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Class Actions: To Be or Not to (B)(3)

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CLASS ACTIONS: TO BE OR NOT TO (B)(3)?†

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† After coming up with our title, we discovered that our effort at cleverness had been preceded by Professor Linda S. Mullenix in an article she recently published in the National Law Journal (To (B)(2) or Not to (B)(2)?). We hope the resemblance in titles will not confuse researchers and that our common source would have approved the word-number play in both.

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INTRODUCTION

In addressing the questions aptly presented by the Conference title—"Need for and Structure of a Class Action Rule for Mississippi"—this paper examines several issues facing both Mississippi and federal lawmakers in the wake of recent major reforms to the state's and the nation's civil liability systems. In Mississippi, courts and legislators have greatly restricted the use of joinder rules to aggregate "mass tort," antitrust, employment discrimination, environmental, and other types of multi-claim

"accident" litigations.[1] As a result, Mississippi is now the only state without a class action rule or other formal process for aggregating numerous, similar claims.[2] At the federal level, Congress has recently passed the Class Action Fairness Act, which grants federal courts jurisdiction over most large-scale, interstate aggregate litigations.[3] In effect, both Mississippi and the federal government are grappling with exactly what to do with class actions. Mississippi, however, has the unique opportunity to write a prescription for the future treatment of such cases on a relatively clean slate—a prescription that could pave the way for a more widespread change in the way class action are currently administered. Our analysis of "need" and "structure" for class actions thus takes this opportunity for charting a new course to heart.

Our central conclusion is that the mandatory litigation class action—mandatory both in automatic certification and no opt-out—is the most effective means of dealing with such litigations. To serve civil liability's objectives of enhancing individual well-being, the class action mechanism we propose would decouple liability determination from damage distribution. Accordingly, the first stage of adjudication would decide liability and assess damages in the aggregate. This assures priority for risk reduction (deterrence) and promotes welfare maximization by enabling individuals to avoid harm from reasonably preventable risks. The second stage would, when appropriate, apply standard insurance principles and practices to distribute aggregate damages among class members. Adopting our class action model would put Mississippi on a different path from states that have modeled their class action rules on Federal Rule 23, whose subsection (b)(3) calls for conditional certification and opt-out requirement.[4] We believe, however, that the boldest approach is the best in this case. Mandatory litigation class action, we shall argue, represents the most workable and effective means for implementing the basic policy objectives of civil liability.

We hasten to note that, in lacking comprehensive knowledge and direct experience of the Mississippi system and practice of civil liability, we necessarily consider these questions from an analytic distance. The new

1. *See, e.g.*, American Bankers Ins. Co. of Fla. v. Booth, 830 So.2d 1205 (Miss. 2002).

2. Janssen Pharmaceutica, Inc. v. Armond, 866 So.2d 1092, 1102 (Miss. 2004) (Graves, J., concurring).

3. Class Action Fairness Act of 2005, 109 P.L. 2, 119 Stat. 4 (2005). Under the Class Action Fairness Act of 2005, state class actions can be removed to federal court unless the aggregate amount in controversy is less than $5 million, the case is almost completely localized, or the parties choose to pursue the litigation in the state court. While the Class Action Fairness Act will undoubtedly have a great impact on state class actions, an examination of the legislation is beyond the scope of this paper. Indeed, the Act was signed into law on the day of the Symposium.

Our paper develops an alternative state-based approach to multi-state class actions that has relevance to cases that are not removable or removed under the Class Action Fairness Act and to any future reconsideration of its provisions by Congress. In any case, our arguments for mandatory class action apply to both state and federal class actions equally.

4. FED. R. CIV. P. 23 (2005).

status quo in Mississippi—adjudication of multiple similar claims by disaggregated means of separate, independent actions—might well be regarded as unproblematic by those better situated than we are. Furthermore, we acknowledge that the Class Action Fairness Act,[5] which grants federal courts jurisdiction in most large-scale, interstate aggregate litigations, will likely reduce both the number and magnitude of class actions brought under any rule Mississippi may adopt. Nevertheless, whether applied to relatively "small" class actions (those with an aggregate amount in controversy of less than $5 million) in Mississippi state court, or relatively "large" class actions in federal court, our motivating assumption for this paper remains the same: litigations comprised of numerous similar claims present problems for the civil liability system that call for consideration of a class action solution.

