletti to decertify the class action based on the extraordinary writ of mandamus,[11] the court of appeals also explicitly outlined a myriad of arguments against the future use of the class action device to litigate mass tort tobacco claims in Maryland.[12] Based on the court's comprehensive denial of certification and its unique use of the writ of mandamus to overrule Judge Angeletti's class certification, this Comment argues that *Philip Morris Inc. v. Angeletti* virtually extinguishes any future possibility that tobacco-related lawsuits will be successfully litigated in Maryland, whether litigated as class actions or litigated by individuals.

In analyzing the *Angeletti* decision and its impact on Maryland law, this Comment begins with a discussion of the original purpose and historical development of the Maryland rule regarding class action certification.[13] Part II provides a comparison of the Maryland rule with the corresponding federal rule and an explanation of the policies behind and proper usage of the class action device as it is currently applied.[14] Part III presents an overview of the facts of *Angeletti*, as well as the analysis and rationale of the Court of Appeals of Maryland in utilizing the extraordinary writ of mandamus as a means of ordering decertification of the class.[15] Part III also details the court's discussion of Maryland's class action certification rule and the problems inherent in tobacco litigation that will likely eliminate the certification of similar class actions in Maryland in the future.[16] Part IV discusses the viability of class action certification for general mass tort claims in other jurisdictions and the reasons for their success or failure as compared to the court's rationale in *Angeletti*.[17] In addition, Part IV details the court of appeals' use of the writ of mandamus as a means of avoiding the final judgment rule[18] and offers suggestions to reduce the use of mandamus in this way.[19] This Comment concludes that *Angeletti* virtually extinguishes any hope for plaintiffs of successful litigation of tobacco claims in Maryland, whether via class action litigation or otherwise, and warns potential similarly situated litigants of the court of

9. *Id.* at 699, 703, 752 A.2d at 205, 208.
10. *See infra* note 259 and accompanying text (noting that the Maryland rules lack the interlocutory appeal provision available in the federal class action rule).
11. *Angeletti*, 358 Md. at 699, 752 A.2d at 205.
12. *See id.* at 729-30, 752 A.2d at 222; *see also infra* Part III.C.
13. *See infra* Part II.A-B.
14. *See infra* Part II.B-C.
15. *See infra* Part III.A-B.
16. *See infra* Part III.C.
17. *See infra* Part IV.
18. *See infra* notes 265-70 and accompanying text.
19. *See infra* Part IV.D.

appeals' ability to review and decertify such class action suits at anytime.[20]

II. DEVELOPMENT OF CLASS ACTION IN MARYLAND

Even before specific rules were enacted defining class action as a litigation device, representative litigation existed.[21] The earliest record of representative litigation in Maryland is the 1852 case of *Negro Jerry v. Townshend*[22] in which two slaves petitioned for their freedom on behalf of themselves and other slaves.[23] This case demonstrates an early example of representative litigation because the plaintiffs represented the rights of others who were not named as parties.[24]

In 1880, the Maryland courts explicitly recognized what they called the "doctrine of representation" in *Bowen v. Gent.*[25] Under the doctrine of representation, the rights of unnamed parties were appropriately protected by the party or parties representing them if the unnamed parties were affected by the ruling of the court and if the unnamed parties had a common interest with the representative parties who appeared in court on their behalf.[26] However, courts hesitated to utilize the doctrine because they were concerned that each individual claiming harm should be a party to the litigation in order to ensure the protection of his interests.[27] The doctrine of representation was in contrast to the general rule that all those whose interests could be affected by adjudication should be made parties to the action, unless doing so would be too difficult or inconvenient.[28]

Over thirty years after *Bowen* and the introduction of the doctrine of representation, the Court of Appeals of Maryland outlined the fundamental concepts behind what would eventually become the modern class action rule.[29] In *Leviness v. Consolidated Gas Electric Light & Power*

20. *See infra* Part V.
21. *See* Ian Gallacher, *Representative Litigation in Maryland: The Past, Present and Future of the Class Action Rule in State Court*, 58 MD. L. REV. 1510, 1515 (1999); *see also infra* note 26 and accompanying text (describing the doctrine of representation).
22. 2 Md. 274 (1852).
23. *Id.*; *see also* Gallacher, *supra* note 21, at 1515-16.
24. *See generally Negro Jerry*, 2 Md. at 274; Gallacher, *supra* note 21, at 1518.
25. 54 Md. 555 (1880). *Bowen* involved a series of claims filed regarding the sale of land held as tenants in common. *Id.* at 556-57. The court held that a co-tenant's interest was not properly represented in an earlier suit and, therefore, he was not bound by the prior decision. *Id.* at 570-71.
26. *See id.*
27. *See* Gallacher, *supra* note 21, at 1518-19.
28. *See id.* The concept of inconvenience is today embodied in the goal of judicial economy. *See infra* Part IV.C. These concerns remain extremely relevant in modern class action litigation, especially in the area of mass torts. *See infra* Part IV.C.
29. *See* Leviness v. Consol. Gas Elec. Light & Power Co., 114 Md. 559, 567-68, 80 A. 304, 307 (1911).

Co., the court held that the use of the doctrine of representation was appropriate in the following situations:

> (1) Where the question is one of a common or general interest, and one or more sue or defend for the benefit of the whole; (2) where the parties form a voluntary association for public or private purposes, and those who sue or defend may fairly be presumed to represent the rights and interests of the whole; (3) where the parties are very numerous and though they have or may have separate and distinct interests, yet it is impractical to bring them all before the Court.[30]

As outlined in *Leviness*, the doctrine of representation resembles the modern class action device in some ways.[31] Both require that the representative plaintiff adequately represent the rights and claims of the other plaintiffs,[32] that the representative plaintiff have interests in common with the other plaintiffs,[33] and that the number of plaintiffs represented be large enough such that individual litigation would be inefficient or impractical.[34]

While this comparison shows that efficiency, or judicial economy, has always been an element of representative litigation, arguably the litigation device also developed as a means of giving parties greater access to the courts. Certain parties may have had access to the courts through representative litigation based on the common law right under the doctrine of representation, but Maryland did not codify the right until 1961.[35]

A. Statutory Right to Class Action in Maryland

Although Federal Rule of Civil Procedure 23[36] ("Federal Rule") codified the use of class action in federal court in 1938, Maryland had

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30. *Id.* (quoting section 97 of Story's Equity Pleading). Concepts of the modern requirements of numerosity, commonality, typicality, and adequacy are each represented within the early rule. See *infra* Part II.B for a discussion of the modern requirements.
31. *See infra* note 43 (quoting the full text of Maryland Rule 2-231); *see also* Gallacher, *supra* note 21, at 1520 (noting that the doctrine of representation and the modern class action device also differ regarding notice requirements, use in equity versus law courts, and dismissal procedures). *Compare supra* notes 25-28 and accompanying text (discussing the doctrine of representation), *with* MD. R. 2-231.
32. *Compare* MD. R. 2-231(a)(4), *with Leviness*, 114 Md. at 567-68, 80 A. at 307.
33. *Compare* MD. R. 2-231(a)(4), *with Leviness*, 114 Md. at 567-68, 80 A. at 307.
34. *Compare* MD. R. 2-231(a)(4), *with Leviness*, 114 Md. at 567-68, 80 A. at 307. *See also* FED. R. CIV. P. 23(a) (requiring that a class be numerous enough that joinder is impractical).
35. *See infra* note 37 and accompanying text.
36. Federal Rule 23 states:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the

class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class which would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class which would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions. (1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be conditional, and may be altered or amended before the decision on the merits. (2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel. (3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class. (4) When appropriate (A) an action may be brought or maintained as a class action with respect to particular issues, or (B) a class may be divided into subclasses and each subclass treated as a

no statutory right to class action until over twenty years later in 1961 when it adopted Rule 209.[37] Perhaps because Rule 209 was not as

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class, and the provisions of this rule shall then be construed and applied accordingly.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16, and may be altered or amended as may be desirable from time to time.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

(f) Appeals. A court of appeals may in its discretion permit an appeal from an order of a district court granting or denying class action certification under this rule if application is made to it within ten days after entry of the order. An appeal does not stay proceedings in the district court unless the district judge or the court of appeals so orders.

FED. R. CIV. P. 23.

37. Maryland Rule 209 stated:

a. *When Allowed.* When there is a question of law or fact common to persons of a numerous class whose joinder is impracticable, one or more of them whose claims or defenses are representative of the claims or defenses of all and who will fairly and adequately protect the interests of all may sue or be sued on behalf of all.

b. *Elimination of Representative Character.* Except where a class action is maintained of right, the court may adjudicate and declare the non-representative character of the action and render judgment specifically determining that only the parties to the action are bound thereby.

c. *Protective Orders-Notice.* The court at any stage of the action may impose such terms as shall fairly and adequately protect the interests of the persons on whose behalf the action is brought or defended, including an order that notice be given in such a manner as it may direct: (1) of the pendency of the action, (2) of a proposed settlement, (3) of rendition of judgment, (4) to come in and present claims, or (5) of any other proceedings in the action.

d. *Court Approval for Compromise or Dismissal.* Except with the approval of the court, a class action shall not be compromised or dismissed.

