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*(Article begins on next page)*

2013

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# CONCEPCION'S PRO-DEFENDANT BIASING OF THE ARBITRATION PROCESS: THE CLASS COUNSEL SOLUTION

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David Korn and David Rosenberg\*

*By mandating that numerous plaintiffs litigate their common question claims separately in individual arbitrations rather than jointly in class action arbitrations, the Supreme Court in AT&T Mobility LLC v. Concepcion entrenched a potent structural and systemic bias in favor of defendants. The bias arises from the parties' divergent stakes in the outcome of the common question litigation in individual arbitrations: each plaintiff will only invest to maximize the value of his or her own claim, but the defendant has an incentive to protect its entire exposure and thus will have a classwide incentive to invest more in contesting common questions. This investment advantage enables the defendant to wield superior litigation power against each plaintiff, skewing the outcome of individual arbitrations in its favor and frequently rendering claims not worth filing. Concepcion perpetuates the bias by precluding the use of a class arbitration solution. We propose that courts neutralize the Concepcion bias by appointing class counsel to represent each plaintiff in individual arbitrations. Without threatening Concepcion's holding that arbitral efficiency precludes class arbitration unless the parties specify otherwise, the class counsel solution equalizes the parties' investment incentives to transform individual arbitrations into a socially useful legal system for promoting the deterrence, compensation, and other public policy objectives of federal and state substantive law.*

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## INTRODUCTION

*AT&T Mobility LLC v. Concepcion*<sup>1</sup> caps a series of recent Supreme Court decisions that together read the Federal Arbitration Act (FAA)<sup>2</sup> to require resolution of all common question litigations in individual arbitrations<sup>3</sup> unless class arbitration is expressly agreed to

1. 131 S. Ct. 1740 (2011).

2. 9 U.S.C. § 2 (2006).

3. “Common question litigations” involve multiple plaintiffs suing a common defendant—business or government—on causes of action for damages or equitable remedies that present the same or similar legal and factual claims or defenses. For simplicity, references to “plaintiff” and “defendant” generically include the principal adversarial parties to suits in court and arbitration. In some types of common question litigations, such as copyright infringement and recent mortgage-backed securities suits, the relationship of the parties is reversed, with a common plaintiff suing multiple defendants. *See, e.g.*, Assaf Hamdani & Alon Klement, *The Class Defense*, 93 CALIF. L. REV. 685 (2005); Peter J. Henning, *U.S. Takes Hard Line in Suits Over Bad Mortgages*, N.Y. TIMES DEALBOOK (Sept. 6, 2011, 3:46 PM), <http://dealbook.nytimes.com/2011/09/06/u-s-takes-hard-line-in-suits-over-bad-mortgages/> (“The Federal Housing Finance Agency, which oversees the mortgage giants Fannie Mae and Freddie Mac, is suing 17 leading banks that sold them nearly \$200 billion worth of subprime mortgage-backed securities that fell sharply in value when the housing market collapsed.”).

by the parties—realistically, by defendants—or mandated by Congress.<sup>4</sup> Whether intended or not, *Concepcion*'s default rule against class arbitration creates a potent structural and systemic bias in favor of defendants.<sup>5</sup> In biasing the arbitration process, *Concepcion* subverts deterrence, compensation, and other public policy objectives of federal and state substantive law.

In this Article, we explain why this bias can arise under *Concepcion*'s mandate for individual arbitration trials of common question claims but does not arise when such claims are resolved by class arbitration, the arbitration version of the judicial class action that contemplates classwide trial and *res judicata* effects. We show, however, that the bias can be eliminated readily without running afoul of *Concepcion*'s rejection of non-contracted class arbitration.<sup>6</sup> Under our proposal, instead of imposing class arbitration, courts would rectify the pro-defendant bias by proceeding under standard class action rules to appoint class counsel to represent class members individually in their respective arbitrations.

Our proposal may seem paradoxical, as it assigns class counsel the role of representing individual plaintiffs in individual arbitration trials rather than representing the class collectively in a classwide trial. However, once we clarify the nature of the pro-defendant bias, it will be evident that our “class counsel solution” eliminates bias completely, efficiently, and—consistent with *Concepcion*—without requiring class arbitrations or otherwise compromising the purposes and functioning of the individual arbitration process.

Essentially, a structural bias arises when common question claims are resolved through individual arbitrations: the stakes of the defendant and each plaintiff starkly differ, as do their corresponding incentives to invest in making their cases on common questions.<sup>7</sup> A

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4. See *Concepcion*, 131 S. Ct. at 1751 (“[C]lass arbitration, to the extent it is manufactured by [state law] rather than consensual, is inconsistent with the FAA.”); *Stolt-Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1775 (2010) (“[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so.”); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (“Having made the bargain to arbitrate [individually], the party should be held to it unless Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue.”). The FAA thus effectively preempts all lawmaking authorities except Congress—including state legislatures as well as state and federal courts—from modifying such basic procedures of arbitration as the mandate for individual arbitrations.

5. See *infra* Part I.A. We discuss the *Concepcion* Court’s motivations in concluding remarks.

6. See *infra* Part III.

7. The pro-defendant bias applies to all common question litigations resolved in court by separate actions or in arbitration by individual arbitrations. Our argument derives from

common defendant always has the greater stake (indeed, a class-wide stake) and consequently the greater incentive (usually by many orders of magnitude) to spend than the plaintiff. In contrast to the plaintiff's stake and related investment incentive, which are defined and limited by the expected recovery on his or her particular claim, the defendant litigates from an aggregate—classwide—perspective. Even though its liability will be determined claim-by-claim, the defendant invests to develop the common question defense that minimizes its classwide exposure to the costs of liability and litigation in the *aggregate*, not for any particular claim.<sup>8</sup> On the realistic assumption that the amount spent on lawyers, experts, discovery, and other litigation needs correlates with their quality, and hence with the odds of winning at trial,<sup>9</sup> the defendant's resulting superior litigation power will skew outcomes in its favor classwide, across all claims.

Exploiting such scale efficiencies to optimally invest on a class-wide basis against an adversary limited to investing based on a fractional, typically minute stake, the defendant can deploy a common question defense in any given individual arbitration that will likely overwhelm the plaintiff's case. Knowing that the defendant will spend more and win more often, potential plaintiffs may never bring claims. Thus, for example, a defendant facing one hundred similar arbitration claims each for \$1,000 would, all else equal, rationally spend up to \$100,000 in developing its best case on the common questions to deploy against the plaintiff in any given individual arbitration.<sup>10</sup> In response, each plaintiff would rationally

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analysis of the problem and the collective action solution in the judicial context introduced to the literature in David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984) [hereinafter Rosenberg, *Causal Connection*], subsequently developed in David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002) [hereinafter Rosenberg, *Mandatory-Litigation Class Action*], and formally examined with important extensions in David Rosenberg & Kathryn E. Spier, *On Structural Bias in the Litigation of Common Question Claims* (Harvard Pub. Law Working Paper No. 11-28, 2011), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=1950196](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950196). For recent elaboration and application of the structural bias analysis in the context of judicial class actions, see Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT'L L. 751 (2012). We also draw upon the arguments and proposals for multiple class action trials in Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1378 nn.4-6 (2000). This Article contributes to the literature by applying the analysis to the arbitration context and advancing the class counsel solution to eliminate pro-defendant bias in a manner consistent with *Concepcion's* mandate for individual arbitrations.

8. See *infra* Part I.A.

9. See Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 430-31 (1973).

10. For the sake of simple illustration, we also assume that the defendant spends only to litigate the common question.

spend up to the \$100 at stake in the particular case. Spending one hundred times more than each plaintiff in an individual arbitration likely will allow the common defendant to wield a decisive upper hand at trial (arbitral or otherwise), which in many cases will preclude plaintiffs from filing claims in the first place. In *Concepcion*, AT&T had incentive to make a classwide investment in its common question defense against thousands of claims, each worth roughly \$30.<sup>11</sup>

This pro-defendant bias is endemic to the process of resolving common question claims in individual arbitrations. Its existence is not a function of the defendant's wealth, the business or governmental activity involved, or the size, type, or complexity of the litigation—though any combination of these factors may compound or mitigate the problem. Indeed, the defendant's investment advantage in individual arbitrations pervades the entire spectrum of common question litigations, including consumer, franchise, and other contractual disputes; personal-injury claims for non-economic damages; and controversies implicating important public policies, such as those presented in constitutional, civil rights, employment discrimination, copyright, securities, and anti-trust cases. However, as indicated above, the number of independently prosecuted individual arbitrations is a highly significant variable; the more plaintiffs that must proceed independently by individual arbitrations, the more the process becomes biased against them. The bias decreases as the number of plaintiffs proceeding alone in individual arbitrations falls and vanishes when plaintiffs proceed as one by class arbitration.

The key to addressing *Concepcion's* bias is correcting the stake-driven asymmetry in investment incentives. Class arbitrations do just that by vesting class counsel with the same classwide stake and corresponding scale efficiencies that the defendant naturally exploits in making its classwide investment on common questions. But classwide trial itself does not cause or cure the bias. *Concepcion's* bias occurs in the individual arbitration process because of the lack of symmetry between the defendant's classwide stake and each plaintiff's recovery-specific stake in the outcome of the common question litigation. Class arbitration is sufficient, but not necessary, to solve the problem. Indeed, all of the heavy lifting in correcting the asymmetry in incentives in class arbitrations is done simply by

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11. Although AT&T's arbitration contract obligated it to reimburse each plaintiff for the cost of the individual arbitration, including a reasonable attorney fee for litigating the \$30 claim, the plaintiff had little chance of succeeding against the defendant's classwide financed common question defense. For further discussion of this point, see *infra* note 24.

the appointment of class counsel with a classwide stake (normally the court-awarded attorney's fee) contingent on the outcome of the common question litigation across all claims. It matters not at all whether those claims are tried collectively or individually.

Our proposal for appointing class counsel to represent plaintiffs in individual arbitrations completely solves the structural bias problem by vesting the attorney with a classwide stake in the outcome of the common question litigation equivalent in scope to that of the defendant's. Proceeding as the "owner" of the classwide recovery stake in the outcome of the common question claims, just as defendant proceeds as "owner" of the classwide defense stake, class counsel will be motivated to optimally invest on a classwide basis to maximize the return (net of litigation cost) from the recovery on all claims.<sup>12</sup> In the above example, all else equal, class counsel can exploit scale efficiencies as fully and cost-effectively as the defendant and invest up to \$100,000 in making plaintiffs' best case on the common questions and countering the defendant's common question defense.<sup>13</sup> By providing both sides—defendant and plaintiffs—a classwide stake in the outcome of the common question litigation and a corresponding incentive to invest in making their respective best cases, the class counsel solution levels the playing field, transforming the arbitration process into a socially beneficial system for promoting (instead of obstructing) the social goals and effective enforcement of substantive law.

The class counsel solution achieves these results without adding cost to arbitral and judicial processes or conflicting with *Concepcion*. The proposal entails no classwide arbitration trial, thereby avoiding the potential for "in terrorem" settlement and other class action

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12. See *infra* Part I.B.

13. Our example should not be taken to suggest that vesting plaintiffs with a stake equivalent in scope to defendant's in the classwide outcome of the common question litigation will lead the parties actually to spend the same amount. Indeed, their expenditures may well differ under the circumstances of a particular common question litigation, if, for example, one party must pay more than the other for legal services, if plaintiffs have first-party insurance to cover their losses and mitigate their risk-bearing costs, or if the defendant fears damage to its reputation in the marketplace. Differences in the parties' incentives and investments are virtually inevitable in reality when those decisions reflect, as they typically will, forecasts of the opposing party's spending. The amount invested on common questions in any litigation depends on the costs and benefits of spending more or less on the margin for discovery, experts, lawyers, and other variable-cost factors (on which expenditures can be scaled up or down, in theory, continuously, as opposed to fixed-cost inputs such as fees for filing, arbitrators, and stenographic services). That determination turns on a strategic estimate of how much the other side will spend and what effect that expenditure is expected to have on the outcome of the common question litigation. In equilibrium, the parties likely will spend markedly different amounts according to their differing, interactive investment options and choices, but *Concepcion's* bias puts a systematic thumb on the scale in favor of common defendants.



burdens on the arbitration process.<sup>14</sup> Because it only contemplates class counsel representing individual plaintiffs in individual arbitrations, and relatedly operates subject to each plaintiff's prerogative to refuse authorization for filing his or her arbitration claim as well as to opt-out of the class, the proposal also avoids the complexities of certifying a class action for classwide trial. Although the normal Rule 23<sup>15</sup> (or analog state) criteria for certifying class action would apply, it is likely that the sole significant issue for the court to determine would be the relative adequacy of candidates vying for appointment as class counsel—nothing new in class action.<sup>16</sup>

Courts can implement the class counsel solution in full accord with *Concepcion*. The Court ruled out judicial or state legislative attempts to alter, for policy reasons, the arbitration process by conditioning enforcement of arbitration agreements on their incorporation of a corrective, such as class arbitration, that is antithetical to the *raison d'être* of the process: its procedural efficiencies. Pursuant to our proposal, courts would enforce all valid arbitration agreements directly after determining whether to certify a Rule 23(b)(3) class for the very limited purpose of appointing class counsel to represent common question plaintiffs in their individual arbitrations. Alternatively, courts would declare no-class arbitration clauses invalid for biasing the arbitration process and would condition enforcement on the defendant agreeing to the judge's consideration of such limited class action certification—a corrective that actually promotes the efficiency of the individual arbitration process.

Part I elaborates the causes and consequences of *Concepcion's* pro-defendant biasing of the individual arbitration process before explaining how the class counsel solution eliminates the problem. Part II describes in greater detail how our proposal operates and then evaluates its social benefits and costs, including potential burdens on the arbitration and judicial processes, as well as its comparative effectiveness relative to relying on the market to solve

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14. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

15. FED. R. CIV. P. 23. There is a strong argument for treating the mandatory class action provisions of Rule 23(b)(1) and (2) as express congressional exemptions from the FAA default rule barring class arbitration and mandating individual arbitrations recognized in *Concepcion*. For this reason, we focus analysis on the provisions for judicially assisted voluntary classwide joinder under Rule 23(b)(3).

16. See FED. R. CIV. P. 23(a)(4). Far from a sidebar, the responsibility to appoint adequate counsel is central to the judicial management of modern litigation not only in multidistrict litigation (MDL) and other aggregate litigation contexts, but also in bankruptcy, administration of decedent estates, and a host of other areas in which courts appoint attorneys (or other fiduciaries) to represent the interests of individuals who lack the means or practical ability to personally hire and oversee their own legal counsel.

the pro-defendant bias through voluntary claim joinder. Part III considers the compatibility of our proposal with the FAA as interpreted by *Concepcion* and with Rule 23 certification of judicial class actions. In concluding remarks, we briefly note that the class counsel solution alone cannot correct troubling concerns raised by *Concepcion* that range far beyond its pro-defendant biasing of the arbitration process.

## I. *CONCEPCION'S* BIAS PROBLEM, AND HOW TO SOLVE IT

We begin this Part by elaborating on the nature and effects of *Concepcion's* pro-defendant biasing of the individual arbitration process, extending our analysis to consider parties making marginal, interactive investment decisions in settlement as well as trial contexts. Following that discussion, we explain how and why the class counsel solution works to eliminate the *Concepcion* bias without offending its individual arbitration mandate. We defer to Part II a description of the mechanics by which class counsel will be appointed to represent arbitration class members in their individual arbitrations and an evaluation of our proposal's social benefits and costs.