It is also useful to specify at the outset what we regard as the key problems with adjudicating multi-claim litigations in separate, independent actions. Among the most salient surely is that disaggregated adjudication can pervert litigated outcomes, undermining the use of civil liability as an effective means of law enforcement. In particular, disaggregated adjudication impedes the use of civil liability as a means of promoting optimal deterrence (preventing unreasonable risks) and optimal insurance (replacing losses according to severity of harm and need for compensation). This matter is of pressing concern, since suboptimal deterrence and insurance has great consequences on individual well-being and overall social welfare.

The use of civil liability under study governs virtually all risk-taking by mass producers—governments as well as businesses—and hence virtually all civil litigation outside the realm of automobile cases. Litigations involving asbestos, tobacco, Enron, racial discrimination in farm subsidies, Three-Mile Island, and atomic bomb radiation merely exemplify the significant and varied potential for mass production designs and policies to place large populations at greater chance of death, crippling disease and trauma, destruction of livelihood and property, invidious discrimination, fraud, anti-competitive restraints on trade, and other major injuries to legally protected interests. It is crucial to bear in mind, however, that while mass production processes, products, and services generate systematic risk, the ability of businesses and governments to exploit the efficiencies of large-scale, standardized means of production also increases individuals' chances of surviving and prospering in this world of prevalent danger and scarce resources. Indeed, but for the availability of mass production processes and goods, most people in the world would be impoverished or dead.

Courts thus play an important role in the overall effort by the law enforcement system to manage mass production risks. This law enforcement effort consumes trillions of (net) dollars annually in seeking to reduce these risks to reasonable, socially appropriate levels and to insure against hazards that cannot be avoided by reasonable investment in precautions.

5. *See supra* note 3.

Courts, like administrative and executive law enforcers, must strike the balance of benefit and risk from mass production that best enhances individual well-being. In the parlance of civil liability, the objective is to minimize total accident costs, including the costs of precautions, unavoided harm, insurance, and transactions (e.g., administrative and litigation). Even under the most favorable circumstances, this task of marshaling, evaluating, and taking appropriate action upon the relevant information is daunting. The difficulties are evident from the complex questions of natural science, technology, economics and other social sciences, and public policy posed by the typical mass production case.

Take the example of a conventional product liability claim alleging that the safety latch on a car door suffered from a design defect, which resulted in the door opening and the plaintiff being thrown from the car in a collision. The questions the court and jury must resolve are not limited to the basic but hardly simple and uncomplicated inquiry of whether "the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and [that] the omission of the alternative design renders the product not reasonably safe."[6] The decision-maker must also weigh the relative benefits and costs of the product design in question against those of competing designs, regardless of their commercial availability at the time of sale. In addition, the alternative design must be assessed for feasibility and practicality, including whether consumers could afford the costs of additional precautions. And finally, because riskless products are generally unaffordable and often impractical, if not impossible, to use for their intended purposes,[7] adjudication often requires further rationing of social resources by trading off one set of risks against another. In the example, this rationing might involve calculating the point on the margin at which a stronger safety latch lowers risk of occupants being thrown from cars less than it increases the risk of limiting their egress in case of fire.

Moreover, in any given case of a single consumer prosecuting a defective design claim, the court and jury must, by virtue of the unitary nature of mass production designs and policies, determine liability "class-wide." That is, adjudication of the particular case entails applying the benefit-risk analysis to assess the reasonableness of the design for all *prospective* consumers, uses, and conditions in the aggregate. Thus, to the extent we are aiming to improve safety without preempting mass production completely, the determination of civil liability for mass production risk can never be individualized to the particular plaintiff. Rather, it must be based on a judgment that the design as a whole was either unreasonable or reasonable for everyone whose legally protected interests might be affected by it.

6. *See* RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 (1997).

7. *See, e.g.*, RESTATEMENT (THIRD) OF TORTS: PRODUCTS LIABILITY § 2 cmt. a (1998) ("Society does not benefit from products that are excessively safe–for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.").

While often overlooked, this point can be generalized to all cases of mass production risk and must be kept front and center in considering the utility of class actions.

There is substantial doubt concerning whether courts possess the resources to perform these law enforcement tasks effectively. This skepticism about the ability of courts to make "complicated fact-finding and . . . debatable social judgment[s]" recently prompted the Supreme Court to conclude that in enacting ERISA, Congress preempted mass tort-type medical malpractice suits against HMOs, challenging their use of financial incentives to induce physician compliance with the insurer's medical service guidelines.[8] Regardless of whether one shares this rather pessimistic outlook, there should be no gainsaying the need for courts to make every effort to increase the resources available for adjudicating mass production cases. With the civil liability system already allocating hundreds of billions of dollars in social resources annually, not to mention the lives and social welfare that also hang in the balance, it is inconceivable that courts should—by neglect or by sheer profligacy—fail to make needed reforms, let alone continue to work at cross purposes to the ends of law.