MD. R. 209 (1961) (repealed 1984).

instructive as the federal rule, the Maryland courts often referred to federal class action cases when deciding certain issues.[38]

In *Johnson v. Chrysler Credit Corp.*,[39] the Court of Special Appeals of Maryland looked for guidance in interpreting its own class action statute and followed the United States Supreme Court case of *Eisen v. Carlisle & Jacquelin*.[40] In following *Eisen*, the court in *Johnson* held that the class should incur the cost of providing notice to class members and that the trial court should not inquire into the merits of the litigation during the class certification phase.[41] At the time *Johnson* was decided, Maryland Rule 209 directed only that the court should protect the interests of the class members by giving notice "in such a manner as it may direct."[42] By modeling its interpretation of Rule 209 after federal case law interpreting the federal class action rule, Maryland courts seemed to be calling out to the rule-making body for additional guidelines. Consequently, the Standing Committee on Rules of Practice and Procedure ("Committee") responded in 1984 with the enactment of the new Maryland Rule 2-231.[43]

38. *See* Johnson v. Chrysler Credit Corp., 26 Md. App. 122, 127, 337 A.2d 210, 213 (1975) (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974) and stating that the Supreme Court's interpretation of Federal Rule 23 is not binding, but is persuasive for Maryland courts and that the federal rule is substantially more detailed than the Maryland rule).
39. 26 Md. App. 122, 337 A.2d 210 (1975).
40. 417 U.S. 156 (1974).
41. *See Johnson*, 26 Md. App. at 128-29, 337 A.2d at 213-14.
42. *See* MD. R. 209.
43. *See* MD. R. 2-231. This rule states:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
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> (b) Class Actions Maintainable. Unless justice requires otherwise, an action may be maintained as a class action if the prerequisites of section (a) are satisfied, and in addition: (1) the prosecution of separate actions by or against individual members of the class would create a risk of (A) inconsistent or varying adjudications with respect to individual members of the class that would establish incompatible standards of conduct for the party opposing the class, or (B) adjudications with respect to individual members of the class that would as a practical matter be dispositive of the interests of the other members not parties to the adjudications or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members and that a class action is superior to other available methods for the fair and efficient ad-

judication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.

(c) Certification. On motion of any party or on the court's own initiative, the court shall determine by order as soon as practicable after commencement of the action whether it is to be maintained as a class action. A hearing shall be granted if requested by any party. The order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action. The order may be conditional and may be altered or amended before the decision on the merits.

(d) Partial Class Actions; Subclasses. When appropriate, an action may be brought or maintained as a class action with respect to particular issues, or a class may be divided into subclasses and each subclass treated as a class.

(e) Notice. In any class action, the court may require notice pursuant to subsection (f)(2). In a class action maintained under subsection (b)(3), notice shall be given to members of the class in the manner the court directs. The notice shall advise that (1) the court will exclude from the class any member who so requests by a specified date, (2) the judgment, whether favorable or not, will include all members who do not request exclusion, and (3) any member who does not request exclusion and who desires to enter an appearance through counsel may do so.

(f) Orders in Conduct of Actions. In the conduct of actions to which this Rule applies, the court may enter appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument, (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in the manner the court directs to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise to come into the action, (3) imposing conditions on the representative parties or intervenors, (4) requiring that the pleadings be amended to eliminate allegations as to representation of absent persons, and that the action proceed accordingly, (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 2-504, and may be altered or amended as may be desirable from time to time.

(g) Discovery. For purposes of discovery, only representative parties shall be treated as parties. On motion, the court may allow discovery by or against any other member of the class.

(h) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. Notice of a proposed dismissal or compromise shall be given to all members of the class in the manner the court directs.

(i) Judgment. The judgment in an action maintained as a class action under subsections (b)(1) and (2), whether or not favorable to the class, shall include and describe those whom the court finds

B. Class Action Certification Under Maryland Rule 2-231

The Committee modeled Maryland Rule 2-231 almost entirely after Federal Rule 23.[44] As such, Maryland courts often refer to federal decisions for guidance when the Maryland rule fails to adequately address an issue.[45] Thus, case law interpreting Federal Rule 23 may also be used as a guide to interpreting Maryland Rule 2-231.[46] Under both Maryland Rule 2-231 and Federal Rule 23, class actions are maintainable only if the action meets the four threshold requirements of numerosity, commonality, typicality, and adequacy.[47]

1. Numerosity

The numerosity requirement necessitates that the class be so numerous that "joinder of all members is impracticable."[48] The rules require no specific number of litigants, and courts have held that satisfaction of this requirement hinges on the facts of each case.[49] Classes with as few as twenty-five or thirty members have met the numerosity requirement.[50] Courts generally use a common sense approach in determining whether joinder of the parties reaches the required "im-

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> to be members of the class. The judgment in an action maintained as a class action under subsection (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subsection (e)(1) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

Id.

44. *See* Md. R. 2-231 source note (listing the sections of Maryland Rule 2-231 derived from Federal Rule 23). Section g is the only section not derived from the federal rule. *Id. Compare* MD. R. 2-231 *with* FED. R. CIV. P. 23.
45. *See, e.g.*, Snowden v. Balt. Gas & Elec. Co., 300 Md. 555, 479 A.2d 1329 (1984). Because Maryland Rule 2-231 does not address the appealability of class certifications, the court of appeals looked to a federal class action case, *Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978), to determine whether an order denying class certification was appealable. *Id.* at 562-63, 479 A.2d 1332-33. *Livesay* held that even if a denial of class certification sounded the "'death-knell'" of the litigation, an order denying certification was not appealable as a matter of right, but possibly could be appealable under the Federal Interlocutory Appeals Act. *Id.* Because Maryland has no similar act regarding interlocutory appeals, the court in *Snowden* held that class certification orders were not appealable. *Id.* at 567, 479 A.2d at 1335.
46. *See* Pollokoff v. Md. Nat'l Bank, 288 Md. 485, 491, 418 A.2d 1201, 1205 (1980) (analyzing the United States Supreme Court's interpretation of Federal Rule 23, in the context of aggregation of claims, for guidance in the interpretation of Maryland Rule 209, the precursor to the current Maryland Rule 2-231).
47. FED. R. CIV. P. 23(a); MD. R. 2-231(a).
48. MD. R. 2-231.
49. *See* Gen. Tel. Co. of the N.W., Inc. v. EEOC, 446 U.S. 318, 330 (1980).
50. *See In re* Kirschner Med. Corp. Sec. Litig., 139 F.R.D. 74, 78 (D. Md. 1991) (stating that a case with twenty-five to thirty plaintiffs would be impractical to litigate as a joinder, but not providing a strict numerical standard for such a case).

practicable" standard.[51] Requiring numerosity primarily serves to ensure that the class action prevails as necessary and more judicially economical than joinder of the parties and claims.[52] Enforcing the numerosity requirement also provides persons with small claims a greater opportunity for access to the courts.[53]

2. Commonality

The Maryland rule also requires that the claims of the class members contain common questions of law or fact.[54] This requirement ensures uniform decisions with respect to common issues, and promotes convenience and judicial economy.[55] Even a single common issue of law or fact may adequately bind the members together as a class for litigation under this requirement.[56] An issue should be viewed as common "only to the extent its resolution will advance the litigation of the entire case."[57]

Achieving commonality requires only that common issues exist – not that they predominate the claims of the class members.[58] Although similar to the Rule 2-231(b)(3) requirement of predominance[59] of common issues over individual issues, the commonality requirement under Rule 2-231(a) is less stringent and is easily met in most cases.[60]

3. Typicality

The requirement of typicality makes certain that the claims or defenses of the class representatives encompass the typical claims or defenses of the rest of the class.[61] In determining whether this requirement exists in a particular case, courts use a common sense inquiry into whether the interests of the plaintiffs represent the interests of the rest of the class.[62] There must be "similar legal and remedial theories underlying the representative claims and the claims of

51. *See* Gallacher, *supra* note 21, at 1558-59.
52. *See* Philip Morris Inc. v. Angeletti, 358 Md. 689, 732, 752 A.2d 200, 223 (2000).
53. *See id.*
54. *See* MD. R. 2-231(a).
55. *See Angeletti*, 358 Md. at 734, 752 A.2d at 225.
56. *See id.* at 736, 752 A.2d at 226.
57. *Id.*
58. *See id.* at 734, 752 A.2d at 225.
59. *See infra* notes 77-84 and accompanying text (explaining the predominance requirement).
60. *See Angeletti*, 358 Md. at 734, 737, 752 A.2d at 225-26.
61. *See* MD. R. 2-231(a).
62. *See Angeletti*, 358 Md. at 737-38, 752 A.2d at 227.

the class."[63] Although each plaintiff's case may be factually different, the typicality requirement may still be met.[64]

Requiring typicality also ensures that the claims of the class representatives embody the best interests of those less active in the litigation.[65] Essentially, the representative must be able to prove the class members' cases by proving her own case.[66]

4. Adequacy of Representation

Maryland Rule 2-231(a) provides in part that the "representative parties will fairly and adequately protect the interests of the class."[67] The adequacy of representation requirement actually addresses two concerns: 1) that the class representatives have no conflict with the rest of the class members, allowing each representative to vigorously pursue the action on behalf of the other members, and 2) that the attorney representing the class will do so with vigor and diligence.[68] In considering whether representation is "adequate," courts analyze conflicts of interest, determine whether representatives and members share interests, and determine whether a harmony exists between the goals of the class members, representatives, and counsel.[69]

Adequacy of representation ensures due process for the absent class members and makes certain that the representatives, not the attorneys for the class, control the litigation.[70] Class representatives must also possess reasonable knowledge of the cause of action and the specifics of the case in order to preserve due process of the absent class members.[71] Courts have refused to certify a class when a representative lacks sufficient knowledge concerning the case.[72]

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63. *Id.*
64. *See id.* at 740, 752 A.2d at 228 (citing Broin v. Philip Morris Cos., 641 So. 2d 888, 892 (Fla. Dist. Ct. App. 1994)). The court in *Angeletti* stated that although the typicality requirement has been met, any concerns regarding factual differences in each plaintiff's case should be addressed under the predominance inquiry. *Id.*
65. *See id.* at 737, 752 A.2d at 226.
66. *See* Gallacher, *supra* note 21, at 1560-61; *see also* Scott S. Partridge & Kerry J. Miller, *Some Practical Considerations for Defending and Settling Products Liability and Consumer Class Actions*, 74 TUL. L. REV. 2125, 2136-37 (2000). Many courts have denied class certification of mass tort cases for this reason because such cases often involve issues of injury, causation, and affirmative defenses. *See id.*
67. MD. R. 2-231(a).
68. *See Angeletti*, 358 Md. at 740-41, 752 A.2d at 228; *see also* Partridge & Miller, *supra* note 66, at 2137-38.
69. *See Angeletti*, 358 Md. at 741-42, 752 A.2d at 229.
70. *See* Gallacher, *supra* note 21, at 1562. Due process requires that the class representative take an active role in the litigation in order to protect the interests of the class members and ensure that attorneys do not become the driving force of the litigation. *See id.*
71. *See* Partridge & Miller, *supra* note 66, at 2139.
72. *See, e.g.*, White v. Ensearch Corp., 78 F.R.D. 547, 548 (N.D. Tex. 1978) (refusing class action status because the plaintiff had almost a total lack of

C. *Classification Under Maryland Rule 2-231(b)(3)*

If a class meets each requirement of numerosity, commonality, typicality, and adequacy, it must also be certified under section (b) of Maryland Rule 2-231.[73] Although four categories of certification exist, the (b)(3) class is the most commonly utilized in mass tort cases.[74]

Under 2-231(b)(3), the court must find that common questions of law or fact predominate over individual issues, and that a class action is superior to other methods of adjudication in order to certify the class.[75] Thus, certification under 2-231(b)(3) generally hinges on the issues of predominance and superiority.[76]

1. Predominance

The predominance test is practical[77] but much more demanding than the commonality requirement of 2-231(a).[78] The predominance inquiry "focuses on the number and significance of common questions as opposed to individual issues."[79]

Achievement of judicial economy often depends on the satisfaction of this requirement.[80] Because individual issues of causation, damages, and defenses are usually specific to each plaintiff, most courts hold that certifying some mass tort suits as class actions defeats the underlying purpose of preserving judicial economy.[81] Although the text of the rule does not explicitly prohibit the exclusion of mass tort claims from class certification,[82] many courts look unfavorably upon

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knowledge about the basis of the suit); *see also* Butterworth v. Quick & Reilly, Inc., 171 F.R.D. 319, 323 (M.D. Fla. 1997) (denying class certification because a representative was not knowledgeable enough about the case to fairly represent the class members).

