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PRIVATIZING MASS SETTLEMENT

*Jaime Dodge**

ABSTRACT

From BP's oil spill in the Gulf of Mexico to the National Football League's (NFL) inability to honor Super Bowl tickets, corporate defendants are contravening the established litigation wisdom and offering full compensation to victims—without haggling to pay pennies on the dollar, without stall tactics and frivolous motions; indeed, without any litigation at all. These offers have often been dismissed as rare one-off exceptions to the rule. This Article challenges that claim, suggesting that these private mass settlements are instead relatively common features in our aggregate litigation system.

The Article explores the reasons that, contrary to traditional wisdom, defendants would voluntarily settle claims. It argues that in cases of clear culpability, defendants can mitigate the harm to corporate reputation and reassure shareholders. But, these settlements can also operate at the opposite end of the spectrum, with far more substantial consequences. Correctly structured, these settlement offers allow defendants to preclude the certification of a class action. These settlements thus offer an incredibly powerful tool in deterring or rendering impotent nuisance-value litigation by de facto converting any claim from an opt-out class action into an opt-in settlement. While arbitration provisions have been used as a mechanism for preventing class certification, they inherently can only reach contractual relationships; bilateral mass settlements are not so constricted, allowing them to reach any mass claim.

This transition from opt-out to opt-in mechanisms upends the traditionally assumed relationship between the interests of compensation, deterrence, and legitimacy with respect to mass wrongs. This balance is far more complex than has been posited in the existing analyses and demonstrates that the twin fundamental assumptions of our class action system are not unchanging truths but instead mere default positions. Indeed, in this new world, defendants now have the ability to prevent almost every class from being certified against them—yet, as the analysis demonstrates, they may not choose to do so. In short, this Article seeks to replace our conception of the public aggregate litigation system with a new, more comprehensive model that also incorpo-

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rates the private ordering that is driving this new emerging generation of aggregate claims mechanism.

INTRODUCTION

Class actions held the promise of remedying previously irremediable harms, from low-value claims¹ to catastrophic mass torts.² Yet, despite this promise, the class action mechanism has been broadly criticized from every side. Defendants complain of nuisance suits,³ blackmail suits,⁴ and over-enforcement;⁵ each skewing damages—and, in turn, undermining deterrence. At the same time, agency problems,⁶ coupon settlements,⁷ competing litigation,⁸ and, more recently, claims forms⁹ have all contributed to an environment in which few absent class members recover meaningful compensation.¹⁰ And, all of this occurs as an exception to our ordinary expectation that an individual should be the master of his own claim, raising fundamental

1 See, e.g., *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (noting that the emergence of aggregate litigation through Rule 23 was largely an attempt to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all” (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (internal quotation marks omitted))).

2 See, e.g., *In re “Agent Orange” Prod. Liab. Litig.*, 996 F.2d 1425, 1429 (2d Cir. 1993).

3 See, e.g., Randy J. Kozel & David Rosenberg, *Solving the Nuisance-Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1879–90 (2004); James J. Park, *Rules, Principles, and the Competition to Enforce the Securities Laws*, 100 CALIF. L. REV. 115, 161 (2012) (discussing the incentive of entrepreneurial enforcers to bring low probability claims).

4 See, e.g., Bruce Hay & David Rosenberg, *“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1378 (2000).

5 See, e.g., *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 396–98 (2010).

6 See, e.g., John C. Coffee, Jr., *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 677–84 (1986); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 7–8 (1991).

7 The use of coupon settlements was restricted by Congress when it passed the Class Action Fairness Act of 2005. See Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005).

8 See, e.g., Geoffrey P. Miller, *Overlapping Class Actions*, 71 N.Y.U. L. REV. 514, 514–15 (1996).

9 See Tiffaney Allen, *Anticipating Claims Filing Rates in Class Actions*, RUST CONSULTING (Nov. 2008), http://www.rustconsulting.com/Knowledge_Sharing/Articles_and_Publications/ID/124/Anticipating_Claims_Filing_Rates_in_Class_Action_Settlements.

10 Others have focused upon the practice of settling class claims without even attempting to make distributions to the class—a phenomenon that has troubled class action scholars who view the practice as an abandonment of one’s duty to the class in favor of a charitable group comprised of individuals that are not clients (but are instead, for example, political allies). See Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 528–29 (2012) (describing objections to *cy pres* distributions and documenting examples of politically directed *cy pres* recoveries).

questions about whether the autonomy costs of the class action are too high.¹¹

Given these critiques from all sides, it might be unsurprising that parties are experimenting with privatizing the mass settlement process. With the high stakes of class action trials, settlements have become the inevitable end game.¹² Recognizing that the case will ultimately end in a settlement facility administered by a private claims administrator, defendants can short-circuit the litigation process by creating the facility at the outset. The Gulf Coast Claims Facility (GCCF) created by BP to satisfy its statutory obligations in the wake of Deepwater Horizon's explosion has become the most prominent example of a private settlement fund.¹³ Perhaps for this reason, many scholars have dismissed the fund as a one-off oddity driven by a unique statutory scheme.¹⁴ But, corporations have not.

At both sides of the class action spectrum, would-be defendants are exploring the use of private settlement funds as a superior alternative to the litigation process. Companies responsible for mass torts are now announcing the creation of private claims funds in the immediate aftermath of the tort as a component of their public relations rehabilitation or crisis management efforts.¹⁵ At the opposite end of the spectrum, savvy defendants are creating

11 See Samuel Issacharoff, *Class Action Conflicts*, 30 U.C. DAVIS L. REV. 805, 805 (1997) ("Class actions occupy an uncertain position in Anglo-American law. Nowhere else do we find such a clear departure from the premise that no one should be bound to a judgment in personam absent the personal security offered by notice and a full opportunity to participate in the underlying litigation.").

12 See, e.g., ROBERT H. KLONOFF ET AL., CLASS ACTIONS AND OTHER MULTI-PARTY LITIGATION 415 (2d ed. 2006) ("Relatively few class actions actually go to trial; most settle, either after the certification decision or as trial approaches."). For an excellent discussion of the dynamics of modern class settlements, see Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1651 (2008).

13 For the official website of the Gulf Coast claims fund, see GULF COAST CLAIMS FACILITY, <http://www.gulfcoastclaimsfacility.com> (last visited Oct. 25, 2014). Although BP would ultimately reach a class action settlement approved in 2012, BP resolved more than two thirds of its claims—more than \$7.8 billion, see Campbell Robertson & John Schwartz, *How a Gulf Settlement that BP Once Hailed Became Its Target*, N.Y. TIMES, Apr. 26, 2014, <http://www.nytimes.com/2014/04/27/us/how-a-gulf-settlement-that-bp-once-hailed-became-its-target.html> (noting the amount), through a private claim resolution facility required by the Oil Pollution Act of 1990. See 33 U.S.C. § 2705(a) (2012).

14 See, e.g., Tracy A. Thomas, *Remedies for Big Disasters: The BP Gulf Oil Spill and the Quest for Complete Justice*, 45 AKRON L. REV. 567, 570–73 (2012) (summarizing the conclusion of symposium participants that the GCCF should not serve as a template for other disasters or compensation programs).

15 See *Chevron Has Paid Out \$10 Million for Refinery Fire*, ABC7 NEWS (Jan. 30, 2013, 7:45 PM) http://abclocal.go.com/kgof/story?section=news/local/east_bay&id=8973226; see also Jeff Bennett, *GM Compensation Fund to Offer Payments for Recalled Car Accidents*, WALL ST. J., June 30, 2014, <http://online.wsj.com/articles/gm-compensation-plan-to-offer-payments-for-recalled-car-accidents-1404136801>; Jim Efstathiou Jr. & Mark Drajem, *Drillers Silence Fracking Claims with Sealed Settlements*, BLOOMBERG (June 6, 2013, 12:00 AM), <http://www.bloomberg.com/news/2013-06-06/drillers-silence-fracking-claims-with-sealed-settlements.html>; Bruce Einhorn, *Plane Disaster in Ukraine Deepens Malaysia Airlines' Tragic Year*, BLOOM-

programs to address small-value and outlier claims in an effort to provide superior compensation to those affected while simultaneously avoiding the vast expenditure of resources on frivolous claims that have become the hallmark of class litigation for so many defendants.¹⁶

Yet, our scholarship continues to conceive of mass claims resolution through the lens of public aggregate litigation—class actions and, in recent years, multi-district litigation (MDL).¹⁷ If we speak of private ordering, the conversation typically focuses only upon pre-dispute arbitration as a mechanism for preventing aggregation.¹⁸ As a consequence, many of these innovations are dismissed as ad hoc responses to extraordinary situations.¹⁹

BERG BUSINESSWEEK (July 17, 2014), <http://www.businessweek.com/articles/2014-07-17/ukraine-plane-crash-deepens-malaysian-airlines-tragic-year>; John Hoeffel, *PG&E Announces \$100-million Relief Fund for San Bruno Gas Explosion Victims*, L.A. NOW (Sept. 10, 2013, 1:38 PM) <http://latimesblogs.latimes.com/lanow/2010/09/pge-announces-100-million-relief-fund-for-san-bruno-gas-explosion-victims.html>; Gaia Pianigiani, *Stricken Cruise Ship's Operator Offers Settlements to Passengers*, N.Y. TIMES, Jan. 27, 2012, http://www.nytimes.com/2012/01/28/world/europe/costa-cruises-offers-settlement-to-shipwreck-passengers.html?_r=0; Amy Schoenfeld, *Where BP's Money Is Landing*, N.Y. TIMES, July 3, 2010, <http://www.nytimes.com/2010/07/04/business/04metricstext.html>.

16 See Daniel H. Gold & John Tancabel, *Aqua Dots Products Liability Litigation: Company's Voluntary Reimbursement Plan Defeats Class Certification*, HAYNES BOONE LLP (Aug. 22, 2011), http://www.haynesboone.com/files/Uploads/Documents/Alerts/Aqua_Dots_Product_Liability.pdf; Jeremy Stahl, *Gameday Theory*, SLATE (Feb. 11, 2011, 1:49 PM), http://www.slate.com/articles/sports/sports_nut/2011/02/gameday_theory.html.

17 When federal civil actions pending in different districts have common questions of fact, MDL is utilized to combine and transfer the actions to any district for consolidated pretrial proceedings. 28 U.S.C. § 1407 (2012). The new trend within the scholarship has been toward the recognition of quasi-class action settlement structures through MDL as contrasted with traditional class actions; yet both mechanisms fall within the traditional conception of aggregation. See, e.g., Elizabeth Chamblee Burch, *Financiers as Monitors in Aggregate Litigation*, 87 N.Y.U. L. REV. 1273, 1273 (2012); John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 371 (2000); Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963 (2012); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 110–11 (2010).

18 For extended discussions of the relationship between ex ante and ex post systems, see Jaime Dodge, *Disaggregative Mechanisms: Mass Claims Resolution Without Class Actions*, 63 EMORY L.J. 1253 (2014); D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT LAW 91 (2012).

19 See, e.g., Thomas, *supra* note 14, at 570 (summarizing the conclusion of symposium participants that the GCCF should not serve as a template for other disasters or compensation programs); Adam S. Zimmerman, *Funding Irrationality*, 59 DUKE L.J. 1105, 1114, 1118 (2010) (attributing the lack of scholarship on public funds to the conception that they are “sui generis” products of “special legislation”). For studies of particular tribunals, see KENNETH R. FEINBERG, *WHAT IS LIFE WORTH?* (2005) (discussing the development of the September 11th Victim Compensation Fund of 2001 (September 11 Fund)); Robert M. Ackerman, *The September 11th Victim Compensation Fund: An Effective Administrative Response to National Tragedy*, 10 HARV. NEGOT. L. REV. 135, 205 (2005); Robert L. Rabin, *Indeterminate Future Harm in the Context of September 11*, 88 VA. L. REV. 1831, 1831–32 (2002); Byron G.

I argue that we are witnessing the birth of a new privatized mechanism for mass claims resolutions, competing with the traditional public aggregation mechanisms. Most commonly, these private mass settlements consist of a unilateral settlement offer by the defendant, which each victim may then accept, forming a bilateral settlement agreement—thereby avoiding the procedural hurdles associated with judicial aggregation and its associated agency costs and due process checks.

These settlements contravene the traditional conception of defendants resisting settlement and attempting to delay resolution and impose costs upon plaintiffs as they pursue low-probability defenses.²⁰ These emerging structures are based upon a wholly different dispute resolution methodology than those described in the existing literature—one that bypasses the determination of common questions at the core of aggregate mechanisms entirely.²¹ Instead, these mechanisms use individualized claims determination as the vehicle for mass claims resolution—whether culminating in a claims settlement fund²² or simply direct payments from the defendant.

Private mass settlements give defendants no less than the option to avoid class actions altogether—substantially limiting the experiment with aggregation that has occurred over the last half century.²³ This completely upends our understanding of the nature of aggregation, creating a completely new generation of mass claims strategies—with a completely new effectuation of compensation, deterrence, efficiency, and legitimacy—unlike any of its predecessors.²⁴

This Article proceeds in three parts. Part I of this Article demonstrates that the emergence of private mass settlements reveals the error of the fundamental premises upon which the class action system is built. This Part then

Stier, *The Gulf Coast Claims Facility as Quasi-Public Fund: Transparency and Independence in Claim Administrator Compensation*, 30 MISS. C. L. REV. 255, 255–57 (2011).

20 See RICHARD A. NAGAREDA, *MASS TORTS IN A WORLD OF SETTLEMENT* 18–19 (2007).

21 Leading scholars are now focused upon doctrinal trends within aggregation toward smaller classes and multi-district litigation—what I suggest here is a far more fundamental shift in mass claims resolution. See, e.g., Elizabeth Chamblee Burch, *Disaggregating*, 90 WASH. U. L. REV. 667, 667 (2013) (discussing trend toward smaller classes); Alexandra D. Lahav, *The Case for “Trial by Formula,”* 90 TEX. L. REV. 571 (2012) (discussing the trend towards class sampling and the effects on class-action outcome equality).

22 See Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1380–81 (2005) (“Except for the option of individual trials, all of the currently available litigation procedures for an endgame in disputes involving large numbers of claims contemplate a claims resolution facility. [Rule 23 federal class actions], state class actions, bankruptcy, multidistrict litigation, and mass settlements all reach closure with a claims resolution facility.”).

23 Post-dispute, defendants in contract and tort actions alike can now use disaggregative settlements not just to deter the filing of a class action, but to prevent a class action altogether. See, e.g., *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1209–10 (10th Cir. 2012); *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

24 Cf. Linda S. Mullenix, *Designing Compensatory Funds: In Search of First Principles*, 3 STAN. J. COMPLEX LITIG. (forthcoming 2015), available at <http://ssrn.com/abstract=2466301>.

analyzes the market for these offers and demonstrates that these offers have the capacity to generate simultaneous win-win outcomes for both the defendant and the claimants—a remarkable assertion, suggesting the superiority of these offers from the perspective of the parties.

Part II takes on the emerging consensus in the developing literature. It first seeks to demonstrate that these offers have the capacity to drift in both directions from the optimal compensation value, rather than reliably disfavoring claimants. It then turns to the “lesson” of BP—that MDLs offer better results for both claimants and defendants than private claims funds. This Part argues that the conventional explanations for the superiority of MDL cannot rationally account for the compensation differential, and instead identifies extrinsic causes. This insight raises not only difficult normative questions about the entanglement of public and private litigation, but also suggests limitations on the predictive value of BP in future mass claims settlements.

Part III of this Article then explores the strategic use—and limits—of private mass settlement funds. This Part argues that privatization can be an incredibly effective mechanism for deterring frivolous nuisance suits, which have typically represented a large component of many companies’ complex litigation budgets. This Part then posits that private funds can also be a useful component at the opposite end of the litigation spectrum as part of a disaster mitigation strategy. Apart from these potentially effective uses, the discussion also focuses on identifying the factors that make privatization less likely to offer a superior resolution for the corporation, and the situations in which we should expect to see fewer unilateral settlement offers by defendants.

Part IV of this Article situates bilateral settlements within the broader transitions occurring in aggregation mechanisms. This Part argues that unlike the practical limitations upon arbitration and MDL, bilateral mass settlement is able to reach any type of claim—and convert it from the opt-out regime of class actions. This is a remarkable step in the evolution of aggregation, giving rise to a new generation of mass claims enforcement in which opt-in rather than opt-out mechanisms are poised to obtain dominance given their grassroots popularity and remarkable potential for superior outcomes for both the defendant and claimants. But, this analysis also reveals that the emerging doctrine creates gaps in the closure afforded by bilateral settlements. The result is an overall picture of enforcement that is increasingly discordant—a result that impedes compensation, deterrence, efficiency, and legitimacy. Finally, the Article concludes by offering some observations about the consequences of bilateral mass settlement for the doctrine and theory of mass claims and aggregation.

I. THE PARADOX OF PRIVATE MASS SETTLEMENT

The proliferation of early individualized settlement offers contravenes the established wisdom that defendants will assert class-wide defenses and insist upon individualized proof as a means of threatening to increase the

cost of litigation and thus decrease settlement values.²⁵ At the outset then, one must wonder why defendants would make unilateral settlement offers, surrendering the bargaining power derived from delay.²⁶

The paradox of the resulting bilateral settlement contracts only deepens when one considers that defendants do not obtain the most important benefit of a class action: closure.²⁷ A final judgment or class settlement binds all of the class members, precluding the entire class from filing later litigation on this matter—even if they did not receive any compensation (or, worse yet, lost on the merits). “Buying peace” is thus the primary motivation of defendants in most class settlements.²⁸ Yet, bilateral mass settlements do not bind anyone other than those individuals who accept the offer—and thus offer no peace, no closure. This Part explores the mistaken assumptions about both the nature of aggregation and the dynamics of bilateral mass settlement that drive this disconnect between theory and real-world experience.

A. *Rethinking the Fundamental Premises of Aggregation*

This Section posits that the predictions that private mass settlements would remain mere one-offs have proven inaccurate because the default rules of aggregation are based on a number of false premises. Identifying these false assumptions has allowed corporations to craft mechanisms that alter these features of the system, creating alternatives that are potentially superior for both participants.

1. The Fallacy of Aggregation’s Efficiency

The public aggregate litigation system is assumed to yield greater efficiencies than seriatim litigation because it avoids the need for duplicative litigation of the same claim by each victim.²⁹ Aggregation thus enables a pooling of resources across victims that corrects the investment asymmetries that would otherwise cripple effective vindication in many small-value

25 See Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 111–54 (2009).

26 See FEINBERG, *supra* note 19 (arguing that private defendants would not have an incentive to enter into early, post-dispute settlement regimes).

27 See Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 270–74 (2011).

28 See Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 751 (2002) (discussing the asbestos, silicone gel breast implant, and fen-phen class settlements, which he noted “all aspire to create some form of private administrative system” that “promises more efficient compensation for plaintiffs, long-term peace for defendants, and a reduced litigation burden for the courts”).

29 *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (describing seriatim resolution of asbestos claims as generating transaction costs that “‘exceed the victims’ recovery by nearly two to one’” while causing long delays as “‘the same issues are litigated over and over’” (quoting REPORT OF THE JUDICIAL CONFERENCE AD HOC COMMITTEE ON ASBESTOS LITIGATION 2–3 (1991) [hereinafter REPORT OF THE JUDICIAL CONFERENCE])).

claims.³⁰ Indeed, it was the vindication of small-value claims that would individually be negative-value claims—as the costs of litigation would exceed the potential recovery—that prompted the creation of Rule 23(b)(3).³¹

Yet, the impetus for these funds lays in the recognition that the costs of aggregation can often exceed the benefit.³² Thus, even in cases with substantial common questions of general liability, the costs of aggregation may overwhelm the benefit to the parties—making opting out a mutually value-enhancing option.³³

How can this be? While aggregation can offer efficiencies by avoiding the costs of duplicative merits litigation, it generates new procedural costs. The costs of class certification and settlement approval can often represent substantially the entire recovery obtained by plaintiffs—and this is before one includes defense costs.³⁴ But, parties should rationally pursue litigation only so long as the anticipated joint future costs of litigation are less than the difference in expected value between the two sides. Reconceptualized in this manner, the litigation costs can be redistributed to the parties to expand the net joint gains possible through settlement—simultaneously allowing both the plaintiff and defendant to be made better off in some cases through bilateral settlement than in aggregate litigation.