### A. *Concepcion's Pro-Defendant Bias*

*Concepcion's* pro-defendant biasing of the individual arbitration process reflects the basic axiom of litigation economics (true for any rationally financed venture): the litigant with more at stake has an incentive to spend more in making its case.<sup>17</sup> When multiple claims against a common defendant turn on common questions of law or fact, *Concepcion's* mandate for individual arbitrations creates a decisive asymmetry in stakes and corresponding incentives to invest in contesting common questions. The defendant literally has a classwide stake in the outcome of such litigation across all claims—more accurately, against all claims it expects to face—while each plaintiff's stake is limited to his or her potential recovery from the particular claim. This disparity—increasing with each additional claim prosecuted independently—steeply slants the individual arbitration process, distorting both trial and settlement outcomes in the

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17. See Posner, *supra* note 9, at 418–19.

defendant's favor and undermining the economic viability of meritorious claims even to the point of forcing their forfeiture by plaintiffs.

### 1. How *Concepcion* Biases Litigation Strategies and Arbitration Outcomes

We use a richer numerical example to illustrate the operation of the *Concepcion* bias in a realistic context, with the parties choosing how much to spend against each other on a marginal and strategically interactive basis. Thus, each party decides whether to spend more or less in litigating the common questions by assessing costs and benefits of the investment, not in absolute terms and isolation, but rather incrementally, as a function of the amount and impact of the other party's likely investment. This enables us to spotlight our central point: the cause and driver of the *Concepcion* bias is the asymmetry between the defendant's classwide stake and the plaintiff's personal, recovery-specific stake, which creates divergent incentives to invest and skews the resolution of the common questions in an individual arbitration.

Consider a case involving ten common-question arbitration claims against a bank, each seeking \$10,000 in damages for alleged predatory mortgage-lending practices.<sup>18</sup> Assume that the defendant bank and the plaintiff borrower in an individual arbitration each have the option of spending either \$5,000 or \$12,000 on common question litigation expenses (i.e., lawyers, discovery, experts, etc.). If the parties each spend the same amount, the plaintiff's probability of winning at trial would be 60 and 70 percent, respectively.<sup>19</sup> If one party invests \$5,000 while the other invests \$12,000, assume the party spending the greater amount will have a 90 percent chance of winning at trial on the common questions.

Suppose first that only one borrower will file a claim against the bank. Under these circumstances, both parties will each invest the

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18. *Cf., e.g.,* *Watkins v. Wells Fargo Home Mortg.*, 631 F. Supp. 2d 776, 779 (S.D. W. Va. 2008) (involving putative class claims based on predatory lending practices brought by borrower who defaulted on her home mortgage). We consider a case involving ten claims for the sake of simplicity; it is easy to imagine how the bias's effect compounds in the typical case, which involves far more than the one hundred class member claims required for diversity jurisdiction under the Class Action Fairness Act. *See* 28 U.S.C. § 1332(d)(5)(B) (2006).

19. To simplify the example, we assume only two investment options. In real world litigation, the parties' options approach a continuum. *See* Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 7, at 848 & n.40.

same amount, \$5,000, with the result that the defendant would expect to incur \$11,000 in total costs of liability and litigation<sup>20</sup> while the plaintiff would expect to recover \$1,000 net of litigation cost.<sup>21</sup> Neither party will have an incentive to invest \$7,000 more on the margin because spending that amount would not improve the expected return by more than the additional investment regardless of whether the marginal expenditure is made by both or only one of them.<sup>22</sup>

But when the bank faces not one but ten claims, it is in a position to exploit scale efficiencies for a classwide investment advantage. The bank now has a classwide stake of \$100,000 in the success of its common question defense and would find it economically rational to spend \$12,000 against plaintiff's \$5,000. Each plaintiff's individual incentives are the same as those shown above, so no plaintiff has an incentive to make the marginally higher investment. Straightaway, by investing an additional \$7,000 on the margin, the bank reduces its total expected costs of liability and litigation at trial *across all claims* by \$43,000.<sup>23</sup>

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20.  $\$11,000 = (60\% \times \$10,000) + \$5,000$ .

21.  $\$1,000 = (60\% \times \$10,000) - \$5,000$ .

22. If the parties each make the higher investment, then the additional \$7,000 will result in a \$1,000 change in the expected outcome. If one party anticipates that the other will not match the added \$7,000 investment, then the expenditure of \$7,000 will result in a change of \$3,000 in outcome.

23.  $\$43,000 = [(60\% \times \$100,000) + \$5,000] - [(10\% \times \$100,000) + \$12,000]$ . Because the defendant spreads the increased marginal investment equally (in this example) across all claims, the additional expenditure reduces its effective total expected costs in litigating a particular claim from \$6,500  $[(60\% \times \$10,000) + \$500]$  to \$2,200  $[(10\% \times \$10,000) + \$1,200]$ , saving \$4,300 per claim. The ability to spread costs is an elemental feature of the defendant's investment advantage, and it plays a pivotal role in *Concepcion's* pro-defendant biasing of individual arbitration settlements. As we show later, settlement biasing occurs because the defendant can spread costs across all claims, whereas each plaintiff bears his or her costs alone and fully. It should be noted that the defendant's classwide stake and related investment incentive advantage will not necessarily lead to lower per-claim costs as an absolute matter. Indeed, the defendant is likely to end up spending more on each claim than it would spend on a claim if it were the only one filed. The essence of defendant's investment advantage is the *productivity of the investment* in increasing the defendant's chances of succeeding at trial on the common questions. The defendant's marginal choice may involve increasing its per-claim and overall cost, yet it will have an economically rational motive to spend the additional amount if it expects to gain even more on the margin at trial. Thus, the defendant's advantage stems from the one-sided opportunity to increase the *quality* of its common question case on a classwide basis and hence to increase its chance of winning against each plaintiff in an individual arbitration.

## 2. Defendants Exploit Bias to Bar Filing of Arbitration Claims

A defendant can exploit the *Concepcion* bias not just to overwhelm each plaintiff's case at trial, but to totally destroy the potential value of his or her claim so as to render it not worth filing. Thus in the example, the defendant bank gains an even greater benefit from its superior investment incentive: its credible threat to make a devastating marginal investment against the plaintiff that should reduce liability exposure to zero without costing a dime. Because it is economically rational for the defendant to spend \$7,000 more on the margin, the plaintiff should anticipate this investment and the resulting reduction in his or her probability of winning at trial to 10 percent. With an expected recovery of only \$1,000, the plaintiff will not spend even \$5,000 on common question litigation and instead will forfeit the claim. By confronting potential plaintiffs with the prospects of going into the red from prosecuting their claims in individual arbitrations, the defendant can entirely escape civil liability under governing state and federal laws, regardless of the magnitude of its wrongdoing. As a result, the pro-defendant bias in *Concepcion* deters a wide array of otherwise viable, socially beneficial claims.

Defendants can wield their investment advantage to achieve the same preclusive result even more easily if the plaintiff bears the fixed costs of the individual arbitration, which can include paying a filing fee for the claim and rent on the room in which the arbitration takes place. These costs can extinguish claims in many cases involving losses of small to modest amounts.<sup>24</sup> But when added to

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24. See Posner, *supra* note 9, at 437–40. The defendant might be required under Supreme Court rulings like *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000), to cover most, and possibly all, of the plaintiff's fixed costs, win or lose. See *id.* at 90–91. Many mistakenly believe that class action is primarily needed only to overcome the fixed-cost obstacle to filing suit and thus would be unnecessary if the plaintiff were relieved of that burden, say by the defendant or taxpayers bearing the cost. See, e.g., RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* 785 (8th ed. 2011). Were this approach taken, however, the *Concepcion* bias would still remain in full force and thus be capable of destroying the viability of any claim whose chance of success could be affected by the defendant's variable-cost investment. Only the rare claim that is virtually certain to succeed upon its mere filing can escape the event horizon of the *Concepcion* bias. See generally Rosenberg & Spier, *supra* note 7 (demonstrating that structural bias operates in all common question cases involving variable costs and hence that there is virtually universal need for class action to eliminate defendants' resulting class-wide investment advantage by vesting class counsel with equivalent classwide stake and corresponding investment incentive).

It is noteworthy that in *Concepcion* the defendant apparently agreed to reimburse the plaintiff's reasonable attorney's fees, win or lose (except for frivolous or otherwise improperly motivated claims). See *Laster v. AT&T Mobility LLC*, 584 F.3d 849, 856 n.10 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011) (referencing the revised arbitration agreement providing that the defendant would cover all costs and fees

the plaintiff's variable costs, fixed costs mean defendants need not threaten to spend as much to turn an otherwise economically viable claim into a nullity. Modifying slightly the above example of ten claims for \$10,000 each, suppose the plaintiff bears \$1,500 in fixed costs. In this case, anticipating that the plaintiff would invest no more than \$5,000, the defendant need only spend \$5,000 instead of \$12,000 to preempt filing of the claim.<sup>25</sup> By driving the plaintiff's expected recovery below the fixed cost barrier into "negative expected value" territory, the defendant can eliminate its entire liability exposure.

Regardless of the incidence of fixed costs, the background obstacle to filing claims remains the *Concepcion* bias. Observers should not be fooled by the cosmetic beneficence of an arbitration agreement that imposes fixed costs on the defendant. Beneath an appearance of evenhandedness perpetuated by the Supreme Court<sup>26</sup> remains the reality that disproportionate investment incentives cull a large proportion of claims, saving defendants from paying anything in costs or compensation.

### 3. The Bias Distorts Settlement Values

Even when individual plaintiffs retain an incentive to pursue their claims, the bias operates to reduce the amount a defendant will pay in settlement by enabling the defendant, but not the plaintiff, to make a classwide common question investment that both skews the chance of winning at trial in its favor and spreads the cost of that investment across all claims. Again, by modifying the mortgage claim example, we can demonstrate this effect. Now assume that each claim is worth \$60,000; that the higher common question investment is \$25,000; that if both parties each spend \$5,000 or

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of arbitration, except if the plaintiff's claim was frivolous or otherwise improperly motivated). Obviously, if by committing to pay each plaintiff's attorney's fees the defendant was agreeing as a practical matter to settle for the face value of the underlying claim, then there would not be any *Concepcion* bias because there would not be any dispute to arbitrate. However, when the defendant disputes a common question claim, its payment of a plaintiff's attorney's fees, calculated as the reasonable expenditure for prosecuting an individual \$30-type arbitration claim and surely not for making the *classwide* investment needed to overcome the *Concepcion* bias, would do little if anything to mitigate its enormous, classwide investment advantage.

25. Even though the net expected recovery is \$1,000 if both parties invest \$5,000, the plaintiff will not file the claim because the anticipated payoff is insufficient to overcome the \$1,500 fixed-cost barrier.  $-\$500 = [(60\% \times \$10,000) - \$5,000] - \$1,500$ .

26. *Compare Green Tree*, 531 U.S. at 90 ("[T]he record does not show that Randolph will bear such [large] costs if she goes to arbitration."), *with id.* at 95 (Ginsburg, J., dissenting) ("[T]here is no reliable indication in this record that Randolph's claim will be arbitrated under any consumer-protective fee arrangement.").

\$25,000, the plaintiffs' probability of success at trial will be 60 and 70 percent, respectively; and that if one party invests more than the other, the party making the higher investment will have an 80 percent chance of succeeding at trial on the common questions. Because spending \$20,000 more on the margin increases the marginal expected recovery by only \$6,000,<sup>27</sup> each plaintiff will invest no more than \$5,000. Anticipating that each plaintiff will stick with the \$5,000 investment, the defendant bank will be motivated to make the marginal investment of \$20,000 to reduce its total expected costs of liability and litigation across all claims from \$365,000 to \$135,000, thereby reaping considerable savings of \$220,000.<sup>28</sup>

To show the settlement effects of the *Concepcion* bias in the modified example, we assume that both parties' estimates of the expected recovery and powers of bargaining are equivalent. As such, settlement should track the expected trial outcome, which would be \$36,000 if the parties invest the same amount (\$5,000), and \$20,000 if the defendant bank invests \$25,000 while the plaintiff sticks with \$5,000. Primarily motivated to avoid trial costs, the parties in each individual case will consider a settlement range defined by the sum of the defendant's total expected costs of liability and litigation and the plaintiff's net expected recovery.<sup>29</sup> With balanced bargaining power,<sup>30</sup> it is likely the parties will thus reach settlement around the mean of those expected amounts. If the bank faced only one claim and both parties spent \$5,000 each for a 60 percent probability of plaintiff success at trial, then that plaintiff should expect to receive \$36,000 in settlement.<sup>31</sup> However, facing ten claims, the bank is motivated not only to make a classwide investment of \$25,000 against each plaintiff's investment of \$5,000, but also to spread it across all claims. Lacking equivalent opportunity to spread the common question investment, the plaintiff in any given individual arbitration should expect to receive a mere \$10,750 in settlement.<sup>32</sup>

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27.  $\$6,000 = (70\% \times \$60,000) - (60\% \times \$60,000)$ .

28.  $\$220,000 = [(60\% \times \$60,000 \times 10) + \$5,000] - [(20\% \times \$60,000 \times 10) + \$25,000]$ . The plaintiff will not seek to match the defendant's \$25,000 investment, since the marginal expenditure of \$20,000 would only lead to a gain of  $\$10,000 = [(70\% \times \$60,000) - \$25,000] - [(20\% \times \$60,000) - \$5,000]$ .

29. See STEVEN SHAVELL, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW 401-03 (2004).

30. If anything, the defendant bank likely would hold the upper hand in settlement negotiations, aggravating its structural advantage.

31.  $\$36,000 = (\text{Defendant's Expected Costs} + \text{Plaintiff's Expected Recovery}) / 2 = \{[(60\% \times \$60,000) + \$5,000] + [(60\% \times \$60,000) - \$5,000]\} / 2$ .

32.  $\$10,750 = \{[(20\% \times \$60,000) + (\$25,000 / 10)] + [(20\% \times \$60,000) - \$5,000]\} / 2$ .

#### 4. The Bias Grows with the Number of Plaintiffs Confronting a Common Defendant

A defendant's superior litigation power grows with the number of claims prosecuted independently in individual arbitrations. Perversely, a defendant is increasingly more likely to avoid answering for the harms it causes when those harms affect a greater percentage of the population.

Again taking up our example, suppose that the defendant bank discussed above faced one hundred common question claims (giving it a \$6 million classwide stake in the outcome of the common questions) and that the parties can each invest \$5,000, \$25,000, or \$100,000. If both parties invest the same amount, the plaintiff will win \$60,000 in each individual arbitration with probabilities of 60, 70, or 90 percent, respectively. Further assume that if the bank spends either \$25,000 or \$100,000 while the plaintiff spends only \$5,000, plaintiff's probability of succeeding at trial will be 20 and 10 percent, respectively. Knowing the plaintiff will stick with \$5,000, the bank will make a rational decision to increase its investment from \$25,000 to \$100,000, reducing each plaintiff's net recovery to \$1,000<sup>33</sup> and the bank's total expected costs of liability and litigation by \$525,000 across all claims.<sup>34</sup>

As the number of independently prosecuted arbitration claims increases, the defendant bank's stake increases relative to each plaintiff's, so the defendant bank is likely to have even more options for marginal investments that will lower its total costs of liability and litigation across all claims. With a \$6 million classwide stake (compared to each plaintiff's \$60,000), it is thus reasonable to assume that the bank might be able to spend quite a bit more, say \$300,000, to reduce each plaintiff's chance of recovery at trial to 1 percent. Under the circumstances, this would be an economically rational investment because spending \$200,000 more on the margin classwide lowers total expected costs of liability and litigation across all claims by \$340,000.<sup>35</sup> However, this marginal classwide investment would wipe the plaintiffs off the map. If a prospective plaintiff anticipates the defendant making such an investment for a 99 percent chance of winning at trial, he or she would never file in

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33.  $\$1,000 = (10\% \times \$60,000) - \$5,000$ .