In addition to providing social context for the following analysis, we have emphasized problems that call for a class action solution to counter the tendency of some class action critics to minimize the costs of separate, independent adjudication. Some critics dismiss these costs as merely the routine messiness of civil litigation.[9] Others characterize these costs as simply the price we must pay to preserve individual "autonomy," however unreal and self-destructive the choice to sue "solo."[10] Indeed, the choice is stark because the stakes are high. As we conclude, nothing short of complete collectivization of all claims assures that civil liability can accomplish its law enforcement mission of optimally deterring unreasonable risk and, when appropriate, optimally insuring harm from reasonable risk. Part I develops the grounds for this conclusion. It extends the argument by demonstrating that the conclusion holds even if all claims are prosecuted separately or in any combination short of full collectivization. It then goes on to explain why only mandatory class action can secure the optimal degree of collectivization. Finally, the workings of the envisioned mandatory class

8. *See* Pegram v Herdrich, 530 U.S. 211, 220-22 (2000) ("(C)omplicated fact-finding and . . . debatable social judgment(s) are not wisely required of courts . . . . We think, then, that courts are not in a position to derive a sound legal principle to differentiate an HMO like [defendant] Carle from other HMOs.").

9. John A. Siliciano, Mass Torts and the Rhetoric of Crisis, 80 CORNELL L. REV. 990, 998.

10. *See* Richard A. Nagareda, *Autonomy, Peace, and Put Options in the Mass Tort Class Action*, 115 HARV. L. REV. 747, 749-50 (2002) (quoting Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 617 (1997)). As will be discussed further below, *see infra* notes 64–79 and accompanying text, commentators who sing the praises of plaintiff autonomy largely (i) ignore evidence that plaintiffs show a preference for optimally deterring unreasonable risk and compensating harm from reasonable risk over autonomy; (ii) dismiss the fact that exercising plaintiff autonomy via opt-out comes at the price of increased risk to everyone; and (iii) completely disregard the fact that the costs of opt-out are suboptimal deterrence and insurance, both of which leave everyone worse off.

action are elaborated. Proceeding to Part II, we explain why Rule 23, despite supplying a ready template, is a poor class action rule model. Although it provides mandatory collectivization to some extent for cases qualifying for (b)(1) and (b)(2) treatment, Rule 23 creates a substantial enforcement gap by needlessly relegating many cases to separate-action adjudication. We close this part with a discussion of plaintiff "autonomy" and other anti-collectivist objections to mandatory class action and the instrumental uses claimed for opt-out. In Part III we address several core questions bearing on the structuring, operation, and scope of collectivization. In particular, we first argue that class action should be convened automatically and immediately based on the filing of the first, actualized harm claim, encompassing all potential claims, without delay for "maturation" through pre-certification separate actions. Second, we explain why litigation class actions are superior, and in all ways preferable, to settlement-only class actions. Third, we discuss the conditions under which Mississippi should conduct a multi-state class action.[11] And finally, we proffer remedies for the problems (assuming their reality) of "sweetheart" and "blackmail" class settlements.

I. THE NORMATIVE ARGUMENT FOR MANDATORY CLASS ACTIONS

Our argument proceeds from the fundamental premise that the legal system should aim to maximize individual welfare. That is, given that there is no costless way to reduce mass production hazards to zero, the legal system ought to manage this unavoidable risk according to the mode of adjudication an individual would rationally choose in seeking maximum welfare.[12] To discern that preference, we adopt a perspective that puts the individual "behind a veil of ignorance."[13] Aiming to maximize well-being regardless of what fate has in store, the individual rationally chooses the legal system that maximizes welfare by minimizing the sum of accident costs.[14] Specifically, the preferred legal system would employ civil liability

11. Obviously, the Class Action Fairness Act of 2005 has largely eliminated many of the problems Mississippi would face in adjudicating large-scale, multi-state class actions by granting federal courts jurisdiction in most such litigations. However, even "localized" cases (cases where over two-thirds of the class members and the primary defendants are Mississippi residents) may implicate the laws and interests, as well as residents, of other states. Therefore, though the passage of the Class Action Fairness Act of 2005 relieves state courts of most large-scale, multi-state class actions, some such litigations will remain, and thus our arguments as to the need and process for multi-state, including nationwide and, in the appropriate case, international class actions also remains relevant.