73. MD. R. 2-231(b).

74. *See* James W. Elrod, *The Use of Federal Class Actions in Mass Toxic Pollution Torts*, 56 TENN. L. REV. 243, 259-67 (1988). This Comment addresses only the (b)(3) category. Other categories under the rule are: the (b)(1)(A) class used by parties wishing to defend against multiple adjudications, not for the benefit of the class members; the (b)(1)(B) class used in "limited fund" situations; and the (b)(2) class used primarily in cases in which equitable relief is sought. *See id.*

75. MD. R. 2-231(b)(3).

76. *See* Elrod, *supra* note 74, at 267.

77. Gallacher, *supra* note 21, at 1591 (stating that this prong of the test is pragmatic).

78. *See* MD. R. 2-231(a); *Angeletti*, 358 Md. at 743, 752 at 231.

79. *See* Partridge & Miller, *supra* note 66, at 2139.

80. *See Angeletti*, 358 Md. at 743, 752 A.2d at 229-30 (citing Valentino v. Carter-Wallace, Inc., 97 F.3d 1227, 1234 (9th Cir. 1996)).

81. *See Angeletti*, 358 Md. at 762, 752 A.2d at 240. *But see supra* Part IV.C.

82. *See* Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 625 (1997) (discussing the rationale of the Advisory Committee for the 1966 revision of Rule 23 in promulgating the rule).

such actions.[83] As a result, often in mass tort litigation, class actions fall short of certification because they fail this test.[84]

2. Superiority

The requirement of superiority mandates that the class action should be the most efficient means of adjudicating the matter.[85] Maryland Rule 2-231(b)(3) lists factors that should be considered in analyzing the superiority requirement:

> (A) The interest of members of the class in individually controlling the prosecution or defense of separate actions, (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class, (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum, (D) the difficulties likely to be encountered in the management of a class action.[86]

The first factor, the interest of the representative in controlling the case, focuses on the principle that "the greater the individuals' stake in the litigation, the greater their interest in controlling their own actions in individual litigation."[87] When drafting Federal Rule 23, the Advisory Committee stated its reasoning for this consideration:

> The interests of individuals in conducting separate lawsuits may be so strong as to call for denial of a class action. On the other hand . . . the class may have a high degree of cohesion and prosecution of the action through representatives would be quite unobjectionable, or the amounts at stake for individuals may be so small that separate suits would be impractical.[88]

The second factor, the nature of the litigation already commenced, looks to the extent and nature of litigation surrounding the claim that has already been initiated.[89] If too much pre-existing litigation exists, a class action may be unproductive.[90]

The third factor, desirability, embodies two considerations. First, the court must determine whether allowing the action to proceed as a class action would reduce the possibility of inconsistent results.[91] The second consideration requires analyzing whether the chosen forum is

83. *See supra* note 2 and accompanying text.
84. *See, e.g., Amchem*, 521 U.S. at 625; Castano v. Am. Tobacco Co., 84 F.3d 734, 746-47 (5th Cir. 1996); *Angeletti*, 358 Md. at 728-29, 752 A.2d at 221-22.
85. MD. R. 2-231(b)(3).
86. *Id.*
87. *Angeletti*, 358 Md. at 763, 752 A.2d at 240-41.
88. FED. R. CIV. P. 23 advisory committee's note b(3) (1966 amendments).
89. *See Angeletti*, 358 Md. at 764, 752 A.2d at 241.
90. *See id.*
91. *See id.*

an appropriate location for the parties in interest, accessibility of witnesses and evidence, and the condition of the court's docket.[92]

Finally, the court should consider the fourth factor, manageability of the action as a class action.[93] At the crux of this factor lies the ultimate goal of judicial economy.[94] Mass tort class action certification generally fails because of the great number of individual issues involved, litigation of which, using the class action device, might be unmanageable, and therefore not serve the goal of judicial economy.[95]

III. THE INSTANT CASE

Although certification of class action lawsuits involving mass tort litigation rarely occurs, some judges have held that certain claims pass all of the tests of Rule 2-231(b)(3).[96] In *Philip Morris Inc. v. Angeletti*, the Court of Appeals of Maryland used the extraordinary relief of mandamus to decertify a class action tobacco lawsuit, originally approved under Rule 2-231(b)(3) by Maryland Circuit Court Judge Edward J. Angeletti.[97]

A. *Factual background*

The plaintiffs in *Angeletti* filed their case in the Circuit Court for Baltimore City, alleging that they and similarly situated Maryland residents suffered various injuries including nicotine dependency and injuries caused by smoking cigarettes and/or using smokeless tobacco.[98] In a complaint alleging ten counts, the plaintiffs filed suit against all tobacco manufacturers and their Maryland distributors, two industry trade groups, and a marketing and public relations firm.[99]

92. *See id.* at 765, 752 A.2d at 241.
93. *See* MD. R. 2-231(b)(3).
94. *See Angeletti*, 358 Md. at 765, 752 A.2d at 242; *see also supra* Parts IV.B, V (explaining that the court in *Angeletti* relies heavily on the concept of judicial economy in making its decision).
95. *See id.* at 765-66, 752 A.2d at 242 (citing Kurczi v. Eli Lilly & Co., 160 F.R.D. 667, 681 (N.D. Ohio 1995), which declared that where individual issues are great, "this scenario is hardly the picture of judicial economy envisioned by Rule 23").
96. *See* Philip Morris Inc. v. Angeletti, 358 Md. 689, 701, 752 A.2d 200, 206 (2000).
97. *Id.* at 699, 752 A.2d at 205-06.
98. *Id.* at 699-700, 752 A.2d at 205-06.
99. *Id.* In the plaintiffs' fourth amended complaint, eight of the ten counts alleged in the amended complaint included tort or contract causes of action: fraud and deceit, negligent misrepresentation, intentional infliction of emotional distress, negligence, breach of express warranties, breach of implied warranties, strict products liability, and conspiracy. The plaintiffs also alleged several violations of the Maryland Consumer Protection Act. Finally, the plaintiffs urged the court to recognize an equitable cause of action they entitled "medical-monitoring," a fund financed by the defendants to treat and prevent future injury to the class. *Id.*

The plaintiffs filed a motion for class certification, which Judge Angeletti granted.[100] Certification was divided into two classes: 1) Maryland residents with serious injury and death claims,[101] and 2) Maryland residents with nicotine dependence claims.[102] The court also approved a proposed three-phase trial plan introduced by the plaintiffs.[103] Under Phase I of the trial plan, a class action jury trial would be conducted to determine whether the defendants were liable to the plaintiffs.[104] Also during Phase I, the jury would determine factual and legal issues and decide whether those issues were common to all class members.[105] Phase II would consist of determining issues of causation and damages for any of the claims on which the plaintiffs prevailed in Phase I.[106] Phase III would involve trial of the issues of

100. *Id.* at 701, 752 A.2d at 206 (stating that the class action was approved under Maryland Rule 2-231(b)(3) with regard to the tort and contract causes of action, and under Maryland Rule 2-231(b)(2) with regard to the equitable "medical-monitoring" claim).

101. *Id.* The circuit court defined this class as:

> All Maryland residents as of the date of class notice who have suffered, presently suffer, or who have died of diseases, medical conditions, and injury (while a resident of Maryland) caused by smoking cigarettes or using smokeless tobacco products that contain nicotine, and 1) The estates, representatives, and administrators of these persons; and 2) The spouses, children, relatives and significant others of these persons as their heirs or survivors.

Id.

102. *Id.* at 701-02, 752 A.2d at 206-07. The circuit court defined this class as:

> All nicotine dependent persons in Maryland who have purchased and used cigarettes and smokeless tobacco products manufactured by the Defendant Tobacco Companies. . . . "[N]icotine dependent" shall be defined as: 1) All cigarette smokers or smokeless tobacco users who have been diagnosed by a medical practitioner as nicotine dependent, and/or; 2) All cigarette smokers who have regularly smoked more than 15 cigarettes per day for at least three years and who have made at least one unsuccessful effort to quit smoking, and/or; 3) All regular daily users of smokeless tobacco products for at least three years and who have made at least one unsuccessful effort to quit using smokeless tobacco.

Id.

103. *See id.* at 702, 752 A.2d at 207.

104. *See id.* at 702-03, 752 A.2d at 207.