34.  $\$525,000 = [(20\% \times \$6,000,000) + \$25,000] - [(10\% \times \$6,000,000) + \$100,000]$ . In settlement, each plaintiff would expect to receive only \$4,000.  $\$4,000 = \{[(10\% \times \$60,000) + (\$100,000/100)] + [(10\% \times \$60,000) - \$5,000]\} / 2$ . If each plaintiff would incur fixed costs of \$1,500, then the defendant's credible threat to invest \$100,000 would preempt the filing of all claims.

35.  $\$340,000 = [(10\% \times \$6,000,000) + \$100,000] - [(1\% \times \$6,000,000) + \$300,000]$ .



the first place (or would drop the claim immediately with the hope that a lenient defendant will not seek costs). Ultimately, as more individual claimants confront a common defendant, that defendant will have an incentive to spend more on common litigation expenses, reducing even further the chance that plaintiffs recover on their specific claims.<sup>36</sup>

### B. The Class Counsel Solution

The foundational insight shaping our proposal is that the causal driver of the *Concepcion* bias is the asymmetry between defendant's classwide stake and a plaintiff's personal recovery stake in the outcome of the common question litigation. The solution is to correct this asymmetry by vesting the plaintiff-side with a classwide stake in that outcome equivalent in scope to the defendant's. Certifying class arbitration for classwide trial is sufficient for effecting this correction, but it is not necessary. Class arbitration works because, and

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36. The defendant can also inflate its stake to magnify the *Concepcion* bias. Thus, in *Concepcion*, the defendant stipulated that it would pay double the attorney's fee plus \$7,500 (subsequently raised to \$10,000) to a plaintiff who won an arbitration award exceeding the company's pre-arbitration settlement offer. 131 S. Ct. 1740, 1744 & n.3 (2011). This self-imposed "penalty" prompted both the majority and dissenters to speculate about its pro-plaintiff implications. See *id.* at 1753; *id.* at 1760 (Breyer, J., dissenting). The majority and dissenters might have viewed the penalty's pro-plaintiff implications in terms of mitigating the *Concepcion* bias (if they had recognized the problem). The evidence, however, seems to support neither the majority's hypothesis that the promised bonus for winning would strongly induce plaintiffs to file claims, see *Coneff v. AT&T Corp.*, 620 F. Supp. 2d 1248, 1258 (W.D. Wash. 2009) (noting the paucity of arbitration claims filed despite defendant's pro-consumer provisions), *rev'd and remanded*, 673 F.3d 1155 (9th Cir. 2012), nor the dissenters' prediction that the defendant would simply pay the face value of a claim—certainly AT&T had not paid the *Concepcion* plaintiffs anything. In any event, rather than operate in plaintiffs' favor to mitigate the *Concepcion* bias, the penalty provision likely would produce the perverse opposite result. While the promise of a bonus for winning raises a plaintiff's individual stake, it simultaneously raises by far more the defendant's classwide stake. On the related bias-enhancing effects of cost-shifting rules, see Rosenberg & Spier, *supra* note 7, at 37 (noting that English-style fee-shifting can increase the magnitude of defendants' advantage when structural bias gives them a high probability of victory). Thus, in the above example involving one hundred claims each for \$60,000, the defendant would have the incentive to invest \$100,000 to lower the plaintiff's chance of recovery from 60 to 10 percent, but it would not have the incentive to invest \$500,000 to further lower the plaintiff's chances to 0.1 percent. However, if it had to pay a \$20,000 penalty on any winning claim, the defendant would be motivated to invest the additional \$400,000 on the margin to reduce each plaintiff's chance of winning at trial on the common question to 0.1 percent, thereby profiting from a marginal reduction in total expected liability and litigation cost from \$900,000 to \$508,000.  $900,000 = \{ [10\% \times (\$60,000 + \$20,000) \times 100] + \$100,000 \}$ ;  $508,000 = \{ [0.1\% \times (\$60,000 + \$20,000) \times 100] + \$500,000 \}$ . Thus, even if the defendant is not obligated by law to pay the costs or a penalty to a winning plaintiff, it might do so voluntarily depending on which arrangement yields it the greater classwide investment advantage over the plaintiff.

only because, appointed class counsel has a vested stake in the class-wide outcome of the common question litigation. The *Concepcion* bias is completely eliminated when the class action commences, which is long before classwide trial; indeed, it is eliminated as soon as class counsel is appointed and vested with the classwide stake in the outcome of the common question litigation. While it may have other advantages, processing the collective action through classwide trial is thus entirely superfluous for purposes of achieving symmetrical investment incentives. Nothing more than appointing class counsel is required to end *Concepcion*'s pro-defendant bias.

Based on this understanding, our solution for *Concepcion*'s pro-defendant bias is designed to work effectively and fully simply by appointing class counsel to represent each class member's claim in an individual arbitration. Classwide trial, judicial or arbitral, does not occur under our plan. Hence, the class counsel solution we propose is consistent with *Concepcion*'s prohibition against courts, state legislatures, and arbitrators furthering any public policy goals, however socially beneficial they may be, by requiring class arbitration against or outside the parties' arbitration agreement.

### 1. Class Counsel Appointment Solves *Concepcion* Bias Without Classwide Trial

The coherence and effectiveness of the class counsel solution is evident when applied in the above examples. Return to the mortgage fraud case involving ten common question arbitration claims for \$10,000 each and parties' options to spend either \$5,000 or \$12,000 on common question discovery and experts.<sup>37</sup> Recall that if each side spent the same amount, the plaintiff's probability of winning at trial in the individual arbitration would be 60 and 70 percent, respectively. However, as the beneficiary of the *Concepcion* bias, the defendant bank wielded its asymmetric incentive to invest \$12,000 against the plaintiff's investment of \$5,000, thereby reducing the plaintiff's chance of winning to 10 percent. Indeed, as noted above, the bank's marginal classwide investment of \$7,000 renders the plaintiffs' claims worthless, thereby shielding it from civil liability for harm caused by any violation of law it may have committed.

This biased result would never occur if class counsel represented each plaintiff in his or her individual arbitration. Vested with the classwide stake in the expected recovery across all claims, class

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37. See *supra* Part I.A.1-2.

counsel would have an economically sound justification for matching the defendant's \$12,000 investment. By spending this amount, class counsel increases the plaintiffs' classwide expected net recovery on the common questions from \$0 to \$58,000<sup>38</sup> and individual net recovery from trial by \$5,800. In the example, the bank would also spend \$12,000 rather than \$5,000 because the additional \$7,000 investment effects a \$13,000 marginal reduction in its total expected costs of liability and litigation.<sup>39</sup> Claims plaintiffs never would have pursued without class counsel become not just viable but highly valuable after balancing investment incentives.

Crucially, the appointment of class counsel alone eliminates the *Concepcion* bias regardless of whether the classwide, stake-driven investment in the common questions is deployed to make the plaintiff's case in each of a series of individual arbitration trials or in a single classwide arbitration trial. Class counsel makes the same classwide investment in developing the plaintiff-side case for trial on the common questions to counter the classwide investment by the defendant. Matched up against each other in a given individual arbitration, the parties' respective \$12,000 common question cases will result in each plaintiff having a 70 percent probability of winning \$10,000 at individual arbitration trial for an aggregate gross expected recovery of \$70,000, yielding an aggregate net expected recovery of \$58,000 and per claim net expected recovery of \$5,800. The same essential result would obtain if the parties matched up their \$12,000 common question cases at classwide arbitration trial: aggregate gross expected recovery for plaintiffs of \$70,000 and aggregate net expected recovery of \$58,000 with a per claim expected recovery of \$5,800.<sup>40</sup>

## 2. The Class Counsel Solution Maximizes the Value of Economically Viable Claims

To extend the basic analysis, take the modified example, in which each plaintiff's claim has positive net expected recovery value.<sup>41</sup> In this example, each of the ten claims is worth \$60,000, the

38.  $\$58,000 = (70\% \times \$10,000 \times 10) - \$12,000$ .

39.  $\$13,000 = [(90\% \times \$100,000) + \$5,000] - [(70\% \times \$100,000) + \$12,000]$ .

40. Here, we are assuming there are no non-common questions that might require resolution subsequent to resolution of the common questions by classwide trial. Resolving the common question by a single classwide arbitration trial may entail more or less cost than resolving them in a series of individual arbitration trials in which the plaintiffs are represented by class counsel. We consider this point in the overall assessment of the social welfare consequences of our proposal in Part III.

41. See *supra* Part I.A.3.

higher common question investment is pegged at \$25,000, and if only one party invests that amount, while the other invests \$5,000, the party making the higher investment will have an 80 percent chance of succeeding at trial in an individual arbitration. Recall that although the defendant anticipated each plaintiff filing a claim, it also recognized that plaintiffs would not spend more than \$5,000 each. The asymmetric investment incentives provide defendant with ample motivation to spend the marginal \$20,000 to increase its probability of winning at trial in each individual arbitration from 40 to 80 percent, thereby reducing each plaintiff's gross expected recovery from \$36,000 to \$12,000 (and net from \$31,000 to \$7,000) and the defendant's total expected costs of liability and litigation by \$220,000.

If plaintiffs were represented by class counsel, however, they would have the incentive to match defendant's marginal investment of \$20,000. Spending that additional amount, class counsel would convert a marginal decrease in plaintiffs' expected net recovery classwide of \$260,000 and individually of \$25,500<sup>42</sup> into a marginal net gain of \$35,000, yielding \$395,000 classwide and \$39,500 individually.<sup>43</sup> Similarly, the defendant would match class counsel's additional expenditure of \$20,000 to avoid incurring \$40,000 in increased total expected costs of liability and litigation.<sup>44</sup> In equilibrium, each party spends \$25,000 with the result that the defendant incurs \$445,000 in classwide total expected costs of liability and litigation, while plaintiffs obtain expected net classwide recovery of \$395,000 at trial across all individual arbitrations.<sup>45</sup> With

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42. Assuming both parties start at \$5,000 each and the defendant moves first to invest \$20,000 more to confront class counsel with a net decrease in expected recovery classwide of \$260,000 = [(60% x \$600,000) - \$5,000] - [(20% x \$600,000) - \$25,000] and individually of \$25,500 = (\$355,000 / 10) - (\$100,000 / 10).

43. By investing \$20,000 more, class counsel increases the probability of success from 60 percent to 70 percent and thus net classwide recovery from \$355,000 to \$395,000 = [(70% x \$600,000) - \$25,000], and individually from \$25,000 to \$39,500 = [(70% x \$600,000 - \$25,000) / 10].

44. Assuming both parties start at \$5,000 each and class counsel moves first to invest \$20,000 more to confront the defendant with a net increase in its expected total liability of \$40,000 = [(80% x \$600,000) + \$5,000] - [(70% x \$600,000) + \$25,000].

45. Note that each party spending the same amount is an artifact of the example. If plaintiffs instead had a 75 percent chance of winning at trial when each party invested at the higher level, the defendant might not match class counsel's \$25,000 investment, as it would only yield a marginal reduction of \$10,000 in its total expected costs of liability and litigation. Likewise, the numerical example could readily be modified to reverse the result with class counsel finding the additional expenditure uneconomical. As noted above, the fact that the class counsel solution corrects the *Concepcion* bias by vesting class counsel with a classwide stake equivalent in scope to defendant's does not imply the parties will spend the same amounts in individual arbitration trials on the common questions. In reality, where the parties have continuously calibrated investment options, the variance in their relative

stakes and incentives balanced, more meritorious litigation proceeds.

### 3. The Class Counsel Solution Prevents Defendants from Rendering Otherwise Viable Claims Valueless

The class counsel solution also prevents a common defendant from preempting litigation altogether by exploiting the *Concepcion* bias in cases involving numerous claims or non-negligible fixed costs. Under our proposal, plaintiffs will no longer be subject to increasing bias as the number of individual arbitrations grows. Any greater classwide scale efficiencies in cases involving numerous claims will accrue in equal degree to both parties. And, because class counsel nullifies the *Concepcion* bias, the defendant will not be able to render the claim worthless by using asymmetric investment incentives to drive the plaintiff's expected recovery in an individual arbitration below fixed costs. Thus, our proposal nullifies the defendant's liability-evading strategy in the above example where, under the *Concepcion*-biased system, the defendant could spend \$100,000 to drive the expected net recovery value of the arbitration claim below the \$1,500 fixed cost barrier. With classwide stakes equal to defendant's, class counsel would match the \$100,000 investment, spending \$95,000 more on the margin to dramatically swing the classwide outcome on the common questions from \$0 to \$5.3 million in aggregate expected net recovery.

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expenditures will likely be far smaller than in the example with only two discrete and widely separated options.

That the parties cumulatively spend less than the amount at stake is also an artifact of the example. To favorably affect the outcome at trial, a rational civil litigant will invest up to the amount he or she might win or lose. In reality, the point of negative diminishing marginal benefit (return) will arrive short of that amount but often not before the party's spending and that of his or her adversary in combination exceeds the monetary value of the outcome over which they are disputing. This is all the more likely in cases involving property that has subjective as well as objective value. Although the general economic laws of civil litigation apply to disputes over classwide stakes, it is reasonable to surmise that occasions when parties' jointly spend more than the amount in controversy occur less frequently when both parties have classwide investment stakes in arbitration because of its streamlined process, the chance for more coordination and cooperation between lead counsel on both sides, and other practical considerations such as arbitrator expertise. *But see* AT&T Mobility LLC v. *Concepcion*, 131 S. Ct. 1740, 1751 (2011) (noting that class arbitration is slower, costlier, and more reliant on procedural formality than bilateral arbitration).

#### 4. The Solution Negates Biasing of Settlement Values

Class counsel representation negates the *Concepcion* bias in settlement, as well as at trial in the individual arbitration. In short, class counsel representation prevents the skewing of the settlement range in defendant's favor due to the parties' asymmetric stakes and related investment incentives; instead, the range becomes an unbiased reflection of the parties' equivalent opportunities to exploit classwide scale efficiencies.

To show the settlement effects of our proposal, assume the parties would each spend \$25,000 on the common questions, giving the plaintiffs a 70 percent probability of winning \$60,000 in their individual arbitrations. In the absence of class counsel representation, each individual arbitration settlement would likely occur within a range distorted by the defendant's asymmetric investment advantage. Each plaintiff would accept nothing less than the expected arbitral judgment, minus the investment required to obtain it, equal in the example to \$17,000.<sup>46</sup> The defendant would offer nothing more than the expected arbitral judgment plus the *per claim* share of the common defense investment: in the example \$44,500.<sup>47</sup> If the parties settle at the mean, each plaintiff will receive \$30,750. By contrast, class counsel representation leads each plaintiff to set his or her reservation point to reflect the spreading of the common question investment. Because a plaintiff therefore will accept nothing less than \$39,500,<sup>48</sup> the settlement range shifts significantly in his or her favor; in this example the mean now becomes \$42,000. As with litigation decisions, the class counsel solution shields settlement values from the pro-defendant *Concepcion* bias.

## II. PROPOSAL DESCRIBED AND SOCIAL CONSEQUENCES EVALUATED

This Part sketches how the proposal works in practice. For convenience, the description focuses on federal courts implementing the class counsel solution in a case like *Concepcion*.<sup>49</sup> Following this discussion is a social welfare assessment of the proposal that examines

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46.  $\$17,000 = (70\% \times \$60,000) - \$25,000$ .

47.  $\$44,500 = (70\% \times \$60,000) + (\$25,000 / 10)$ .

48.  $\$39,500 = (70\% \times \$60,000) - (\$25,000 / 10)$ .