12. In deriving the contours of the legal system based on the rational preferences of a single, welfare-maximizing individual, this analysis draws on work developing and applying the "behind the veil of ignorance" perspective in normative theories of individual rational choice. Most notably, see John C. Harsanyi, *Morality and the Theory of Rational Behavior*, 44 SOC. RES. 623 (1977). *See also* CHARLES FRIED, AN ANATOMY OF VALUES: PROBLEMS OF PERSONAL AND SOCIAL CHOICE 204 (Harvard Univ. Press 1970); Ronald Dworkin, *What Is Equality? Part 2: Equality of Resources*, 10 PHIL. & PUB. AFF. 283 (1981); John Rawls, A THEORY OF JUSTICE (Belknap Press 1971).

13. Rawls, *supra* note 12, at 136.

14. Our argument broadens the normative framework developed in Guido Calabresi, THE COSTS OF ACCIDENTS: A LEGAL AND ECONOMIC ANALYSIS (Yale Univ. Press 1970).

to optimally deter unreasonable risk-taking[15] and to optimally insure accident victims once harm materializes. Absolutely essential to this discussion is the realization that the individual would rationally prefer a legal system that prevents unreasonable risk, rather than one that simply compensates for it. We then go on to demonstrate that the only way to achieve optimal deterrence and insurance is through collective adjudication. The third part of this discussion explains why courts must intervene and not leave the process of collectivization to market forces as we presently do. In particular, we argue that courts should apply the mast-tying mechanism of mandatory class action to overcome collective action problems. The fourth and final part of this discussion describes the contours of our proposed mandatory class action mechanism. Our overall conclusion is this: adjudication through mandatory class action is essential to achieving the normative goals of optimal deterrence and insurance, which enhance the well-being of everyone.

A. Behind the Veil of Ignorance

We adopt the perspective of an individual behind the veil of ignorance because sound legal policymaking could not be accomplished otherwise. Since a decision-maker standing behind the veil of ignorance could be anyone with a probability corresponding to the actual demographics of the world to come, the individual's choice of legal system under those conditions of uncertainty will maximize his or her expected welfare by maximizing the welfare of everyone across all states of the world. This behind-the-veil-of-ignorance perspective is thus compelling not only because it is the only decision point for making rational choices that can maximize overall welfare, but also because those choices express common, unprejudiced interests. It is these common, unprejudiced interests—not the self-interested preferences that arise once the future is revealed—that will provide a reliable as well as respected basis for legal policymaking.[16]

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15. Throughout this paper, we define unreasonable risks as those risks that are more costly to bear than to avoid. That is, a risk that imposes $100 of harm and costs $50 to avoid is unreasonable. On the other hand, a risk that imposes $50 of harm but would cost $100 to avoid is reasonable.

16. Some commentators deny the importance of the behind-veil-of-ignorance perspective. *See, e.g.*, Jules L. Coleman, RISKS AND WRONGS 180-81 (Oxford Univ. Press 1992). They do not deny that such a perspective is impartial. Neither do they deny that predicating policy outcomes on individuals' preferences once the future is revealed simply recreates a Hobbesian state of nature, pitting each against all (or more accurately, the lucky against the unlucky). Rather, these critics claim that such a perspective is too hypothetical, too unrealistic. We disagree. As alluded to before, the behind-the-veil-of-ignorance perspective is essential for analyzing legal policy. This is true because it provides a robust critical benchmark against which legal policy can be measured. Indeed, we often want and expect legislators and judges to assume such a perspective because it restrains self-dealing and forces lawmakers to take into account the preferences of all individuals, instead of relying on (or protecting) the interests of the privileged few. Furthermore, the behind-the-veil-of-ignorance perspective is employed on a daily basis by our courts, corporations, and fellow citizens. Courts use it to interpret and enforce contracts; corporations use it to decide how to structure their enterprises; and individuals use it to decide how much insurance to buy. Certainly, there can be little doubt that the behind-the-veil-of-ignorance perspective is not only widely-employed, but also critical to structuring and evaluating our social institutions.