2. Revisiting the Class Action as Compensation Mechanism

Modern class actions are often conceived as a mechanism for permitting absent class members to receive compensation for wrongs they would otherwise not have pursued individually. The class action overcomes not only the litigation cost of pursuing these damages, but even the opportunity cost by presumptively incorporating all class members. Individual class members then have the opportunity to affirmatively opt out. But aggregation often does not deliver on the dual promises of compensation and a meaningful ability to opt out.

First, with respect to small-value claims, the opportunity cost of investigation and participation often generates a high rate of passivity among class

30 See Hay & Rosenberg, *supra* note 4, at 1380–81; David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 852–53 (2002).

31 *Amchem*, 521 U.S. at 617.

32 See, e.g., *id.* at 598 (noting that the transaction costs were exceeding recovery in the asbestos cases by a 2:1 ratio).

33 Cf. Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 397–401 (2014).

34 See Burch, *supra* note 17, at 1274–82 (discussing agency problems in both class actions and MDL and the possibility of third-party financiers acting as monitors in the context of nonclass aggregative litigation to help manage principal-agent problems); Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561 (2014) (discussing the agency costs inherent in representative actions and the potential impact of alternative litigation financing); Macey & Miller, *supra* note 6, at 7–8 (discussing agency in the context of Rule 23 class litigation and MDL as well as the agency costs unique to aggregate litigation).

members—even when compensation is guaranteed.³⁵ While this means that they do not opt out, it also means that they often disregard notices and do not file claims forms.³⁶ Where these forms are required, on average 80 to 98% of class members find themselves in the worst possible compensation situation: they receive no compensation, but as class members are fully precluded from future litigation.³⁷

Second, because opt-out rates are typically less than 1%,³⁸ for individuals who are dissatisfied by the settlement the choice is effectively between class participation and single-plaintiff litigation. If one presumes that attorneys' fees and costs will represent 30%—and further assumes away the time value of money and any risk aversion³⁹—unless the compensation offered by the settlement is perceived as offering less than 70% of the expected compensation, the absent class member should still remain in the class. Of course, reality is not this favorable: given that class actions retain their greatest vitality with small-value claims, in many cases the litigation costs for the plaintiff will entirely dwarf the expected recovery in litigation.⁴⁰ Thus, even if the individ-

35 See Allen, *supra* note 9 (noting that where an absent class member simply needs to return a form to obtain compensation, the filing rates range from 2–20%, with the higher rates reserved for cases involving greater compensation).

36 In order to provide compensation, the claims administrator must be able to determine who is in the class, the compensation due under the settlement, and have a mechanism for payment. In a small subset of cases, the defendant may have all of this information. For example, a bank accused of overcharging can review records to determine which accountholders were overcharged, and then credit that amount to their accounts. While a few accountholders may have closed their accounts, the vast majority can be automatically credited, leaving only a subset to receive a notice from the administrator requesting updated address information for the mailing of a check. While these abilities are increasing in our increasingly technological world, claims forms are still a routine feature of class action litigation.

37 See TIFFANEY JANOWICZ, FED'N OF DEF. & CORPORATE COUNSEL, CLASS ACTION PERSPECTIVES (2013), available at <http://www.thefederation.org/documents/16.Class%20Action%20Perceptives.pdf> (noting that where an absent class member simply needs to return a form to obtain compensation, the filing rates range from 2–20%, with the higher rates reserved for cases involving greater compensation).

38 The Federal Judicial Center reports that the rate of opting out in class actions is typically 0.1%. BARBARA J. ROTHSTEIN & THOMAS E. WILLGING, FED. JUDICIAL CTR., MANAGING CLASS ACTION LITIGATION 20 (2005).

39 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597–98 (1997) (holding the class settlement proposing global resolution of current and future claims could not be certified consistent with due process, but noting that lack of certification meant that “future claimants may lose altogether” given the specter of exhaustion of assets (quoting REPORT OF THE JUDICIAL CONFERENCE, *supra* note 29, at 2–3)).

40 These expectations have been confirmed by a recent study of securities class actions, which found that while 3% of all class action settlements had at least one opt-out case, 53% of class settlements with at least \$500 million in class settlement funds drew opt-out litigation. AMIR ROZEN ET AL., OPT-OUT CASES IN SECURITIES CLASS ACTION SETTLEMENTS I (2013), available at <http://www.cornerstone.com/getattachment/7cf8bd53-9e0b-45beb4b3-3d810dfe2be3/Opt-Out-Cases-in-Securities-Class-Action-Settlements.aspx>. The study further found that the most frequent opt-out plaintiffs are pension funds and other asset

ual believes that his particular wrong is being undercompensated due to the allocation methodology selected, in most cases the error (no matter how great) cannot overcome the costs of single-plaintiff litigation.⁴¹ For this reason, opt-out rates remain at less than 1%. Despite the promise of opting out, the reality is that aggregation has placed a heavy weight on the scale in favor of remaining in the class.

3. Rethinking Aggregation as Mechanism for Optimal Enforcement

Even if the class action device does not routinely provide meaningful compensation, proponents argue that it is still worthwhile because it has a unique ability to further the public interest in the enforcement of law and deterrence. Indeed, this goal of law enforcement and deterrence—rather than compensation—was the primary motive in the adoption of Rule 23.⁴² Yet many bilateral mass settlements operate, in part, by upending this linkage.

The vast majority of class actions focus upon small-value and medium-value claims, as to which opt-out rates will be low, but so too will opt-in rates.⁴³ Thus, the direction of the presumption has a dramatic impact on the value of damages at stake. Ordinarily, in the baseline world of the single plaintiff, an individual has the right to pursue his claim. But if he declines to, the law rarely appoints another to vindicate that claim on his behalf. The class action thus works a radical reversal by allowing one aggrieved individual

management companies, not individual investors. *Id.* Finally, the study noted that opt-out plaintiffs faced higher proportional costs and in some cases failed to recover any of their claimed losses. *Id.*

41 For these individuals, objecting to the settlement may be the best option. But, as I have discussed elsewhere, objections are rarely filed and rarely succeed, particularly in small-value cases. *See* Dodge, *supra* note 18, at 1268–69.

42 *Amchem*, 521 U.S. at 617.

43 Collective actions provide the contrary example, of opt-in litigation. Under the Fair Labor Standards Act (FLSA), certain types of employment claims are brought not as opt-out but opt-in cases, meaning that each victim must affirmatively join the aggregate litigation. Of course, these claims are typically far larger than the usual class action claim, representing recoveries of hundreds or thousands of dollars. The size of these claims thus incentivizes participation but, because of the streamlined procedures for wage claims, also increases the ability of individuals to pursue their actions individually. Yet, the participation rate in collective actions still remains between 15 and 30%. *See* Matthew W. Lampe & E. Michael Rossman, *Procedural Approaches for Countering the Dual-Filed FLSA Collective Action and State-Law Wage Class Action*, 20 LAB. LAW. 311, 313 (2005) (reporting 15–30% rates); *see also* SEYFARTH SHAW LLP, FIGHTING TO WIN: DECONSTRUCTING CONDITIONAL & CLASS CERTIFICATION 10 (2012), available at http://www.seyfarth.com/dir_docs/publications/WHPLITpartII.pdf (reporting 10–20% opt-in rates). Some cases have even generated rates below three percent. *See, e.g.*, *Thiebes v. Wal-Mart Stores, Inc.*, No. CIV. 98-802-KI, 2002 WL 479840, at *3 (D. Or. Jan. 9, 2002) (finding a 2.7% opt-in rate).

to file suit on behalf of everyone similarly situated.⁴⁴ This shift has prompted a vast literature on where optimal deterrence lays.⁴⁵

As reasonable people, we can see claims at both ends of the spectrum: it seems likely that few individuals would have purchased Chobani yogurt if it were prominently labeled as contaminated with toxic bacteria.⁴⁶ So too, few men would likely have purchased a baldness drug if they knew it would cause impotence.⁴⁷ On the other hand, only a fraction of consumers would likely file suit over undeclared nuts in something named “Crunch’N Nutter.”⁴⁸ But the law of class certification does not currently have this capacity to apply subjective discernment—although one could surely envision procedural mechanisms that would allow this question or proxies for it to enter into the process.⁴⁹

* * *

Corporate counsel have often stated that the intent in employing pre-dispute aggregation waivers is not to prevent class actions for the sake of preventing justice. Instead, they fear the filing of meritless litigation that will

44 In one interesting case, a California court held that, where only 5 of 53 sales representatives opted into an FLSA collective action, it was proper to prevent certification of an opt-out class action on the same grounds. *Zulewski v. Hershey Co.*, No. CIV 11-05117-KAW, 2013 WL 1748054, at *4 (N.D. Cal. Apr. 23, 2013). There, the court noted that while it agrees that not filing an opt-in form is passive and not an affirmative choice not to opt-in, the Court is also concerned that allowing an opt-out class action, with the knowledge that many potential class members were non-responsive to the FLSA opt-in collective action, could amount to a deprivation of rights.

Id.

45 See Sergio J. Campos, *Class Actions All the Way Down*, 113 COLUM. L. REV. SIDEBAR 20, 27 & n.57 (2013); see also Lemos, *supra* note 10, at 488 (“Few aspects of contemporary civil litigation have attracted as much scholarly attention as the damages class action. Commentators have criticized class actions as either too powerful or not powerful enough.” (footnotes omitted)); Nagareda, *Class Certification*, *supra* note 25, at 97 (“Few pretrial motions in our civil justice system elicit as much controversy as those for the certification of class actions.”).

46 Press Release, Chobani, Inc. Voluntarily Recalls Greek Yogurt Because of Product Concerns, U.S. FOOD & DRUG ADMIN. (Sept. 12, 2013), <http://www.fda.gov/safety/recalls/ucm367298.htm>.

47 *Questions and Answers: Finasteride Label Changes*, U.S. FOOD & DRUG ADMIN. (Apr. 11, 2012), <http://www.fda.gov/Drugs/DrugSafety/InformationbyDrugClass/ucm299754.htm>.

48 Indeed, most consumers likely assumed, with a name like Crunch’N Nutter and a nut-shaped package, the product contained nuts. Moreover, most of the small percentage of consumers with allergies to peanuts would (recognizing the potential for cross-contamination and that their own allergens may have shifted over time) likely make the decision to simply select a non-nut snacking option. Press Release, Merrell Food Group Issues Allergy Alert on Undeclared Peanut in “Crunch’N Nutter – Mixed Nut,” U.S. FOOD & DRUG ADMIN. (Jan. 18, 2014), <http://www.fda.gov/Safety/Recalls/ucm382257.htm>.

49 Cf. John H. Beisner et al., *Class Action “Cops”: Public Servants or Private Entrepreneurs?*, 57 STAN. L. REV. 1441, 1444–57 (2005) (discussing distrust of class actions by the public and impact upon the selection and settlement of lawsuits).

require substantial resource investments to defeat,⁵⁰ or the filing of frivolous claims that only a handful of plaintiffs would pursue.⁵¹ For fearful would-be defendants, arbitration provisions have traditionally been the primary means of avoiding aggregation.⁵² Yet, arbitration clauses can only reach a subset of claims: those between parties that consent to a contract that is capable of incorporating a dispute resolution clause.

Bilateral mass settlement, in contrast, can reach all types of claims—contract and tort, those with pre-existing relationships and without, high value and low value, alike. As it does, it has the power to convert the traditional opt-out regime into what is functionally an opt-in regime, with the corporation paying only those individuals who submit claims. In so doing, private settlement agreements can leverage the shortcomings of the existing aggregate litigation system to create a system with greater claimant autonomy, increased compensation, and decreased nuisance litigation. The next two sections turn, respectively, to the benefits most important to both parties to the contract, which are driving this new trend: compensation to victims, and closure for defendants.⁵³

B. *Reassessing the Claim of Victim Exploitation in Private Mass Settlement*

Most of the scholarship on claims funds formed outside of the litigation process has been highly critical.⁵⁴ Indeed, even Kenneth Feinberg, the special master for both the 9/11 Fund and the BP Gulf Coast Claims Facility, has suggested that these were one-off funds that should not be replicated.⁵⁵ But corporations have continued to offer these funds, victims are accepting the

50 Indeed, it was precisely this fear, not of liability but of the cost of prevailing, which prompted Congress's creation of the September 11 Fund. See FEINBERG, *supra* note 19, at 17–20 (noting the costs and delay of litigation created a sense that the airlines needed to avoid being dragged into court).

51 See, e.g., Emory School of Law, *Consumer Arbitration Agreements and the Demise of Collective Dispute Resolution*, YOUTUBE (Feb. 10, 2014), <https://www.youtube.com/watch?v=ZEvGQb2mGM> (providing a recording of the Thrower Symposium remarks of Home Depot General Counsel and Vice President Teresa Wynn Roseborough).

52 See, e.g., *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011); *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666–72 (2010).

53 See Issacharoff & Rave, *supra* note 33, at 412 (identifying the same metrics for the interests of parties to a mass tort compensation fund).

54 See, e.g., Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 430 (2005) (“Allowing companies to simply opt out of exposure to collective litigation is no more defensible than a system in which corporations may decide whether they wish to be exposed to federal antitrust, securities, or civil rights laws.”); Issacharoff & Rave, *supra* note 33, at 402–03; Linda S. Mullenix, *Prometheus Unbound: The Gulf Coast Claims Facility as a Means for Resolving Mass Tort Claims—A Fund Too Far*, 71 LA. L. REV. 819, 916 (2011) (stating that in light of the BP GCCF, “the precedent has now been set for corporate malefactors who are caught up in the maelstrom of massive liability to discharge their legal responsibilities on their own terms and favorable to their own interests”).

55 KENNETH R. FEINBERG, WHO GETS WHAT 179 (2012) (“Like the 9/11 fund, the GCCF is unlikely to be replicated. It is a one-off.”).

offers in lieu of litigation, and, as noted in the previous section, courts are recognizing that in many cases these funds are effective enough to not just inhibit but to preclude the filing of a class action.⁵⁶

Despite the extensive literature suggesting that these funds are exploitive,⁵⁷ these funds are increasingly obtaining substantial participation rates. Opt-in collective actions typically range between 10–20% participation, with rates below 3% in small-value cases, and almost no reported cases exceeding 30% participation.⁵⁸ In contrast, after its refinery explosion, Chevron created a fund for the estimated 4,000 victims, and of those, 3,800 sought settlement offers through its disaggregated claims procedure by the end of the very week the explosion occurred—an astounding 95% participation rate.⁵⁹ Likewise, the Aqua Dots recall and refund procedure obtained a 60% participation rate.⁶⁰

These participation rate differentials do not prove that private mass settlements offer greater compensation to victims than traditional aggregate litigation. Indeed, it may be that the compensation offered is lower, but that other factors are driving the acceptance of the offer: the delay in compensation, the net deduction of attorneys' fees and costs, or the uncertainty of recovery in litigation. But it does suggest the need to take a harder look at the reasons victims choose to participate in these settlements at a higher rate than those approved by the courts.

1. Low Compensation Rates in Class Actions

A number of barriers stand in front of compensation within the class action system. For low-value claims, even with near-perfect inclusion of class members, the amount at stake may be so small that once the class counsel is paid, the named plaintiffs receive their “incentive payment” (typically a few thousand dollars), and a settlement administrator retained to provide class notice is paid, too little remains available to distribute to class members. Indeed, mailing a check to class members requires not merely the costs of processing, packaging and mailing the checks, but also the maintenance of records on the cashing of those checks, repeated mailings for bounce-backs, the retention of investigators to attempt to locate current addresses for those

56 See *supra* subsection I.A.2.

57 See *supra* note 54 and accompanying text.

58 See *supra* subsection I.A.2.

59 See Paul Elias, *Thousands File Claims After Chevron Refinery Fire*, AP (Aug. 11, 2012, 4:39 AM), <http://bigstory.ap.org/article/thousands-file-claims-after-chevron-refinery-fire>. Chevron's fund ultimately ballooned to 23,900 claims filed after 15,000 people sought medical treatment, yielding a total payout of approximately \$10 million through its claims settlement fund. See *supra* note 15.

60 This rate is particularly notable given that it required return of the product and thus, as Judge Easterbrook concluded, likely included substantial individuals that were satisfied with or had previously used the product—and thus chose not to seek compensation—rather than simply what I have termed a “no-action” bias. See *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750–52 (2011).

“missing” absent class members, and, depending upon the residual, potentially a secondary distribution to class members of those unclaimed funds. Once these costs are considered, it is unsurprising that *cy pres* distributions of settlement funds to charitable purposes are being selected in lieu of actual payments of compensation to class members.⁶¹

Even if there are sufficient funds to make direct payments of compensation, settlements increasingly require class members to file a claim form to obtain compensation. These forms are commonly used where difficulties in determining the identity or location of class members are anticipated, or where there are potential variations in damages alleged. Yet, a recent study by Rust Consulting—one of the preeminent settlement administration firms—found that the claims form completion rate is approximately 2–20% in consumer cases, while higher rates obtain in securities (20%) and employment (20–85%) cases.⁶² This leads to the dramatic realization that, in many class actions, only a small fraction of the harmed individuals actually receive compensation—while preclusion operates to bar the claims of all class members, including even those that received no compensation.⁶³

2. The Delay and Cost of Aggregate Litigation

Aggregate litigation inherently creates additional procedural costs and delays. If the parties choose to utilize the class action mechanism, they must obtain court approval of both the class certification and class settlement. MDL does not require certification of the class representative or a proposed settlement, because the individuals retain the autonomy to litigate and settle their own claims. Yet, to the extent that pretrial discovery and motion practice is being consolidated in a single court, plaintiffs’ counsel need to put

61 A *cy pres* distribution occurs when class damages cannot be feasibly distributed or when a balance remains. Under this system, the funds are to be distributed to the next best compensation use, typically a charitable donation. 3 ALBA CONTE & HERBERT B. NEWBERG, *NEWBERG ON CLASS ACTIONS* 514–16 (4th ed. 2002). For an excellent discussion of the *cy pres* system, see William B. Rubenstein, *On What a “Private Attorney General” Is—And Why It Matters*, 57 *VAND. L. REV.* 2129, 2142–71 (2004).

62 See Allen, *supra* note 9.

63 See, e.g., AM. LAW INST., *PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION* § 3.07 cmt. b (2010) (recommending judges limit such payments to circumstances in which direct distribution to individual class members is not economically feasible, or where funds remain after class members are given a full opportunity to make a claim).

This observation does not even account for the practice of settling class claims without even attempting to make distribution to the class—a phenomenon that has troubled class action scholars who view the practice as an abandonment of one’s duty to the class in favor of a charitable group comprised of individuals that are not clients (but are instead, for example, political allies). Yet, lawyers have argued that in small-value cases transaction costs of payment can exceed damages. See Lemos, *supra* note 10, at 528–29 (describing objections to *cy pres* distributions and documenting examples of politically directed *cy pres* recoveries).

additional resources into their coordination in these proceedings and may even create a formalized plaintiffs' steering committee.⁶⁴

In addition, the defendant must bear the reciprocal costs of motion practice⁶⁵ as well as the increasingly massive costs of not only discovery but also electronic document preservation, or risk sanction for spoliation of evidence.⁶⁶ In small-value cases, these costs of document preservation can actually exceed the amount at stake in the underlying litigation. While the courts have recognized the coercive effects of these costs, a successful motion to dismiss will still bind only the named plaintiff unless the company bears the costs of proceeding through class certification.⁶⁷

Although the conventional wisdom has been that these procedural costs and delays are offset by efficiencies in the merits determination, private mass settlements are testing this assumption. For a defendant to propose a mass-settlement structure, it must expect that the costs of the claims fund and its administration will be less than the cost of resolving the case through litigation. This baseline calculation may also incorporate business considerations such as consumer goodwill and loyalty, the value of closure for shareholders as reflected in share price, and the time value of money.⁶⁸ A potential plaintiff should likewise rationally accept the offer where the amount offered through the claims fund exceeds the anticipated net recovery in litigation after adjustments for risk tolerance, payment horizon, and other personalized preferences.