49. We leave to another day more detailed consideration of how state courts might implement the proposal. We also do not address whether the FAA precondition for enforcement of arbitration agreements—that the parties can effectively vindicate their claims of right—authorizes arbitrators to adopt the class counsel solution pursuant to their general rule-making powers.

its benefits and costs and compares its advantages to the chief alternative of relying on the market to eliminate *Concepcion's* pro-defendant bias. This analysis generates the central conclusion that the class counsel solution effectively and efficiently eliminates the *Concepcion* bias in a manner the market cannot match, all while leaving intact the Court's mandate for individual arbitrations and transforming that process into a socially beneficial legal system at no significant social cost. We defer to Part III discussion of the proposal's compatibility with the FAA and federal class action rules.

### A. Class Counsel Solution in Operation

Judges must review the scope and validity of a challenged arbitration agreement before ordering its enforcement.<sup>50</sup> The need for courts to consider the use of the class counsel solution is therefore contingent on the "gateway" review determinations.<sup>51</sup> So, before describing how courts would implement our proposal, we briefly outline the conventional procedural route and substantive standards for making these gateway decisions.

#### 1. Judicial Gateway Review

*Concepcion* illustrates the most common and straightforward procedures by which federal courts conduct gateway review of arbitration agreements. Plaintiffs file a complaint and a related motion for certification of a Rule 23 class action seeking classwide trial of their claims in court. The common defendant then moves for an order compelling plaintiffs to submit to arbitration.<sup>52</sup>

At this juncture, when considering whether to mandate arbitration, the court generally considers two sets of gateway questions: (1) arbitrability under the contract; and (2) validity and enforceability

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50. See, e.g., *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*5, \*7-14 (S.D. Cal. Aug. 11, 2008) (citation omitted) (denying defendant's motion to compel arbitration after ruling against the validity of the arbitration agreement under state contract law), *aff'd sub nom.* *Laster v. AT & T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom.* *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *amended in part*, *Laster v. T-Mobile USA, Inc.*, Nos. 06cv675 DMS (NLS), 05cv1167 DMS (WVG), 2012 WL 1681762 (S.D. Cal. May 9, 2012).

51. See *Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2777-78 (2010) (citations omitted) (internal quotation marks omitted).

52. Although *Concepcion* involved a federal court exercising diversity jurisdiction over state claims (upon removal from state court), there is no reason to suppose the case would have followed a different procedural path had plaintiffs sought enforcement of federal constitutional, statutory, or common law or had initiated the case directly in federal court.

of the contract.<sup>53</sup> Arbitrability concerns the scope of the arbitration agreement's binding effect and typically regards what claims are covered for what parties. Obviously, our proposal is not needed when a court finds that an agreement subjects no plaintiffs or no common question claims to arbitration. The class counsel solution comes into play only if the court rules for the defendant on arbitrability, finding that the agreement subjects at least some plaintiffs and common question claims to arbitration.

On the second step, involving questions of invalidity, the application of our proposal will vary. It will apply to correct the *Concepcion* bias if a court sustains the validity of an arbitration agreement notwithstanding its inclusion of a no-class action arbitration clause, or alternatively, if the court invalidates the agreement on the ground that it contains a no-class arbitration clause. Application of the proposal in either case accords with *Concepcion* because that case precludes courts from imposing class arbitration or other public policy fixes that would destroy the procedural efficiency of arbitration; the class counsel solution enhances the workings of the individual arbitration process.<sup>54</sup> However, because the proposal provides no useful remedy for other defects in the arbitration process, it would not apply if a court invalidates the no-class counsel clause (or the agreement as a whole) on grounds unrelated to the *Concepcion* bias.

## 2. Judicial Implementation of the Class Counsel Solution

Our proposal contemplates that courts—here focusing on federal courts—would implement the class counsel solution, adhering to the standard process and criteria for certifying Rule 23(b)(3) class actions. However, a court would only perform two functions related to the proposal: initiating and closing the class action. The following overviews both steps.

### a. Class action initiation

First, a court must determine whether to certify an arbitration-claim class action for purposes of appointing class counsel to represent class members in individual arbitrations. Upon such

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53. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985); see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

54. See discussion *infra* Part III.



certification, the court must appraise the adequacy of available applicants for the post of class counsel and appoint the lawyer best able to provide such representation.

If the court orders enforcement of an agreement with a no-class arbitration clause, the proposal calls for a simple process. Having sustained arbitrability and validity of the clause, the court proceeds as normal to deny the pending motion to certify a Rule 23(b)(3) class action for classwide judicial trial. The court would then take up plaintiffs' motion to certify the arbitration claims for class action treatment only to the extent of appointing class counsel to represent class members in individual arbitrations.

To implement our proposal, a court might also, during gateway review, adjudge the arbitration agreement invalid and unenforceable as applied on the grounds that it unconscionably, unreasonably, or in violation of public policy biases the process against plaintiffs and prevents them from effectively vindicating their claims.<sup>55</sup> On this finding, the court could directly take up the plaintiffs' motion to implement the class counsel solution, or alternatively, condition enforcement of the no-class arbitration clause on the defendant's agreeing to allow the court to consider the motion.

The principal question posed by the motion to implement the class counsel solution is whether the applicant seeking appointment is able (or who among rival applicants for the post is best able) to adequately and effectively represent class members in their respective individual arbitrations in accordance with Rule 23(g)(1) criteria. If there are no applicants or none that possess the qualifications necessary to provide such representation, the court will deny the motion and, lacking an effective means of remedying *Concepcion's* pro-defendant bias, enforce the arbitration agreement by its terms, relegating plaintiffs to a process of individual arbitrations

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55. See *Concepcion*, 131 S. Ct. at 1746 (explaining that the "saving clause" of FAA § 2 authorizes courts to declare arbitration agreements unenforceable "upon such grounds as exist at law or in equity for the revocation of any contract" including "generally applicable contract defenses, such as fraud, duress, or unconscionability"); *Mitsubishi Motors Corp.*, 473 U.S. at 637 (requiring as a condition for enforcing agreements to arbitrate federal statutory claims that the arbitration process provide the means for a litigant to "effectively . . . vindicate its statutory cause of action in the arbitral forum" so that the underlying law "will continue to serve both its remedial and deterrent function"). For discussion of these bases for declaring that the *Concepcion* bias renders the arbitration agreement invalid and unenforceable, see *infra* Part II.B.

stacked against them.<sup>56</sup> If the court concludes that adequate counsel is available to provide representation in individual arbitrations, it will appoint the applicant class counsel for this purpose.

Upon making the appointment, the court will direct and oversee notification of class members pursuant to Rule 23(c)(2)(B).<sup>57</sup> Counsel will inform members of the nature of the certification decision, the case—including the claims, issues, and defenses involved—and class counsel’s assignment to represent each plaintiff in his or her individual arbitration. Class members will also be told that they can opt-out of the class, and file or forfeit their arbitration claims as they wish, or remain in the class but subsequently intervene in their individual arbitration through counsel of their own choosing.<sup>58</sup> Once the class membership is fixed, the court will direct class counsel to proceed in representing individual plaintiffs by filing and prosecuting their respective arbitration claims. Having thus initiated the class counsel solution, the court will suspend further judicial proceedings related to implementing the proposal pending the outcome of the litigation, either by judgments or settlements in individual arbitrations or by settlement on an aggregate or classwide basis.

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56. The logical and socially appropriate remedy of declaring the agreement unenforceable appears to be foreclosed by *Concepcion*. See 131 S. Ct. at 1748.

57. See FED. R. CIV. P. 23(c)(2)(B) (“[T]he court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.”).

58. Generally, class members who do not opt out may still intervene in class actions later, employing their own attorneys. Beyond receiving documents and observing hearings in the common question phase of the proceedings, such intervention usually amounts to nothing more than taking over the non-common question phase of the litigation. Here, the intervention might take over the entire claim in the individual arbitration, usually following (and contingent upon) resolution of the common questions in the plaintiffs’ favor. Whether that lawyer could use class counsel’s work product is a separate question. Class counsel might license its use, but if the intervening lawyer gained access to the information through other means, say, through the public domain, a court-awarded fee could, as in MDL cases, tax the fee of the intervening lawyer to pay for class counsel’s investment in the common questions. See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 22.927 (2004) (“If there is a combination of individual settlements and a classwide settlement, the judge sometimes orders individual plaintiffs’ lawyers to pay a certain percentage of the fees they received into a common fund to contribute to the fees of the class counsel, whose work in discovery and trial preparation contributed to the settlement of the individual cases as well.”); Jeremy Hays, *The Quasi-Class Action Model for Limiting Attorneys’ Fees in Multidistrict Litigation*, 67 N.Y.U. ANN. SURV. AM. L. 589, 629 (2012) (“[I]n the *Diet Drugs* settlement, the transferee court ordered the defendant to pay 9% of each plaintiff’s award into a separate account . . . to provide common-benefit fees to attorneys for work those attorneys did that benefitted the plaintiffs as a whole.”). The Supreme Court has articulated a “common-fund doctrine” undergirding such bias-neutralizing results. See, e.g., *Boeing Co. v. Van Gemert*, 444 U.S. 472, 478 (1980) (“[T]his Court has recognized consistently that a litigant or a lawyer who recovers a common fund for the benefit of persons other than himself or his client is entitled to a reasonable attorney’s fee from the fund as a whole.”).

*b. Class counsel fee award*

Class counsel's classwide investment incentive to maximize the classwide recovery derives, under our proposal or in class arbitration, from his or her stake in that recovery. This stake ultimately turns on the court's award of fees and expenses at the close of the arbitration process. Many modes and types of fee arrangements exist, including the possibility of individual agreements between class counsel and each plaintiff. However, for present purposes, we assume that courts will adopt the fee-setting conventions used for class, consolidated, and aggregate actions.<sup>59</sup>

Thus, as suggested, the court-awarded fee will be contingent on class counsel recovering damages or other positive value from individual arbitrations and settlements. In accord with standard practice and our proposal's central objective to put the defendant and plaintiffs on an equal classwide investment footing, the court will calculate the fee—employing a percentage, lodestar, or mixed approach—based on class counsel's aggregate, classwide investment and recovery.<sup>60</sup> In other words, class counsel's fee must reflect the nature of the classwide investment and recovery as a whole—an amount that is by definition greater than the sum of its parts—which includes the investments and recoveries that plaintiffs' attorneys would have made in independently prosecuted individual arbitrations proceeding under the reign of the *Concepcion* bias.<sup>61</sup> It

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59. Any fee award by the court would be made in accordance with the procedural and substantive criteria set forth in Rule 23(h) and prevailing conventions and practices. See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION (2010). For a description of fee-setting conventions in MDL and "quasi-class action" cases, see generally Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010).

Pursuant to these conventions, the defendant is likely to retain its investment advantage when courts limit class counsel's fee to a percentage of the aggregate recovery, indeed to an artificially reduced level far below the general contingency fee standard of 33 percent. See Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 830–31 (2010). Thus, even under our proposal, class counsel would lack a fully optimal incentive to make the classwide investment that will counter the *Concepcion* bias. Cf. Murray L. Schwartz & Daniel J. B. Mitchell, *An Economic Analysis of the Contingent Fee in Personal-Injury Litigation*, 22 STAN. L. REV. 1125, 1139 (1970) (noting that under a contingent fee arrangement there is a gap between the client's interest in maximizing the total recovery and the lawyer's interest in maximizing his or her share of the recovery). Since this constraint on class counsel's investment incentives does not arise from the *Concepcion* bias and applies to percentage fee arrangements in any context, we will disregard its effects in the ensuing analysis.

60. See Judith Resnik, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296, 339–45 (1996).

61. The synergistic nature of class counsel investing to maximize the recovery on a classwide rather than claim-by-claim basis explains not only why *Concepcion's* pro-defendant bias arises in the absence of such classwide investment opportunities on the plaintiffs-side but also

is important to note that class counsel's work in maximizing the aggregate, classwide recovery typically includes claim-specific expenditures on non-common questions as well as classwide investment on common questions. Consequently, the court must necessarily compute class counsel's fee in light of the total investment and recovery (more accurately on the basis of the total investment that maximizes the expected aggregate, classwide recovery) from litigation of the non-common as well as common questions.

### B. Social Welfare Assessment

We assess the benefits and costs of our proposal and the market alternative in accordance with the Supreme Court's affirmation that the validity of arbitration hinges on its providing the means for a litigant to "effectively . . . vindicate [his or her] statutory cause of action in the arbitral forum" so that the underlying law "will continue to serve both its remedial and deterrent function."<sup>62</sup> Thus, we

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why the class counsel solution works to eliminate the bias completely. Courts and commentators frequently neglect this crucial feature of centralized investment across all common question claims. See, e.g., *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002) (denying class action treatment of mass tort claims because only a "decentralized process" of independently tried claims would "yield the information needed for accurate evaluation" of the claims involved); *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995) (overturning certification of class because it threatened huge classwide liability despite the fact that the defendant had won twelve of thirteen prior independent trials); Charles Silver, *The Responsibilities of Lead Lawyers and Judges in Multidistrict Litigations*, 79 *FORDHAM L. REV.* 1985, 2001–02 (2011) (arguing that lead counsel focuses on selecting cases that will maximize billable hours, rather than those cases that are strongest and will maximize value for the plaintiffs).

62. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985). The Court's pre-condition for judicial and, presumably, arbitral enforcement of arbitration agreements can be read narrowly as applying only to causes of action arising from federal statutes. However, this reading is hard to accept, as it would imply a rather antisocial proposition: arbitration agreements are enforceable even though the arbitration process contravenes the deterrence, compensation, and other public policies of the substantive law involved by preventing the litigants from vindicating all defenses as well as causes of action, or all legally protected rights arising under constitutional, statutory, or common law—state as well as federal. Consequently, we read the *Mitsubishi* test broadly to encompass all sources of substantive law inclusive of the grounds of fraud, duress, and unconscionability recognized by the FAA § 2 saving clause for revocation of contracts. See 9 U.S.C. § 2 (2006). For further discussion of the *Mitsubishi* and FAA conditions on the enforceability of arbitration agreements, see *infra* Part III.A.

Because arbitration claims generally arise from contracts, in some fraction of cases the parties may have expressly waived all legal routes of recourse. In assessing the costs and benefits of the effectiveness of our proposal to ensure the effective vindication of plaintiffs' legal rights, we assume that the parties have not so waived their claims or that if they have, such waiver is not legally enforceable. For the same reason, we also assume that when the plaintiff has not expressly waived his or her claim, courts will not sustain defendant's argument that

proceed on the understanding that the social objective of enforcing civil liability in arbitration is identical to that which applies to courts: attaining maximum net social benefit from civil liability by minimizing the total relevant social costs of complying with, violating, and enforcing the law.<sup>63</sup> Reconciling this fundamental condition for validating arbitration with *Concepcion*'s mandate for individual arbitrations, we adopt a further assumption—one we find implausible but that we nonetheless will accept for the sake of argument. We posit that Congress deemed individual arbitrations to be superior—on average, the most cost-effective means of serving the deterrence and compensation functions of civil liability in common question litigations—compared not only to individual or class actions in court, but also to class actions in arbitration.<sup>64</sup>

### 1. Benefits of the Class Counsel Solution

The foregoing analysis leaves no doubt that *Concepcion*'s pro-defendant biasing of the individual arbitration process can

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the plaintiff effectively waived the claim by agreeing to litigate against the defendant despite its ability to exploit *Concepcion*'s rigged process to marshal an overwhelming common question defense.

63. This social function of civil liability (colloquially, minimizing the sum of accident costs) is derived from the path-breaking analysis in GUIDO CALABRESI, *THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS* (1970).