B. Minimizing Total Accident Costs

Having recognized the normative appeal of the behind-the-veil-of-ignorance perspective, we must now decide what that means in terms of selecting a legal system. As we discussed above, this perspective places a single individual behind a veil of ignorance concerning his or her future prospects in a world characterized by scarce resources and accident risks. Essentially, the individual ex ante internalizes the ex post reality of all possible fates (including preferences for and reactions to available options and outcomes) of all possible people. Aiming to maximize well-being no matter what this future has in store, the individual rationally selects a legal system that minimizes the sum of accident costs.[17] Such a conclusion logically flows from the overwhelming evidence that people, though differing in their subjective valuations, prefer to avoid what they respectively deem "unreasonable" accident cost and from the axiomatic proposition that efficient reduction of accident costs increases individuals' net welfare across all possible states of the world. In other words, an individual who wishes to maximize his or her own share of social welfare would rationally choose a legal system that maximizes welfare overall.

To illustrate this point, we use a stylized example taken from a Third Circuit case regarding advertising practices in the insurance industry.[18] Assume that an insurance company that has a total wealth of $10,000 engages in advertising practices that cause ten percent of those who buy their insurance to suffer $100 of harm.[19] Assume further that 100 people purchase the company's insurance and that each individual begins with a total wealth of $100 (for a total wealth of $10,000). Without taking any precautions, the insurance company will impose $1,000 of harm on the purchasers ($100 of harm on 10 purchasers). Total individual wealth (for present purposes, equatable with total individual welfare) will therefore be $19,000 (the company's net worth of $10,000 + the purchasers' net worth of $10,000 - the $1,000 of harm). Ignorant of whether he or she will be the insurer or the insured, the individual standing behind the veil of ignorance internalizes all possibilities: 1/101 chance of having a wealth of $10,000 + 90/101 chance of having a wealth of $100 + 10/101 chance of having a wealth of $0. Thus, the average total wealth of all individuals in all states of this tiny world is

17. Our conception of rationality consists of the three simple axioms that comprise the foundation of rational choice theory—the study of individual choice under conditions of uncertainty and risk that undergirds the basic theories of law enforcement (including general deterrence) and of insurance. *See generally* Harsanyi, *supra* note 12. First, we assume that individuals compare all alternatives consistently, meaning that if A is preferred to B and B is preferred to C, then A is preferred to C. Second, we assume that individuals prefer a lottery with more valuable prizes to a lottery with the same probabilities but in which one or more of the prizes is less valuable. Third, we assume that individuals have continuous preferences, so that a small shift in the value of an outcome would not produce a drastic shift in individuals' valuation of that outcome. These axioms supply the complete basis for proving that individuals will maximize the expectation of their utility—that is, the sum of the utilities corresponding to each outcome weighted by the probability that each outcome will be realized.

18. In re Prudential Ins. Co. of Am. Sales Practices Litigation, 148 F.3d 283 (3rd Cir. 1998).

19. Realize, of course, that a great number of people who actually need insurance will be helped by the practice.

$188.12. Assume now, that if the company spends $100 on modifications to its sales practices, it will cut the risk of harm in half (5%). Here, the total wealth would increase to $19,600 (the company's net worth of $10,000 + the purchasers' net worth of $10,000 – the $500 of harm – the $100 of precautions). Now, internalization of all possibilities is as follows: 1/101 chance of having a total wealth of $9,900 + 95/101 chance of having a total wealth of $100 + 5/101 chance of having a total wealth of $0. Thus, the average total wealth of all individuals in all states of this tiny world is $192.08. Hence, the individual standing behind the veil of ignorance would select a legal system that compels the insurance company to take the above-mentioned precaution, since it improves his or her chances of obtaining more wealth. Indeed, the individual would prefer a legal system that compels the entity imposing the risk to incur costs of precautions up to the point at which the expense of taking an additional unit of precaution exceeds the benefit of the additional risk avoided.

The question then becomes, how should the legal system go about minimizing the sum of accident costs? We believe that the most effective way to accomplish this task is by employing civil liability (assuming the need for judicial risk management in the first place) to provide optimal deterrence of unreasonable risk-taking and optimal insurance to compensate for loss once residual, reasonable risks result in any case of actualized harm.

1. Optimal Deterrence

Optimal deterrence entails threatening defendants with liability for the total costs of their unreasonable conduct. By doing so, it gives defendants the proper financial incentives to invest efficiently in precautions. That is, it provides them with the proper incentives to incur the cost of precaution up to the point at which the expense of taking an additional unit of precaution would exceed the benefit of risk avoided. As illustrated in the example above, this regime maximizes each individual's expected welfare by maximizing the amount of welfare overall.