The confluence of these two phenomena suggest the basis for the grass-roots appeal of bilateral mass settlements. The aggregate litigation system entails substantial transaction costs that at times allows only \$1 of every \$3 spent by the defendant in litigation to reach the victims.⁶⁹ This creates a

64 See Jaime Dodge, *Facilitative Judging: Organizational Design in Mass-Multi-District Litigation*, 64 EMORY L.J. (forthcoming 2014) (manuscript at 10–30) (on file with author) (providing a discussion of internal delays within a court occasioned by the conversion to an MDL as well as a discussion of the complexity of appointing leadership counsel and scholarship suggesting benefits of delayed or interim appointments); cf. DUKE LAW CTR. FOR JUDICIAL STUD., MDL STANDARDS AND BEST PRACTICE 28 (2014) (stating Best Practice 2c(ii)).

65 See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 563 (2007) (establishing a heightened pleading standard).

66 Frederic M. Bloom, *Information Lost and Found*, 100 CALIF. L. REV. 635, 644 (2012).

67 Cf. *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380–83 (2011) (holding that pre-certification decisions and statements by named plaintiffs cannot bind absent class until after certification).

68 See generally Russell Gold, *Compensation's Reputational Role in Class Action Deterrence* (Oct. 10–11, 2014).

69 See David Rosenberg & Steven Shavell, *A Simple Proposal to Halve Litigation Costs*, 91 VA. L. REV. 1721, 1727 (2005) (stating that “on average, it costs approximately one dollar in legal expenses for the legal system to transfer one dollar from a defendant to a plaintiff,” even in settlement); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (“The most objectionable aspects of asbestos litigation can be briefly summarized: dockets in both federal and state courts continue to grow; long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims’

substantial zone of potential agreement, in which the corporation and the victim can both not only receive the full net expected value of the aggregate litigation, but then split the remaining monies that are avoided through litigation costs and losses. In other words, private mass settlement has the ability to consistently offer a simultaneously superior outcome for both the would-be defendant and would-be plaintiffs.

C. *Closure Without Adjudication?*

One of the biggest drawbacks of private funds is of course the lack of closure relative to public aggregation. Class actions—despite their costs to defendants—at least offer the promise of nearly complete closure; the class settlement precludes suit by the entire class, leaving only the handful of victims that opt out as litigation risks. MDL—because of its opt-in nature—only offers closure as to the individuals that accept the settlement. Yet, if the company is able to obtain a global settlement of the MDL and parallel state court actions, this usually entices all individuals who will ultimately pursue litigation to come forward—and statute of limitations issues will likely bar those who do not with respect to most types of claims. Thus, whether formally or informally, companies usually obtain a relatively high degree of closure through the public aggregation mechanisms.

But, by their nature, bilateral settlements have no ability to bind or preclude any other party; thus, the conventional wisdom goes, closure is limited to the handful of individuals who accept the settlement. This section challenges this critique of private settlement funds, arguing that a more nuanced analysis reveals more subtle bases for closure than have been heretofore identified.

1. Informal Quasi-Closure Mechanisms

Because these mass settlement offers are made directly to individuals without class certification, they do not bind any victims other than those who expressly accept the offer. Thus, victims who choose not to accept the settlement are not precluded from bringing subsequent suit.

Nevertheless, as a practical matter, high participation rates can have the effect of practically creating closure. As participation rates increase, the number of victims with actionable claims decreases. As this occurs, the extent to which the costs of litigation can be spread across plaintiffs—whether in a class action or an MDL—decreases. Just as only large-value claims can be viably prosecuted by opt-out class members, so too as participation rates increase, the ability of victims to pursue litigation decreases. This likewise comports with the initial impetus for Rule 23(b)(3), which recognized that many harms are not individually viable but instead require aggregation to incentivize an attorney to bring the claim.

recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.” (quoting REPORT OF THE JUDICIAL CONFERENCE, *supra* note 29, 2–3) (internal quotation marks omitted)).

For companies offering bilateral mass settlements, a high participation rate may thus disincentivize the filing of aggregate litigation, effectively insulating them from a class action even if only a portion of the class accepts the offer. For participants, these programs often provide full or even super-compensation.⁷⁰ For defendants, the litigation cost savings and elimination of free riding allow a decreased net outlay. Together, this creates a situation in which both parties are better off. But, this comes at the expense of the public—both the nonparticipating, would-be absent class members and the general public interest in private enforcement of rights.⁷¹ This raises fundamental questions about what normative outcomes our system should prefer, to the extent that modern mechanisms are able to disaggregate compensation and deterrence.

2. Formal Quasi-Closure Mechanisms

Bilateral mass settlements cannot preclude any nonparticipating victims from filing claims for individual relief, nor from requesting joinder or an MDL of these individual cases where procedurally appropriate. But these procedural maneuvers operate on a functionally opt-in basis, as they can only adjudicate claims that have been filed by individuals—they cannot capture the massive number of no-action victims. Thus, the ability to file a class action in the shadow of a bilateral settlement becomes a substantial factor in determining the damages at stake.

A number of recent cases have begun to suggest an emerging doctrine as to the extent to which the offer of a bilateral mass settlement can preclude later certification of a class action. In *Aqua Dots*, the Seventh Circuit held that “[a] representative who proposes that high transaction costs (notice and attorneys’ fees) be incurred at the class members’ expense to obtain a refund that already is on offer is not adequately protecting the class members’ interests.”⁷² In addition, arguments have been advanced that, where these settlements offer full compensation, certification would be inconsistent with the

70 One exemplar of this approach lays in the NFL’s response to the seating shortage at the Dallas Cowboys’ stadium during the 2011 Super Bowl. Notwithstanding the price paid and limitations on liability contained in the contract, the defendants offered those ticketholders who were denied seats a choice of: (a) a ticket to the 2012 Super Bowl plus \$2400; (b) a ticket to any future Super Bowl, including airfare and a four-night hotel stay; or (c) the greater of \$5000, or actual ticket price paid, travel, lodging, and meal expenses (with accompanying receipts). See Dodge, *supra* note 18, at 1279. For additional discussion of this settlement offer and other super-compensation offers, see *id.*

71 See Mullenix, *supra* note 24, at 3–6.

72 *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

adequacy, superiority, and manageability requirements,⁷³ and may even render injunctive claims moot.⁷⁴

As Judge Easterbrook noted, the “substantial costs of the legal process” offered little value as “plaintiffs could have had refunds—and still can have them today.”⁷⁵ Moreover, as he went on to note, there was little reason to believe that the court’s notice campaign would be more effective than that of the corporation—most consumers had returned the product, there were no complaints by the governing agency, and it was likely that many of the unreturned products had been used prior to the recall.⁷⁶

In contrast, in the BP MDL the court granted certification of a tagalong class action.⁷⁷ In the wake of the Deepwater Horizon explosion, BP created the Gulf Coast Claims Facility to process the claims of victims of the oil spill.⁷⁸ BP framed the GCCF as a full compensation fund; it would pay out at a 100% rate for all damages recognized by the fund’s administrators.⁷⁹ Its selection of a full payout rate provided a preliminary assurance to potential claimants that so long as the administrator properly determines the claims payable, they should receive the greatest possible compensation for their losses—free of the allocational error, diminution for attorneys’ fees and costs, and delay inherent to the class action system. This substantive promise of full compensation combined with the procedural structure and selection

73 See, e.g., *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488 (S.D. Cal. 2013) (summarizing the caselaw on voluntary settlement offers as destroying adequacy and superiority and finding that that class action was not superior due in part to alternative remedial measures available to the plaintiffs); see also *Pagan v. Abbott Labs.*, 287 F.R.D. 139, 151 (E.D.N.Y. 2012) (“[R]ational class members would not choose to litigate a multiyear class action just to procure refunds that are readily available here and now.” (quoting *In re Aqua Dots Prods. Liab. Litig.*, 270 F.R.D. 377, 383 (N.D. Ill. 2010)) (internal quotation marks omitted)); *Webb v. Carter’s Inc.*, 272 F.R.D. 489, 504–05 (C.D. Cal. 2011) (stating that the class action was not superior because “because [Defendant] is already offering the very relief that Plaintiffs seek,” namely, refunds and out-of-pocket medical costs for treating skin irritation); *In re PPA Prods. Liab. Litig.*, 214 F.R.D. 614, 622 (W.D. Wash. 2003) (stating that, because defendants maintained refund and product replacement programs for individuals still in possession of products, “[i]t makes little sense to certify a class where a class mechanism is unnecessary to afford the class members redress”).

74 See *Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208, 1210 (10th Cir. 2012) (stating that the voluntary recall filed with the applicable government agency rendered moot a class action because the recall had already provided the entire remedy to which the class members would be entitled); see also *Thorogood v. Sears, Roebuck & Co.*, 627 F.3d 289, 293–94 (7th Cir. 2010) (discussing a variety of ways that class actions may not protect the interests of the class).

75 *In re Aqua Dots*, 654 F.3d at 751.

76 *Id.*

77 Order and Reasons at 36, *In re Oil Spill by the Oil Rig “Deepwater Horizon,”* 910 F. Supp. 2d 891 (E.D. La. 2012).

78 Although BP would ultimately reach a class action settlement approved in 2012, BP resolved more than two thirds of its claims—more than \$7.8 billion, see Robertson & Schwartz, *supra* note 13, through a private claim resolution facility required by the Oil Pollution Act of 1990, 33 U.S.C. § 2705(a) (2012).

79 See Issacharoff & Rave, *supra* note 33, at 399–402.

of Kenneth Feinberg—the 9/11 Fund administrator—enhanced the legitimacy and perception of fairness for some claimants.

Yet, substantial questions arose about the legitimacy of this fund. While some heralded the GCCF as a superior mechanism for getting money to victims when they needed it most, others decried it as an illegitimate system, crafted by a defendant who, they posited, had the ability to control Feinberg and elicit favorable determinations. Indeed, the difficulty in deciding how to value damages for businesses that were already in the midst of a recession led to complex legal determinations. As Linda Mullenix described it,

The serious challenges that scholars have raised with regard to the legitimacy of the September 11th Victim Compensation Fund have even more powerful resonance in relation to the Gulf Coast Claims Facility. . . . For those concerned with the rule of law, equity, and fundamental fairness, the GCCF ought to be a cause for concern.⁸⁰

The Department of Justice (DOJ) confirmed her intuitions of systemic bias, finding that in its audit of the tribunal's awards, the average claimant received \$8,800 less than the independent reviewers determined to be due, triggering aggregate payments of more than \$64 million.⁸¹

Against this backdrop, the court noted that substantial questions had been raised about whether the private settlement fund was awarding the full amount of compensation that victims might receive in litigation, or instead whether systemic features were resulting in undercompensation in the award—despite the facial offer of full compensation.⁸² As a result, it granted certification of the class and approval of the settlement, replacing the GCCF with a court-approved class action settlement for medical and economic damages claims as part of the Deepwater Horizon MDL.⁸³

Under this emerging doctrine, if the compensation offered by the bilateral settlement is equal to the greatest possible recovery in the class action, the class cannot be certified. But, if the putative class representative can establish that the settlement offer does not provide the full value of compensation available in a class action, then the class may be certified notwithstanding the settlement offer.⁸⁴ For companies that expect a low participation rate, making an overly generous offer allows the company to avoid class certification—with its *de facto* mandatory class and resulting increase in dam-

80 Mullenix, *supra* note 54, at 825.

81 BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY I (Apr. 19, 2012), available at <http://www.justice.gov/iso/opa/resources/697201241917226179477.pdf> (noting total fund payout of over \$6.2 billion to more than 220,000 claimants).

82 See *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 910 F. Supp. 2d 891, 941 (E.D. La. 2012).

83 *Id.* at 964.

84 See, e.g., *In re Pet Food Prods. Liab. Litig.*, 629 F.3d 333, 336 (3d Cir. 2010) (upholding certification where class settlement obtained relief beyond refund); *Jovel v. Boiron, Inc.*, No. 11-cv-10803-SVW-SHx, 2014 WL 1027874, at *7 (C.D. Cal. Feb. 27, 2014) (granting certification where time period varied from private refund programs); *Waller v. Hewlett-Packard Co.*, 295 F.R.D. 472, 488 (S.D. Cal. 2013) (granting certification where no refund offer was made and noting that this made it distinguishable from *In re Aqua Dots*).

ages.⁸⁵ But, perhaps equally important, it avoids the costs and discovery risks of litigating to class certification, as bilateral mass settlements can be used to simply strike the class allegations of the claim. In contrast, where the damages are highly individualized or variable, it becomes more difficult to establish that the payments made are clearly superior to a class action, without paying more than the value obtained by avoiding the aggregate proceeding.⁸⁶

To be clear, this emerging doctrine does not require that this offer represent all possible remedies and compensation. Rather, the requirement is only that the offer represents the maximum available within a class action. Thus, to the extent that certain damages cannot be pursued within the class action—for example, state law claims in a nationwide class action, punitive damages, or the claims of future claimants—these need not be paid by the bilateral settlement to bar class litigation.⁸⁷ For defendants, this may add further value to a bilateral mass settlement, as it creates functional closure as to not only those compensatory damages paid but even related claims, like punitive damages or state law damages, that were not paid.

* * *

Despite the grassroots popularity of these programs, substantial normative questions remain. While theoretically both parties should be better off through streamlining, the capacity for defendants to extract low-value settlements from unrepresented victims raises substantial normative concerns with respect to both compensation and deterrence. Part II turns to the concerns about actual compensation in privatized mass settlements.

II. IN THE SHADOW OF THE LAW

Having challenged the conventional wisdom suggesting parties should not participate in these settlements in Part I, this Part analyzes the risks these settlements pose. While scholars have commonly identified risks to victims,

85 For an interesting discussion, see Ryan C. Williams, *Due Process, Class Action Opt Outs and the Right Not to Sue*, 115 COLUM. L. REV. (forthcoming 2015), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2513539##.

86 In some cases, courts have even denied certification notwithstanding the presence of potential hypothetical class members that could theoretically receive more through litigation than the private settlement offer—where the vast majority of the class are fully compensated—apparently recognizing that the perfect could become the enemy of the good where a single hypothetical plaintiff could subvert the entire settlement's closure. See, e.g., *Daigle v. Ford Motor Co.*, No. 09-3214 (MJD/LIB), 2012 WL 3113854, at *5–6 (D. Minn. July 31, 2012) (“Ford does acknowledge that there may be class members that paid to have the entire transmission replaced, and who may not be fully reimbursed because replacement of the entire transmission is not required to repair the defective torque converter. Despite the possibility that certain class members will not be fully reimbursed through the recall, the Court nonetheless finds that the recall weighs against a finding that a class action is a superior method of adjudication of the claims asserted in this case.”).

87 See, e.g., *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752–53 (7th Cir. 2011).

this discussion first extends the literature by arguing that the risks and benefits of these settlements are not unidirectional but are instead bidirectional. This Part then assesses the companion argument that, even assuming arguendo that fair compensation is offered, the claimants will receive less than they would in an MDL class action.

A. *Bidirectional Errors in Compensation in Private Funds*

Understanding the impetus for privatization, the potential for win-win compensation funds, and the factors that drive formal and informal closure allows for a more careful consideration of the strategic dynamics that bilateral mass settlements generate. Contrary to the existing literature on these mechanisms,⁸⁸ this Section argues that bidirectional dislocations exist and identifies the impact of the competing pressure of shifting compensation away from the value of the expected legal recovery. Indeed, while bypassing the merits determination is rational for the parties, it creates a lack of precision in determining actual damages. At the extreme, both innocent and guilty parties may find it cheaper to pay full damages to those who file claims in a private proceeding than to proceed through class certification and summary judgment.

While these problems of nuisance litigation are well-documented in the context of class actions as well, this Section posits that they are more extreme in the bilateral settlement context. In class actions or MDLs, an innocent defendant should be able to negotiate a smaller settlement than a guilty defendant by persuading class counsel of the weaknesses of the case on the merits. But, in the bilateral mass settlement context, there is no single agent to negotiate with on behalf of the plaintiff; therefore, guilty and innocent parties may pay substantially equal amounts to obtain plaintiffs' participation.

While bearing the risk of an inaccurate settlement is a rational decision for the parties, it closes the differential between the two competing states of compliance and noncompliance with the law. As this differential creates the deterrent value a given law possesses, the lack of merits-based determinations in disaggregated settlements may weaken the goal of not just compensation, but also deterrence.

This Section identifies and develops the potential sources of this inaccuracy in compensation, arguing that the dysfunction is far more complex than identified in the existing literature.

1. Pro-Plaintiff Sources of Error

Scholars have generally concluded that mass settlement offers made unilaterally by the defendant will favor the defendant, offering less compensation to plaintiffs than would be available in litigation.⁸⁹ Yet, the reality on the

⁸⁸ See *supra* Section I.B.

⁸⁹ See, e.g., Gilles, *supra* note 54, at 376; Mullenix, *supra* note 54, at 825; Judith Resnik, Comment, *Fairness in Numbers: A Comment on AT&T v. Concepcion, Wal-Mart v. Dukes, and Turner v. Rogers*, 125 HARV. L. REV. 78, 161–68 (2011).

ground is far different. Corporations are frequently making offers of full compensation, and in many cases are even offering a premium beyond the best possible result in litigation. For example, when Hyundai discovered that some of its cars actually obtained 26 miles per gallon instead of 27 miles per gallon,⁹⁰ it not only offered consumers a full reimbursement of these additional fuel costs for the life of their ownership, but also a 15% premium to cover any inconvenience—a premium not available by law.⁹¹ When a class action was later filed on the same grounds, the lump sum payment option negotiated by class counsel⁹² offered only a fraction of this recovery for plaintiffs.⁹³ Likewise, when Super Bowl ticket holders were either relocated or denied seats altogether due to construction and permitting delays at the new Dallas Cowboys' stadium, most legal analysts concluded that the ticket holders were entitled to traditional contract damages.⁹⁴ Yet, the NFL made a more generous offer to each of the affected classes.⁹⁵ This subsection analyzes the structural factors presented by mass settlement offers that may drive

90 *Voluntary Fuel Economy Adjustment*, HYUNDAI (Nov. 2, 2012), <https://hyundaimpginfo.com/news/details/hyundai-and-kia-initiate-voluntary-program-to-adjust-fuel-economy-ratings>. The incongruity in the fuel economy rating was the result of procedural errors made during so-called “coastdown” testing at Hyundai and Kia’s joint testing facility in South Korea. *Id.*

91 Jaclyn Trop, *Hyundai Expands Choices in Gas Mileage Settlement*, N.Y. TIMES, Dec. 23, 2013, <http://www.nytimes.com/2013/12/24/business/hyundai-expands-choices-in-gas-mileage-settlement.html>. The mileage formula has four components: “(1) 2012 average fuel prices for the Hyundai owner’s geographic area; (2) mileage accrued by the owner; (3) change in combined (city/highway) EPA estimates for the vehicle; and (4) the fuel grade (regular or premium) recommended for the vehicle.” *Hyundai Reimbursement Program Facts*, HYUNDAI (Nov. 2, 2012), <https://hyundaimpginfo.com/resources/details/hyundai-reimbursement-program-facts/>.

92 Jerry Hirsch, *Hyundai, Kia Reach \$400-Million Settlement over Inflated MPG Claims*, L.A. TIMES, Dec. 23, 2013, <http://articles.latimes.com/2013/dec/23/autos/la-fi-hy-hyundai-kia-settle-mpg-lawsuit-20131223>.

93 According to the Kelley Blue Book, a study conducted by global market intelligence firm R.L. Polk & Co. indicates that Americans keep their new cars for an average of 71.4 months (or 5.95 years). *Average Length of U.S. Vehicle Ownership Hit an All-Time High*, KELLEY BLUE BOOK (Feb. 23, 2012, 9:07 AM), <http://www.kbb.com/car-news/all-the-latest/average-length-of-us-vehicle-ownership-hit-an-all-time-high/2000007854>. In addition, according to the Federal Highway Administration, Americans between the ages of 20 and 34 drive an average of 15,098 miles annually. *Licensed Drivers*, FED. HIGHWAY ADMIN. (Apr. 4, 2011), <http://www.fhwa.dot.gov/ohim/onh00/onh2p4.htm>. Based upon these average inputs, a Gulf Coast customer who keeps her Tucson for 5.95 years and drives an average of 15,098 miles per year, using current gas prices will recover a total of \$542.94. A West Coast consumer who does the same will receive \$624.93. Thus, depending upon geographic adjustment, the reimbursement will range between \$542–625; in contrast, the class counsel negotiated only \$353 in a lump sum payment. Hirsch, *supra* note 92.