64. Our assumption treats the pro-defendant bias as an unintended byproduct of Congress's (qua the *Concepcion* Court's) mandate for individual arbitrations. The problem of bias goes without mention by either the majority or dissent in *Concepcion*, and we certainly would not attribute to the Court or Congress an intention to give defendants a decisive upper hand in arbitration or to undercut civil liability enforcement of substantive law. The class counsel solution is thus consistent with the FAA as interpreted by *Concepcion* because it eliminates the unintended pro-defendant bias while not merely leaving the individual arbitration process intact, but, as discussed below, by improving and facilitating its operation.

The Court might respond that Congress prescribed the "default rule" of individual arbitrations not on a finding that this process was superior to alternative modes of dispute resolution, but rather on a reasonable inference drawn from the parties' consent to arbitrate that they deemed it so. We reject this possible rejoinder, which would require accepting a formal, hollow legal fiction of "consent." In the type of small claim case the Court found best suited for arbitration, it is unreasonable to believe that the individual parties to these adhesive contract transactions—for example in checking the "I agree" box online—actually read or understood the no-class arbitration clause and expressed an informed preference for non-class arbitration. It would be the height of lawmaking arrogance for Congress to have conditioned the individual parties' rights to judicial and class action enforcement of the law on consulting lawyers for the meaning of the no-arbitration clause in the sales terms of every product or service they buy, which for virtually everyone would be a sheer waste of time and money. There is no suggestion in the statutory text or history that the FAA was designed to preempt rather than expedite enforcement of federal and state substantive law. *See, e.g.*, *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 220 (1985) (referencing legislative history that indicated a desire to address "agitation against the costliness and delays of litigation" (quoting H.R. Rep. No. 96, 68th Cong., 1st Sess., 2 (1924))).

undermine, and in many cases destroy, the social value of plaintiffs' claims in promoting the deterrence and compensation function of civil liability. This biasing also frustrates related general goals, such as the use of civil liability for securities fraud as a means of assuring investor confidence in the integrity and reliability of markets for publicly traded stocks.<sup>65</sup> To protect these interests, a system that resolves common question litigations in individual arbitrations may yet represent the most cost-effective means of enforcing the law because it provides, in the Court's view, the relatively efficient, streamlined procedures of the arbitral process without envisioned costs of classwide trial.<sup>66</sup>

Although generally superior to judicial class actions, according to the majority in *Concepcion*, class arbitration entails costs that swamp its benefits.<sup>67</sup> Questions concerning the structure of classwide representation and trial encumber the class arbitration process with time-consuming complexities and procedural formalities. And arbitrators, usually focused on the parties before them, may struggle to account for absentee due process rights.<sup>68</sup> Although classwide trial entails special procedural and managerial costs that fall on both parties, what appears to be the real showstopper is its increased risk for defendants.<sup>69</sup> Confronting the defendant with the prospect of a single classwide trial potentially resulting in a judgment for enormous aggregate damages forces it to choose between "bet[ing] the company" and capitulating to "'in terrorem' settlement[ ]" pressures by paying questionable claims.<sup>70</sup>

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65. See Joel Seligman, Commentary, *The Merits Do Matter: A Comment on Professor Grundfest's "Disimplying Private Rights of Action Under the Federal Securities Laws: The Commission's Authority,"* 108 HARV. L. REV. 438, 440 (1994) ("Private [securities] litigation performs a significant role in maintenance of investor confidence by enforcing the mandatory disclosure system.").

66. A simple example illustrates the implications of the Court's assumptions. Suppose a series of class actions with classwide trial would produce deterrence and compensation benefits of \$1,000, but would exact litigation costs of \$800 or \$700 respectively in court or in arbitration. It is evident that class arbitration minimizes total accident costs, resulting in maximum net social benefit of \$300, \$100 more than a resolution in court. Now suppose that resolving the same common question claims by individual arbitrations would yield just \$500 in deterrence and compensation but would tax the parties only \$100 in litigation cost. Despite their comparatively deficient deterrence and compensation results, individual arbitrations nonetheless would prove the best means of resolving the common question claims, yielding maximum net social benefit of \$400.

67. See 131 S. Ct. 1740, 1751 (2011).

68. See *id.* at 1751–52.

69. *Id.* at 1752.

70. *Id.* Oddly, the *Concepcion* majority reasoned that if defendants were faced with this choice they would be compelled to jettison arbitration in favor of courts. See *id.* The assumption that courts would not convene class actions and impose the same choice is implicit and unsubstantiated.

With the Court's assumptions taken as true, the class counsel solution provides unalloyed social benefit. It completely eliminates *Concepcion's* pro-defendant bias in individual arbitrations, yet creates none of the costs and risks of class arbitration. Recall the example in which the defendant confronts ten claims each seeking \$10,000 in damages, and assume that by investing \$60,000 in precautions it could avoid the risk of harm entirely. Given its *Concepcion*-biased asymmetric stakes and classwide investment advantages, the defendant lacks any legal incentive to take these precautions because it anticipates that its \$12,000 expenditure to each plaintiff's \$5,000 will render all claims worthless. The class counsel solution rectifies this socially destructive result. Vested with a classwide stake in the outcome of the common question litigation, class counsel could have a cost-effective incentive to match defendant's investment, thereby increasing the chance of each plaintiff winning in an individual arbitration from 10 to 70 percent. Consequently, *ex ante*, when contemplating whether to invest \$60,000 in precautions, the defendant would confront the choice between spending that amount or incurring total expected liability and litigation cost of \$82,000<sup>71</sup> and would rationally elect to prevent any harm from occurring. Obviously, the class counsel solution promotes compensation goals. If the defendant failed to invest in precautions, each plaintiff would expect to recover \$5,800 at trial<sup>72</sup> and \$7,000 in settlement, compared to \$0 under the *Concepcion* pro-defendant biased regime.

But the class counsel solution does not simply leave the individual arbitration process intact; it makes the process more efficient and more efficacious.<sup>73</sup> Judicial appointment of class counsel saves plaintiffs the time, trouble, and expense of searching for and hiring their own personal lawyers. All plaintiffs can—and virtually all will—benefit from the court screening for attorney quality and setting the fee and other terms for class counsel's representation of claims in individual arbitrations.<sup>74</sup> Early on, class counsel will develop the classwide case for liability on the common questions that

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71.  $\$82,000 = (70\% \times \$10,000 \times 10) + \$12,000$ . In settlement, defendant would likely pay out \$70,000.

72.  $\$5,800 = (70\% \times \$10,000) - (\$12,000/10)$ .

73. The FAA does not preempt state legislative and judicially imposed conditions on the enforcement of arbitration agreements that promote the use and efficiency of arbitration. See *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474–78 (1989).

74. Plaintiffs who exercise their opt-out or intervention prerogatives will also benefit from the record and analysis created by the court in choosing their own counsel. The effort to hire separate counsel, however, will suffer from lack of scale efficiencies as well as saddle the plaintiff with high cost for his or her attorney to coordinate with class counsel in litigating

will be deployed thereafter in the many hundreds or thousands of ensuing individual arbitrations for low or no marginal cost. In short, the class counsel solution transforms the individual arbitration process into a socially responsible system of law enforcement by at once eliminating *Concepcion*'s pro-defendant bias and enabling plaintiffs to avoid duplicative expense and capitalize on classwide scale efficiencies.

## 2. Costs of the Class Counsel Solution

Given our conclusion that the class counsel solution maximizes net social benefit by cost-effectively promoting the substantive law's deterrence and compensation objectives, we now inquire directly whether this net-benefit evaluation holds after accounting for any costs it imposes on the individual arbitration process.<sup>75</sup> To address this question realistically, we compare the effects of our proposal to the benchmark of the individual arbitration process in operation under *Concepcion*. However, we shall ignore *Concepcion*'s bias insofar as it precludes plaintiffs from filing claims and thus assume that plaintiffs will file and prosecute the same number of claims in individual arbitrations under the benchmark regime as under our proposal-reformed regime. We find that the only significant effects of our proposal on FAA objectives are positive.

Because the class counsel solution operates within the procedural framework of the individual arbitration process, the only complaint that could be lodged against the proposal is that appointing class counsel could delay the start of the arbitration.<sup>76</sup> Of course, some delay is already inevitable. Unless the FAA is read mistakenly to put its preemptive weight behind enforcement of no-legal representation as well as no-class action clauses, plaintiffs necessarily will require a reasonable amount of time to seek counsel for an evaluation of whether and how best to prosecute their claims. To be meaningful, this opportunity cannot be measured in

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the common questions. Those who choose to proceed without the benefit of class counsel's classwide investment on the common question likely will face the magnified force of the defendant's *Concepcion*-biased investment advantage. See Rosenberg & Spier, *supra* note 7, at 40–41.

75. It should be noted that the FAA sets no schedule or deadline for judicial enforcement of the agreement to arbitrate. See 9 U.S.C. § 4 (2006); cf. *Volt Info. Serv.*, 489 U.S. at 474 (“[T]he FAA does not confer a right to compel arbitration of any dispute at any time.”). For general analysis of our proposal's compatibility with the FAA as interpreted by *Concepcion*, see *infra* Part III.A.

76. The court's determination of class counsel's fee and expenses has no effect on the processing of arbitration claims and thus has no relevance to FAA objectives.



absolute time periods. Rather, the amount of time the plaintiff should reasonably have and take will vary according to the nature of the claim. However, as is evident from the claim-aggregation market in which a plaintiff rarely, if ever, proceeds “solo,”<sup>77</sup> plaintiffs will rationally seek legal representation that promises to make the most cost-effective case for recovery on the common question elements of the case—essentially by aggregating the classwide stake to rationally motivate making a classwide investment on the common questions. Thus, even without our proposal, the period for selecting counsel must allow plaintiffs time to identify the best representative to marshal and manage a classwide investment that will maximize the expected recovery from the claims involved and, in so doing, negate the *Concepcion* bias.

As an empirical matter, federal court implementation of our proposal will do little to delay the start of arbitration. Indeed, it is likely to expedite it. To be sure, initiating the proposal involves applying Rule 23(a) and (b)(3) conditions for class certification and appointing class counsel. In other situations, this process can enmesh the parties and court in complex and time-consuming inquiries relating to the appropriateness of classwide trial, which can require determining the predominance of common questions, the cohesiveness of class member interests, and the manageability of collectively adjudicating claims arising under differing laws and factual circumstances. But questions of this sort are irrelevant to the implementation of our proposal for the simple reason that the class would be certified and class counsel appointed solely for representation of class members’ arbitration claims in individual arbitrations. The proposal entails no classwide representation, no classwide binding effects, and no classwide trial; essentially, the class action only affords class members judicial assistance to overcome the practical barriers and costs of voluntary joinder.<sup>78</sup>

The class counsel solution presents only one, straightforward, and speedily resolvable question: who among the candidates for the

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77. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 383 (2000); Rosenberg, *Mandatory-Litigation Class Action*, *supra* note 7, at 832–33.

78. Even if these pre-certification questions bore some relevance to class certification under our proposal, their resolution would promote FAA objectives by greatly facilitating and enhancing the individual arbitration process. This is because virtually all of the work product generated by classwide discovery, evaluation of statistical and other generalized proof, and related merits screening aimed at answering these questions will be directly usable in the arbitration process, thereby avoiding enormously complex, expensive, time-consuming duplication of effort by the parties and by hundreds or thousands of arbitrators in hundreds or thousands of individual arbitrations.

post of class counsel is best able to adequately and effectively represent class members in their individual arbitrations? Generally, the proposal requires little if any additional time and effort because the court in most cases would have considered and decided the issues needed to determine class counsel adequacy as an independent, preliminary matter, with far more comprehensive and in-depth scrutiny than required by the class counsel solution. Courts are routinely called upon to consolidate class action cases and to appoint lead counsel before taking up matters relating to the enforcement of arbitration agreements.<sup>79</sup> More generally, pursuant to Rule 23(g)(3), courts will increasingly appoint class counsel on an interim basis or implicitly assign class representation to a lead plaintiff's attorney of record for purposes of litigating classwide, common gateway questions as well as jurisdictional issues and the like.<sup>80</sup> Thus, courts will have already completed what is needed for an inquiry focusing on the much narrower, workaday question of whether class counsel can satisfy the normal obligations of an attorney representing an individual client in an individual action.<sup>81</sup>

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79. See, e.g., Memorandum of Points and Authorities in Support of Motion to Consolidate, Appoint Lead Counsel and Grant Other Relief, *Italian Colors Rest. v. Am. Express Co.*, No. C 03-03719 EDL (N.D. Cal. Oct. 14, 2003) (seeking the appointment of lead counsel before the court heard motions to compel arbitration).

80. See FED. R. CIV. P. 23(g)(3) ("The court may designate interim counsel to act on behalf of a putative class before determining whether to certify the action as a class action."); see also *Laster v. T-Mobile USA, Inc.*, No. 05cv1167 DMS (AJB), 2008 WL 5216255, at \*1, \*13 (S.D. Cal. Aug. 11, 2008) (treating the *Concepcion* claims as a "putative class action" without conducting Rule 23 certification procedures when ruling on arbitrability), *aff'd sub nom. Laster v. AT&T Mobility LLC*, 584 F.3d 849 (9th Cir. 2009), *rev'd sub nom. AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011), and *amended in part, Laster v. T-Mobile USA, Inc.*, Nos. 06cv675 DMS (NLS), 05cv1167 DMS (WVG), 2012 WL 1681762 (S.D. Cal. May 9, 2012). Interim class representation will also be needed for resolution of such classwide questions as those regarding jurisdiction and preliminary injunctive relief. Notably, courts often consider class certification before deciding whether to enforce arbitration agreements. See, e.g., *Herrera v. LCS Fin. Servs. Corp.*, 274 F.R.D. 666, 681 (N.D. Cal. 2011). But see *Amar Shakti Enters. v. Wyndham Worldwide, Inc.*, No. 6:10-cv-1857-Orl-31KRS, 2011 WL 3687855, at \*2 (M.D. Fla. Aug. 22, 2011) (distinguishing the instant case from the convention of first deciding class certification because plaintiffs interposed no argument that enforcing the arbitration agreement would "offend public policy, or offer any other reason why arbitration would be inappropriate").

81. The Rule 23 fair and adequate class representation inquiry is aimed in part at determining whether class counsel will be placed in the position of having to represent conflicting, or at least significantly differing, interests among class members in the resolution of common questions by classwide trial. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625-27 (1997). We emphasize that no such problem exists under our proposal. As a practical as well as formal matter, the class counsel solution provides only personal, individual representation to class members. Formally, putative class members will receive notice—often, because of the contractual basis of the claims, directly and individually—of the individual nature of their representation on the specified claims and means of assuring their individual representation

Our proposal calls upon the court to assess the attorney's litigation experience, legal expertise, and financial and other resources only in relation to making the classwide investment on the common questions. This assessment requires a court to gather and scrutinize any relevant information it has not already obtained and assessed for purposes of appointing interim, gateway class counsel. In all likelihood, the question of adequacy will be decided expeditiously and at little, if any, cost to the parties or court. As noted above, any cost in producing the public record documenting and assessing class counsel's qualifications will be greatly outweighed by the benefits to class members, both for the vast majority that probably will rely on the court's selection of counsel and for those who instead use the information in choosing their own counsel to opt out or intervene.<sup>82</sup>

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by opting out of the class or intervening through their own attorney. The practical meaning of the prerogative to intervene is that a plaintiff's own counsel will conduct the individual arbitration at least on the non-common questions, and possibly on the common questions as well, albeit paying class counsel for use of any classwide work product.