105. *Id.* Examples of the factual and legal issues to be determined by the jury include: whether nicotine in the defendants' cigarettes and smokeless tobacco products is addictive; whether the defendants' manipulated the amounts of nicotine contained in the tobacco products; whether the defendants knew and intentionally concealed information that tobacco causes disease; whether cigarettes are defectively designed; whether affirmative defenses such as contributory negligence and assumption of risk are applicable under the laws of Maryland; and whether Maryland allows punitive damages in such cases. *Id.*

106. *Id.* at 703, 752 A.2d at 207.

causation, damages, and smoking history for each individual plaintiff who had proved he was an established class member.[107]

In response to the class certification order, defendants filed a Motion for Reconsideration of Class Notice and to Stay Issuance of Class Notice.[108] The circuit court denied this motion upon hearing.[109] The defendants then filed a Petition for Writ of Mandamus and/or Writ of Prohibition with the Court of Appeals, requesting that the court of appeals order the circuit court to decertify the class.[110] On the same day, defendants also filed a motion with the circuit court requesting a stay of class notice pending the decision of the court of appeals regarding the Petition for Writ of Mandamus.[111] The circuit court denied this motion.[112] The defendants then filed a Motion for a Stay of Class Notice Pending Petition for Writ of Mandamus with the Court of Appeals.[113] The court granted this motion, pending the decision on the Petition for Writ of Mandamus.[114]

In requesting that the court of appeals grant the writ of mandamus, the defendants argued that because there could be no opportunity to appeal the class certification until Phase III of the trial, both the parties and the judicial system would suffer irreparable harm if, in fact, the certification of the class were improper.[115] The defendants also asserted that the circuit court committed an abuse of discretion in certifying the class under Maryland Rule 2-231 because the class members did not meet the prerequisites of the rule, including predominance, superiority, and manageability.[116] The defendants also claimed that the circuit court did not consider closely enough many of the important individual issues relevant to the certification, including contributory negligence, assumption of risk, conflict of laws, fraud, statutes of limitations, causation, and reliance.[117]

In their response, the plaintiffs contended that the court of appeals lacked authority to issue a writ of mandamus.[118] They claimed that the court of special appeals had "primary jurisdiction" to decide on

107. *Id.* At this stage, individual plaintiffs have the choice of proceeding with a full jury trial on the issues determined in Phase III, accepting the damages awarded during Phase III, having a summary jury trial on the issues determined in Phase III or initiating proceedings before a special master or magistrate on all of the issues in Phase III.
108. *Id.*
109. *Id.* at 703, 752 A.2d at 207-08.
110. *See id.* For a discussion of the difference between a writ of mandamus and writ of prohibition, see *Angeletti*, 358 Md. at 707 n.5, 752 A.2d at 209 n.5.
111. *Id.* at 703, 752 A.2d at 207-08.
112. *Id.*
113. *Id.* at 703-04, 752 A.2d at 208.
114. *Id.* at 704, 752 A.2d at 208. One week later, both the plaintiffs and the Attorney General filed oppositions to this motion. *Id.*
115. *Id.*
116. *Id.*
117. *Id.*
118. *Id.* at 705, 752 A.2d at 208.

the petition for writ of mandamus at this stage of the case.[119] Additionally, the plaintiffs claimed that issuance of a writ of mandamus or prohibition should have been subject to the standard of whether there was a judicial "'usurpation of power,'" not whether the ruling was merely erroneous or based on an "'abuse of discretion.'"[120] Finally, plaintiffs stated that the right to appeal on *final* judgment afforded the defendants the appropriate legal remedy to address any alleged mistakes of the circuit court.[121]

B. Writ of Mandamus

The court of appeals issued the writ of mandamus, decertifying the class action.[122] In its decision, the court of appeals held that the rules governing the appellate process were inapplicable because at common law, the "writ of mandamus is an original action and not an appeal."[123] Therefore, the court held that appellate rules did not apply and did not preclude the court of appeals' issuance of a writ of mandamus.[124] Additionally, the court noted that because the writ of mandamus is not an appeal, the court of special appeals did not possess primary jurisdiction over the action.[125] As a result, the court held that "under the circumstances of this case" and "in aid of our appellate jurisdiction," the power to issue a writ of mandamus rested with the court of appeals.[126] However, the court did note the preference for the final judgment rule[127] and the need for the defendants to demon-

119. *Id.* at 705, 752 A.2d at 208-09. In support of their argument, plaintiffs cited *In re Petition for Writ of Prohibition*, 312 Md. 280, 539 A.2d 664 (1988), which held that Title 8 superseded the ability of the court of appeals to issue mandamus or prohibition in aid of appellate jurisdiction. *Id.* They also claimed that even if appellate review of the certification were appropriate at this point in the case, under the doctrine of "primary jurisdiction," the court of appeals may only assert jurisdiction if the motion is filed in the intermediate appellate court, the court of special appeals. *See id.*

120. *Id.* at 706, 752 A.2d at 209. In support of this claim, the plaintiffs stated that the judgment and legal reasoning of the lower court were sound and in accordance with the Maryland class action rule. *Id.*

121. *Id.* (explaining that because the case was at the interlocutory stage, the issuance of a writ of mandamus or prohibition would be "unnecessary and improper").

122. *Id.*

123. *Id.* at 707, 752 A.2d at 210 (citing Goodwich v. Nolan, 343 Md. 130, 145, 680 A.2d 1040, 1047 (1996)).

124. *Id.* at 709, 752 A.2d at 210-11 (explaining that Title 8 does not prohibit the court from issuing a writ of mandamus).

125. *Id.* at 709, 752 A.2d at 211.

126. *Id.* at 710, 752 A.2d at 211. The court explained that "in aid of appellate jurisdiction" means that the court should have the authority to review a potentially unreviewable question by issuing a writ of mandamus or prohibition. Justification for this authority lies in the potential irreparable harm to the moving party and the need to maintain the integrity of the legal system. *Id.* at 711, 752 A.2d at 212.

127. *See infra* note 265 and accompanying text (explaining the final judgment rule).

strate a "paramount public policy interest" to overcome the fact that an alternative remedy to mandamus already existed.[128] The court held that a paramount public policy interest did exist due to the immeasurable amount of time and expense to be incurred by both the parties and the Maryland judicial system.[129] Therefore, the court of appeals held that it had the right to issue a writ of mandamus should it subsequently find that the class should be decertified upon an examination of the merits.[130]

C. Merits of Class Certification Under Maryland Rule 2-231

With regard to the initial four requirements of class certification,[131] the court first analyzed the numerosity requirement.[132] The court of appeals held, and both parties agreed, that because this litigation could potentially impact hundreds of thousands of Maryland residents, the numerosity requirement was easily satisfied.[133]

Regarding commonality,[134] the court stated that "an issue of law or fact should be deemed 'common' only to the extent its resolution [would] advance the litigation of the entire case."[135] Taking this standard into consideration, the court allowed the finding of commonality by the circuit court to stand, but explained that the more stringent requirement of predominance of common issues over issues of individuals would be addressed further in its analysis.[136]

Regarding the requirement of typicality,[137] the court expressed some concern with the degree of differences between the plaintiffs' claims, and stated that this problem would also be addressed during the predominance inquiry.[138] As a result, the court held that the cir-

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128. *Angeletti*, 358 Md. at 712-13, 752 A.2d at 213; *see also* Brack v. Wells, 184 Md. 86, 90-91, 40 A.2d 319, 321 (1944) (stating that a writ of mandamus should not be granted if the petitioner has another adequate legal remedy). In *Angeletti*, the alternate legal remedy was to appeal after a final judgment had been ordered, in lieu of this interlocutory mandamus. *Angeletti*, 358 Md. at 713, 752 A.2d at 213.

129. *Angeletti*, 358 Md. at 722, 752 A.2d at 218.

130. *Id.*

131. *See supra* Part II.B.1-4 (noting that numerosity, commonality, typicality, and adequacy of representation are the four requirements).

132. *See supra* notes 48-53 and accompanying text (discussing the concept of numerosity).

133. *Angeletti*, 358 Md. at 733, 752 A.2d at 224.

134. *See supra* notes 54-60 (discussing the concept of commonality).

135. *Angeletti*, 358 Md. at 736, 752 A.2d at 226 (citing Insolia v. Philip Morris Inc., 186 F.R.D. 535, 542 (W.D. Wis. 1998)).

136. *Id.* at 736-37, 752 A.2d at 226.

137. *See supra* notes 61-66 and accompanying text (discussing the concept of typicality).

138. *Angeletti*, 358 Md. at 740, 752 A.2d at 228.

cuit court did not commit an abuse of discretion in finding that the typicality requirement had been satisfied.[139]

The defendants did not dispute the adequacy of the class representatives, and the court did not discuss this issue.[140] However, the court did address the defendants' argument that counsel for the plaintiffs had a concurrent conflict of interest due to another case in which plaintiffs' counsel represented the State of Maryland against the same defendants.[141] The court found that because the State of Maryland had entered into a finalized settlement agreement with the defendants, no conflict of interest existed.[142] Therefore, the requirement of adequate representation had been satisfied.[143]

Thus, according to the court, the plaintiffs easily met all four requirements of Maryland Rule 2-231(a) in the first step of class certification.[144] The court then turned its attention to the requirement of predominance under Rule 2-231(b).[145]

1. Predominance

On examination of the plaintiffs' individual issues, the court first considered conflict of laws issues.[146] The plaintiffs argued that only Maryland law applied to all class members, as the class contained only members who suffered injury in Maryland.[147] The defendants countered with the argument that the class necessitated an individual choice of law analysis for *each member* because a determination needed to be made as to the exact location of the individual when the addiction began.[148] The court stated that Maryland adheres to the *lex loci delicti* rule of tort law, which holds that the laws of the state where the injury occurred should apply.[149] The First Restatement of Conflict of

139. *Id.* The court explained that at this stage of the litigation, the plaintiffs had met their burden by alleging that "'the same unlawful conduct was directed at or affected both the named plaintiff[s] and the class[es] sought to be represented.'" *Id.* (quoting 1 HERBERT NEWBERG & ALBA CONTE, NEWBERG ON CLASS ACTIONS § 3.13, at 3-77 (3d. ed. 1992)).
140. *Id.* at 742, 752 A.2d at 229.
141. *Id.* (stating that some of the class members' interests and the State of Maryland's interest conflict with regard to Medicaid expense reimbursement).
142. *Id.* (citing Agreed Dismissal Order, State v. Philip Morris Inc., No. 96122201/CL211487 (Balt. City Cir. Ct., Dec. 1, 1998)).
143. *Id.* at 743, 752 A.2d at 229.
144. *Id.*
145. *Id.*; *see also supra* notes 77-84 and accompanying text.
146. *Angeletti*, 358 Md. at 744, 752 A.2d at 230.
147. *Id.*
148. *Id.* (citing the plaintiffs' brief at the circuit court level).
149. *Id. Lex loci delicti* is a traditional conflict of laws principle, and one that only a few states still utilize. It requires that "when an accident occurs in another state substantive rights of the parties, even though they are domiciled in Maryland, are to be determined by the law of the state in which the alleged tort took place." *Id.* at 745, 752 A.2d at 230 (quoting White v. King, 244 Md. 348, 352, 233 A.2d 763, 765 (1966)).