94 See, e.g., Stahl, *supra* note 16.

95 The NFL offered a tiered compensation structure, which each ticketholder could choose to accept in lieu of litigation. The 2000 ticketholders who were delayed or were relocated could choose (a) the face value of their ticket, or (b) a ticket to a future Super Bowl. The approximately 400 ticketholders that did not receive any seat were given two options to select between: (a) \$2400 plus a ticket to the 2012 Super Bowl, which they could

corporations to offer terms that are objectively in excess of the legally available remedies.

Private mass settlement offers generate substantial net gains through the elimination of contested litigation and, in turn, plaintiffs' counsel. On one level, this streamlining would seem to be highly efficient: in most cases, the defendant is in the best position to know whether it perpetrated the alleged wrong or not. Likewise, the victim typically has superior information as to his or her particular injuries and damages. There are, of course, exceptions, but most litigation follows this model. It would therefore seem that the defendant has the capacity to decide whether it anticipates a finding of liability or not, sufficient to drive its decision to make a mass settlement offer. Likewise, confronted with that offer, the victim would seem to be able to assess whether the compensation offered is equal to or greater than the damages suffered. Given this litigation structure, private mass settlement can bypass the costs of litigation in most cases, because while neither party has full information, each has the specific information necessary to make or accept an offer.

But this streamlining substantially reshapes not just discovery, but the settlement process more broadly. In the aggregate litigation context, plaintiffs' counsel conducts an inquiry into the defendant's liability and assesses damages. The plaintiffs' attorney can then provide an assessment of the fairness of any proposed settlement offer including advising and educating clients about their legal rights. In contrast, private mass settlement offers are typically designed to operate without counsel.⁹⁶ As a result, there is no individual who can perform these functions. In the absence of a legal assessment of the settlement offer, victims are largely left to rely on their own subjective perceptions of fairness. This shift in the nature of the settlement decision gives rise to a number of insights about the conditions for settlement—and potential for error.

First, unilateral mass settlement offers may yield low participation rates where potential claimants cannot accurately ascertain the compensation to which they are legally entitled without the aid of counsel. In these cases where information is low, cognitive biases are most likely to operate—leading individuals to overestimate the strength of their own position and to reactively devalue any proposal made by the corporation.⁹⁷ In contrast, in cases

use or sell in the secondary market; or (b) a ticket to a future Super Bowl, including airfare and a four-night hotel stay. *See id.*

While the court would be limited to the contractual damages available, the offer of tickets to a future Super Bowl of the ticketholder's choosing created an offer objectively superior to any potentially available in court. *See id.* Not only did the NFL offer a subjective value for plaintiffs given the difficulty in obtaining tickets for a particular Super Bowl, but also an enhanced objective value given the secondary market premium on tickets. *See id.*

96 *See* Dana A. Remus & Adam S. Zimmerman, *The Corporate Settlement Mill*, 101 VA. L. REV. (forthcoming 2015) (manuscript at 7, 14), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2414754.

97 *See* Pianigiani, *supra* note 15 (highlighting consumer group's outright rejection of a settlement offer based on the belief it was too low).

in which damages are relatively objective, even laypersons can relatively accurately predict the compensation available by law.⁹⁸ Unilateral settlement offers made for claims whose value individuals can easily determine and compare are therefore less likely to suffer from legitimacy concerns or a belief that the defendant is undercompensating through the claims fund.

Second, the lack of plaintiffs' counsel can prevent the effective education of potential claimants about either potential merits defenses or limitations upon damages. In the traditional public aggregation mechanisms of class actions and MDL, the defendant is able to bargain with plaintiffs' counsel to diminish the amount of settlement based upon the likelihood of success on the merits. But risk premiums and risk discounts require an understanding of the legal arguments and resulting bargaining process. Yet, the nature of bilateral mass settlement offers functions as a one-way ratchet, preventing this education from occurring.

Consider the *Costa Concordia*, which shipwrecked off the Italian coast resulting in a loss of property, out-of-pocket transportation costs, and psychological harm to the surviving passengers.⁹⁹ The cruise line immediately issued a bilateral mass settlement offer.¹⁰⁰ The cruise line attempted to explain that it had provided generous compensation relative to litigation, given a combination of forum selection provisions, procedural barriers, and damages caps, which together made the offer a fair estimate of what victims would obtain.¹⁰¹ Indeed, in an attempt to build legitimacy for the offer, the company even bargained with nonprofit consumer groups about the offer's terms.¹⁰²

But, what message did the victims receive? Any plaintiff's attorney who believed the offer was fair had no incentive to invest in the case; the settlement was already on offer. Only those attorneys who believed that the deal was unfair had an incentive to appear on the dock, attempting to sway passengers that the courts would not enforce the contractual waivers the passengers had agreed to and would instead permit a class action. Given the trends in Supreme Court doctrine, the probability of success on such a claim was objectively quite low. Yet, the message to the victims was quite different—every plaintiff's attorney lobbying for his business was arguing that these provisions would not be enforced. Indeed, they had to—no reasonable plaintiff's attorney would solicit business with the claim that he would obtain less than what was already on offer. Thus, even if only 1% of plaintiffs' attorneys

98 *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 750 (7th Cir. 2011) (noting that 60% of the one million affected toys were returned for a full refund).

99 See Pianigiani, *supra* note 15.

100 *Id.*

101 See *Costa Cruises Details Costa Concordia Guest Reimbursement*, CRUISE RADIO (Jan. 27, 2012), <http://cruiseradio.net/costa-cruises-details-costa-concordia-guest-reimbursement/>.

102 See Barbie Latza Nadeau, *Why Survivors Aren't Buying Costa Concordia's Compensation Offer*, DAILY BEAST (Jan. 27, 2012), <http://www.thedailybeast.com/articles/2012/01/27/why-survivors-aren-t-buying-costa-concordia-s-compensation-offer.html> (describing survivors' reasons for hiring counsel for a class action lawsuit rather than accepting the settlement offer).

took this view, they still represented 100% of those soliciting the passengers' business. Against this seemingly unanimous message, the defendant's legal arguments likely seemed hollow and self-serving. Indeed, it may thus be unsurprising that the *Concordia* settlement struggled to obtain participation, even though it had been negotiated with consumer groups in an attempt to gain this elusive legitimacy.¹⁰³

Third, as foreshadowed by the previous example, unilateral settlement offers are most likely to be effective for midsized claims: small-value claims will have payout offers so small that few participants are willing to apply for compensation, while large-value claims may incentivize would-be plaintiffs' counsel to take a public stance in opposition to the deal, suggesting that they can obtain superior compensation.

Implicit in this discussion is the recognition that, while these structural features can act as barriers to settlement, they can also shift the substantive content of the settlement offer. Sophisticated defendants are increasingly realizing that offering super-compensation can increase perceptions of legitimacy and, in turn, goodwill and participation rates. Because of the high costs of litigation, companies can offer relatively enhanced compensation without exceeding the anticipated costs of litigation and settlement in the public aggregation system.¹⁰⁴

Not only can high litigation costs drive defendants to make mass settlement offers for amounts in excess of the maximum amount that may be awarded in litigation, but even to make offers on claims that they believe are meritless. Mass settlement offers are designed to decrease litigation costs, often through a defendant conceding liability on a particular substantive issue. Such a concession is rational where the defendant believes it is likely to be found guilty, such that the continuation of litigation is unlikely to yield a decrease in liability, but will certainly generate additional costs. But, it can also result where the substantive issue is one whose determination is likely to cost more than the liability at stake—making it a negative-value defense. Indeed, companies are now routinely offering recall and refund provisions on claims that may seem objectively dubious in order to take advantage of *Aqua Dots* closure.¹⁰⁵

This use of unilateral mass settlement offers is entirely rational for the defendant: a class action will presumptively include all consumers who have purchased the product in question, and will require expensive litigation on either the merits, class certification, or both. In contrast, making an offer of a full refund effectively converts the claims to opt-ins, such that only the handful—or more likely one—complaining consumer can be paid a comparatively small sum. In this manner, it should effectively deter the filing of frivolous class action suits.

Yet, as companies begin to offer mass settlements for harms that have not even been complained of, it suggests a powerful dysfunction within our

103 *See id.*

104 *See supra* Part I.

105 *See* Nadeau, *supra* note 102.

aggregate litigation system. One might interpret this as a pro-consumer development, as companies are now proactively identifying and offering remedies for harms. But, to the extent that companies are paying substantial sums to settle claims that are without legal basis, it diminishes the gap between complying and not complying with the law. Since deterrence is a function of the anticipated difference in outcome the potential wrongdoer will obtain if it violates or does not violate the law, over-enforcement of the law against innocent parties can diminish deterrence.

This leads to a powerful normative observation. Bilateral mass settlements have typically been criticized as permitting defendants to inflict externalities upon society by evading payment to nonparticipating claimants. But this analysis suggests a far more complex picture. To the extent that bilateral mass settlements permit defendants to deter the filing of frivolous litigation, they enhance deterrence and improve the enforcement of law. Moreover, while purely privatized settlement offers have typically been characterized as tools to undercompensate victims, there are powerful structural pressures toward overcompensation.

2. Pro-Defendant Sources of Error

Despite the theoretical potential for an equitable division of the joint gains derived from the efficiencies of bilateral mass settlement, bargaining power or procedural structures may drive a different allocation. As described above, many unilateral mass settlement offers have included super-compensation to plaintiffs, relative to the expected outcome in public aggregation, as a mechanism for enhancing participation given the trepidation of victims about the fairness of these offers. However, as mass settlement offers gain increased acceptance and legitimacy, this premium may decrease. Indeed, both the September 11 Fund¹⁰⁶ and the BP GCCF¹⁰⁷ obtained the participation of individuals who received awards less than those available under tort law.

This suggests an alternate possibility: that defendants may be able to deploy the efficiencies gained by settlement to reduce the payout of compensatory damages—shifting the division of joint gains in favor of the defendant. When one considers attorneys' fees, related litigation costs, and the time value of money, even an offer of compensation at a rate of 70% would be objectively superior to the net value of litigation. When one accounts for the risk of litigation, the necessity of a quick payout to pay medical bills or compensate for lost income, as well as personal preferences for immediate payment, this partial payout might be accepted at an even lower rate.¹⁰⁸

106 See FEINBERG, *supra* note 55.

107 BDO CONSULTING, *supra* note 81, at 2 (finding that in its audit of the tribunal's awards, the average claimant received less than the independent reviewers determined to be due, triggering aggregate payments of more than \$64 million).

108 See Dodge, *supra* note 18, at 1302–06.

In the context of mass claims, as some victims begin to accept a settlement, this increases the pressure on others to accept the terms—a dynamic I term “the tyranny of settlement.”¹⁰⁹ Essentially, as plaintiffs begin to settle their claims, they constrict the pool of individuals across whom costs can be spread. As the costs of litigation increase, this causes the settlement to become a superior option to the net expected outcome in litigation. As these individuals accept the settlement, the pattern continues, continuing to diminish the benefit of aggregation for those who do not accept the settlement.

When one considers that the administrative costs and recoveries of mass tort cases hovers around a 2:3 ratio,¹¹⁰ and in some cases legal fees and costs actually exceed compensation,¹¹¹ the extent of potential distortion becomes clear. Once a settlement gains traction among some plaintiffs—perhaps those in the most desperate financial circumstances—it can induce others to settle for only a small fraction of the claim’s value.¹¹² This potential spiral would not only impair the compensation of the victims, but also the extent to which deterrence is effectuated.

Of course, if a company offered such an explicit fractional compensation to victims, it would likely be rejected by most as an insult or injustice out of a simple sense of fairness. Moreover, to the extent that the harm was one that had caused secondary effects, as victims remained hospitalized and were unable to work, and then were being pressured to accept settlements to feed their families or to avoid foreclosure, the media would likely be quick to publicize the victims’ stories.

But, what if it were not so blatant? Claims valuation is often a complex endeavor, as exemplified by the litigation surrounding not only the BP GCCF, but also the court-approved MDL class settlements that succeeded it.¹¹³ Private mass settlements have historically operated as unilateral offers of compensation made by the corporate defendant to the victims. This places defendants in the role of both the settlement drafter and the systems designer.¹¹⁴

As the settlement’s author, the defendant must decide the eligibility requirements for participation.¹¹⁵ While some cases have self-evident contours, more often there are complex questions about who should be eligible

109 See Jaime Dodge, *The Tyranny of Settlement: Recapturing the Promise of Multi-District Litigation* 2, 3, 11–24 (unpublished manuscript) (on file with author).

110 See Robert L. Rabin, *Tort System on Trial: The Burden of Mass Toxics Litigation*, 98 *YALE L.J.* 813, 820–21 (1989) (collecting studies and reviewing PETER SCHUCK, *AGENT ORANGE ON TRIAL* (1987)).

111 See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997) (noting that the transaction costs were exceeding recovery in the asbestos cases by a 2:1 ratio).

112 See Dodge, *supra* note 109, at 20–24.

113 For a discussion of the complexity of claims valuation, see CPR INST., *CPR MASTER GUIDE TO MASS CLAIMS RESOLUTION FACILITIES* 19–50 (2010).

114 For a discussion of the role of dispute systems designers, see NANCY H. ROGERS ET AL., *DESIGNING SYSTEMS AND PROCESSES FOR MANAGING DISPUTES* (2013).

115 See CPR INST., *supra* note 113, at 71–78.

for compensation. This is particularly true where there are indirect harms, zones of harm, or even near-misses triggering psychological trauma and survivor guilt.¹¹⁶ Will the contours be driven purely by cognizable legal claims, or will the company recognize others whom equity might suggest should receive some compensation? In drawing these lines, the defendant may well decide to create certain presumptions of harm for individuals meeting certain criteria, recognizing that the cost of an individual inquiry would likely outstrip the benefit of identifying a few weak claims.

But this also presents a tactical opportunity. If the line is carefully drawn, the settlement should attract the participation of the highest-value claims. This may leave a subset of claims with weaker merits or low-value claims, disincentivizing plaintiffs' lawyers from taking up these claims.

In these roles, the defendant also has the opportunity to define the criteria for compensation. In creating the GCCF, BP elected not to exercise this power, but instead to allow the special master, Kenneth Feinberg, to set the terms. In creating the compensation structure, Feinberg consulted with prominent scholars in making a variety of difficult decisions, for example, whether to offset replacement income and how to value future risk (as the settlement was a final settlement of all claims).¹¹⁷ Yet, he and BP still came under attack for the compensation structure, arguing that it was intended to undercompensate victims.¹¹⁸ The controversy only became worse when the DOJ issued a report documenting an underpayment of claims of \$64 million; although, one must take this number in the context of \$6.2 billion being paid to more than 220,000 claimants.¹¹⁹

This is not to say that corporate defendants will exploit victims, intentionally or otherwise. Rather, the key observation is simply that bilateral mass settlements are highly malleable devices, which can be used to obtain a broad array of outcomes. Indeed, the next Part takes up the question of how defendants can most effectively utilize these settlements—and their limits.

Contrary to the widespread scholarly assumption that corporations will delay settlement for as long as possible, litigating even low probability motions, corporations are regularly offering victims of mass claims full com-

116 See Richard Blackburn & Lindsay Murdoch, *Malaysia Airlines Disaster: How Much Is a Passenger Worth?*, SYDNEY MORNING HERALD, Mar. 26, 2014, <http://www.smh.com.au/world/malaysia-airlines-disaster-how-much-is-a-passenger-worth-20140327-zqn9o.html>. The recent fund established to aid the families of the victims of the Malaysian Air Flight 371, which was blown up in flight over Ukraine, exemplifies this line drawing, as it provides assistance to the families of those that were killed, but does not provide compensation to those that were booked on the flight but then bumped off the flight. Yet, some of these survivors clearly have the capacity to experience substantial psychological harm beyond merely the loss of their loved one: whether it is the mother that told her son to fly despite his premonition the plane would crash, or his brother who was bumped from the flight that then claimed the lives of his two younger brothers.

117 See FEINBERG, *supra* note 55.

118 Mullenix, *supra* note 54, at 825.

119 BDO CONSULTING, *supra* note 81, at 1 (noting total fund payout of over \$6.2 billion to more than 220,000 claimants).

pensation outside of the litigation process.¹²⁰ These settlements offer a substantially more efficient mechanism for resolving claims, limiting the transaction costs relative to traditional aggregation by upending the most fundamental assumptions of our class action system.

B. *Reconceptualizing the “Lesson of BP”*

A second level of scholarly commentary suggests that, even assuming arguendo that the private compensation fund pays out a reasonable level of compensation, claimants and defendants should still prefer an MDL settlement to a private claims fund.¹²¹ The argument is that victims are better off because defendants pay more in damages, while defendants are better off because they receive more closure—particularly in high-value cases like the BP oil spill.¹²² But, is this always true?

I do not dispute the fundamentals on which these scholars rely—the decreased litigation costs, mitigation of adverse selection problems, and benefit of resolving the final “handful” of cases.¹²³ But I question whether these justify the extent of the premium suggested here, or whether something more was at play.

1. The Traditional Conception of the Deepwater Horizon Funds

Issacharoff and Rave posit that there were three components of the MDL peace premium that justified the enhanced settlement values relative to the GCCF: decreasing litigation costs by settling in bulk, instead of through individualized negotiations; reducing the risk of adverse selection, whereby the individuals with the best claim opt-out of the settlement; and resolving all claims, thereby avoiding the disproportionate costs the final holdouts can impose upon a corporation.¹²⁴ But does this explain the more generous public settlement?

It is true that the MDL’s embedded class actions converted the claims from de facto opt-in structures to opt-out Rule 23(b)(3) classes. But, what did this buy? The GCCF had already processed \$6.2 billion in payments to 220,000 claimants. In contrast, only 3,016 cases have been filed in the MDL.¹²⁵

Against a backdrop of an existing claims fund and a running statute of limitations, how many strong claims was BP buying peace as to? Put another

120 See Eric P. Voigt, *A Company’s Voluntary Refund Program for Consumers Can Be a Fair and Efficient Alternative to a Class Action*, 31 REV. LITIG. 617, 618–20 (2012).

121 See, e.g., Issacharoff & Rave, *supra* note 33, at 412–14 (arguing claimants receive greater compensation, while defendants get greater closure).

122 See, e.g., *id.*

123 See *id.* at 414.

124 See *id.*

125 See *MDL Statistics Report – Distribution of Pending MDL Dockets by District*, U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIG. (Sept. 15, 2014), http://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-August-15-2014.pdf.

way, how many individuals who had not filed in the GCCF nor already filed lawsuits were likely to come forward before the statute of limitations expired? Given this dynamic, the class settlement required BP to make payments calculated based upon a large number of claims that would never have been pursued but for the class action device.

The claimants in the class action can be conceived in three basic categories: (1) those who, for whatever reason, did not file a claim before the GCCF and also would not ultimately file in the Rule 23 action either—essentially the “no action” absent class members; (2) those who did not trust the GCCF, often because of its ties to BP or other questions of legitimacy, but would participate in a Rule 23 settlement with similar terms negotiated at arm’s length; and (3) the claimants who believed they were systemically undercompensated by formulaic damages, and thus would opt out of both the private and subsequent public suits.

Having disaggregated the potential claimants in this way, it becomes easier to conceptualize the limited role of adverse selection. So long as the settlement obtains final approval, BP would obtain peace as to the first category of “no action” claimants. Regardless of whether it paid the lower or higher amount, these individuals would be in the class and precluded from subsequent litigation—but the victory would be rather hollow, since they would never have filed claims in either system. So too, the second group of claimants, who merely wanted a legitimate, arms-length process for damages determination, will participate in the settlement at the lower or higher value. For clarification purposes, one might label these the procedural legitimacy/non-opt-out class members—they will accept whatever terms are approved by class counsel and the court.