82. A court might raise two other questions as it considers implementing our proposal. The first concerns the prerequisite that "the class is so numerous that joinder of all members is impracticable." FED. R. CIV. P. 23(a)(1). Although the "impracticability of joinder" explains why the courts should intervene pursuant to our proposal to cut the costs of effecting the voluntary joinder of plaintiffs, very few cases will present a serious question of numerosity requiring judicial consideration. Generally, the number of potential class members will be large enough to make presumptive joinder by class certification more cost-effective than relying on the claims market. In contrast to class action aggregation subject to individual opt-out, under market aggregation, competing plaintiffs' attorneys solicit prospective plaintiffs in order to amass common claims in large groups (or "inventories") for common question representation. This competition creates duplicative costs, and in contrast to class counsel publicly soliciting claims armed with a court-decreed "work product patent," competing plaintiffs' attorneys facing the prospect of free-riding will restrict the content they will publicize to acquire claims and limit their overall investment well below the common defendant's.

Similarly, though class certification depends on the existence and predominance of "questions of law or fact common to the class," FED. R. CIV. P. 23(a)(2), rarely would courts be called upon to verify satisfaction of these conditions. First, the existence of such questions—common questions, the elucidation and resolution of which benefit from the scale efficiencies of classwide investment—is virtually always obvious on the face of a complaint charging a government or business with systematically creating sanctionable risks or injuries. *See, e.g., Amgen Inc. v. Conn. Ret. Plans & Trust Funds*, 133 S. Ct. 1184, 1194 (2013) (recognizing commonality from the face of a securities complaint and noting that "Rule 23 grants courts no license to engage in free-ranging merits inquiries at the certification stage"). Second, the condition can be readily satisfied for purposes of the class counsel solution because it contemplates only individual arbitration trials and therefore does not implicate the need for a stricter test of common question predominance to assure the efficiency, manageability, and cohesion of class interest in classwide trials. Third, there is no need to apply the condition at all in certifying a class action pursuant to our proposal because in the absence of common questions, there would be no profit from, and hence no motivation to seek, the post of class counsel.

### 3. The Failure of Market Alternatives

There are but two means by which plaintiffs can obtain representation with a classwide stake within the constraints imposed by *Concepcion*: the class counsel solution and the private marketplace for legal services. But leaving plaintiffs to the claim-aggregation market for legal representation is an inadequate and extremely costly means of addressing *Concepcion's* pro-defendant bias. The class counsel solution, by comparison, completely negates the bias while producing social savings rather than costs. In essence, the proposal affords the very classwide legal representation that rational plaintiffs would seek and, assuming the impractical, would obtain in the marketplace to overcome *Concepcion's* bias. The only difference between the two modes of "voluntary joinder" is that the market requires a costly miracle to eliminate the bias, while the class counsel solution achieves this result automatically and without costs.<sup>83</sup>

For many types of common question litigations, a few leading plaintiffs' attorneys compete to acquire large shares of claims (often referred to as "inventories") to create the aggregate stake and incentive for making a corresponding investment in developing the common question case against the defendant.<sup>84</sup> The impetus to aggregate claims stems from both the natural quest for profitable returns from scale efficiencies and the recognition that, without the aggregate investment incentive, litigating common questions against a defendant with a classwide stake is a hopeless

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83. Our analysis applies to all class action alternatives that depend on the market to aggregate claims, notably including the use of collateral estoppel for offensive issue preclusion. Thus, under the collateral estoppel regime, without some heretofore undiscovered means by which the market can aggregate claims as cheaply and completely as class counsel, the defendant investing to maximize its aggregate defense stake will overmatch the first plaintiff who will only invest to maximize the value of his or her specific claim. For a comparison of collateral estoppel and class action, see David Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market* (Harvard Law Sch. Pub. Law, Research Paper No. 044, John M. Olin Ctr. for Law, Econ., & Bus., Discussion Paper No. 394, 2002), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=354100](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354100).

84. See Erichson, *supra* note 77, at 383–84, 388–89 (describing how competing attorneys form ad hoc arrangements to cooperatively prosecute common questions claims); Hay & Rosenberg, *supra* note 7, at 1380 n.8 (recognizing that in mass tort litigation, groups of plaintiffs' attorneys compete for market shares of claims); Peter H. Shuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 CORNELL L. REV. 941, 952 (1995) (noting the "high degree" of informal coordination among plaintiffs' attorneys); STEPHEN J. CARROLL ET AL., RAND CORP., ASBESTOS LITIGATION 23–24 (2005), available at [http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND\\_MG162.pdf](http://www.rand.org/content/dam/rand/pubs/monographs/2005/RAND_MG162.pdf) (finding that the asbestos litigation has been prosecuted for decades mainly by a handful of large, competing law firms, each with inventories comprising thousands of claims).

venture. Some have suggested that this claim-aggregation market can solve problems of asymmetric investment incentives, such as those created by the *Concepcion* bias in the individual arbitration process.<sup>85</sup>

Leave-it-to-the-market prescriptions admit the existence and seriousness of pro-defendant bias (though often only implicitly), but they fall far short of solving the problem and, in many cases, can make matters much worse. High costs, long delays, and other basic defects prevent the market from efficiently—or virtually ever—producing a plaintiff-side stakeholder with classwide investment incentive equivalent in scope to a common defendant's; indeed, the market's burdens and failings amplify the impact of the defendant's biased investment advantage. Our proposal is a superior alternative because it achieves (presumptively, given opt-out and intervention) what the market cannot provide: universal and immediate voluntary joinder of the common question claims.

Although market forces can generate large inventories, each comprising a sizable but far from dominant market share of the claims, such voluntary joinder comes at a high price. Searching for, soliciting, evaluating, and acquiring common question claims entails substantial outlays. Consequently, claims with relatively small amounts in controversy, especially when the claims accrue in different jurisdictions and time periods, will likely yield an insufficient *aggregate* return to attract attorney investors. Competition among lawyers compounds these costs.<sup>86</sup> In vying for greater market share of claims, the competing lead lawyers will largely duplicate efforts and expenditures as each prepares and prosecutes parallel cases on the common questions.<sup>87</sup> The common defendant's (biased) classwide investment advantage will surely motivate these attorneys to coordinate their activities. They will share information, though

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85. See, e.g., Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 762 (2002).

86. See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 908 (1987). Competition among plaintiffs' attorneys has become increasingly fierce as markets for their services have shrunk. See, e.g., Brian Cheffins et al., *Delaware Corporate Litigation and the Fragmentation of the Plaintiffs' Bar*, 2012 COLUM. BUS. L. REV. 427, 466–67 (2012) (attributing the rise of non-Delaware suits against directors of companies incorporated in Delaware to increased competition among plaintiffs' attorneys specializing in securities and corporate governance litigation).

87. From the 1970s through 2002, asbestos litigation, the longest running mass tort case in U.S. history, cost \$70 billion in attorney fees and expenses. Defendants paid net compensation of \$30 billion to plaintiffs (before recovery by insurers on subrogation claims), and thus consumed roughly \$1.40 in overhead for every \$1 in recovery by a plaintiff. See Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899, 1922–24 (2002); CARROLL ET AL., *supra* note 84, at xxvi–xxvii.

rarely will it involve anything of particular value or importance; attorneys will hold their best cards close in hopes of winning a competitive edge. Arrangements among rivalrous attorneys to pool claims and possibly to centralize investment in developing aggregate work product are costly to organize and manage, particularly when it comes to negotiating and enforcing agreements that allocate the burdens and benefits of the enterprise, including the need to monitor for shirking, information leaks, and defections.<sup>88</sup>

In addition to these transaction costs, a major barrier to effective collective action is free-riding. Much of the leading lawyers' work product will fall into the public domain by way of publicly disseminated trial records and published formal opinions.<sup>89</sup> Though information does not flow quite as freely with arbitration, the prospect of free-riding still creates a first-mover disadvantage that reduces the amount and value of the information produced.<sup>90</sup> When competitors co-opt expensive work product, lawyers will expect a smaller return and have less incentive to invest; those otherwise motivated to invest may instead hold back in order to capitalize on the fruits of others' labor.<sup>91</sup> Free-riding and other related costs prevent competing plaintiffs' attorneys from collectivizing their claim holdings and centralizing their investment decisions on the scale and with the degree of coherence required to blunt the defendant's classwide investment advantage.

It might be supposed that free-riding could over time produce more optimal investment; the free-rider could spend some of the "savings" from appropriating others' work product to build the plaintiff's case beyond the point where the original investor's incentives ran out, where the marginal cost exceeded marginal return.

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88. Defendants may seek to undermine these arrangements, for example, by creating freely accessible discovery depositories to decrease the value of costly cooperation and by making differentiated settlement offers that account for a lawyer's relative trial experience and prowess to heighten conflict and competition among the attorneys.

89. Arbitrators increasingly rely on arbitral precedents—case records, orders, and awards—in making their decisions. See generally Jeffery P. Commission, *Precedent in Investment Treaty Arbitration: A Citation Analysis of a Developing Jurisprudence*, 24 J. INT'L ARB. 129 (2007) (reviewing the value and precedential role of tribunal cases, awards, and orders in investment treaty arbitration); Gabrielle Kaufmann-Kohler, *Arbitral Precedent: Dream, Necessity or Excuse?*, 23 ARB. INT'L 357, 362–69 (2007) (analyzing arbitrators' incentives to rely on past awards in international commercial arbitration, sports arbitration, and international investment arbitration). However, the motivation of an arbitrator to make a decision publicly accessible is subject to the counter pressure of potential appropriation of this work product by competing arbitrators. See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 248–50 (1979).

90. On the effect of free-riding in deterring first-mover investment, see Michael Abramowicz & John F. Duffy, *Intellectual Property for Market Experimentation*, 83 N.Y.U. L. REV. 337, 354–63 (2008).

91. See Coffee, *supra* note 86.

Because the free-rider got a costless head start, one might think it could convert those savings into additional investments that aid the plaintiffs' common question case. Yet free-riding, even unimpeded and costless—never close to the case in reality—will not lead to such accretive investments. If a marginal investment is not worthwhile for the original investor to make, it is similarly not economical for the free-rider, even though he or she spent nothing to get to that same decision point.<sup>92</sup> Free-riding cannot solve, and often will exacerbate, the *Concepcion* bias.

To be sure, our proposal entails some of the same types of transaction costs that exist when the market provides individual representation. In particular, class counsel must expend resources to identify and notify class members and then obtain agreement and cooperation from each in order to prosecute the arbitration claims in individual arbitrations. Plaintiffs then must spend time and effort deciding to participate and supplying needed information. Class counsel will strive to cut these costs efficiently, at least matching the best practices of the leading lawyers in the market. Thus, driven to maximize return on investment, class counsel will, like his or her market counterparts, develop innovative means for reducing overhead through streamlining and routinizing contacts with plaintiffs. These methods may include soliciting clients over the internet, not only through advertisements but also indirectly via politically and socially minded third-parties publicizing the defendant's alleged wrongdoing and the need for filing claims to achieve deterrence and compensation.<sup>93</sup> By using class counsel, plaintiffs will only incur these transaction costs once, unlike in the market, which magnifies costs by encouraging duplication of effort in hunting for and managing large "inventories" of clients.

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92. This point is one of the most important developed in Rosenberg & Spier, *supra* note 7, at 21–25.

93. After *Concepcion*, plaintiffs' attorneys used a website to build an inventory of roughly 1,000 potential arbitration claims to file individually against AT&T in an attempt to block a proposed merger. See FIGHT AT&T'S TAKEOVER OF T-MOBILE, <http://www.fightthemerger.com> (last visited Mar. 19, 2013); see also Martha Neil, *After Supreme Court Win Forcing Customers to Arbitrate, AT&T Now Sues to Stop the Arbitration*, A.B.A. J. (Aug. 17, 2011, 2:03 PM), [http://www.abajournal.com/news/article/after\\_supreme\\_court\\_win\\_requiring\\_customers\\_to\\_arbitrate\\_att\\_now\\_tries](http://www.abajournal.com/news/article/after_supreme_court_win_requiring_customers_to_arbitrate_att_now_tries). Although indicative of the potential for soliciting claims over the internet, the plaintiffs' arbitration claims did not suffer from *Concepcion* bias, as they involved a formally centralized cause of action for classwide injunctive relief, not individual damages. Unamused, AT&T was suddenly less excited about the prospect of individual arbitration. See Complaint for Declaratory and Injunctive Relief at 2, *AT&T Mobility LLC v. Gonnello*, No. 11CIV5636, 2011 WL 3565070 (S.D.N.Y. Aug. 12, 2011) (“[D]efendants and the other claimants intend to ‘use AT&T’s own Arbitration Agreement’ against ATTM by filing ‘thousands’ of copycat consumer arbitrations seeking identical, classwide relief: a blanket injunction prohibiting ATTM from completing its \$39 billion merger with T-Mobile USA, Inc.”).

The collective action advantages of the class counsel solution should enable it to address these transaction costs better than the claim-aggregation market, the only alternative remaining after *Concepcion*.<sup>94</sup> Vast savings will accrue immediately because class members can rely on an informed judicial determination of the attorney best qualified to provide them with effective representation in their individual arbitrations. Our proposal will also enhance plaintiffs' ability to secure representation. Motivated by the class-wide stake, class counsel will exploit far greater scale efficiencies for more cost-effective results than attorneys in the market could muster from their respective fractional stakes. These efficiencies should

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94. Indeed, our proposal may well prove superior in this regard to class action, which of course *Concepcion* renders generally unavailable in arbitration. See 131 S. Ct. 1740, 1751 (2011). Class action does not eliminate individual representation and its costs. Thus, in typical class actions, class counsel's aggregate fee is conditioned on ultimately establishing liability and damages for each class member on an individual basis. See generally David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871 (2002) (arguing against using a "unified judgment" to resolve class actions and for decoupling classwide determination of liability and damages for deterrence purposes from the distribution of the aggregate recovery for compensation purposes). Courts have developed various decoupling methods for cutting the costs of individual representation in class actions. These strategies included the use of random sampling, generalized proof, or formulas to assess aggregate liability and damages. *Id.* at 1893, 1917–18. Courts also pursued "workers compensation" type schemes for distributing aggregate damages among class members (while avoiding deterrence diluting effects) by invoking *cy pres* or fluid recovery rules to pay the typically large unclaimed balance to third parties rather than back to the defendant. See, e.g., *In re Folding Carton Antitrust Litig.*, 744 F.2d 1252, 1271 (7th Cir. 1984). But these methods have been called into serious question by the Supreme Court. See *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011) ("The Court of Appeals believed that it was possible to replace [individual district court] proceedings with Trial by Formula. . . . We disapprove that novel project."); see also *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231–32 (2d Cir. 2008) ("When fluid recovery is used to permit the mass aggregation of claims, the right of defendants to challenge the allegations of individual plaintiffs is lost, resulting in a due process violation.").

Moreover, *Dukes* also casts doubt on determining the defendant's liability and damages in the aggregate, deferring questions of individual causation, impact, and damages to a discrete stage of mini-trials and the like. The Court suggested not only that plaintiffs' prima facie case required a showing of classwide injury to minimize, if not eliminate, the need for determinations of individual harm, but also that this showing must be made at the pre-certification stage, all but eliminating the previously well-established, albeit relatively minor, benefit from structuring class actions so as to contingently avoid the transactional costs of individual representation in the event the defendant prevails at classwide trial of the common questions. See, e.g., *Dukes*, 131 S. Ct. at 2550–552 (insisting that courts undertake searching pre-certification scrutiny of the putative class members' individual circumstances to verify that all have suffered some injury due to the defendant's alleged wrongdoing and thereby assure that common questions will yield common answers); see also *In re Hydrogen Peroxide Antitrust Litig.*, 552 F.3d 305, 311–12 (3d Cir. 2008). For arguments opposing this trend in decisions as imposing arbitrary and socially irresponsible constraints on the availability of class action, see generally Campos, *supra* note 7; David Rosenberg, *Collectivising Private Enforcement of Antitrust Law: A Reform Proposal for the United States and Possibly Beyond*, 3 GLOBAL COMPETITION LITIG. REV. 11 (2010).



substantially improve solicitation and communication among class counsel and plaintiffs.