Laws defines the "place of injury" as "'where the last event necessary to make an actor liable for an alleged tort takes place.'"[150] The court held that without individual assessments, based on the principles of Maryland tort law, it would be impossible to apply only Maryland law to each individual.[151] The court explained further that because a person exposed to tobacco in one state may experience effects of disease in another state and may be diagnosed in yet another state, the class of injured plaintiffs may not necessarily be subject to the substantive laws of Maryland, and as a result, Maryland may not qualify as the place where the last wrong occurred.[152] In addition, the class of plaintiffs alleging nicotine addiction may not be subject solely to the laws of Maryland because such plaintiffs may have become addicted in another state and simply moved to Maryland, where they remained addicted.[153] In sum, the court held that because the class included only "Maryland residents," it did not necessarily mean that those residents were harmed in Maryland.[154] Therefore, the laws of the state where the wrong occurred may not be the state of Maryland.[155]

2. Additional Individual Issues

The legal nature of the claims of fraud and deceit and negligent misrepresentation sealed the fate of the predominance inquiry against the plaintiffs.[156] These claims placed the burden on the plaintiffs of proving that each individual plaintiff relied on material misrepresentations of the defendants.[157] Therefore, the court concluded that because proof of reliance represented a unique issue for each plaintiff, individual issues predominated over common issues.[158] With regard to the claims of negligent misrepresentation, the court recognized

150. *Id.* at 746, 752 A.2d at 231. Because Maryland is one of only a few states that continues to adhere to the *lex loci delicti* principle, reference to the First Restatement of Conflict of Laws is proper, although it is only of historical guidance in other states. *Id.*

151. *See id.* at 747, 752 A.2d at 232 (citing Georgine v. Amchem Prods., Inc., 83 F.3d 610, 627 (3d Cir. 1996)).

152. *Id.* at 748, 752 A.2d at 232; *see also* Geiger v. Am. Tobacco Co., 696 N.Y.S.2d 345, 349 (N.Y. Sup. Ct. 1999) (stating that a tobacco case is not a mass tort arising from a single accident or event).

153. *Angeletti*, 358 Md. at 749, 752 A.2d at 233 (stating that "place of injury" is not necessarily equivalent to "place of residency").

154. *Id.*

155. *Id.*

156. *Id.* at 750, 752 A.2d at 234. The plaintiffs' claims under the Maryland Consumer Protection Act were similar in nature to these claims, and therefore were also unsuitable for class action treatment. *Id.*

157. *Id.* at 750-51, 752 A.2d at 234 (explaining that each plaintiff must show reliance on material misrepresentations regarding nicotine's addictive characteristics, the detrimental health effects of tobacco, the defendants' knowledge of and research regarding the adverse effects of tobacco, and the defendants' manipulation of nicotine levels in their tobacco products).

158. *Id.* at 751, 752 A.2d at 234 (citing the Advisory Committee's Note for Federal Rule 23, which states that although fraud cases may have a common

that determining reliance under this claim would also vary from plaintiff to plaintiff.[159]

More individual issues weighed against the prerequisite of predominance of common issues.[160] Those issues included: 1) whether an individual is either "'dependent'" on or "'addicted'" to nicotine; 2) whether the emotional distress alleged in the claim of intentional infliction of emotional distress is "'severe;'" 3) whether affirmative defenses such as contributory negligence and assumption of risk apply; and 4) whether comparative negligence issues arise, depending on in which state the wrong occurred.[161] The court expressed "serious doubts" that these and other individual issues related to causation would not need to be addressed individually at some point during the litigation.[162]

3. Superiority

When determining whether the prerequisite of superiority had been met,[163] the court held that the members of each class had a great interest in individually controlling the prosecution or defense of separate actions.[164] The court pointed out that the plaintiffs claimed in excess of $500,000 in compensatory damages and $1,000,000 in punitive damages for each class member.[165] Regarding the extent of litigation already commenced, the court found that because so few individual tobacco cases were currently pending in the courts of Maryland, there existed little risk of inconsistent judgments or of a flood of individual claims if certification were to be denied.[166]

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core, they are unsuitable for class action treatment if there is a material difference in the kinds or degrees of reliance of each plaintiff).

159. *Id.* at 753-54, 752 A.2d at 235 (drawing this conclusion after reading depositions from several class members).

160. *See id.* at 755, 752 A.2d at 236.

161. *Id.*

162. *Id.* at 755-56, 752 A.2d at 237 (citing Insolia v. Philip Morris Inc., 186 F.R.D. 535, 546 (W.D. Wis. 1998) for the proposition that "[c]ausation remains one of the more formidable issues not subject to general proof"); *accord* Barnes v. Am. Tobacco Co., 176 F.R.D. 479 (E.D. Pa. 1997), *aff'd*, 161 F.3d 127, 135 (3d Cir. 1998), *cert. denied*, 526 U.S. 1114 (1999) (stating that "[t]he resolution of this 'general causation question' would accomplish nothing for any of the individual plaintiffs"); Smith v. Brown & Williamson Tobacco Corp., 174 F.R.D. 90, 96 (W.D. Mo. 1997) (stating that a decision finding cigarettes "generally capable of causing disease" would have a minimal effect in advancing the litigation because, ultimately, liability would turn on "whether cigarettes caused a particular plaintiff's disease").

163. *See supra* notes 85-95 and accompanying text (discussing the superiority requirement).

164. *Angeletti*, 358 Md. at 763, 752 A.2d at 241 (noting that individuals may have significant stakes in individual tobacco litigation).

165. *Id.*

166. *Id.* at 764, 752 A.2d at 241.

When considering the desirability of utilizing one forum for resolution of the claims, the court held that because this lawsuit involved many Maryland residents, the present forum of the Circuit Court for Baltimore City was as an appropriate forum as any other in Maryland.[167] Also, under the superiority inquiry, because individual issues would require many separate and potentially extensive trials, the court held that certification of this class would not further judicial economy.[168]

Thus, because the elements of superiority and predominance had not been met according to the court of appeals, the court held that decertification was appropriate. As such, the court issued a writ of mandamus ordering Judge Angeletti to decertify the class.

IV. ANALYSIS OF *ANGELETTI*

A. *Tobacco Litigation Class Action Suits in Other Jurisdictions*

Nationally, the tobacco industry generally opposes class action certification.[169] Mass tort class actions in several states have been struck down, and as of the writing of this Comment, only a few have been certified and viable to any extent in the United States.[170] While difficulties in proceeding with a class action of this type present a virtual bar to representative litigation of tobacco claims, some modifications may exist that would afford both the parties and the courts a more efficient and fair litigation process.[171]

Much skepticism exists regarding the certification of tobacco class actions.[172] While some courts have held that in most tobacco class action suits individual issues predominate over common issues of law or fact, or that class actions do not represent the superior device for litigating such claims,[173] other courts have found creative ways to utilize the class action device in mass tort cases.[174]

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167. *Id.* at 765, 752 A.2d at 242.
168. *Id.* (citing Emig v. Am. Tobacco Co., 184 F.R.D. 379, 393 (D. Kan. 1998), which held that a similar trial plan would not further judicial economy because it would require many individual trials).
169. *Tobacco, Lung Cancer Victims Seek Class Certification in Judge Weinstein's Court,* MEALEY'S LITIGATION REPORTS, July 6, 2000 (stating that the industry opposes certification on several grounds).
170. *See, e.g.*, R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996); Broin v. Philip Morris Cos., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).
171. *See infra* Part IV.
172. *See In re* Agent Orange Prod. Liab. Litig., 818 F.2d 145, 150 (2d Cir. 1987); *see generally* 3 NEWBURG ON CLASS ACTIONS § 17.02 (3d ed. 1992).
173. *See* Arch v. Am. Tobacco Co., 175 F.R.D. 469, 486 (E.D. Pa. 1997).
174. Other courts have also approved use of the class action device to decide issues that are common to all plaintiffs. In *In re Agent Orange Product Liability Litigation,* 818 F.2d 164, 167 (2d Cir. 1987), the court approved a mass tort class action solely to resolve a military contractor defense, which was common to all plaintiffs. However, the court also qualified the case in stat-

In *Sterling v. Velsicol Chemical Corp.*,[175] the United States Court of Appeals for the Sixth Circuit certified a class action in an environmental toxic tort case.[176] While individual issues of causation and damages existed, the court stated that individualization of issues did not justify denying class action certification in mass tort claims.[177] The court in *Sterling* allowed the class action to proceed with five class representatives to determine the issue of *general* causation – whether the plaintiffs' exposure to the contamination *could have caused* the alleged injuries.[178] Although the court noted that its decision to pursue the case as a class action would necessitate further individualized litigation to determine proof of individual damages,[179] it rejected the idea that a need existed for "a more efficient method of disposing of a large number of lawsuits" and held that a class action was superior for determining some issues.[180]

The court in *Sterling* recognized that utilizing the class action device to resolve issues common to all plaintiffs would likely improve the efficiency of handling mass tort cases.[181] In fact, certification on a general causation issue may produce three possible outcomes: 1) the exposure to a product will always cause harm; 2) the exposure will never cause harm; or 3) exposure may or may not cause harm, depending on various factors.[182] If the judge or jury determines that the product exposure will never cause harm, further adjudication is unnecessary.[183] If causation is established, individual issues must still be heard[184] at the risk of trying possibly thousands of cases over a period

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ing that, had the case been based on exposure to toxins in civilian affairs, class certification would have been an error. *Id.* The Third Circuit also certified a class action to determine a single issue in *In re School Asbestos Litigation*, 789 F.2d 996 (3d Cir. 1986). In that case, the court allowed certification for the purpose of determining property damages because, according to the court, although asbestos affected several different buildings, it affected each building in the same manner. *Id.* However, the court added that because the effect of asbestos on people is unlike the effect of asbestos on buildings, personal injury determinations for each individual would be required and would therefore not be appropriate. *Id.* at 1009-11.