It is only the third group of absent class members whose participation is driven by the settlement’s terms. But, because the same grid applies to all claimants, in order to capture each additional absent class member in this third, “potential opt-out” group, all claimants must receive these increasingly favorable terms. Put another way, to obtain the marginal participation increase of those potential opt-outs who demand 1% more in payouts, the no-action and procedural legitimacy class members will all also need to receive the additional 1%.

But, opt-out rates are typically only 1 to 2% of the class. Moreover, opt-outs take all forms. Some opt-outs are opting out of the litigation because they effectively agree with the defendant that it should not be held liable for the alleged harm. Other opt-outs represent the opposite end of the spectrum, believing that the compensation on offer is too little. Within this group, each claimant choosing to opt out rationally must anticipate that the underpayment under the Rule 23 settlement is substantial enough to justify the litigation costs of proceeding, or that there will be enough individuals who opt out to generate cost spreading sufficient to overcome this dynamic. Finally, another set of opt-outs may seek alternative end-goals; for example, wanting to continue discovery to bring to the public’s attention additional details of the corporation’s wrongdoing. Given this dynamic, only a portion

of the potential opt-outs can be captured by a sweeter deal—those that favor the company or who oppose any settlement will opt out under any terms.

Taken together, one must then ask whether increasing the payout structure was the best available approach to minimizing adverse selection. It may well be that in some cases, damages are clustered so closely that even paying all claimants at the highest possible damage level is still less expensive than litigating. Indeed, this is the basic principle behind many of the private mass settlement funds identified in this Article. But, where the premium was paid for claims in an area of uncertainty—as here—there is less cause to expect that only a small increase in payout will markedly change the opt-out rate. As the payout demanded by holdouts increases in size, it becomes more costly to extend this largesse throughout the entire absent class.

Moreover, because the GCCF had already paid a substantial number of claims, the universe of potential filers was somewhat distorted. Removing those claims from the MDL pool inherently left a greater percentage of no-action claims than would otherwise have existed. Yet, these no-action claimants were still included in the calculation of the fund, at the now-magnified rate of the settlement premium.

At the extreme, the premium demanded by the final holdouts—even if irrationally high—may be enough to incentivize the corporation to simply accept the opt-outs. But, if this is done, then the adverse selection and disproportionate, final-holdout costs have not been eliminated by the more generous terms; they have merely been mitigated.

Recognizing the high costs and functional limits to the peace purchased by BP, might there have been other factors that combined with these to incentivize its more generous MDL settlement terms?

2. A Supplemental Public/Private Interaction Narrative

BP settled its economic loss and medical claims cases in March 2010, in the shadow of the pending criminal charges, which were the largest in U.S. history.¹²⁶ Viewed in this context, BP's settlement on the courthouse steps may have been not simply about the victims' claims, but about their collateral effect on other public proceedings. By settling with the victims, BP could decrease any likelihood that the government would seek compensation on behalf of private victims—as it has frequently done in recent years. But, more importantly given the procedural posture of the settlement, it removed the uncompensated victim from the table as a symbol of BP's wrongdoing. And, it affirmatively allowed BP to argue that neither retributive nor corrective justice required government regulators to seek the harshest possible penalty against BP. Instead, it could argue that while it had made mistakes, it

¹²⁶ Press Release, U.S. Dep't of Justice, BP Exploration and Production Inc. Agrees to Plead Guilty to Felony Manslaughter, Environmental Crimes and Obstruction of Congress Surrounding Deepwater Horizon Incident (Nov. 15, 2012), <http://www.justice.gov/opa/pr/bp-exploration-and-production-inc-agrees-plead-guilty-felony-manslaughter-environmental>.

had already learned its lesson, had compensated victims—and even remote potential victims—with extreme largesse, and was, in short, attempting to make right its wrongs. In this tale, generous compensation became the lynchpin of proving remorse—and, in turn, demonstrating that draconian regulatory terms were simply punitive rather than deterrent.

This alternative narrative explains the paradox of the BP settlement for many. As BP—and before it, Haliburton—have argued (if not demonstrated) in their filings, there are persons being generously compensated who may not have suffered any legally cognizable injury, while for others the payments outstrip the actual harm suffered. Why did BP agree to—and some would say actually pushed for—this over-compensation in terms of both the scope of the class and damages paid? And, more perplexing, what drove BP's sudden change of heart, in which it suddenly began appealing the settlement to which it had just consented, with the ink barely dry?¹²⁷

One might argue that BP simply had bad lawyers, who did not realize that this was the consequence of the settlement agreement until months after the negotiations concluded and the claims processing was underway. Given restrictions on settlement talks for British corporations, there might be some merit to the argument that talks were too hurried for robust reality testing and thus there was a lack of a true consensus on what certain terms would mean. But, BP had hired many of the best lawyers in the nation and was working with many of the leading settlement advisors, making it difficult to believe that BP's lawyers did not see the gaping holes in the settlement. Indeed, many of the terms now complained of were expressly discussed in the settlement talks and, after having the consequences pointed out, BP's attorneys expressly agreed to the terms.¹²⁸ This suggests that the tale is not purely one of incompetent lawyering as some have assumed.¹²⁹

Removing this explanation, the story is not one in which BP did not know what it was agreeing to pay to whom. Instead, it is one in which BP knowingly consented to participate in (at least some) largesse, desiring to make the class as broad as legally possible even to the point of paying compensation to what it regards as non-victims. And then, it suddenly changed course.

If the story was one of closure, the change we would expect to see would be that BP faced higher opt-out rates than anticipated, such that it did not receive closure. But, the record does not suggest that the opt-out rate was

127 See, e.g., Alison Frankel, *BP Plays Twister in Latest Deepwater Horizon Appellate Brief*, REUTERS (Sept. 3, 2013), <http://blogs.reuters.com/alison-frankel/2013/09/03/bp-plays-twister-in-latest-deepwater-horizon-appellate-brief/>.

128 See Brief for Appellees at 14–22, *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (No. 13-30315) (detailing the meetings at which the terms and issues contested by BP on appeal had been raised during the fall of 2012, prior to the fairness hearing for the settlement).

129 For an early rejection of the notion “that BP and Kirkland & Ellis . . . were somehow hoodwinked by plaintiffs lawyers,” see Alison Frankel, *BP, Buyer's Remorse and the Future of Mass Tort Settlements*, REUTERS (July 11, 2013), <http://blogs.reuters.com/alison-frankel/2013/07/11/bp-buyers-remorse-and-the-future-of-mass-tort-settlements/>.

higher than would be anticipated for this type of case. Moreover, if this was an *ex ante* concern of BP's, its sophisticated counsel knew how to draft participation rate guarantees, and had done so in prior cases. Thus, even if part of the premium paid was for closure, it does not explain the change in course by BP—and in turn, may suggest a different *ex ante* motivation for the deal.

One might alternatively posit, as BP has, that its change in stance was instead about a special master with an undisclosed connection to plaintiffs acting in disregard of the plain meaning of the contract's terms.¹³⁰ But, the Fifth Circuit has agreed that the special master's interpretations have been wholly consistent with the settlement agreement's terms, even if the settlement itself provided compensation for individuals who did not have cognizable legal claims. Moreover, setting aside the question of how the terms should now be interpreted *ex post* given the language that was selected, the terms in question are ones that sophisticated counsel could have drafted better *ex ante*.¹³¹ Thus, this argument too appears to reduce to an argument that BP's counsel assumed that the special master would interpret the agreement to have additional terms, rather than expressly stating them. Given that even first year law students are taught to put the terms in writing, leaving nothing to chance, it may strain credulity for many to believe that none of BP's army of counsel thought better of this strategy.

But, does the timeline of BP's change of heart suggest an alternative theory? Only months after the class action settlements, on November 15, 2012, the DOJ announced that BP had "agreed to plead guilty to felony manslaughter, environmental crimes and obstruction of Congress and pay a record \$4 billion in criminal fines and penalties for its conduct leading to the 2010 Deepwater Horizon disaster."¹³² Less than two weeks later, the Environmental Protection Agency (EPA) suspended BP and its affiliates from entering into any new government contracts—expressly relying on its plea deal with the DOJ.¹³³ The ban prevented BP, which held an estimated \$2 billion in federal fuel contracts, from obtaining new government contracts.¹³⁴ But,

130 For an excellent summary of these claims, see *id.*

131 For example, while BP has now been relegated to arguing that it assumed that the eligibility criteria would only be applied to those showing a legally cognizable injury, the purpose of eligibility criteria is generally to serve as a proxy for legally cognizable injury. Thus, if the proposed eligibility criteria was not a sufficient gate, sophisticated counsel could well have added a term that the gate served as a mere presumption and that BP could make an individual challenge to causation as to any claimant.

132 See Press Release, *supra* note 126.

133 See Press Release, U.S. Evtl. Prot. Agency, BP Temporarily Suspended from New Contracts with the Federal Government (Nov. 28, 2012), <http://yosemite.epa.gov/opa/admpress.nsf/79c090e81f0578738525781f0043619b/2aaf1c1dc80c969885257abf006dafb0!OpenDocument>.

134 See Alan Neuhauser, *EPA to Lift Ban Barring BP from New Federal Contracts*, U.S. NEWS & WORLD REP., Mar. 13, 2014, <http://www.usnews.com/news/articles/2014/03/13/epa-to-lift-ban-barring-bp-from-new-federal-contracts> (noting that experts saw the drop from "plus \$2 billion to minus \$600 million" as unprecedented among federal contractors (internal quotations omitted)).

more critically, the ban prevented BP from entering into any new oil and gas leases in the United States.¹³⁵ Particularly devastating, this meant that BP was not only losing a “crucial profit center” in the short term, but it was losing potential new leases that were coming available—while it was prohibited from bidding—to competitors like Royal Dutch Shell and Chevron.¹³⁶

As late as the November 8, 2012 fairness hearing, BP had expressed no reservations about the special master’s interpretation of the terms, even though the special master had both expressly raised the issues that BP would later challenge in theoretical terms and applied his understanding in processing more than 79,000 claims, authorizing payments of more than \$1.3 billion.¹³⁷ Indeed, BP’s counsel even told the court that “Mr. Juneau . . . is doing a wonderful job.”¹³⁸ According to the special master, it was December 5, 2012—mere days after the EPA ban—that BP suddenly changed its posture, which it confirmed in writing on January 8, 2013.¹³⁹

Given this timeline, there is a plausible argument that it was not only closure vis-à-vis the victims, but obtaining low cost closure with the government that drove BP’s largesse. As discussed in the prior section, because of the prior GCCF, BP had already received partial closure. Moreover, given both the right of opting out and the continuing parallel litigation, even the MDL settlement would not generate a global settlement or global peace. But, reconceptualizing the settlement within this broader global litigation framework helps explain why BP would pay such a premium for a settlement that, for one-off reasons, was offering less closure than comparable class settlements typically offer.

It also explains the sudden shift from pressing for a broader settlement and advocating for its approval by the court to opposing the settlement and appealing its implementation.¹⁴⁰ In anticipation of the DOJ talks, BP may have wanted to eliminate all potential private victims from the calculation in order to limit not only the spectrum of actions and remedies available to DOJ, but also to incentivize it to agree to more modest terms. In its negotiations with the DOJ, BP expected it was buying closure as to its public regulatory woes.¹⁴¹ By December, BP’s incentive toward generosity due to the

135 See Stanley Reed, *BP Sues U.S. Over Contract Suspensions*, N.Y. TIMES, Aug. 14, 2013, http://www.nytimes.com/2013/08/15/business/global/bp-sues-us-over-contract-suspensions.html?_r=0.

136 *Id.*

137 Brief for Appellees at 22, *In re Deepwater Horizon*, 739 F.3d 790 (5th Cir. 2014) (No. 13-30315).

138 *Id.* at 24.

139 *Id.* at 24–25.

140 As late as May 2012, BP agreed to a modification of the settlement agreements, indicating its continued support for their terms. Cf. *MDL-2179 Oil Spill by the Oil Rig “Deepwater Horizon,”* U.S. DIST. COURT, E. DIST. OF LA., <http://www.laed.uscourts.gov/oilspill/oilspill.htm> (last updated Sept. 25, 2014).

141 Of course, just as the class settlement did not buy complete closure (but instead was subject to the caveat of opt-outs), so too the DOJ settlement was not anticipated to buy complete closure as to public claims. For example, parallel state litigation remained pend-

pending DOJ investigation had not only been removed, but it also discovered that it had not obtained closure. This alternative narrative suggests that the problem in BP's lawyering came not in the class settlement, but in the negotiations with the federal government that followed. And, indeed, it was precisely when these negotiations turned out badly for BP that it suddenly shifted to a far more aggressive stance with the government and in the MDL, ultimately culminating in its pending appeal to the U.S. Supreme Court.

At this point, it is impossible to know with certainty what happened in the negotiating room or in the boardroom—and indeed, we may never know. But whatever the actual origins of the BP litigation strategy, we can draw some insights about potential settlement paths and lessons. Just as private settlements can obtain a closure premium, so too, I posit that public regulatory closure can also have disproportionate value such that it generates a settlement premium. The question then is how this premium should be negotiated, how it is sequenced or intertwined with private rights of action, and ultimately who should capture this premium.

It seems clear that we will see an increasing degree of interaction between public and private enforcement in the coming years, such that the public prosecution can influence the terms of private settlements and vice versa. In future cases, corporate defendants may attempt to negotiate for increasing levels of global regulatory settlement, in which all government regulators and even attorneys general may be pressed to settle simultaneously—for example, here ensuring that the EPA would not bring separate process only days after and expressly relying upon the DOJ settlement. Defendants may also attempt to expressly link these public settlements with the private ones, whether in a single settlement document or through informal linkages.¹⁴²

III. MASS SETTLEMENT AS STRATEGY

As noted in Part I, privatized mass settlements are typically initiated through a unilateral offer of settlement, extended by the would-be corporate defendant. This Part thus turns to the potential uses of these settlements for corporate defendants and articulates a structure for operationalizing a claims settlement fund within each of these frameworks. This Part concludes by

ing with respect to the harms to the Gulf States. Rather, BP seemingly expected the DOJ settlement would resolve its litigation with the federal government.

142 Such a condition might seek to preclude redundant litigation of a cause of action for compensation that is tied to the individual victims' harm but which may be pursued by either the government or the victims directly. In such a case, the waiver would simply clarify the preclusive effect of the settlement with the private parties. But the settlement demand could also go further—expressly pitting the victims' desire for payment now against the public agency's interest in conducting further investigation. Or, the defendant could make a truly global settlement offer inclusive of fines and penalties, as well as compensation, stating that it would leave the allocation to the plaintiffs' attorneys and government officials. In short, the opportunities for innovation in linkages in nearly endless, if defendants follow this path.

assessing the limitations of mass settlement offers, identifying particular variables that may limit the ability of the corporation to derive its desired outcome—and thus the types of cases in which we might expect to see comparatively limited use of privatized settlements.

A. *Detering the Nuisance Lawsuit?*

The problem of nuisance lawsuits is one of paramount importance for both in-house counsel and defense counsel. The structure of the law inherently forces corporations to spend substantial sums on defending even the most spurious class actions.¹⁴³ At a minimum, the company must bear the costs of discovery and motions practice, culminating in summary judgment.¹⁴⁴ But this yields no closure beyond the putative named plaintiff.¹⁴⁵ Thus, companies often instead choose to bear the substantial costs of proceeding through a class certification decision. If the company prevails and defeats class certification, it is still subject to individual litigation, but has at least obtained a decision that will serve as a partial deterrent against future class filings on the claim.¹⁴⁶ If the company loses, it is now able to litigate its summary judgment motion and have the outcome bind the entire class.¹⁴⁷ In essence, the problem of nuisance lawsuits is that due process requires such a high litigation cost to be borne before the case can fairly be dismissed.¹⁴⁸

Private mass settlement offers have the capacity to solve the nuisance lawsuit problem in a wide swath of cases. These settlements are able to overcome the procedural hurdles due process requires, which have heretofore prevented efficient resolution of these cases.¹⁴⁹ The first key to this solution lies in returning autonomy to the victim. Because the individual is empow-

143 Cf. Hay & Rosenberg, *supra* note 4, at 1378.

144 See, e.g., *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 559 (2007) (“[T]he threat of discovery expense [can] push cost-conscious defendants to settle even anemic [class actions.]”).

145 *Smith v. Bayer Corp.*, 131 S. Ct. 2368, 2380 (2011) (stating that unless a class is certified, the absent class members are not bound by either a formal class certification or by any principle of virtual representation).

146 As the Supreme Court clarified in *Smith v. Bayer Corp.*, a denial of class certification is not binding on absent class members, and thus the judge cannot enjoin the pursuit of class certification in another court. However, while a federal judge is without power to enjoin state court litigation, the Court did remind federal courts to apply the comity principle in order to avoid incentivizing repeat litigation of the class certification question. *Id.* at 2381–82; see also *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 767 (7th Cir. 2003) (objecting to “an asymmetric system in which class counsel can win but never lose” because of their ability to relitigate the issue of certification).

147 See *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (describing certification as “forcing these defendants to stake their companies on the outcome of a single jury trial” or “to settle even if they have no legal liability” out of “fear of the risk of bankruptcy”).

148 See Rosenberg, *supra* note 69, at 1727.

149 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557–58 (2011) (describing the myriad protections that Rule 23, the Rules Enabling Act, and the Constitution provide to protect both the defendant and absent class members alike).

ered to decide whether to accept the offer, the procedural checks imposed upon a class action are removed. The second key lies in the closure mechanism, which mandates fair compensation as a condition of closure.¹⁵⁰ With these two principles in mind, we can turn to how such a system could be operationalized by a corporation. Understanding what these systems would look like then enables an analysis of the normative concerns implicated by the likely pattern of operationalization.

1. The Fundamental Premise

Corporations face a plethora of claims that they are often quite convinced no rational person would make, particularly in the context of consumer claims.¹⁵¹ Private mass settlements offer these companies a new and powerful option in heading off these lawsuits. Thus far, courts faced with class certification in the wake of a private mass settlement offer have focused upon whether the class counsel will be able to obtain any benefit for the class not already on offer from the defendant.¹⁵² As a result, the key to utilizing a mass settlement to inoculate against a class action turns upon offering full compensation.

In establishing its settlement fund, the emerging doctrine therefore incentivizes companies to follow the same procedures used in court-approved settlements. This practice allows the company to insulate itself against challenges arguing that its program was defective in informing the consumers about the settlement, and thus the value of the class action will not be a superior monetary recovery but instead effective notice. A company would therefore provide notice to the eligible consumers or victims, whether through direct communications, website, or traditional newspaper advertising, in order to satisfy the due process standards that would apply in settlement.¹⁵³ As a matter of best practices, this notice is more likely to be done through a combination of these methods.

Drafting the notice in plain language, akin to the short-form and long-form notices in a Rule 23 settlement, not only increases claimant understanding and thus allows for increased participation but also reduces the risk of inadequate notice preventing formal closure.¹⁵⁴ If the corporation will have

150 See *supra* Part I.

151 For a similar argument regarding securities lawsuits, see Paul Atkins, *The Supreme Court's Opportunity to End Abusive Class Action Securities Lawsuits*, FORBES (Mar. 4, 2014), <http://www.forbes.com/sites/realspin/2014/03/04/the-supreme-courts-opportunity-to-end-abusive-securities-class-action-lawsuits/> (commenting on arguments in *Halliburton Co. v. Erica P. John Fund, Inc.*, 134 S. Ct. 2398 (2014)).

152 See *supra* Part I (discussing *In re Aqua Dots* and *In re Deepwater Horizon*).

153 For the Federal Judicial Center's latest guidance, see *Judges' Class Action Notice and Claims Process Checklist and Plain Language Guide*, FED. JUDICIAL CTR. (2010), [http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/\\$file/NotCheck.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf).