Further, class counsel's contact with class members will occur under the legitimizing aegis and imprimatur of federal court orders convening the class action and implementing our proposal. Instead of evaluating and choosing from among a confusing array of competing attorneys, class members would hear the single, judicially approved voice of class counsel. Moreover, conveying the formal indicia of judicial sanction and oversight, these communications will be imbued with attributes of authority and authenticity that should encourage plaintiffs to seriously consider responding favorably to class counsel's overtures and requests.<sup>95</sup>

Class counsel in effect possesses an exclusive patent on acquiring and representing the entire class of claims. Plaintiffs thus gain investment-incentive parity without incurring the market's organizational costs, including those from free-riding as well as the dead weight social loss from attorneys' duplicative efforts. Indeed, the principal organizational process entailed by our proposal—courts appointing and awarding fees to class counsel—adds social benefit at no significant cost.

### III. CONSISTENCY WITH EXISTING FEDERAL LAW

Our proposal can be implemented immediately under existing federal law—the FAA, as interpreted by *Concepcion*, and Rule 23. Affording plaintiffs the advantages of class counsel's ability to marshal their pooled legal resources against the common defendant serves the Rule 23 goal of providing plaintiffs with effective assistance of counsel and coheres with the aim of the FAA, as interpreted by *Concepcion*, to allow them access to the efficient procedures of individual arbitrations.

This conclusion springs from analysis of the terms of these provisions but also from recognition of their complementary contributions to the shared end of fostering and enhancing the legal options of prospective plaintiffs to vindicate their rights. Rule 23 overcomes the collective action barriers that prevent plaintiffs from

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95. Class counsel should benefit from the practice in class actions generally, whereby courts relax ordinary restrictions on attorney solicitations with "non-clients" and affirmatively facilitate these and other efforts to obtain class members' informed participation, not only by reviewing and endorsing the solicitations and other communications but also by requiring the defendant to provide names and contact information of potential claimants. To reduce unnecessary cost, courts also permit a class member to "retain" class counsel as his or her individual representative without filling out a lengthy retention agreement, but rather by simply checking a box on a form and supplying any necessary evidentiary documentation.

voluntarily joining together to obtain legal representation capable of negating the pro-defendant *Concepcion* bias.<sup>96</sup> As such, Rule 23 provides plaintiffs with freedom of choice (to associate or not) in selecting legal counsel to prosecute their common question claims. Class members can still opt out, but they also can join together to take advantage of the recovery-maximizing power of centralized, classwide action. The FAA provides plaintiffs with the additional option of streamlined and efficient individual arbitration procedures, which, according to *Concepcion*, operate most cost-effectively in small claim cases.<sup>97</sup> There is no discernible conflict between the two regimes. Our proposal advances both the public policies and fundamental constitutional norms animating Rule 23—that plaintiffs should be free (or at least as free as defendants) to select and organize their legal representation to vindicate their claims of right—and the FAA policies promoting the procedural efficiency of arbitration.<sup>98</sup> In providing plaintiffs with effective assistance of counsel to make their case, unconstrained by the *Concepcion* bias but within the framework of the individual arbitration process, our proposal promotes the basic policies of the FAA and Rule 23.

#### A. FAA Compatibility

The policy animating the FAA, as the Court in *Concepcion* emphasized, aims to afford the parties the option of having their dispute resolved by “efficient, streamlined [arbitration] procedures.”<sup>99</sup> The class counsel solution, as we have shown, complements rather than conflicts with this objective. Appointing class counsel to represent plaintiffs in their individual arbitrations is, on its face and in operation, fully consistent with any set of standard (*Concepcion* default rule) or customized arbitration procedures that the parties would elect to govern in their individual arbitrations. The FAA extends no

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96. Class action is thus designed to afford plaintiffs the benefits of voluntary joinder that the market, as a practical matter, fails to produce. Notably, the first prerequisite for certifying any type of class action is that “the class is so numerous that joinder of all members is impracticable.” FED. R. CIV. P. 23(a)(1).

97. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (noting that arbitration is not well suited to large stake claims, let alone class actions, especially because of the lack of the availability of judicial review).

98. It would be surprising, to say the least, for the Court to follow up *Concepcion* by interpreting the FAA to deny plaintiffs in arbitration the basic prerogative they have in every other domain of the legal system to freely choose their own counsel, whether by class action or other lawful means.

99. 131 S. Ct. at 1749 (“The point of affording parties discretion in designing arbitration processes is to allow for efficient, streamlined procedures tailored to the type of dispute.”).

preemptive force to dictate what legal representation, if any, plaintiffs can obtain; it does not override statutes of a majority of states that specify that parties have the right to be represented by an attorney in arbitration.<sup>100</sup> As arbitration codes recognize, the opportunity to be represented by an attorney is a central, defining attribute of arbitration so important that it may not be waived before a controversy arises.<sup>101</sup> Representation by counsel is part and parcel of the arbitral procedures protected by the FAA. As evidenced by its text and history as well as its basic design, the FAA addresses the procedural structure of the arbitral adjudicative process,<sup>102</sup> not the lawyer who appears for the plaintiff, not the professionally sanctioned relationship between the lawyer and other similarly situated plaintiffs, and surely not the lawyer's capacity to effectively represent his or her clients' interest by preventing the defendant from stacking the procedural deck against them in individual arbitrations.<sup>103</sup>

To the contrary, the Court has consistently read the FAA as containing a basic requirement that arbitration processes must not operate to prevent plaintiffs from effectively making their case under the governing substantive law. In *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,<sup>104</sup> the Court held that the FAA endorsed the arbitration of federal claims, "so long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum," to ensure the substantive law would "continue to serve both its remedial and deterrent function."<sup>105</sup> In applying the FAA, the majority stressed that, "[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by [a] statute."<sup>106</sup> By correcting for a process slanted in the defendant's favor, the proposal directly furthers this primary purpose.

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100. See, e.g., UNIF. ARBITRATION ACT § 16 (2000) ("A party to an arbitration proceeding may be represented by a lawyer.").

101. See *id.* § 4(b)(4).

102. See, e.g., *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985) (recognizing that, in agreeing to arbitrate, a party only "trades the procedures and opportunity for review of the courtroom for the simplicity, informality, and expedition of arbitration").

103. Without developing the point here, we note that *Concepcion's* reading of the FAA indicates that arbitrators may exercise rule-making discretion to adjust the procedures, including by adopting the class counsel solution, to correct the *Concepcion* pro-defendant bias.

104. 473 U.S. 614.

105. *Id.* at 637.

106. *Id.* at 628; see also *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 28 (1991) (affirming that arbitration is not merely a means for resolving private grievances, but serves to "further broader social purposes" of the substantive law, such as the ADEA policies involved, a function it can perform only so long as the arbitral procedures assure that "the

The Court has made clear that this fundamental FAA principle of supporting underlying private rights and public interests protected by the substantive law applies regardless of whether the process either by design or unintentionally precludes plaintiffs (and presumably defendants) from effectively vindicating their claims of right. Thus, in *Green Tree Financial Corp.-Alabama v. Randolph*,<sup>107</sup> the Court posited that even neutral rules that formally burden each party equally can lack FAA sanction when, for example, “large arbitration costs . . . preclude a litigant . . . from effectively vindicating her federal statutory rights in the arbitral forum.”<sup>108</sup>

Most importantly for the present analysis of *Concepcion*, the *Green Tree* Court indicated that to the extent an arbitration procedure prevents plaintiffs from effectively vindicating their claims, courts, state legislatures, and arbitrators may impose a corrective condition for enforcement of the arbitration agreement so long as the procedural fix is consistent with the nature and purposes of arbitration.<sup>109</sup> A good example of such a corrective is the cost-shifting rule that is a standard component of the procedural code governing consumer arbitrations.<sup>110</sup> Thus, had the plaintiff in *Green Tree* demonstrated the existence of prohibitive costs, the Court seemed prepared to uphold the lower court ruling that effectively conditioned the arbitration agreement’s enforcement on the defendant’s willingness to shoulder costs that prevented plaintiff from effectively vindicating the federal claim involved.<sup>111</sup>

Seen in this light, *Concepcion* stands for the narrow, well-established proposition that courts, state legislatures, and arbitrators may not implement a public policy that imposes a corrective condition

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prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum” (quoting *Mitsubishi Motors Corp.*, 473 U.S. at 637)).

107. 531 U.S. 79 (2000).

108. *Id.* at 90.

109. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1748 (2011).

110. See AM. ARBITRATION ASS’N, CONSUMER DUE PROCESS PROTOCOL princ. 6, Reporter’s Cmts. (2012), available at <http://www.adr.org/aaa/faces/rules/codes> (“The consensus of the Committee was that if participation in mediation is mandated by the ADR agreement, the Provider should pay the costs of the procedure, including mediator’s fees and expenses.”); see also *Green Tree*, 531 U.S. at 95 & n.2 (Ginsburg, J., concurring in part and dissenting in part).

111. 531 U.S. at 90–91 & n.6. *Green Tree* found the risk of such costs “too speculative to justify the invalidation of an arbitration agreement,” noting in particular that the standard cost-shifting procedure in consumer arbitrations might well apply to solve the preclusive-cost problem in the plaintiff’s case. *Id.* Without offending the FAA, recent courts have found unconscionable arbitration agreements that included prohibitive cost-shifting arrangements. See, e.g., *Barras v. Branch Banking & Trust Co. (In re Checking Account Overdraft Litig. MDL No. 2036)*, 685 F.3d 1269, 1276–82 (11th Cir. 2012); *Hall v. Treasure Bay Virgin Islands Corp.*, 371 F. App’x 311, 313–14 (3d Cir. 2010).

on enforcement of an arbitration agreement if the corrective conflicts with the essential attribute of the arbitration process as an efficient mode of dispute resolution.<sup>112</sup> In *Concepcion*, the Court did not question California's public policy objective of assuring access to court or arbitration for consumers with claims for small losses arising from the terms of adhesive contracts.<sup>113</sup> The Court instead rejected the corrective condition for enforcing arbitration agreements—class arbitration—as preempted by the FAA. It concluded that “the switch from bilateral to class arbitration sacrifices the principal advantage of arbitration—its informality—and makes the process slower, more costly, and more likely to generate procedural morass than final judgment.”<sup>114</sup> But the Court was most concerned that defendants would be discouraged from agreeing to arbitration in the first place if they faced the prospect of class arbitration with its “‘in terrorem’ settlement[ ]” pressures of classwide trial.<sup>115</sup>

The class counsel solution poses no such risk; indeed, as we have shown, it will further the objective of arbitration by providing an efficient, streamlined process for plaintiffs and defendants to effectively vindicate their common question claims and defenses. Unconstrained by the *Concepcion* bias, class counsel will be able and motivated to make a stronger case on the common questions than would a lawyer proceeding independently—in reality an absolutely stronger case because there would be no case under the *Concepcion* bias—and class counsel will do so *within the agreed upon or default procedures for the individual arbitration*. Like all plaintiffs' attorneys, class counsel must abide by the governing procedures.

The class counsel proposal preserves the process of individual arbitrations mandated (in the absence of express agreement by the parties or congressional directive to the contrary) by *Concepcion*. Class counsel eliminates *Concepcion*'s pro-defendant bias, enabling plaintiffs to effectively vindicate their claims in individual arbitrations, which may take place exactly as specified in the arbitration agreement. Because the proposal solves the problem of pro-defendant bias without adversely affecting the arbitration process, it provides a consistent, and needed, complement to *Concepcion*'s mandate for individual arbitrations.

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112. See *Concepcion*, 131 S. Ct. at 1751.

113. See *id.* at 1746.

114. *Id.* at 1751.

115. *Id.* at 1752.

### B. Rule 23 Compatibility

Non-mandatory class action principally aims to remedy collective action problems and market failures that prevent numerous plaintiffs from voluntarily aggregating their individual stakes into a collective classwide stake that will motivate their attorney (class counsel) to invest optimally in making the best case against the defendant on common questions.<sup>116</sup> By doing so, class action eliminates the pro-defendant bias that arises when an individual plaintiff with investment incentives limited to the personal stake in the outcome of his or her claim is pitted against the defendant with investment incentives in the classwide outcome of all claims. Even though the class counsel solution does not authorize classwide trial, by promoting voluntary joinder it brings the same bias-busting effects to individual arbitrations. Despite the lack of classwide trial, Rule 23(b)(3) accommodates and can be used to effectuate our proposal.

Nothing in the Rule's requirements precludes courts from implementing our solution to *Concepcion's* bias by certifying a class of arbitration claimants to appoint class counsel who will represent class members in their respective individual arbitration trials. In particular, the Rule does not, by its purposes or terms, either expressly or implicitly, stand against appointment of class counsel to represent class members in their individual arbitrations rather than in a classwide judicial or arbitral trial.<sup>117</sup> Quite to the contrary, the policy "at the very core of"<sup>118</sup> Rule 23 seeks to enable "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'"<sup>119</sup> "by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor."<sup>120</sup> The crucial role of Rule 23(b)(3), as the Court in *Amchem* explained, is vesting class counsel with the classwide stake and corresponding investment incentives.<sup>121</sup>

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116. See *supra* Part I.B.

117. Nor does Rule 23(b)(3) restrict class counsel to representing class members in federal court as opposed to litigating their common question claims in some other forum, for example as when the federal court certifies certain questions for determination by a state or administrative agency on grounds such as abstention, exhaustion, or deferential comity.

118. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

119. *Id.* (quoting Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969)).

120. *Id.* (quoting *Mace*, 109 F.3d at 344).

121. See *id.*; see also Campos, *supra* note 7, at 773-74.

Appropriately, the Court did not suggest any need for classwide trial to accomplish this purpose.<sup>122</sup> Indeed, *Amchem* held that Rule 23 does not even require that class certification be intended for trial at all—classwide, judicial, or otherwise.<sup>123</sup> To be sure, the Court focused on classing claims for small recoveries—without excluding cases with higher stakes from the Rule’s purview—but these are precisely the type of claim for which the Court in *Concepcion* mandated individual arbitrations.<sup>124</sup>

Amid atmospheric hostility to class action, the Court’s reaction to the risk of “in terrorem” settlement pressures has placed the traditional Rule 23 class action in a precarious position.<sup>125</sup> Reading Rule 23 to authorize appointment of class counsel to conduct individual trials in court, or, as we propose, in arbitration, could perpetuate the purpose of the traditional class action; assigning class counsel to try class members’ claims in individual trials preserves the consolidating savings of Rule 23 without any “in terrorem” settlement danger. And it achieves the class action’s central purpose of affording plaintiffs’ freedom of choice and association in selecting and

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122. See *id.* at 617–18.

123. *Id.* at 618–21 (finding nothing in the Rule mentioning certification of settlement-only class actions in which the parties disavow all trials, but observing that nonetheless this “has become a stock device” and deciding to follow “all Federal Circuits [in] recogniz[ing] the utility of Rule 23(b)(3) settlement classes”). Rule 23’s silence on questions of trial organization and management, rather than implying a restrictive reading, has been taken to encourage judicial innovation and experimentation pursuant to the broad grant of discretion in Rule 23(d) authorizing trial judges to “issue orders that . . . determine the course of proceedings.” FED. R. CIV. P. 23(d)(1). Thus, despite the lack of express authorization, courts employ sampling, both random and non-random. See, e.g., *Barnes v. District of Columbia*, 278 F.R.D. 14, 20 (D.D.C. 2011) (applying non-random sampling of class members to determine general damages, with both sides selecting up to fifteen class members); *In re Estate of Marcos Human Rights Litig.*, 910 F. Supp. 1460, 1469 (D. Haw. 1995) (applying random sampling since there are no due process concerns and this will create lower costs than individual trials for all class members), *aff’d sub nom.* *Hilao v. Estate of Marcos*, 103 F.3d 767 (9th Cir. 1996). And it says nothing about class litigation proceeding through mini-trials, another innovation applied by some courts. See, e.g., *Jenkins v. Raymark Indus., Inc.*, 109 F.R.D. 269, 282 (E.D. Tex. 1985) (“If the Class Representatives are successful in establishing that any asbestos-containing products were defective, then the members of the class may return to the particular division and the District Judge to which each underlying suit was originally assigned for consolidated mini-trials of four to ten plaintiffs on the issues of exposure to any products previously found to be defective; any damages legally caused by such exposure; and any comparative fault of each plaintiff in incurring such damages.”), *aff’d*, 782 F.2d 468 (5th Cir. 1986).