175. 885 F.2d 1188 (6th Cir. 1988).

176. *Id.* at 1197. The plaintiffs alleged personal injuries as a result of drinking water that had been contaminated by chemicals leaking from the defendant's landfill. *Id.* at 1192.

177. *Id.* at 1197.

178. *Id.* at 1197-200.

179. *Id.* at 1200.

180. *Id.* at 1196-97.

181. *Id.* at 1197.

182. *See Agent Orange Prod. Liab. Litig.*, 818 F.2d at 164-65.

183. *See, e.g., In re* Paoli R.R. Yard PCB Litig., 35 F.3d 717, 781-83, 785 (3d Cir. 1994) (affirming summary judgment against the plaintiffs because the plaintiffs failed to prove that exposure to the defendant's toxins caused their injuries).

184. *Sterling*, 855 F.2d at 1200.

of years.[185] However, these issues would have to be tried individually regardless of the method of litigation.[186]

Clearly, Judge Angeletti contemplated the need for individual litigation.[187] By approving Phase III of the trial plan proposal, he planned to allow individual class members to proceed in one of four ways to determine issues such as causation and damages, after having decided factual and legal issues common to all class members.[188] While the Phase III trials in *Angeletti* would represent the bulk of the individual litigation that the court of appeals claims would be judicially inefficient, certification to determine common issues in Phases I and II might actually sustain judicial economy.[189]

B. Conflict of Laws

Determining which state's laws apply to each plaintiff factors into both the predominance and superiority requirements, and often presents additional individual issues to be decided.[190] Not surprisingly, courts of other jurisdictions have refused to certify class actions based on the necessity of overwhelming choice of law inquiries for each class member.[191]

The court in *Angeletti* relied on the traditional tort principle of *lex loci delicti* in refusing certification and decided that under this principle, a tort action must be "'governed by the substantive law of the state where the wrong occurred.'"[192] Using *lex loci delicti*, even when

185. *See* Owens-Illinois v. Levin, 792 F.Supp. 429, 431 (D. Md. 1992) (hypothesizing that trying 9000 asbestos cases would take over 100 years); Cimino v. Raymark Indus., 751 F. Supp. 649, 652 (E.D. Tex. 1990) (stating that it could take six and a half years to try 2298 cases); R. Joseph Barton, *Utilizing Statistics and Bellwether Trials in Mass Torts: What do the Constitution and Federal Rules of Civil Procedure Permit?*, 8 WM. & MARY BILL RTS. J. 199, 209 n.83 (comparing *Owens-Illinois* with *Cimino* and stating that "[a]pparently, the courts in Texas are more efficient than those in Maryland," but adding that regardless of the accuracy of these estimates, trying a large number of cases would obviously strain the court system).

186. *See Sterling*, 855 F.2d at 1200; *Angeletti*, 358 Md. at 760, 752 A.2d at 238.

187. *See supra* notes 105-09 and accompanying text.

188. *See Angeletti*, 358 Md. at 703, 752 A.2d at 207; *see also supra* notes 105-09 and accompanying text.

189. *See infra* notes 230-32 and accompanying text (stating that some courts have narrowed the class in order to make use of the class action device more manageable).

190. *See* Susan E. Kearns, *Decertification of Statewide Tobacco Class Actions*, 74 N.Y.U. L. REV. 1336, 1369 (1999).

191. The Fifth Circuit denied certification of a nationwide class action based on the complexity of the choice of law inquiry, which would have required an analysis of the tort laws of each state. Castano v. Am. Tobacco Co., 84 F.3d 734, 749-50 (5th Cir. 1996) (stating that determining choice of law for each individual would not be impossible, but it would make individual litigation more attractive than proceeding with the litigation as a class action).

192. *Angeletti*, 358 Md. at 746, 752 A.2d at 230 (quoting Hauch v. Connor, 295 Md. 120, 123, 453 A.2d 1207, 1209 (1983)).

an injury occurs in another state and the injured party is domiciled in Maryland, courts apply the substantive laws of the state in which the alleged tort occurred.[193] *Lex loci delicti* no longer maintains universal acceptance, and less than one half of the states continue to adhere to it.[194] Maryland considered overruling the doctrine of *lex loci delicti* in *White v. King*,[195] but refused to do so.[196] Citing the court of special appeals, the *Angeletti* court noted that "Maryland is among the few states that continue to adhere to the traditional conflict of laws principle of *lex loci delicti*, . . . while of merely historical interest elsewhere, [*lex loci delicti*] continues to provide guidance for the determination of . . . questions in Maryland."[197] In applying this tort principle, Judge Angeletti did not rule out the need for individualized inquiries. However, the Court of Appeals of Maryland believed that he "simply misapplied the [rules of choice of] law," in deciding that only Maryland law would apply to each class member.[198]

Like Maryland, Kansas also adheres to the tort principles of *lex loci delicti*.[199] The United States District Court for the District of Kansas also refused to certify a class action brought by Kansas smokers in *Emig v. American Tobacco Co.*[200] To avoid related choice of law problems, the plaintiffs sought to limit members of the class to persons whose claims were "properly disposed of under Kansas law."[201] The court reasoned that in their attempt to narrow the class for choice of law purposes, the plaintiffs overlooked the difficulty in determining whether each class member's injury actually occurred in Kansas.[202] If, for example, addiction were the alleged injury, each member would have to prove they became addicted to tobacco in Kansas through individual hearings with opportunities for the defendant to cross-examine.[203]

Even the United States Court of Appeals for the Fourth Circuit has recognized that Maryland lags behind in utilizing its current tort principle, asserting that "against what may be the general trend of latter times toward 'significant relationship' analysis, [Maryland] appears

193. *Id.* at 745, 752 A.2d at 230 (citing White v. King, 244 Md. 348, 352, 223 A.2d 763, 765 (1966)).
194. *See* Guitierrez v. Collins, 583 S.W.2d 312, 316, 316 n.2 (Tex. 1979) (citing case law from each state and listing the jurisdictions that have rejected *lex loci delicti*).
195. 244 Md. 348, 354-57, 223 A.2d 763, 765-67 (1966).
196. *Id.* at 355, 223 A.2d at 767; *see also Guitierrez*, 583 S.W.2d at 316 n.2.
197. *Angeletti*, 358 Md. at 745 n.25, 752 A.2d at 231 n.25 (citing Black v. Leatherwood, 92 Md. App. 27, 41, 606 A.2d 295, 301, *cert. denied*, 327 Md. 626, 612 A.2d 257 (1992)).
198. *Angeletti*, 358 Md. at 747, 752 A.2d at 232.
199. *See* Emig v. Am. Tobacco Co., 184 F.R.D. 379, 394 (D. Kan. 1988).
200. *Id.* at 395.
201. *Id.* at 393-94.
202. *Id.* at 394.
203. *Id.*

rather steadfastly to have adhered to *lex loci* [*delicti*] as the ordering principle in tort cases."[204] One remedy for alleviating choice of law problems could involve Maryland adopting the "significant relationship" analysis[205] over the antiquated doctrine of *lex loci delicti*.[206] The significant relationship analysis is derived from section 145 of the *Restatement (Second) of Conflict of Laws* and states, in part, that "[t]he rights and liabilities of the parties with respect to an issue in tort are determined by the local law of the state which . . . has the most *significant relationship* to the occurrence and the parties."[207] This approach may offer a more rational and flexible guideline for courts when deciding conflicts issues.[208]

Florida adheres to the significant relationship analysis when analyzing choice of law in tort actions.[209] Coincidentally, at least one class action tobacco lawsuit has, to date, been successfully certified by the Florida courts, with certain modifications.[210]

1. *R.J. Reynolds Tobacco Co. v. Engle*

In a 1996 Florida class action case, plaintiffs brought a products liability action against R.J. Reynolds Tobacco Company and other tobacco manufacturers.[211] Those plaintiffs sought damages for alleged addictions and various other claims, similar to those of the plaintiffs in *Angeletti*.[212] The trial court in *Engle* certified the class of plaintiffs including "'[a]ll United States citizens . . . who have suffered . . . from diseases and medical conditions caused by their addiction to cigarettes . . . .'"[213] The defendants appealed the order of certification.[214]

On interlocutory appeal, the Florida District Court of Appeal held that the plaintiffs had not successfully satisfied the superiority require-

204. Farwell v. Un, 902 F.2d 282, 286 (4th Cir. 1990).
205. *See generally* RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (1971).
206. *See Guitierrez*, 583 S.W.2d at 318 (noting other appropriate conflicts theories may be available including the "governmental interests" test, the "functional approach," the "principles of preference," the "better law" theory, and "choice-influencing considerations").
207. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145 (emphasis added).
208. *See Guitierrez*, 583 S.W.2d at 318 (discarding the *lex loci delicti* principle for the more modern significant relationship test).
209. *See* Tune v. Philip Morris Inc., 766 So. 2d 350, 353 (Fla. Dist. Ct. App. 2000).
210. *See* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).
211. *Id.* at 40.
212. *Compare id.* (stating plaintiffs' causes of action as strict liability in tort, fraud and misrepresentation, breach of implied warranty of merchantability and fitness, negligence, breach of express warranty, intentional infliction of emotional distress, and equitable relief), *with Angeletti*, 358 Md. at 700, 752 A.2d at 206 (stating the plaintiffs' causes of action as strict products liability, fraud and deceit, negligent misrepresentation, breach of expressed and implied warranties, intentional infliction of emotional distress, negligence and conspiracy).
213. *Engle*, 672 So. 2d at 40.
214. *Id.*

ment of the Florida class action rule.[215] Similar to Maryland Rule 2-231, the Florida class action rule is modeled after Federal Rule 23.[216] However, in affirming the trial court's order of certification, the *Engle* court held that by reducing the class to "manageable proportions" and restricting members to "Florida citizens and residents," the class action could proceed.[217] By narrowing the class to include only Florida residents, the class action presumably met all requirements under Florida Rule of Civil Procedure 1.220(b)(3). Although the court in *Engle* did not discuss potential issues of determining choice of law for each class member,[218] and it appears from the case that the defendants did not argue choice of law, one may assume that, under Florida's significant relationship test,[219] Florida law applied to all class members.