154 Small-value claims are typically addressed through simple short-form style notices. See, e.g., U.S. CONSUMER PROD. SAFETY COMM'N, RECALL HANDBOOK 18–25 (2012). However, attention should be given to any government-mandated minimums. In contrast,

a claims cut-off date, this should be included as well to minimize challenges—although, for reasons that will be explained below, the company should presumptively disfavor restrictions on participation.¹⁵⁵ To the extent that corporations seek to minimize later-filed classes, one may expect that notice campaigns tailored to the particular dispute's unique features should be anticipated. For example, the education levels and geographic dispersion of the victims, the corporation's access to contact information for the victims—whether through its own records or through an intermediary, the traditional media these victims are likely to access (whether television, radio, or even newspapers and magazines), as well as the potential for using Internet technology (whether through search engine searches, advertisements, or even YouTube or other social media campaigns), will likely all be considered.¹⁵⁶

To maximize the likelihood of preventing class certification, a company would offer substantive terms that are equivalent to any recovery possible through litigation.¹⁵⁷ For many companies, this may be easier said than done, given variations in damages under state law.¹⁵⁸ But, as a threshold matter, the compensation offered should not be lower than that available under the corporation's own state law, as this standard would leave the corporation subject to a nationwide class action filed under its own law.¹⁵⁹

With this baseline, the company can then consider whether an upward ratcheting of damages should occur. One option is for the corporation to consult with its counsel on the damages available by state, and designate a higher payout for residents of certain states.¹⁶⁰ This allows the company to pay more in the handful of states where exemplary damages are available,

high-value claims will often require far more careful summaries of the programs. *See, e.g., Feinberg Announces GM Ignition Compensation Claims Resolution Facility*, GM IGNITION COMP. CLAIMS RESOLUTION FACILITY, <http://www.gmignitioncompensation.com/> (last visited Oct. 27, 2014) [hereinafter GM IGNITION COMP. CLAIMS].

155 *See, e.g., Jovel v. Boiron, Inc.*, No. 11-cv-10803-SVW-SHX, 2014 WL 1027874, at *7 (C.D. Cal. Feb. 27, 2014) (granting certification where time period in proposed settlement varied from that in the private refund program).

156 *See* Julie Locke, *Tips for Using New Media in Class Action Notice Plans*, LAW 360 (Jan. 19, 2011), <http://www.law360.com/articles/218356/tips-for-using-new-media-in-class-action-notice-plans> (discussing modern class notice programs).

157 *See, e.g., Winzler v. Toyota Motor Sales U.S.A., Inc.*, 681 F.3d 1208 (10th Cir. 2012); *In re Aqua Dots Prods. Liab. Litig.*, 654 F.3d 748, 752 (7th Cir. 2011).

158 *See generally* Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2027 (2008) (discussing rules regarding choice of law for federal class actions).

159 For an insightful discussion of these complexities and their emergence, see Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008).

160 As an example of a program that varies compensation by location, although in the context of a settlement fund that the defendant sought to have approved through the class action mechanism by the court, see FAQ, KIA MPG INFO., <https://kiampginfo.com/faq#litigation> (last visited Oct. 28, 2014). This is in contrast to settlement funds that use geography/state residence as part of the eligibility criteria; for example, the GCCF's subse-

without over-compensating all claimants. However, as a practical matter, the company may decide to streamline processing by granting all claimants a uniform level of compensation.¹⁶¹ This beneficence generates not only intangible goodwill, but also builds in a heightened burden for would-be class counsel to overcome in establishing that they can obtain any legal remedy not already on offer.¹⁶²

2. Maximizing Closure

In crafting its settlement program, the corporation and its claims program designer are inherently balancing the intersecting concerns of efficiency, accuracy, and legitimacy.¹⁶³ As a matter of legitimacy and to increase the likelihood of surviving any subsequent challenge to the program, the corporation should bear the full costs of administration without contribution from claimants or a diminution of their compensation. Some corporations attempt to cut corners in this regard, for example, requiring the consumer to bear the costs of return postage if a defective item is to be returned and exchanged.¹⁶⁴ Surely this saves a minimal amount on postage and may even disincentivize some consumers from bothering to return the defective product.¹⁶⁵ Yet, if the cost of this penny-pinching at the margins is to create a colorable argument for plaintiffs' counsel that they could provide a superior net remedy for the plaintiffs—by eliminating these costs through a different

quent MDL successor used proximity to the Gulf as one factor in presuming damages causation—although this is now on appeal.

161 The GM ignition-switch fund cases follow this model. See *GM IGNITION COMP. CLAIMS*, *supra* note 154.

162 See, e.g., *Daigle v. Ford Motor Co.*, No. 09-3214 (MJD/LIB), 2012 WL 3113854, at *5–6 (D. Minn. July 31, 2012) (“Ford does acknowledge that there may be class members that paid to have the entire transmission replaced, and who may not be fully reimbursed because replacement of the entire transmission is not required to repair the defective torque converter. Despite the possibility that certain class members will not be fully reimbursed through the recall, the Court nonetheless finds that the recall weighs against a finding that a class action is a superior method of adjudication of the claims asserted in this case.”).

163 See generally *CPR INST.*, *supra* note 113, at 85–114.

164 One variant some corporations have utilized is offering to reimburse the claimant for these mailing costs, up to a reasonable amount. See, e.g., *Microsoft North American Retail Product Refund Guidelines*, MICROSOFT <http://www.microsoft.com/mscorp/productrefund/refund.mspx> (last visited Oct. 28, 2014).

165 The buyer-pays approach is particularly common among high shipping cost items. Nevertheless, it may give rise to claims by putative class counsel that they could obtain more for the victims who were incentivized to keep the item because two-way shipping would swamp the return value, making retaining the item or selling it a superior option, and preventing them from privately vindicating their rights without litigation. See, e.g., *Bowflex® Buy Back Guarantee*, BOWFLEX, <http://bowflex.com/bowflex-home-gyms-us/customer-support/returns.jsp> (last visited Oct. 28, 2014); cf. *Hatebowflex4goodreason, Do Not Buy from Bowflex or Nautilus*, PISSED CONSUMER (Jan. 3, 2009), <http://bowflex.pissedconsumer.com/do-not-buy-from-bowflex-or-nautilus-20090103143659.html> (customer alleging that his return costs would have exceeded the value of the machine).

claim mechanism or by obtaining a remedy from those deterred by those costs—it may well be a fool’s bargain.

Accepting that the company will bear administrative costs rebalances the preference between efficiency and accuracy. Some defendants seek detailed claims forms, whether as a reflexive continuation of the adversariality of the litigation process or more strategically to reduce the likelihood of subsequent challenge or claim of error. Claims forms can be an essential component where the victim class is unidentifiable, or otherwise difficult to ascertain.¹⁶⁶ Even where the would-be class members are identifiable, only a subset of these will likely have suffered the alleged injury.¹⁶⁷ While a corporation may—and one might say should—make direct offers to consumers that have already complained to the company, there should be a mechanism for other consumers to file claims—if only to ensure that victims had a full and fair opportunity to participate sufficient to decrease the risk of class certification. Claims forms can also be useful in determining damages, particularly where the defendant does not have perfect information on the identity of the claims holders or the damages suffered.

However, there are reasons to hesitate before employing a robust claims form in the private mass settlement process. First, the form should be streamlined to include only required information in order to ensure that the form is not deemed burdensome.¹⁶⁸ Second, to the extent that the payment formula becomes more complex, requiring more inputs, there is greater likelihood of an error being made—and potentially opening the door to a challenge akin to the ones made against the BP GCCF. Third, even if no errors are made, it is the would-be defendant that is bearing the processing costs. Thus, a hard question must be asked as to whether the additional coding required for each question added to the form will generate sufficient cost savings to offset for the additional data entry time it requires. The corporation should also anticipate that additional questions may yield not only direct processing costs, but may also be filled out incompletely, incorrectly, or illegibly, requiring the claims administrator to reach out to the individual and request supplemental information. Depending upon the nature of the claims envisioned, the cost of merely mailing a notice back with a pre-paid envelope could exceed the cost of the claim. Thus, while there may be an initial impetus toward a highly accurate damages figure, the company may

166 As an example of the tiered compensation system allowing recovery with or without proof of purchase, in the context of a court-approved settlement, see *Frequently Asked Questions*, GCG, <http://www.cytosportclassactionsettlement.com/faq#Q4> (last visited Oct. 28, 2014).

167 *Cf.* *Webb v. Carter’s Inc.*, 272 F.R.D. 489, 505 (C.D. Cal. 2011) (concluding that private refund fund’s 0.14% participation rate was caused not by apathy or a lack of notice, but by most consumers being satisfied with the product).

168 *Cf. supra* notes 35–37 and accompanying text.

find that allowing a higher fixed rate is preferable to the administrative costs accuracy entails.¹⁶⁹

But, if the company uses a fixed or simple formula, does it open itself to a BP challenge? Fixed rate or simple formulas are particularly helpful in cases in which the damages are essentially a mathematical equation identical for all plaintiffs.¹⁷⁰ For example, in many securities and antitrust cases, damages can be calculated by multiplying the alleged damages per unit by the number of units held by the claimant.¹⁷¹

In other cases, there may be some incidental damages, but these may be so various and difficult to prove (and in turn assess) that the company recognizes that the cost of processing and risk of challenge outweigh the benefit. Using a streamlined formula in which a generous, standardized amount is provided for these individualized damages not only decreases administrative costs, but may also generate a public relations benefit stemming from the unquestionably generous settlement offer. This may in turn increase participation rates and further decrease the risk of tagalong class actions. The gas mileage settlement provides an excellent example, as the formula included an additional sum for incidental damages and inconvenience—preventing would-be class counsel from basing their class certification motion on de minimis individualized damages.¹⁷²

But, as a backstop to these options, the company may also consider allowing a claimant to include any individualized damages claim for harms that purportedly exceed those already on offer.¹⁷³ Allowing a statement to be included on the claims form, including an explanation of the amount sought and a rationale will frequently provide the most de minimis possible burden upon claimants challenging the payment grid or formula.¹⁷⁴ The claims form might also provide for the arbitration of any such claim by a respected third party based upon the written claim and the corporation's response, if the corporation does not stipulate to the damages claimed. As occurred with *Concepcion* waivers, the company may simply waive particularly

169 See generally CPR INST., *supra* note 113, at 85–114 (discussing cost-benefit analysis in claims funds generally).

170 *Id.* at 93–95.

171 See generally Deborah R. Hensler, *Alternative Courts? Litigation-Induced Claims Resolution Facilities*, 57 STAN. L. REV. 1429, 1430 (2005) (discussing claims resolution facilities).

172 See *Hyundai and Kia Initiate Voluntary Program to Adjust Fuel Economy Ratings on Select Vehicles*, KIA (Nov. 2, 2013), <https://kiampginfo.com/news/details/hyundai-and-kia-initiate-voluntary-program-to-adjust-fuel-economy-ratings/> (“Customers will receive a personalized debit card that will reimburse them for their difference in the EPA combined fuel economy rating, based on the fuel price in their area and their own actual miles driven. In addition, as an acknowledgement of the inconvenience this may cause, we will add an extra 15 percent to the reimbursement amount.”).

173 This feature has already been incorporated into many larger scale mass tort settlements. See, e.g., Kenneth R. Feinberg, *The Dalkon Shield Claimants Trust*, 53 LAW & CONTEMP. PROBS. 79, 105–07 (1990).

174 Cf. GM IGNITION COMP. CLAIMS, *supra* note 154.

small-value claims, while retaining the ability to contest any frivolous claims—in order to deter particularly meritless filings.¹⁷⁵

The creation of an appellate process does entail additional costs in implementation and administration.¹⁷⁶ However, it may be worthwhile in the peace that it provides, in avoiding litigation over claims processing errors and by demonstrating superiority over class action remedies. Well-constructed appeals processes have the ability to offer an individual claimant an objectively superior alternative to the class action's opt-out mechanism, as the claimed differential between the settlement and purported actual damages can be easily recovered by the individual, without requiring the individual to go it alone in establishing the merits of the underlying claim. Moreover, the individual is able to capture the full damages without deduction for attorney's fees and costs, which can often represent a substantial portion of the recovery—or even exceed it entirely.¹⁷⁷

3. Implications for Compensation and Deterrence

Only recently, these ideas might have seemed heretical to many. Yet, in recent years scholars and plaintiffs' counsel alike have come to recognize that compensation often never occurs in these small-value cases—and even if it is on offer, few obtain it. There has thus been increasing recognition that these small-value cases are not about compensation, but instead are serving a primarily deterrent function.

At the same time, defendants have often quietly indicated to counsel that they are quite willing to modify their practices to avoid any confusion, but they simply litigate because they are unwilling to pay millions to settle a claim they see as either wholly unmeritorious or reflective of the concerns of only a fraction of their consumers. In other cases, the litigation centers on an issue that is squarely within the ambit of a regulatory agency; for example, alleging that despite compliance with Food and Drug Administration labeling requirements, the product name or other markings on the product were misleading.¹⁷⁸ These lawsuits have been particularly challenging, as judges struggle with the extent to which the relief sought disrupts the decisions of the agency that Congress tasked with regulation. Thus, even if the company is willing to change its practices, the necessity of judicial involvement can create separation of powers, preemption, and federalism concerns.

Against this shifting normative backdrop, private mass settlement has much to commend as a mechanism for addressing these claims by realigning key stakeholders' incentives. While corporations may dismiss claims as frivo-

175 *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1744 (2011).

176 *See generally* CPR INST., *supra* note 113, at 85–114.

177 *See Voigt*, *supra* note 120, at 619–20 (describing a class settlement in which the fee deducted from absent class members' accounts often exceeded the amount obtained in the litigation, such that “many class members had a net economic loss as a result of the class settlement”).

178 *Delacruz v. Cytosport, Inc.*, No. C 11-3532 CW, 2012 WL 1215243, at *1–2 (N.D. Cal. Apr. 11, 2012).

lous, undertaking a bilateral mass settlement requires the payment of those who come forward to claim injury. Thus, it forces the corporation to set aside its biases and take a hard look at the alleged wrong to be sure that it is one that is truly frivolous. For consumers, it allows all those who feel wronged to come forward and obtain full compensation—without deduction for substantial legal fees or a delay of years as the litigation and settlement proceed. But, it also protects customers, ensuring that prices are not driven up by the costs of either defending or settling meritless litigation.

B. *A First Step in a Public Relations Recovery?*

The most high profile uses of private settlement funds have resulted from public relations disasters—BP's fund¹⁷⁹ and GM's current ignition-switch compensation fund¹⁸⁰ being quintessential examples. For legal scholars, the idea that a company would de facto waive the myriad of legal defenses that they might have, accelerating payment to the present rather than delaying in years of litigation, is completely contrary to theory and expectation.

But, corporations are fundamentally businesses—and these funds adhere to the first principles of disaster management. Indeed, for both companies, the primary criticisms came from failures to implement these policies early enough or completely enough—in essence, the failure to get out in front of the problem. What, then, are the fundamental lessons learned from these examples of high-end private claims funds? What roadmap does this suggest for a corporation considering the use of a settlement offer?

With these answers in hand, we can then turn to an assessment of the existing aggregation mechanisms and emerging doctrine governing private funds. Are we getting the right normative outcomes? Or are there particular situations in which the background law is creating strategic behavior that undermines rather than reinforces the principles of deterrence, compensation, and legitimacy?

1. Building Credibility: The First Days

First, establishing a settlement fund takes time. It will take time to select a claims administrator and support staff, and for that administrator to draft the eligibility criteria, payment framework, and release of liability, if that will be a component of the fund.¹⁸¹ Moreover, in many situations the participa-

179 See *supra* notes 13–15 and accompanying text.

180 See generally *Ignition Recall Safety Information*, GEN. MOTORS, <http://www.gmignitionupdate.com/> (last visited Oct. 27, 2014) (providing information about the current status of the General Motors ignition recall).

181 For example, although GM's selected claims administrator had established many similar funds in the past, see Gregory Wallace, *Ken Feinberg to Lead GM Compensation*, CNN MONEY (Apr. 1, 2014, 5:14 PM), <http://money.cnn.com/2014/04/01/news/companies/general-motors-kenneth-feinberg/>, four months passed from the time his selection was announced to the unveiling of the compensation protocol.

tion of the victims in crafting or commenting on the framework will be an important component of obtaining the buy-in and legitimacy necessary for high participation rates.¹⁸² This participation further extends the delay until implementation of the framework.

How can this delay be managed? First, a truly empathetic statement of the company's regret for the harm caused and desire to support the victims should be delivered early and clearly. These statements need not admit legal liability; rather, the key for the victims often lays in the credibility of the individual making the statement and the sense that the regret is truly heart-felt.¹⁸³ In most cases, the most senior officer capable of expressing the requisite empathy should deliver the statement.¹⁸⁴

Second, this should be paired with a clear, concrete action plan. The company should indicate, to the maximum extent possible, its willingness to create a compensation fund and the steps it has already taken toward this end. This statement should also explain what steps remain to be taken before the settlement details will be released and finalized, so that victims understand concretely why the company cannot simply write checks today. This transparency can help to empower the victims through information and assure them that compensation is coming.

2. Claims Estimation

One of the biggest challenges the corporation faces in high-value claims funds is estimating the number and value of claims. Although recently some courts have insisted on claims-made class settlement funds,¹⁸⁵ traditionally corporations have been able to negotiate fixed-fund settlements.¹⁸⁶ For the corporation, a fixed-fund settlement provides closure, capping the compensation that will be paid to the class. But, private claims resolution funds have typically been structured as claims-made funds, in which the company agrees to pay the full settlement value of every claim.¹⁸⁷ Indeed, because the private settlement does not provide closure as to nonparticipants, a corporation would not want to offer a fixed fund, as it may dramatically overcompensate

182 FEINBERG, *supra* note 19, 11–13, 48 (discussing role of victim participation in shaping the settlement funds, and resulting satisfaction in Agent Orange settlement and catharsis in the September 11 process).

183 Mary Barra's handling of the GM ignition switch meetings exemplifies this cathartic focus. *See, e.g.*, Jeff Bennett, *GM's Mary Barra Meets with Families of Victims*, WALL ST. J., Mar. 31, 2014, http://online.wsj.com/news/articles/SB10001424052702304157204579473940845171608?mod=_newsreel_1.

184 The contrast between the GM executives' and BP executives' handling of these early interactions underscores this dichotomy.

185 *Cf. Welcome to the NFL Concussion Settlement Program Website*, NFL CONCUSSION SETTLEMENT, <https://www.nflconcussionsettlement.com/> (last visited Oct. 28, 2014) [hereinafter *NFL Concussion Settlement Website*].

186 *See* Dodge, *supra* note 18, at 1266–68.

187 For an extended discussion of the typology of private settlement structures, see *id.* at 1271–83.

as against the participation rate. So too, for victims a fixed fund would further increase the uncertainty about the defendant's unilateral offer.

A claims-made fund places the burden of properly estimating claims in both quantity and value squarely upon defendants. If it underestimates the nature of the claims, it will bear either the cost of the additional compensation or the litigation costs an aborted claims resolution facility will likely engender.

In assessing claims volume, the corporation faces two considerations. First, the corporation must assess the volume of total potential claims. This determination may be a simple matter that can be projected from product sales data or other simple assessment tools—for example, where the claim involves all products sold during a particular timeframe. But, it may also require a more complex assessment, some variables of which cannot be ascertained with any degree of certainty—for example, where still-evolving science or early epidemiological studies are relied upon to project the incidence of injury among a potential claimant population. This projection becomes all the more uncertain where future claimants are anticipated, as where latent illnesses may emerge. The company may therefore consider using a combination of historical and pending claims data, epidemiological studies, and actuarial assessments to attempt to develop as accurate an understanding of claims volume as possible—but, the risk of the type of substantial errors that occurred in the Manville bankruptcy, silicone breast implants, and Agent Orange all stand as stark reminders of the consequences of miscalculation.¹⁸⁸

Second, the corporation must also attempt to estimate the percentage of these potential claimants who will participate in the settlement fund. This understanding is essential to developing a claims fund whose size, scope, and resources are commensurate with the expected volume of claims at the various phases of processing and paying out claims.