124. See *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011) (explaining that arbitration is ill suited for cases involving high stakes).

125. Emblematic of the not-unjustified mood among *Concepcion* Court watchers was Brian T. Fitzpatrick, *Supreme Court Case Could End Class-Action Suits*, S.F. CHRON. (Nov. 7, 2010, 4:00 AM), available at <http://www.sfgate.com/opinion/article/Supreme-Court-case-could-end-class-action-suits-3246898.php> (arguing prior to *Concepcion* that a wrong decision by the Court will end class actions, since companies will always include arbitration clauses with class action waivers in transactional agreements).

organizing their legal representation through counsel vested with the classwide stake needed to overcome the *Concepcion* bias.

### CONCLUSION

Appointing class counsel to represent common question plaintiffs in individual arbitrations efficiently and effectively negates the *Concepcion* structural bias that would otherwise skew individual arbitration outcomes in favor of a common defendant. Our proposal changes only one feature of the current legal landscape: it enables plaintiffs to marshal a classwide investment in developing their best case on the common questions to counter the classwide investment that the defendant would otherwise make, one-sidedly and overwhelmingly, against each plaintiff. The class counsel solution to *Concepcion*'s bias is thus fully compatible with the FAA and its mandate for individual arbitrations. In compliance with *Concepcion*, the class counsel solution does not entail class arbitration or any changes in the individual arbitration process that would conflict with its essential mission of providing contracting parties with an efficient, streamlined procedural scheme for resolving their disputes. Our proposal also coheres with Rule 23(b)(3) (and its state analogs).<sup>126</sup> Designed to provide class members with class counsel representation in their individual arbitrations, the proposal truncates the process for certifying class actions, requiring only that courts decide on the candidate for class counsel best qualified to marshal the classwide investment to maximize recovery by class members in their individual arbitrations.

Our proposal is no panacea. The class counsel solution eliminates the *Concepcion* bias, but because it achieves this result in a manner consistent with the mandate for individual arbitrations, it cannot avoid transactional litigation costs endemic to individual representation. Thus, class counsel and class members alike will bear costs related to initiating and prosecuting common question claims on an individual basis. In particular, class counsel must expend resources to identify, enlist cooperation from, and obtain

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126. Though the proposal wholly conforms to the existing Federal Rules, an amendment could ensure consistent implementation across the nation's federal courts. The Judicial Conference of the United States could suggest amending the Rules to provide explicitly that federal courts could certify a class in order to appoint class counsel that would represent class members in individual court or arbitration trials. See 28 U.S.C. § 331 (2006). However, this route to reform may run into roadblocks erected by the Rules Enabling Act. See 28 U.S.C. § 2072 (2006). Congress could legislate alternative methods of providing such class counsel representation for judicial and arbitration resolution of common question litigation. States might revise rules to allow a similar solution in state proceedings.



relevant documents and other information (e.g., sales receipts) from each plaintiff, while the class member must spend time and energy to make informed decisions and comply with counsel's requests.<sup>127</sup> How great these transaction costs will be for any given case is hard to say. The market, however, is not a practical alternative. As we have shown, it will fail to solve the *Concepcion* bias and generally will operate at considerably greater cost than would our proposal. Yet, when, as in *Concepcion*, many thousands of widely dispersed plaintiffs present claims for small amounts of individual loss, these transactional litigation costs can severely limit and even thwart class counsel's efforts to aggregate the plaintiff-side stake, thereby handing the defendant a largely unmitigated classwide investment advantage to vanquish plaintiffs at trial and deter lawyers from applying for the post of class counsel.

Even in the absence of its pro-defendant biasing effects, *Concepcion* nonetheless works a socially problematic transformation of the system for private enforcement of the law. It continues a trend in the Court's recent rulings, which have vastly expanded the scope of FAA preemption<sup>128</sup> and greatly narrowed the availability of both class actions<sup>129</sup> and civil liability more generally.<sup>130</sup> It is difficult to credit the ostensible rationale of these lines of decision as simply aimed at reducing the procedural costs of civil litigation. No one could reasonably believe that such saving may be garnered, for example, by resolving the small sum claims in *Concepcion* through thousands or tens of thousands of individual arbitration hearings involving redundant production requests and depositions and the duplicative efforts of different lawyers, experts, and arbitrators. Rather, this fantastical vision of the individual arbitration process in action strongly suggests that the purpose of the Court's rulings is to achieve what they will do in fact: throttle common question litigation across the board, and, in particular, render small sum common question claims—arising from adhesion contracts and the like between individuals and business, government, and other institutions—a virtual nullity.

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127. *Cf. Concepcion*, 131 S. Ct. at 1761 (2011) (Breyer, J., dissenting) ("In California's perfectly rational view, nonclass arbitration over such [small] sums will also sometimes have the effect of depriving claimants of their claims (say, for example, where claiming the \$30.22 were to involve filling out many forms that require technical legal knowledge or waiting at great length while a call is placed on hold).").

128. *See, e.g., Preston v. Ferrer*, 552 U.S. 346, 353, 356 (2008).

129. *See Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 625 (1997); *see also Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561 (2011).

130. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678–81 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

The Court's motivation appears to stem in part from the feeling that plaintiffs (read: plaintiffs' attorneys) are abusing the system, especially by threatening defendants with the "in terrorem" settlement pressures of classwide trial.<sup>131</sup> This danger is asserted without substantiating evidence, but it is also misrepresented analytically as affecting only defendants. Defendants may well be sufficiently risk-averse to settle for more than the expected recovery value of the classed claims to avoid the prospect of liability and damages being determined—*in part*—by a single classwide trial judgment on the common questions. But plaintiffs may likewise be sufficiently risk-averse to settle for less than the expected recovery value of their classed claims rather than face the prospect of liability and damages being determined—*in full*—by such a single classwide trial judgment. Contrary to the Court's one-sided depiction of the problem, classwide trial poses no systematic "in terrorem" settlement effect; both parties are likely to be subject to such pressure, with the party most burdened by risk-bearing cost paying a premium price to avoid classwide trial.<sup>132</sup> Notably, our solution coheres completely with the *Concepcion* Court's policy motivations for reading the FAA to mandate individual arbitrations because class certification for the purpose of appointing class counsel to represent class members in individual arbitrations immediately and entirely eliminates both the bias and "in terrorem" settlement pressures.<sup>133</sup>

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131. The Court also resorts to bumper-sticker superficialities, such as the assertion in *Concepcion* that class arbitration will interfere with the broader individual arbitration system because "there is little incentive for lawyers to arbitrate on behalf of individuals when they may do so for a class and reap far higher fees in the process." 131 S. Ct. at 1750. Nonsense. Lawyers are rational profit maximizers; they seek the highest *net*, not *gross*, return on their investment. The fee in an individual case will surely be less than the fee in a class action. This is so not simply because a 10 percent fee on a \$100 award in a single case will be less than a 10 percent fee on a \$100,000 award in a class action comprising 1,000 such claims. More fundamentally, as we have emphasized, the class action fee will be greater because with 1,000 times more at stake than the plaintiff's lawyer in the individual case, class counsel will have the incentive to make a classwide investment to obtain a classwide recovery, both of which will be greater in whole than the sum of the parts. But, of course, the lawyer's choice to devote a given amount of resources to the class action or to a series of individual actions turns on a net-benefit comparison of relative litigation costs and risks of the alternatives and their consequent expected return. In short, no lawyer will make massive investments of time and money in a risky class action if the expected hourly return from the individual case alternative exceeds that expected from the class action.

132. See Hay & Rosenberg, *supra* note 7, at 1402–04.

133. Some commentators in search of alternatives to class arbitration that provide adequate deterrence and compensation have posited an expansion of state attorney general *parens patriae* powers to prosecute judicial class actions or functionally equivalent actions for collective redress of common question small-loss claims. See e.g., Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623, 675 (2012) ("*Parens patriae* litigation may just be poised for a qualitatively new role

*Concepcion* may also be read as responding to concerns about overuse of the civil liability system. Although the Court again one-sidedly misrepresents the problem as caused by plaintiffs,<sup>134</sup> there is good reason to believe that litigants' private interests will drive them to rationally and in good faith spend more in suing each other than the litigation is worth to society in terms of deterrence and other benefits.<sup>135</sup> But one may be skeptical that the Court possesses the information or the perspective needed to accurately assess and effectively curtail such overuse of the system. In any event, it would be absurd for the Court to argue that its decision in *Concepcion* moves in the right direction by leaving the choice between class and individual arbitration to contract between the prospective litigants. Contract between even the most sophisticated private parties will generally capture too little of the social benefit to optimally produce public goods such as deterrence.<sup>136</sup> And, by the Court's own admission, *Concepcion's* individual arbitration mandate targets precisely the *Concepcion*-type case: numerous consumers, employees, or similar non-commercial individual plaintiffs suing on claims arising from adhesion contracts involving small losses. These cases do not involve pre-dispute contracts between sophisticated repeat-players. Doubtless, the prospective plaintiffs "agreed" to no-class arbitration clauses in such cases not merely without reading them, but without having the means or even an

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in the enforcement landscape."). But such suits cannot eliminate the defendant's biased investment advantage in common question litigations involving alleged wrongdoing spanning multiple states. Nor can such suits address the Court's concerns about the "in terrorem" settlement pressures of classwide trial judgments on defendants; indeed, they only reproduce them. Moreover, state attorney general actions would be subject to myriad public-choice encumbrances, such as government resource constraints, slack performance by salaried state employees, agency imperialism, political conflicts of interest between state agencies, and the danger of state agent capture by or of regulated parties. See FRED S. MCCHESENEY, MONEY FOR NOTHING: POLITICIANS, RENT EXTRACTION, AND POLITICAL EXTORTION (1997); Daryl J. Levinson, *Empire-Building Government in Constitutional Law*, 118 HARV. L. REV. 915 (2005); see also Margaret H. Lemos, *Aggregate Litigation Goes Public: Representative Suits by State Attorneys General*, 126 HARV. L. REV. 486, 487 (2012) ("[F]ar from solving the problems that scholars have emphasized in the class action context, the fact that the attorney general may be an elected official should provide cause for heightened concern.").

134. This may explain *Iqbal*, 556 U.S. 662, in which there was little prospect that the government would settle weak claims.

135. See generally Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997) (discussing the disconnect between the incentives and costs of litigation for private parties and society).

136. We are not questioning the potential social utility of pre-dispute arbitration contracts between commercial parties. See Bruce L. Hay, Christopher Rendall-Jackson & David Rosenberg, *Litigating BP's Contribution Claims in Publicly Subsidized Courts: Should Contracting Parties Pay Their Own Way?*, 64 VAND. L. REV. 1919 (2011) (noting that eliminating the public subsidy for using courts would lead commercial parties to optimally choose between judicial and arbitral resolution of their contract disputes).

economically rational reason to devote time to divining their significance. Prospective institutional defendants may well know whether exposing themselves to class or individual arbitration promotes the joint private (not public) interests of the contracting parties in minimizing the sum of accident costs. But given that this choice determines whether they can exploit the *Concepcion* bias and otherwise shield themselves from liability for wrongdoing, it surely is capricious for the Court to decide (based on the attribution of a perverse intention to Congress) that such deeply conflicted parties should have the final say over their own legal accountability.

For all of its faults, *Concepcion* worked its most serious harm by buttressing a pro-defendant bias that undermines enforcement of the vast network of constitutional, statutory, and common law protections designed to promote deterrence, compensation, and other social welfare enhancing policies. As such, *Concepcion* broke a cardinal rule supported by longstanding precedent: agreements to arbitrate future claims shall not undermine the law's social objectives by forcing a party to forgo effective enforcement of his or her substantive claims of right.<sup>137</sup> The socially detrimental repercussions will reverberate through the legal relationships that define contemporary American life, including those between individuals and a host of social goods suppliers like manufacturers, retailers, banks, employers, healthcare providers, and government agencies.<sup>138</sup> For

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137. See *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985). The Supreme Court may further elucidate the "effective vindication" doctrine this Term. See *Am. Express Co. v. Italian Colors Rest.*, No. 12-133 (argued Feb. 27, 2013); see also David Korn & David Rosenberg, *Cruises, Class Actions, and the Court*, 2 U. MICH. J.L. REFORM ONLINE 96, 98 (2013) (considering the case).

138. Recent cases indicate that the potential impact of the *Concepcion* bias reaches well beyond the cell phone contracts involved in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). For cases dealing with contractual claims against cell phone and Internet companies, see *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011); *Pendergrast v. Sprint Nextel Corp.*, 592 F.3d 1119 (11th Cir. 2010); and *Chalk v. T-Mobile USA, Inc.*, 560 F.3d 1087 (9th Cir. 2009). For cases alleging antitrust violations, see *Stolt-Nielsen S.A. v. AnimalFeeds International Corp.*, 130 S. Ct. 1758 (2010) (oceanic shipper) and *Italian Colors Restaurant v. American Express Company (In re Am. Express Merchs'. Litig.)*, 554 F.3d 300 (2d Cir. 2009) *cert. granted, judgment vacated*, 130 S. Ct. 2401 (2010) (credit card company). For cases dealing with marketing deceptions and fraud in the sale of products, see *Reed v. Florida Metropolitan University, Inc.*, 681 F.3d 630 (5th Cir. 2012) (for-profit college); *Mance v. Mercedes-Benz USA, No. CV 11-03717 LB*, 2012 WL 4497369 (N.D. Cal. Sept. 28, 2012) (car manufacturer); *Fromer v. Comcast Corp.*, 886 F. Supp. 2d 106 (D. Conn. 2012) (cable television provider); and *Graham v. Progressive Direct Insurance Co.*, 271 F.R.D. 112 (W.D. Pa. 2010) (insurer). For cases dealing with fraud and deception in financial and other services, see *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440 (2006) (short-term lender); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000) (mobile home financier). And for cases dealing with employment discrimination, see *Jock v. Sterling Jewelers, Inc.*, 646 F.3d 113 (2d Cir. 2011) (jewelry retailers); *Davis v. Nordstrom, Inc.*, No. C 11-3956 CW, 2012 WL 4478297 (N.D. Cal. Sept. 27, 2012) (department store); *D'Antuono v. Service Road Corp.*, 789 F. Supp. 2d 308 (D. Conn. 2011)

many now and for more to come, the *Concepcion* bias will hit home. Short of reversing the course set by *Concepcion*, the appointment of class counsel for individual arbitrations could prevent massive failure of the legal system to adequately enforce federal and state substantive laws.

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(adult entertainment clubs); *Chen-Oster v. Goldman, Sachs & Co.*, 785 F. Supp. 2d 394 (S.D.N.Y. 2011) (investment bank); *Truly Nolen of America v. Superior Court*, 145 Cal. Rptr. 3d 432 (Cal. Ct. App. 2012) (pest control company); and *Wherry v. Award, Inc.*, 123 Cal. Rptr. 3d 1 (Cal. Ct. App. 2011) (real estate brokers).