2. *Broin v. Philip Morris Co.*

While the court in *Engle* did not discuss conflict of law issues, at least one other Florida class action tobacco case has discussed those issues in certifying a class action.[220] In *Broin v. Philip Morris Co.*, flight attendants filed suit against tobacco manufacturers alleging injuries caused by inhalation of second-hand smoke in airplane cabins.[221] The defendants argued that under the commonality inquiry, different choice of law provisions would apply among the class members, thereby making the plaintiffs' claims too diverse to litigate as a class action, in addition to defeating the commonality requirement.[222] However, the *Broin* court disagreed and stated the following:

> Conflict of laws problems need not defeat the commonality requirement and deprive plaintiffs of class status. Close scrutiny of these issues may reveal fewer discrepancies among substantive laws of various states than defendants would have us believe. Subclasses can be utilized to deal with this situation should the need arise.[223]

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215. *Id.* at 41 (Fla. Dist. Ct. App. 1996) (stating that the plaintiffs did not make the requisite showing of superiority under Florida Rule of Civil Procedure 1.220(b)(3)).

216. *See* Broin v. Philip Morris Co., 641 So. 2d 888, 889 (Fla. Dist. Ct. App. 1994) (stating that Florida Rule of Civil Procedure 1.220 is patterned after Federal Rule of Civil Procedure 23).

217. *Engle*, 672 So. 2d at 42.

218. *See generally* R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39 (Fla. Dist. Ct. App. 1996).

219. *See infra* notes 229-32 and accompanying text (discussing the significant relationship test).

220. *See* Broin v. Philip Morris Co., 641 So. 2d 888 (Fla. Dist. Ct. App. 1994).

221. *Id.* at 889.

222. *Id.* at 891.

223. *Id.* at 891 n.2 (citation omitted).

As in *Engle*, the court in *Broin* found that choice of law issues did not bar the plaintiffs from utilizing the class action device.[224] In fact, both courts condoned the use of subclasses or narrowing the class in order to make the class action more manageable.[225]

3. Maryland and the Significant Relationship Test

If Maryland adopted the approach used in both *Engle* and *Broin*, as well as the significant relationship test, and applied it in a similar manner, many of the issues raised in the predominance inquiry would be resolved. For example, the court in *Angeletti* expressed concern that a plaintiff could be exposed to tobacco in one state, show manifestations of disease in another state, and receive a diagnosis of disease in yet another state.[226] Applying *lex loci delicti*, a Maryland court would then have to determine exactly *where* the wrong occurred in order to apply the law of that state to the particular plaintiff.[227] As the court in *Angeletti* stated, this poses a difficult task, especially when dealing with issues of addiction.[228] However, by utilizing the significant relationship test, the court would analyze the applicable law for the same plaintiff by determining which state had the most significant relationship to the plaintiff or the injury.[229] Under the significant relationship analysis, one Florida court held that even though a plaintiff had been a smoker in another state for most of his life, because he had been domiciled in Florida for the past ten years, Florida law applied, regardless of the plaintiff's primary place of exposure to the defendant's tobacco product.[230] By narrowing the class of plaintiffs to Maryland residents, or an even narrower subclass, *and* following the significant relationship guidelines from the *Restatement (Second) of Conflict of Laws*,[231] Maryland courts

224. *Id.* at 888; *see also supra* notes 215-19 and accompanying text.
225. *Broin*, 641 So.2d at 888; *see also supra* notes 215-19 and accompanying text.
226. *Angeletti*, 348 Md. at 748, 752 A.2d at 232.
227. *Id.* at 744-46, 752 A.2d at 230-31.
228. *See supra* notes 146-55 and accompanying text (discussing the difficulties in determining choice of law for plaintiffs alleging addiction as injury).
229. *See supra* notes 204-10 and accompanying text (discussing the significant relationship test).
230. Tune v. Philip Morris Inc., 766 So. 2d 350, 354-55 (Fla. Dist. Ct. App. 2000) (explaining that the burden fell on the defendant to prove that the law of the plaintiff's former state of New Jersey had a more significant relationship to the action).
231. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 145(2) (1971) states:
> Contacts to be taken into account in applying the principles . . . to determine the law applicable to an issue include: (a) the place where the injury occurred, (b) the place where the conduct causing the injury occurred, (c) the domicile, residence, nationality, place of incorporation and place of business of the parties, and (d) the place where the relationship, if any between the parties is centered. These contacts are to be evaluated according to their relative importance with respect to the particular issue.

could easily determine that only Maryland law applies to each plaintiff.[232]

C. *Judicial Economy*

While solving choice of law issues may reduce the number of individual issues to be addressed in a class action, as the court in *Angeletti* points out, individual hearings for each plaintiff would still be necessary to determine reliance issues and damages.[233] According to the *Angeletti* court, even "'[r]esolution of the common issues in this case [would] not promote judicial economy; in fact, in light of the individual issues a class action in this case will create judicial *dis*economy.'"[234]

In analyzing whether the plaintiffs met the superiority requirement, the *Angeletti* court held that the case should be decertified due to its unmanageability.[235] The court relied on several cases from other jurisdictions that generally held that where individual issues necessitate many individual trials, judicial economy would not be served by certification of a class action.[236] Other courts, however, have refused to allow "judicial diseconomy" to bar plaintiffs from proceeding with their claims as a class action. For example, the court in *Engle* agreed that it must consider the effect on the judicial system when certifying a class action; however, the court held that while class certification would still necessitate individual trials, a class limited solely to Florida residents would not unduly burden the courts and taxpayers of Florida.[237] In addition, the court in *Broin* stated that certifying the class would *aid* judicial economy because a class action would avoid inconsistent or

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Id.

232. *See Guitierrez*, 583 S.W.2d at 319 (stating that most courts would rule as a matter of law that under the significant relationship analysis, the law of the state where the parties were domiciled would apply if the injury to the plaintiff occurred in another state).

233. *See* Philip Morris Inc. v. Angeletti, 358 Md. 689, 750-57, 752 A.2d 200, 234-37 (2000) (discussing additional individual issues, including reliance as an element of fraud, and negligent misrepresentation and addiction as injury).

234. *Id.* at 760, 752 A.2d at 239 (quoting Smith v. Brown & Williamson, 174 F.R.D. 90, 94 (W.D. Mo. 1997)).

235. *Angeletti*, 358 Md. at 768-69, 752 A.2d at 244.

236. *Id.* at 242, 752 A.2d at 765-66. To support its position disfavoring class actions with a high number of individual issues, the *Angeletti* court cited *Emig v. Am. Tobacco Co.*, 184 F.R.D. 379, 393 (D. Kan. 1998), which held that a similar trial plan would not further judicial economy because it would "greatly complicate the management of the class action." The court also mentioned *Kurczi v. Eli Lilly & Co.*, 160 F.R.D. 667, 681 (N.D. Ohio 1995), which stated that individual hearings are "hardly the picture of judicial economy envisioned by Rule 23." *Id.*

237. R.J. Reynolds Tobacco Co. v. Engle, 672 So. 2d 39, 41-42 (Fla. Dist. Ct. App. 1996).

multiple similar decisions of the issues that *were* common to the class members.[238]

While judicial diseconomy may ultimately prevent class action litigation of tobacco-related injuries, the court in *Angeletti* failed to suggest any other approach, whether viable or otherwise, for litigation of the plaintiffs' claims and only hinted at feasible alternatives after decertification. In dicta, the court briefly acknowledged the financial struggle many plaintiffs would face if they were to bring their claims individually against a tobacco manufacturer.[239] The court then cited two cases in which plaintiffs asserted that individual suits were infeasible.[240] Those courts held that the disparity of resources between the individuals and the defendant tobacco companies was "'overstated,'"[241] and that there existed no "'shortage of attorneys willing to undertake tobacco litigation.'"[242] Finally, the court added that a possibility existed that potential claimants were not filing individual suits because they felt they had no compensable injury, or they did not want to stop smoking.[243]

As a result of decertification, many of the class members in *Angeletti* may never file an individual action, likely because of their lack of financial resources. While prohibiting a class action may preserve the court's goal of judicial economy, it might not ultimately enhance the goals of justice.[244] Consistent with the original goals of representative litigation,[245] the class action device should be made available to plaintiffs who want to offset the overwhelming cost of litigation by sharing expenses with other class members.[246] By sharing expenses the plaintiffs may financially be able to sustain the litigation of their claims, thereby granting them true access to the courts.

Even the United States Supreme Court has recognized the importance of a plaintiff's ability to litigate using the class action device as a means of reducing costs:[247] "It is a fundamental principle of American law that every person is entitled to his or her day in court,"[248] regard-

238. Broin v. Philip Morris Cos., 641 So. 2d 888, 891 (Fla. Dist. Ct. App. 1994).
239. *Angeletti*, 358 Md. at 763, 752 A.2d at 241 (stating that the court finds this situation for the plaintiffs "relevant and compelling").
240. *Id.*
241. *Id.* (quoting Castano v. Am. Tobacco Co., 84 F.3d 734, 747 n.25 (5th Cir. 1996)).
242. *Id.* at 764, 752 A.2d at 241 (quoting Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *12 (D.C. Super. Ct. Aug. 18, 1997)).
243. *Id.* (citing Reed v. Philip Morris Inc., No. 96-5070, 1997 WL 538921, at *12 (D.C. Super. Ct. Aug. 18, 1997)).
244. *See* Pruitt v. Allied Chem. Corp., 85 F.R.D. 100, 115 (E.D. Va. 1980).
245. *See supra* Part II.
246. *See* Mark C. Weber, *Thanks for Not Suing: The Prospects for State Court Class Action Litigation Over Tobacco Injuries*, 33 GA. L. REV. 979, 1009 (1999).
247. *See id.* (citing Deposit Guar. Nat'l Bank v. Roper, 445 U.S. 326, 338 n.9 (1980)).
248. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 809 (1985) (noting that class actions may provide a more effective avenue when the pursuit of litigation

less of his or her ability to secure an experienced attorney and adequate funding to match that of the defendant tobacco companies. Tobacco litigation is "hideously expensive"[249] for both plaintiffs and defendants, and often the cases are won by the party who has the most money to spend.[250]