Further complicating this analysis is the potential for the settlement fund's creation and structure itself to shift these claim rates. Some of these features are purely based on process: the announcement of the fund may itself prompt a short-term spike in filing rates, as claimants become aware of their opportunity to resolve the claim—or even of the potential cause of action itself.¹⁸⁹ A well-administered fund may generate a continuing stream of applications, as claimants become comfortable with foregoing litigation in favor of participation in the settlement fund. Filing deadlines may also drive temporary spikes in participation, which the claims administrator should anticipate in deploying its resources.

Other variations in claims rates can be attributed to a combination of procedural and substantive factors. This interaction can be particularly acute where the compensation available to any claimant varies based upon the timing and value of other claims. Thus, the settlement structure itself can incen-

188 See CPR INST., *supra* note 113, at 74.

189 *Id.* at 76–86.

timize filing strategies that increase or decrease claims rates at various points in the claims process.

3. Eligibility Framework

Based upon the projected claims estimation figures, the corporation will need to make a strategic decision as to which claims it will include in its private fund. Theoretically, the company could offer to pay all claims. But, as a practical matter this is often not optimal. Even with respect to the September 11 claims, the special master found it necessary to draw a line as to which claims would be included and which would be excluded. The lines drawn for eligibility in the September 11 Fund created clear, objective rules for inclusion in it, allowing for a focus upon the most serious claims while excluding claims for minor or secondary harms, distant in time or location from the sites of the attacks.¹⁹⁰

Corporations thus must make a strategic decision. On the one hand, it can offer to pay all valid claims, recognizing that this will likely vastly increase processing costs, but expecting that it will have a concurrent public relations benefit in allowing it to say “we are paying all valid claims, no exceptions.” On the other hand, the company can offer to settle only a subset of claims, streamlining processing and saving the cost of paying out minimal-value claims. The public relations aspect of this line drawing will often be influenced primarily by the company’s prior reputation or goodwill and the degree of culpability or blameworthiness the public has found in its actions.

If the company decides to engage in line drawing, a number of strategic considerations arise. The corporation will likely begin with an assumption that it will pay all legally valid claims and not pay claims that are without legal merit. However, the company may decide not to include those small-value claims that are so *de minimis* that neither the individuals nor a class action attorney could financially pursue recovery; thus, anticipated negative-value claims may be excluded. The company has two options in such a situation. With sufficient goodwill and confidence in its program, the company may decide to simply exclude these individuals from the settlement, drawing its offer to include only those individuals likely to sue, while excluding others entirely—as was done with the September 11 Fund and the Hokie Memorial Fund. Alternatively, the company may decide to create a presumption that certain victims were injured, streamlining recovery for those individuals, while requiring more remote victims to affirmatively prove causation—as was done with the BP GCCF.¹⁹¹

At the opposite end of the spectrum, the corporation may also decide not to include the claims that it expects victims will not settle without a premium. From a strategic perspective, to obtain the participation of these individuals, the company would need to ratchet up all compensation—vastly increasing the cost of the fund. Assuming the company does not want to do

190 See FEINBERG, *supra* note 19, at 46.

191 See *supra* notes 77–81 and accompanying text.

so, these individuals may become vocal opponents of the fund, soliciting others to not participate as well. This may leave sufficient nonparticipation to make a class action financially viable. To avoid this outcome, the fund may exclude these individuals from the baseline settlement offer, allowing for one-off negotiations—whether through a different mechanism within the same fund or through a separate process altogether.

As this discussion suggests, corporations need not view the scope of the fund as a binary matter, in which a particular claimant either receives payment or not. Instead, the fund may operate along a spectrum. The company may designate certain classes of claimants who are automatically eligible for compensation, leaving only the calculation of damages. Other classes of claimants may be designated for which questions of general causation are waived, but as to which specific causation must still be proven. And, finally, the company may even decide that there are certain claims as to which it is simply unwilling to streamline the process, preferring to litigate as to both general and specific causation.

In making this determination, corporations have at times seemingly overlooked the basic distinction between settlement and litigation. In settlement, parties make concessions on issues they would ordinarily fight in litigation; indeed, it is for this reason that defendants will support class certification for purposes of settlement, reserving their right to contest certification if the settlement does not receive final approval. But, in the transition from BP's private fund (the GCCF), to the public MDL settlement fund, the parties maintained many of the beneficent waivers of causation that had been made in the GCCF. In the GCCF context, these waivers were part of a broader goodwill campaign and not contested by BP. But, as the MDL claims administration process moved forward, BP began challenging the application of these same waivers—resulting in multiple, costly appeals to the Fifth Circuit and an anticipated appeal to the Supreme Court. While these public and private processes look very similar—indeed, the BP settlements used the same claims administration apparatus, save for a change in the claims administrator himself—the underlying dynamics are often very different. What works in one process cannot simply be swapped into the other.

Claims administration processes often look increasingly cookie-cutter. And, this may save on initial startup costs, but this savings is often short-lived. Instead, careful customization is necessary to ensure an efficient, fair, and comprehensive process. For the defendant, customization can ensure that the right claims are included and excluded from the fund, minimizing not only processing costs but also the risk of successful collateral challenges. For the victims, this customization ensures that those that are the most harmed are able to receive timely compensation, which is not diluted by the weak claims of others, and that the process has the resources to provide for the types of one-on-one assessments, counseling, and closure that are often essential to the success of a high-stakes claims fund.

4. Eligibility Determinations

Corporations crafting a claims fund as part of a disaster mitigation strategy commonly distance themselves from the details of the settlement fund. This allows the corporation to make simple, plain language promises of full compensation through the fund, keeping the message to media and victims simple. But, this may also advance the perception of an arms-length claims fund, in which an independent claims administrator is making the determinations of claims value. Leaving the determination of details to the administrator may thus promote the legitimacy of the fund, helping to improve participation rates. But, as evidenced by the BP MDL debacle, discretion comes at a cost given that claims administrators' success in obtaining participation—and in turn selection for future engagements—requires them to obtain a reputation of neutrality.¹⁹²

Why do corporations not simply screen better in selecting their claims administrator? Often the selection process appears rigorous on paper, with the consideration of multiple candidates and rounds of interviews before an administrator is hired. But, as a practical matter, the universe of claims administrators is exceedingly small and dominated by repeat players. This dramatically restricts the degree to which meaningful discussion can occur.

The better approach may therefore focus upon a systemic solution, recognizing that the incentive structure—if not the duty—for the claims administrator will result in a neutral interpretation of the fund, if not one favoring the claimants. Corporations have the opportunity at the outset to carefully design the eligibility criteria and scope of the fund. Just as a settlement agreement's terms are carefully scrutinized with an eye toward future litigation, so too the claims framework and defense waivers should be carefully scrutinized. If there are certain types of claims that the corporation is unwilling to pay, it should ensure that these are clearly and unequivocally outside of the fund's eligibility criteria—rather than assuming the administrator will share its conclusions on causation. If the administrator is retained to aid in the drafting of the terms, as is commonly done, he or she should work with the defendant to help reality test the framework, to ensure buy-in.¹⁹³

Ultimately, the corporation and claims administrator will need to balance the desire for a purely arms-length process in which the administrator independently designs the fund, and a process where they work as partners in designing the system but then leave the implementation to the administrator alone or a separate claims administration entity.

Whatever balance is struck—whether the grant of discretion is broad or narrow—the structure will inherently include both some degree of discretion to address unforeseen eventualities and some basic agreement on the contours of the fund. For example, is the fund intended to function as a litigation substitute in which individuals must waive their right to sue? If so, is the settlement administrator to pay all claims that he determines to be legally

192 See *supra* notes 77–81 and accompanying text

193 See CRR INST., *supra* note 113, at 81.

valid? Does he have the discretion to pay other claims that are not legally cognizable, but still legitimate?

In addition, the corporation will typically provide the scope of the fund in its retention of the claims administrator.¹⁹⁴ In some cases, it may seem intuitive. For example, with GM's ignition defect fund, it may be particular models manufactured in particular years. But, what if additional models are found to be defective? What if other defects are found in these same cars?

Even assuming a clear scope, second-generation questions quickly emerge in defining the eligible pool of claimants. Continuing the GM example, where a car has been sold, does the present owner have the exclusive right to compensation? What if the car was sold after the defect was announced, such that the original owner claims that the resale value of the car was diminished? What if the car was totaled years ago, so that no one currently holds the title, or perhaps it is held in a junkyard? What if the car was totaled in an accident related to the ignition switch, which was already covered by insurance? Should the driver have a claim for the increased insurance premiums he had to pay thereafter? What if he subsequently divorced; does the ex-wife then also have a claim for the lost value?

The answers to these questions may then impact the eligible pool of claimants. For example, what should the result be where the driver claimed that the ignition switch was responsible, but police rejected the claim at the time believing that the driver had instead negligently accelerated—should the old criminal conviction govern, or should the claims administrator undertake a *de novo* investigation? Does the driver have a claim? What about the estate of the victims killed in the accident? What about the driver's children, who have now grown up without a father, while he has been in jail for years for what was deemed manslaughter? Does the state have a claim for recoupment of its costs in trying and jailing the driver if GM knew about the defect but did not reveal it?

Corporations and claims administrators alike seek to create the maximum distance between the corporation and the settlement fund, in order to enhance the legitimacy of the fund. While many of the decisions described above may be left to the discretion of the claims administrator, the contract with the administrator should both outline the company's agreement to this discretion and the limits upon the administrator's *sui generis* authority. Indeed, in the BP MDL, even though the claims administrator was given a complete settlement agreement, which had far greater restrictions than are common to private funds, BP has still challenged the administrator's decisions and interpretations of the agreement as beyond his authority.¹⁹⁵ The company should thus carefully consider at the outset what terms it is truly prepared to leave in the complete discretion of the administrator, rather than offering a broad grant of discretion.

194 *Id.* at 53–54.

195 *See In re Deepwater Horizon*, 739 F.3d 790, 795–98 (5th Cir. 2014) (noting various objections).

This decision should be a considered one, focused upon the company's key concerns, so as to avoid removing the veneer of independence. The BP GCCF provides the counterexample. BP retained a nationally known mediator, with a longstanding reputation for fairness. While BP paid Kenneth Feinberg's fees, his appointment was made with the approval of the White House—unlike most appointments, which are made with no extrinsic check. Yet, even with the joint selection of a well-known neutral, BP and Feinberg quickly faced criticism and allegations that Feinberg was simply a puppet for BP—even as he relied on a panel of scholars drawn from preeminent institutions for the challenged determinations.¹⁹⁶ Recognizing this dynamic and natural suspicion suggests the careful balance corporations must walk in selecting, compensating, and directing a claims administrator.

5. Claims Valuation

The work of claims valuation typically remains squarely in the hands of the settlement administrator—in contrast to traditional public settlements in which the parties negotiate the framework and, in class actions, is approved by the court. However, a few preliminary remarks may be useful in clarifying the unique aspects of private funds.

As discussed in Part I, claims valuation may be done on a purely individualized basis or as part of a settlement grid. In recent years, corporations have begun offering claimants a choice between the presumptive formula and an individual analysis. Assuming that claimants select the net superior option—adjusted for opportunity cost, delay, and the cost and effort of gathering individualized information—the corporation should expect that claimants who are overcompensated by the flat rate offer accept it, while those with greater damages will elect individualized recovery. Flat rate offers and formulas will thus either fully compensate or overcompensate the individuals who select those methods, creating a one-way systemic bias toward overcompensation.

This would suggest a preference for individual assessments. But, because the corporation will bear the costs of processing these claims, a certain degree of overcompensation can be subsidized by the efficiency gained from streamlined processing. Moreover, the transparency of a flat rate or formula structure may increase participation rates directly, as well as decrease the presence of vocal objectors. As these participation rates increase, the legitimacy of the fund should also increase, potentially gaining additional participants who are assured that the fund is paying out as promised. As a result, corporations are at times offering presumptive amounts of compensation, as well as an opt-out individualized process that can obtain the participation of true outliers.

196 See Jef Feeley & Allen M. Johnson Jr., *BP Mediator Feinberg Can't Call Himself Independent, Judge Says*, BLOOMBERG (Feb. 3, 2011, 12:01 AM), <http://www.bloomberg.com/news/2011-02-02/bp-mediator-can-t-identify-himself-as-independent-court-rules.html>.

6. Special Considerations in Extreme Harm Cases

Where the claim is one that caused substantial harm—for example, significant bodily injury, death, or even a spiral of unemployment into bankruptcy, divorce, or other nonphysical trauma—inclusion of an opportunity for catharsis has the potential to significantly increase participation rates in some cases.¹⁹⁷ Typically, this includes an ability to meet with a senior representative of the company or the claims administrator, simply to share the details of the harm suffered and the loss created. These meetings need not be tied directly to damages or compensation; instead, it is to give the victims and/or their families the opportunity to share their story. This component is particularly important to the extent that the corporation's settlement will typically supersede the victim's day in court. For many victims, there is a need to tell their story and be heard, which is strong enough that failure to attend to this psychological need may reduce participation rates—and, at the extreme, decrease participation to the rate that it undermines the legitimacy of the settlement.¹⁹⁸

Another common coping mechanism in severe harm cases is a need to find purpose in the tragedy, commonly by ensuring that the lessons of the tragedy are learned so that others do not have to suffer in the same way. Crafting such an outlet into the process can be particularly helpful in remedying these extra-legal concerns, enabling individuals to feel psychologically able to accept the settlement. In some cases, this may be done through organized opportunities to meet with corporate representatives and work on a committee tasked with remedial or preventative measures. In other cases, creating a blue-ribbon panel to make recommendations on reform or testify before administrators or legislators might be an appropriate avenue. Each of these techniques is intended to demonstrate the company's true sorrow for the harm that has occurred and willingness to engage in self-help. To the extent that the settlement will supplant private discovery through the litigation process, these groups can help mitigate concerns about the lack of judicial oversight. So too, if the incident is one that will generate legislative inquiries and potential reform, this process allows the company to get in front of the process and put forward its own reforms, with the buy-in of the victims. Properly conducted and with the support of the corporation and defendant, these proposals can have an anchoring affect in reform by providing a starting point for legislation.¹⁹⁹

The ability of the company to participate in these activities is highly correlated with the level of trust it has established with victims. If the relationship has soured through early denials of responsibility or perceived deception and trust has not yet been regained, corporate participation may be seen as attempting to derail the work of the group, pacify the victims, and ultimately undermine the legitimacy of the program. Thus, in some cases,

197 See CPR INST., *supra* note 113, at 104.

198 See FEINBERG, *supra* note 19, at 44.

199 See *id.*

for the victims to obtain the purpose they seek, a trusted outsider may need to lead the group. For a corporation, bankrolling an effort to instigate reform targeting its own practices, led by a traditional adversary such as plaintiffs' counsel or a consumer-rights advocate, can be a troubling notion. Yet, it is precisely for these reasons that the work can help rebuild the perception of corporate integrity by showcasing the company's willingness to truly learn from its (presumed) past mistakes. This is not to say that this type of campaign is always necessary or desirable; rather, it is to say it is one aspect of a potential response that should be evaluated in designing the corporate settlement.²⁰⁰

7. Implications for Compensation and Deterrence

Compensation funds should offer the best of both worlds. Companies take responsibility for their wrongs and quickly compensate victims. Those that they do not compensate retain the ability to move forward in the litigation system: class actions for small-value harms, while high-value claimants will likely prefer to file in the inevitable MDL—further incentivizing corporations to make offers that offer full compensation as defined by applicable law. Moreover, to the extent these are offered in the wake of a tragedy or other high-profile incident, government investigations are likely to proceed parallel to these instances, mitigating the risk to the public interest.²⁰¹

One of the most interesting consequences of these programs is epitomized by the Hokie Memorial Fund, created from public donations made in the wake of a university mass shooting. The donations were far from sufficient to pay all of those that might have claims at law, or even to pay the full damages of the most seriously injured or killed. The university and its claims administrator worked to create a program that would compensate those injured or whose lives were lost, even though this compensation was only partial. The fund was not intended as a litigation substitute; no release was required, victims could still sue the university alleging it had not done enough to prevent the shooting. But they did not. Only a handful of claims were ultimately filed against the university.

Was this a normatively good outcome? On the one hand, if victims were satisfied with the process and found peace outside the litigation system, perhaps we should laud this as an even better outcome than the conflict and adversarial nature of litigation. On the other hand, one might say that this suggests the danger of mass settlement: they may not merely allow defendants a streamlined mechanism for paying the compensation due, but to pay only a fraction of what is due—whether by restricting who is paid, how much is paid, or, as in the case of the Hokie Fund, both. This implicates fundamental questions about our goals as a society that far transcend the scope of this Article. If the victims are satisfied, is that enough?

200 *See id.*

201 *See generally* FEINBERG, *supra* note 55.

C. *Limitations on the Use of Bilateral Mass Settlement*

The first two sections profiled the extremes of the litigation bell curve, illustrating the robustness of private claims funds. But are there limits? This Section turns to that question, asking under what circumstances defendants should forego a private resolution in favor of the public litigation process.

1. Uncertain Merits

Unlike the prototypical fact pattern in the prior two sections, some cases include substantial and fundamental questions about causation. The company's liability is not so irrefutable that it feels public pressure to make its alleged wrong right. Nor can the company be entirely confident that the wrong is so meritless or trivial that it could simply offer to make payment to resolve the matter. Instead, these cases require bearing the costs of discovery to develop the merits. These cases necessitate the role of plaintiffs' counsel to negotiate a settlement based upon the fractional probability of success on the merits, and to assure the victims that the deal is a fair one in light of the totality of the circumstances.

The consequences for the defendant of attempting to go it alone in these cases are indicative of the limits of bilateral mass settlements. Corporations attempting a payout of less than the victims' subjective expectation of damages often struggle to gain participation, even if they offer accurate legal explanations for their payout. Not only are lay people not trained in legal analysis, but tort victims in particular are often at an emotional point that renders them ill equipped to accept legal explanations for decisions to minimize their financial compensation. Indeed, while victims may say that no amount of money can ever repair the harm, they will often be sensitive to decreases in compensation as devaluing the harm they have suffered. This situation will be all the more acute where the explanation comes from the defendant, who is perceived as the cause, and is simply hiding behind the law instead of taking responsibility.

Two recent MDL settlements serve as exemplars of two different ways in which uncertainty on the merits can require the defendant to employ an adversarial process to resolve the claims. The first example comes from the NFL concussion MDL. In those cases, there was substantial uncertainty about whether the science supported the variety of claims raised by the former players.²⁰² Resolving the lawsuit required the development of scientific evidence about the long-term harm of repeated concussions, as well as substantial discovery about the defendants' knowledge of these potential risks and efforts to

²⁰² See Joseph M. Hanna, *Concussions May Prove to Be a Major Headache for the NFL: Players' Class Action Suit Places a Bounty on the League*, N.Y. ST. B.A. J. Oct. 2012, at 10, 13 (noting the NFL had "several defenses at its disposal" and that predictions about litigation were "speculative at best").

mitigate these harms.²⁰³ Moreover, recent studies suggest that the greater concussion risk may lay not in the players' NFL time, but in their years of high school and college play where medical treatment and protective equipment are typically less sophisticated.²⁰⁴ Once the litigation matured and counsel were able to reach a greater degree of certainty on the causation issues, the parties were able to enter into a court-approved settlement.²⁰⁵

The second example comes from the pending transvaginal mesh cases.²⁰⁶ Like the NFL case, the defendants questioned whether the mesh was actually defective.²⁰⁷ But, even assuming it was, there were still many individual questions of not only claims valuation but also causation,²⁰⁸ which would likely create such variation in awards that the settlement could lose legitimacy. Early on it became apparent that many victims had multiple devices implanted, raising questions of causation as between competing corporations.²⁰⁹ Moreover, counsel likely anticipated individualized questions about whether the injuries alleged were a result of the underlying medical condition that prompted the initial surgery, were a known risk of the surgery, were a result of error by the surgeon in the implantation process, or were instead a result of the device malfunctioning. Furthermore, to the extent that the challenges are based upon the discussions between the manufacturer and a surgeon, there could be further individualized questions about not only the content of those discussions but the reasonability of attributing the responsibility to the manufacturer rather than the trained surgeon treating the individual patient—who may therefore have been in a better position to weigh treatment options.