As evidenced by the differing rationales of *Angeletti* and both the *Engle* and *Broin* decisions, courts must inevitably balance judicial economy with overall fairness to the parties.[251] However, while preserving the basic elements required under the rules promoting judicial economy, courts must allow every plaintiff his day in court.[252]

D. Writ of Mandamus

Even if plaintiffs could successfully craft an argument convincing a Maryland court to certify their suit as a class action, after *Angeletti*, the court of appeals would almost certainly reject certification long before the lower court issued a final judgment on the merits.[253]

1. Appealability of Class Certification Orders

In 1984, the Court of Appeals of Maryland decided *Snowden v. Baltimore Gas & Electric Co.*[254] and held that class certification was not appealable because it was not dispositive of a party's entire claim.[255] A search for guidance in federal court decisions on the issue of appealability was fruitless, as Congress had enacted the Federal Interlocutory Appeals Act, authorizing interlocutory appeals of class certification decisions in federal court.[256] The lack of a similar provision in Maryland forced the court in *Snowden* to hold as it did.[257]

Generally, appeals are limited to final decisions on the merits,[258] and, as of the writing of this Comment, Maryland has not enacted a statute or rule that allows for interlocutory appeals of class certification decisions.[259] Before *Angeletti*, the Court of Appeals of Maryland

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by each individual would be uneconomical); *see also* Tice v. Am. Airlines, Inc., 162 F.3d 966, 968 (7th Cir. 1998).

249. *See* Weber, *supra* note 246, at 1009.

250. *See* Richard A. Daynard & Mark Gottlieb, *18 Keys to Litigating Against Tobacco Companies*, TRIAL, Nov. 1999, at 18, 24.

251. *See* Barton, *supra* note 185, at 239.

252. *See id.*

253. *See generally Angeletti*, 358 Md. at 768-69, 752 A.2d at 244.

254. 300 Md. 555, 479 A.2d 1329 (1984).

255. *Id.* at 566-67, 479 A.2d at 1335.

256. *Id.* at 563 n.7, 479 A.2d at 1333 n.7; *see also supra* note 45 and accompanying text (explaining the court's rationale in *Snowden*).

257. *Id.*

258. *See Angeletti*, 358 Md. at 714, 752 A.2d at 214 (citing 7B CHARLES ALAN WRIGHT ET AL., FEDERAL PRACTICE AND PROCEDURE: CIVIL 2D § 1802, at 464 (2d ed. 1986)).

259. *See supra* notes 36-47 (comparing Maryland Rule 2-231 with Federal Rule 23 and noting that only Federal Rule 23 has a provision allowing interlocutory

had never utilized a writ of mandamus to review a class action certification.[260] Other jurisdictions had done so, but courts in those cases generally only issued the writ when there was an abuse of discretion by the lower court,[261] the standard required for mandamus.[262] In fact, before *Angeletti*, the Court of Appeals of Maryland had explicitly stated that it would *not* issue a writ of mandamus for the purpose of micromanaging complex litigation.[263] Apparently, the court has reconsidered this statement.

2. Abuse of Discretion

The court of appeals in *Angeletti* did not address whether Judge Angeletti clearly abused his discretion in certifying the class action. In acknowledging that Judge Angeletti deliberately and seriously exercised his discretion, the dissent suggested that the majority of the court only opposed the *result* of Judge Angeletti's decision to certify.[264] Certainly the petitioners were entitled to an appeal on final judgment,[265] and therefore, under Maryland statute, the petitioners did have an adequate remedy at law.[266] While the defendants' first opportunity to appeal certification would likely arise only after a "fully litigated loss" by the defendants,[267] this does not mean that the defendants would not eventually have adequate relief.[268] However, in summarizing its decision to override the preference for the final judgment rule and issue the writ of mandamus, the court stated that "[p]etitioners have demonstrated the lack of other available, adequate relief as well as the existence of a paramount public and judicial interest [which justifies] the issuance of mandamus, in order to protect the

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appeals of class certification orders); *see also* Gallacher, *supra* note 21, at 1541.

260. *See* Gallacher, *supra* note 21, at 1542 n.166.

261. *See, e.g., In re* Am. Med. Sys. Inc., 75 F.3d 1069 (6th Cir. 1996); *Ex parte* Green Tree Fin. Corp., 684 So. 2d 1302 (Ala. 1996); *Ex parte* Blue Cross & Blue Shield, 582 So. 2d 469 (Ala. 1991).

262. *See* Goodwich v. Nolan, 343 Md. 130, 146, 680 A.2d 1040, 1048 (1996) (stating that "judicial review is properly sought through a writ of mandamus 'where there [is] no statutory provision for hearing or review and *where public officials [are] alleged to have abused the discretionary powers* reposed to them'" (alterations in original) (emphasis added)).

263. *See* Keene Corp. v. Levin, 330 Md. 287, 294, 623 A.2d 662, 665-66 (1993).

264. *Angeletti*, 358 Md. at 799-800, 752 A.2d at 261 (Cathell, J., dissenting).

265. MD. CODE ANN., CTS. & JUD. PROC. § 12-301 (1998). This concept is referred to as the "final judgment rule," which encompasses the idea that usually an appeal is only available on entry of a final judgment. *See* Huber v. Nationwide Mut. Ins. Co., 347 Md. 415, 423, 701 A.2d 415, 418-19 (1997). The policy behind this rule is that "piecemeal appeals are disfavored" as inefficient judicial administration. Cant v. Bartlett, 292 Md. 611, 614, 440 A.2d 388, 389 (1982).

266. *See* MD. CODE ANN., CTS. & JUD. PROC. § 12-303 (1998).

267. *See Angeletti*, 358 Md. at 714, 752 A.2d at 213.

268. *Id.*

integrity of the judicial system in this State."[269] Due to the potential judicial diseconomy that could result from class certification, the court of appeals ignored the abuse of discretion standard and issued the writ based on projected expense that "both the parties and the judicial system of this State [would] incur should the litigation proceed as a class action."[270]

The writ of mandamus is an extraordinary writ and should only be used in "the most extreme cases of discretionary abuse."[271] As such, without any statutory guidelines allowing for review of class certification orders as interlocutory appeals, the court in *Angeletti* created a unique exception in issuing this writ by narrowing the holding to "the unique factual circumstances and procedural nature of this case."[272] Unfortunately, the filing of a motion for a writ of mandamus could become commonplace for all similarly situated class action defendants, and this could ultimately mean that each similar class action certification essentially must be approved by the court of appeals.[273] This process would not only usurp power from lower court judges, but such a process would also fail to promote judicial economy by creating a virtual two-step review of the factual issues. More importantly, after *Angeletti* many judges may be hesitant to certify even the most appropriate classes, for fear of being overruled in the same harsh manner in which Judge Angeletti was overruled. While the court's issuance of the writ of mandamus may effectively undermine the ability of the trial court to certify class actions,[274] it could also eventually result in a decrease in the numbers of class actions certified. Additionally, after *Angeletti*, only the most ineffective defendants' counsel would fail to file a motion with the court of appeals for a writ of mandamus ordering decertification of the class. Ultimately, a plaintiff's right to combine resources with other plaintiffs to successfully bring claims against the tobacco companies may be at the mercy of only the bravest trial court judges, willing to risk being overruled.

V. CONCLUSION

While legitimate arguments exist against certifying tobacco claims as class actions under the current statutory standards in Maryland,[275]

269. *Id.*
270. *Id.* at 722, 752 A.2d at 218.
271. *Id.* at 790, 752 A.2d at 255 (Cathell, J., dissenting).
272. *Id.* at 722, 752 A.2d at 218.
273. *See id.* at 790, 752 A.2d at 255 (Cathell, J., dissenting) (speculating that the majority's decision could result in a "yo-yo" situation in which the court of appeals would have to approve each class action).
274. *See id.* at 789, 752 A.2d at 255 (stating that by not according the trial judge the proper deference, the court of appeals undermines the judicial process, Maryland Rule 2-231, and the final judgment rule).
275. *See supra* Part III (explaining the *Angeletti* court's rationale against certification).

the comprehensive manner in which the Court of Appeals of Maryland disapproved of Judge Angeletti's certification ensures that even a convincing argument advocating class action certification for tobacco claims will likely fail. After *Angeletti,* the court of appeals has authority to utilize a writ of mandamus to order decertification, even if the trial judge has not abused his discretion in certifying the class.[276] A writ of mandamus ordering decertification may also be utilized as a method of appealing certification, which is not generally appealable until final judgment in Maryland.[277] Unless Maryland enacts legislation similar to the Federal Interlocutory Appeals Act or amends Rule 2-231 to include a provision authorizing interlocutory appeal of a certification order, a writ of mandamus may become the new method of circumventing the final judgment rule in Maryland class action litigation. Certainly, after *Angeletti,* no judge will want to undertake a grueling pre-trial certification process only to be overturned. While only time may tell exactly what implications *Angeletti* will have on Maryland law, one message of the court of appeals is clear – Maryland courts adamantly disapprove of class certification for mass tort tobacco litigation.[278] The message to potential plaintiffs is not as obvious and is perhaps an inadvertent consequence – claims against tobacco companies are likely to be unsuccessful in Maryland, whether brought as a class action or brought individually.[279]

The court in *Angeletti* uses judicial economy as the measuring stick for both its decision on the merits and for its decision to issue the writ of mandamus.[280] A decision based on overall judicial economy may place the court's interests in decreasing litigation above the rights of plaintiffs to have their day in court.[281] More specifically, this decision places the court's interest in how taxpayers' dollars are spent ahead of the plaintiffs' interest in compensating taxpayers for their injuries. Although dockets seem perpetually crowded and the burden on taxpayers must be considered,[282] after *Angeletti,* perhaps the most efficient form of justice is not justice at all.

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276. *See supra* Part IV.D.
277. *See supra* Part IV.D.
278. *See supra* Parts III & IV.
279. *See supra* Part IV.C.
280. *See supra* Part IV.C.
281. *See supra* Part IV.C.
282. *See supra* Part IV.C.