2. Individualized Damages

Even if issues of liability could be resolved, the individualized questions surrounding any particular individual's right to recover and the amount of that recovery can threaten the legitimacy of a bilateral mass settlement.²¹⁰ As occurred in the BP class action, a defendant may agree to a class settlement

203 Ken Belson, *Concussion Suit to Cost N.F.L. \$765 Million*, N.Y. TIMES, Aug. 30, 2013, at A1 (noting the mounting scientific evidence concerning the long-term harm of concussions and the NFL's knowledge of those harms).

204 Grant L. Iverson et al., *Cumulative Effects of Concussion in Amateur Athletes*, 18 BRAIN INJURY 433, 440–41 (2004).

205 Belson, *supra* note 191.

206 See *In re Ethicon, Inc. Pelvic Repair Sys. Prod. Liab. Litig.*, 299 F.R.D. 502, 507–08 (S.D. W. Va. 2014).

207 See *id.* at 508–09.

208 See *id.* at 519–22.

209 FDA Public Health Notification: *Serious Complications Associated with Transvaginal Placement of Surgical Mesh in Repair of Pelvic Organ Prolapse and Stress Urinary Incontinence*, U.S. FOOD & DRUG ADMIN. (Oct. 20, 2008), <http://www.fda.gov/MedicalDevices/Safety/Alerts andNotices/PublicHealthNotifications/ucm061976.htm>.

210 See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011).

that leaves these individualized determinations to the settlement administrator.²¹¹

3. Formal Closure

Indeed, the defendant may prefer the closure afforded by a class action.²¹² But, if a defendant chose to pursue these claims as a mechanism for preventing class certification, it would likely prevail given the increasingly stringent standards for certification.

Implicit in these examples is the notion that MDL is unlikely to effectively vindicate small-value claims because of the opt-in nature of the litigation, unless it incorporates a class action lawsuit. Rather, the value of MDL is in reducing the investment asymmetries and inefficiencies of claimants' duplicative development of generic assets. Instead, MDL allows a pooling of these resources and costs in the development of generic assets. At the same time, because these claims are large enough in value that the individuals are incentivized to file individual claims, many would see a normative benefit in resting the autonomy to pursue one's own litigation strategy or settlement terms in the individual claimant's hands.

But while MDL may strike a normatively beneficial balance between collaboration and autonomy for higher value claims, this system begins to collapse as the claims' values becomes smaller. A general correlation exists between the size of a claim and participation by plaintiffs, such that smaller value claims generally illicit lower participation rates. For plaintiffs' counsel, this decreases the opportunity for cost spreading as to both the underlying litigation costs, as well as the additional costs the heightened procedural steps inherent to MDL entail. Likewise, for defendants, MDL does not offer closure; thus, the corporation cannot definitively predict the total outlay necessary to buy peace, unless it waits to settle the claims until the statute of limitations period has expired.

Taken together, MDL can be an effective mechanism for providing compensation to victims, as well as vindicating the plaintiffs' autonomy interests to a higher degree than in class actions. However, because of the de facto opt-in nature of MDL claims, the level of deterrence provided by an MDL is pegged to the number of victims that choose to pursue relief.

4. Auto-Pay Options

One of the largest outstanding questions potentially on the horizon with respect to privatized mass settlement is the extent to which these settlements can maintain an opt-in structure. At present, many settlements require the absent class members to file claims forms or otherwise provide updated contact information in order to receive compensation. Thus, requiring a claims form or opt-in structure in private mass settlement does not decrease com-

211 *In re Oil Spill by the Oil Rig "Deepwater Horizon,"* 910 F. Supp. 2d 891, 903 (E.D. La. 2012).

212 See Erichson & Zipursky, *supra* note 27, at 270–74.

pensation relative to a class action in which an identical form would be filed or an MDL settlement in which the plaintiff must file his or her own claim.

As technology advances, companies have increasing capability to electronically credit plaintiffs' accounts. One can envision a world on the not-too-distant horizon in which distributors' sales records or credit card statements could allow a company to determine with precision who bought the product in question and credit their accounts. For some claims this might be a terrific innovation, allowing companies to quickly correct their errors.

But what about cases in which the claim is one that the company expects few would make? Should offering a voluntary refund program be enough? Or must the company really offer a full refund to every identifiable purchaser of Crunch'N Nutter in order to prevent a class action over its inclusion of nuts? The courts' determination of this issue will vastly impact the incentive for corporations to engage in voluntary refund programs and the frequency of small-value litigation.

D. The New Generation of Opt-in Mass Claims Mechanisms

As described in preceding sections, aggregation has shifted from the traditional mandatory and opt-out class action mechanisms toward a new generation of opt-in mechanisms. This Section explores the predominant mechanisms from the perspective of the parties, developing a more robust conception of the types of cases likely to be pursued through these competing mechanisms—and their limits.

1. The Capacities of MDL Relative to Private Mass Settlement

As described in Part II, avoiding the procedural costs of MDL and the resolution of potential merits issues can generate a large pool of joint gains for division between the parties.²¹³ Thus, as a baseline matter, bilateral mass settlement offers the superior option for the parties by decreasing the wealth transfer to third parties—namely, lawyers and experts. These mass settlement offers can be structured not only as flat rate offers, but also as grid settlements or even formula settlements such that substantially individualized damages calculations can be undertaken.²¹⁴

But, as legal complexity increases, the benefits of bilateral mass settlements begin to decline. This occurs for two reasons. First, victims are less able to accurately assess the fairness of the mass offer, which can decrease legitimacy and, in turn, participation rates.²¹⁵ Second, the extent to which the court will deny class certification based upon the existence of a settlement offer is inherently tied to proof that the offer is equal to or superior to

213 See *supra* Part II.

214 For a typology of claims fund types in the aggregate litigation context, see Dodge, *supra* note 18, at 1273–83; McGovern, *supra* note 22, at 1372–73.

215 Accord Issacharoff & Rave, *supra* note 33, at 405 (discussing the uncertainty in risk transfer premiums as necessitating shifts in the GCCF payout structure and ultimately becoming one of the benefits of the MDL settlement).

the potential class recovery for the absent class members. Thus, as the complexity increases, the extent to which the company must overcompensate as against the expected outcome in order to ensure that it has provided full compensation notwithstanding the uncertainty increases. As this delta grows, the value of bilateral mass settlement over MDL declines.

Thus, to the extent that the claim poses complex legal questions, resolution of which will determine the existence of liability or substantially impact damages valuation, MDL should be the preferred dispute resolution mechanism. MDL is structured to include plaintiffs' counsel and provides for judicial resolution of the issue, enhancing legitimacy. And, of course, to the extent the parties do not wish to bear this risk, settlements are regularly entered through the MDL process. In contrast, bilateral mass settlement lacks these mechanisms. Indeed, even where defendants have attempted to enter into a form of privatized class certification, negotiating with plaintiffs' counsel without the formal class certification procedure, these processes have lacked legitimacy with victims.

But MDL inherently imposes delay upon the parties as well as increased litigation costs—even if, for plaintiffs, these can be spread. Thus, for individual victims whose claim has a high degree of certainty, accepting a bilateral mass settlement offer may be preferable as it allows a greater net recovery sooner than the MDL process. For defendants, if a substantial number of claims can be settled, this may cause the aggregation of costs within the MDL to begin to collapse as the number of plaintiffs—and in turn the amount of damages—across which the costs can be spread is decreased. This may in turn prompt another round of settlement. Bilateral settlements may thus reduce claims to such an extent that alternative aggregation mechanisms like joinder become a superior option to MDL. But they may also simply narrow the scope of the MDL, settling the clearest claims and allowing the MDL to focus upon the most difficult claims.

From this perspective then, MDL can be summarized as providing actual compensation to victims and setting deterrence to the opt-in level. However, functionally it is limited in scope (absent an embedded class action) to relatively large claims that are capable of driving opt-in litigation. Moreover, it offers unique value relative to bilateral mass settlement in cases of high uncertainty—whether factual or legal—that require the presence of plaintiffs' counsel to assess the viability of the defenses presented and, if appropriate, litigate these issues before the court.

2. Selecting Between Privatization Mechanisms: Arbitration vs. Mass Settlement

As companies have increasingly incorporated pre-dispute arbitration clauses, consumer and employment, many scholars have suggested that these provisions are subject to unique impediments to market functioning and argued for restrictions or prohibitions on these terms. Indeed, in recent years, legislation denying enforcement of pre-dispute consumer and employ-

ment arbitration provisions has become common in Congress.²¹⁶ Yet, so far, proponents have been unable to obtain the political support necessary to pass such a measure.

This Article raises a heretofore unidentified possibility: that doctrinal developments in the treatment of mass settlement offers may diminish the relative benefit of arbitration clauses. Traditionally, corporations understood the risk of class actions being filed on nuisance claims, as well as the possibility of blackmail settlements. In order to prevent this over-enforcement, many corporations adopted arbitration provisions and other dispute resolution provisions designed to convert claims to opt-in, single plaintiff status. Yet, these provisions only operate as a default rule. In practice, companies are exploring the use of informal post-dispute mechanisms for quasi-aggregation; for example, replicating the bellwether trial model of litigation within the arbitration process to facilitate settlement of mass claims.²¹⁷

But the emerging doctrine governing bilateral mass settlement removes this *in terrorem* effect by holding that, so long as the compensation offered is equal to or exceeds the recovery available to each individual in class litigation, the class cannot be certified. Thus, to the extent that post-dispute settlements can both be made and preclude the formation of an opt-out class, the risk to the corporation of nuisance class actions is reduced. The company can obtain the same desired opt-in mechanism post-dispute.

For many companies, given the option of committing pre-dispute to arbitration or waiting until post-dispute to make a mass settlement offer, there may be substantial benefits in taking the latter approach. The bilateral mass settlement offer allows the company to undertake a careful assessment of the particular dispute in issue, and to offer a tailored response. In contrast, pre-dispute provisions must be drafted broadly to avoid bifurcation—a determination that only some of the claims are subject to arbitration and thus that the claim must proceed simultaneously in both the arbitral and litigation forums. But, drafting a broad provision risks the possibility that ex post the clause will be too broad—for example, where the dispute is one as to which the company does not want to face seriatim litigation or where such repetition risks inconsistent judgments. Indeed, it was this precise dynamic that initially led to the creation of Rule 23(b)(1) and (b)(2).²¹⁸

For many corporations, the choice between committing to a dispute resolution ex ante or ex post may seem a simple one: corporations almost always prefer to have more information and certainty in making a decision rather than less. Thus, in most cases, with the innovation of bilateral mass settle-

216 See, e.g., Arbitration Fairness Act of 2013, S. 878, 113th Cong. (2013); Arbitration Fairness Act of 2011, S. 987, 112th Cong. (2011); Arbitration Fairness Act of 2009, H.R. 1020, 111th Cong. (2009).

217 See Alex Kozinski & Andrew Bentz, *Privatization and Its Discontents*, 63 EMORY L.J. 263, 276–77 (2014).

218 See FED. R. CIV. P. 23(b)(1)–(2); see also *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 614 (1996) (discussing Rule 23(b)(1) and (b)(2)).

ment, companies will see a substantial diminution in the value of arbitration provisions.

But are there limits to this preference? As a threshold matter, the preference for bilateral mass settlement turns upon its effectiveness as a mechanism for informal or de facto closure. Thus, to the extent that the corporation anticipates claims that are difficult to value—and thus would necessitate systematic overcompensation—pre-dispute arbitration may offer a superior guarantee as against class certification. Likewise, a company may anticipate that the claims will be diverse enough that it will ultimately defeat certification but, as the over decade-long class certification battle in the *Wal-Mart Stores, Inc. v. Dukes* case itself revealed, this can be an expensive and hard-fought victory.²¹⁹ Companies that anticipate claims with sufficient variability to undermine class certification—and thus likely too much variability for mass settlement to offer closure—may continue to prefer to avoid the litigation costs associated with the class certification fight by utilizing a pre-dispute aggregation waiver.

Secondarily, although companies routinely offer mass settlements without arousing any public notice, certain companies may expect that such a settlement offer would be uniquely problematic for their business model. For example, a corporation may expect that issuing an offer would harm its corporate reputation to the extent that it suggests that it engaged in wrongdoing. Alternatively, the corporation may have a unique inability to identify victims, such that false claims are highly likely but also non-identifiable. Finally, the company may be subject to unique statutory reporting requirements or otherwise anticipate that the issue of a settlement offer could be used against it in collateral litigation.²²⁰

Despite these limitations, the emerging doctrine governing bilateral mass settlement suggests that it may provide a superior option for many corporations—allowing them to avoid opt-out litigation just as an arbitration provision would, but providing the added benefit of retaining control over the nature of the proceedings until post-dispute. This suggests that even if arbitration fairness legislation is passed, it may well simply channel additional disputes into bilateral mass settlement, rather than hindering the shift from opt-out to opt-in mass claims resolution.

IV. CONSEQUENCES FOR THEORY AND LAWMAKING

Bilateral mass settlements are but one part of a broader transition from opt-out and mandatory classes toward opt-in processes.²²¹ Yet, their role in this transition is an indispensable one. Bilateral mass settlement offers have

219 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).

220 *Riley v. De'Longhi Corp.*, No. 99-2305, 2000 WL 1690183, at *4 (4th Cir. Oct. 30, 2000) (holding that evidence of a previous product recall can be used as circumstantial evidence that a current product is also defective).

221 For an excellent discussion of the Supreme Court's recent jurisprudence constricting opt-out class actions and sanctioning the use of class waivers in arbitration, see Resnik, *supra* note 89.

the power to reach all types of claims, including those claims that were the final bastion of the class action device. Indeed, the claims that have the coherence necessary for a mass offer to preclude the later certification of a class are the very claims that have the coherence necessary for certification in a post-*Dukes* world. But, this also means that the cases in which corporations will obtain the least closure and thus have the least incentive to create a private mass settlement fund are the cases in which post-*Dukes* certification is the least likely—leaving the victims to pursue individual redress through single plaintiff litigation, joinder, or MDL.

As we stand on the precipice of this new opt-in world, can we make any predictions about its contours? The foregoing analysis suggests that bilateral mass settlement offers the greatest benefit in small-value cases, particularly where the harm alleged is one that few other putative class members are likely to pursue—whether due to their frivolous nature or simply because of the opportunity cost of filing even a simple online claim. In contrast, where there are substantial factual or legal issues outstanding that have the potential to vastly shift claims value and the claim's value is large enough to merit the filing of litigation, MDL is likely to remain the preferred option for defendants.²²² Finally, pre-dispute arbitration provisions are likely to continue to serve as a fail-safe for corporations that anticipate unique aggregation defense costs and an inability to obtain closure from bilateral mass settlement offers. Taken together, these opt-in mechanisms have the capacity to reach all types of claims.

But, the degree of quasi-closure a corporation receives—and in turn the extent to which it is willing to fund these programs—varies substantially. This in turn creates a patchwork, in which in some areas claims will only be able to be pursued on an individual basis, while in others class actions will continue to be filed in substantial numbers. Yet, this patchwork is difficult to justify on a theoretical level: where parties enter into not simply a contractual relationship, but a written contract, the claim may be subjected to a pre-dispute arbitration provision. Of the remaining claims, those that are for objectively and easily ascertained damages can be subjected to a mass settlement offer that precludes subsequent class litigation. But, if the claim is for a more variable or subjective damage, then the court may still grant class certification. Thus, only in this one area should the legislature anticipate opt-out rather than opt-in levels of private enforcement.

But, of course, these lines do not necessarily track the contours of substantive law. Instead, claims for the same violation may fall within opt-out and opt-in mechanisms. These inconsistent levels of enforcement make it

²²² Although not discussed extensively in the literature, MDL is properly characterized as an opt-in process. MDL merely transfers similar litigation into a single court for pretrial proceedings. Unless a class action is filed within the MDL, victims that do not affirmatively file an action are not incorporated into either the damages calculation nor receive any payment. Thus, for purposes of both compensation and deterrence, MDL effectively operates on an opt-in basis requiring individuals to affirmatively seek vindication of their rights and compensation.

difficult, if not impossible, for the legislature to accurately predict enforcement rates and determine the extent to which the law should be modified to correct for over- or under-deterrence.

Likewise, these lines do not comport with the comparative value of a class action. These variations between claimants may well be sufficient to prevent class certification based on challenges to commonality, typicality, and adequacy, or on grounds of manageability. But, even if the class can be certified, these variations among claimants inevitably lead to one of two outcomes.

First, the differences may be minimized, with the settlement offering average damages or a basic damages grid to calculate compensation. Yet, if the variations between victims were too great for the court to find that the defendant's mass settlement offer could provide full compensation to each individual, class settlement structures will simply replicate this failing. Thus, the victims will continue to be subjected to a threat of undercompensation (violating their due process rights) or overcompensation (violating the defendant's due process rights).²²³

Second, the class settlement may provide for individualized compensation determinations. To the extent that this requires the individual to complete a claim form stating his damages, this replicates the compensation structure already on offer in the mass settlement. But while the mass settlement operates on a claims-made basis, with the company paying all claims made against it, class settlements almost always operate on a fixed fund claims model.²²⁴ In a fixed fund model, the defendant agrees to a total lump sum payment, which the settlement administrator then uses to pay the claims made.²²⁵ Thus, it is the victim, rather than the defendant, that bears the risk that the fund will ultimately prove too small to compensate all victims where an individualized inquiry is undertaken.

More broadly, the class action operates on a model that is based on coherence between claims. While procedural innovation can be utilized to allow for these individualized determinations, doing so reduces the comparative benefit of class actions over other dispute resolution models. From this perspective, the one area in which class actions may retain their poignancy despite the innovation of bilateral mass settlement offers is the area in which it offers the comparatively weakest benefits to the victims. This recognition suggests the need for a new generation of scholarship, informing the nascent doctrine and offering a more intellectually coherent and theoretically satisfying path for the incorporation of mass settlement into our aggregative regime.

223 See *Dukes*, 131 S. Ct. at 2557.

224 See Dodge, *supra* note 18, at 1263–87. But cf. *NFL Concussion Settlement Website*, *supra* note 185.

225 Dodge, *supra* note 18, at 1263–87.

CONCLUSION

No longer are opt-out class actions the dominant form of mass claims resolution; instead, we are witnessing a radical shift to opt-in mechanisms that return to a world in which the individual must take some action to vindicate her own claim. In this system, defendants are not presumptively tasked with paying damages for 100% of the potential victims; rather, they need only compensate the fraction who file a claim. This of course raises substantial questions about what enforcement level should be considered optimal. While the opt-out presumption reflected a common normative view of recent decades, in the shadow of the Rules Enabling Act and overlapping jurisdiction, there is an increasing question about what optimal enforcement means—and whether it may even vary transsubstantively.

Moving beyond the opt-in versus opt-out concerns, a second dimension of normative questions surround the impact of private mass claims funds on the functions of litigation. These new mechanisms offer the chance for victims and defendants to be simultaneously made better off through the reduction of transfers to third parties—particularly litigation costs. Of course, these savings come at the cost of reduced public transparency with respect to the underlying wrong and the injuries and damages themselves. Scholars have expressed concern that defendants will utilize these offers to undercompensate even those individuals that file claims, thereby undermining not only compensation, but also deterrence.

This Article has posited that a far more complex and nuanced analysis is necessary, given the rich diversity of claims funds, their differing goals, loci of information, and participation rates. The developing doctrine has motivated corporations to offer full compensation to claimants by making this the standard for preclusion of class certification. In this shadow, corporations have offered full compensation, effectively trading the risk of punitive damages for immediate compensation rather than discounting the compensation offered. Others have offered super-compensation, exceeding that available by law in these compensation systems.

But, some scholars have suggested that even with these doctrinal developments, individual claimants do better in aggregate settlements than private mass claims funds because collective bargaining allows the capture of a closure premium. Using the Deepwater Horizon example cited by these scholars, this Article has posited an alternative hypothesis: public-private litigation linkages. Increasingly, the wrongs that prompt the creation of private rights of action also trigger overlapping public actions—both regulatory and adjudicative. As such, the private mass claims funds are not isolated resolution mechanisms, but are undertaken in this broader litigation context. As parties' sophistication increases, we may well see increasing linkages between these public and private actions—adding yet another level of complexity, and additional normative questions, to the privatization of mass claims processes.