2. Optimal Insurance

Individuals are concerned not only with the probability of accident, but also the magnitude of the potential economic loss relative to their wealth. Thus, the individual standing behind the veil of ignorance would be willing to purchase insurance against loss from the residual, reasonable risk that optimal deterrence cannot prevent. The theory of optimal insurance holds that because risk-averse individuals derive diminishing marginal utility from money, they will rationally agree to pay certain insurance premiums to obtain full—not more or less—compensation for accident losses they might suffer at some future time. Full coverage is optimal because it represents the point at which further investment in premiums yields negative marginal net benefits. Before reaching full coverage, each additional unit of insurance coverage increases the individual's utility from wealth if

he or she suffers an accident more than it diminishes the individual's utility from wealth if he or she does not suffer an accident. Full insurance coverage thus equalizes the individual's marginal utility from wealth between the accident and no-accident states and thus increases expected utility.[20]

3. Preference for Optimally Deterring Unreasonable Risk

To the extent that enhancing individual welfare is the goal of law, the individual standing behind the veil of ignorance would reject a legal system that deployed scarce resources to insure, rather than deter, unreasonable risk-taking. By definition, the costs of preventing unreasonable risk are lower than the costs of compensating loss resulting from such risk. Once risk materializes into harm it imposes losses that greatly exceed liability—in addition to the immediate losses sustained by the harmed individuals, they must also bear the cost of litigation, and society as a whole must shoulder the cost of adjudicating claims. The welfare-maximizing individual would always prefer to avoid such squandering of social resources.

C. The Need for Collective Adjudication

To achieve the normative goals of optimal deterrence and insurance outlined above, the legal system must reflect and adapt to the society in which it operates. In the case of twenty-first-century Mississippi (and America as a whole), that means a legal system capable of dealing with a society whose livelihood depends largely on mass production processes and goods. Undoubtedly, mass production has benefited American society greatly. Standardized police forces provide safety for ourselves and our families, large-scale agricultural organizations provide food at affordable prices, and well-capitalized pharmaceutical companies provide drugs that help us live longer, more fulfilling lives. However, these benefits come at a cost of accident risk.

In the typical mass production case, a defendant or small group of defendants are alleged to have harmed a great multitude of individuals. Cognizant that all claims will present a nucleus of common issues of law and fact that determine across-the-board liability (in addition to the issues peculiar to each claimant that determine whether and the amount he or she shall recover in damages), the defendant invests optimally in the litigation and then spreads the cost over however many cases are ultimately brought. Plaintiffs, on the other hand, must individually shoulder the entire cost of litigating both common and non-common questions in the individualized, case-by-case system of adjudication. Such a situation handicaps their ability to match defendants' investment because their incentive to invest is limited to their individual expected returns (their individual liability). In other

20. For example, if an individual whose total wealth is $100 is subject to a 1% chance of suffering $100 of harm, the individual would rationally pay $1 to purchase $100 of insurance. In the no-accident state, the individual's wealth would be $99 ($100 original wealth - $1 premium). Likewise, in the accident state the individual's wealth would be $99 ($100 of insurance proceeds - $1 premium).

words, only the defendant fully exploits available litigation scale efficiencies. The only way to ameliorate this asymmetry of investment—which undermines the normative goals of deterrence and insurance by skewing outcomes on average in favor of mass production defendants—is through optimizing litigant investment via the class action mechanism.[21] By aggregating all claims, plaintiffs would have the same opportunity to exploit litigation scale efficiencies that defendants naturally enjoy. Furthermore, the

21. Of course, the hallmark of mass production cases is that few claims are prosecuted independently, at least when free-riding on the work product of others is taken into account. Rather, even in the absence of a class action, attorneys compete to acquire shares of actual and potential claims, customarily using various formal and informal aggregation measures, ranging from cooperative arrangements to share expenses and information to claim inventories, joinder, and consolidation. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 532-50 (2003). However, such fractional aggregation short of comprehensive collectivization by class action or a functional equivalent, never assures the full opportunity to exploit scale efficiencies that would enable plaintiffs to maximize the civil liability benefits of deterrence and insurance. Erichson appears to deny the need for universal aggregation, commenting that "[t]he possibility of a large recovery may provide sufficient incentive for a skilled lawyer to pursue [the] claim [of a group of high-damages individuals] vigorously." *Id.* at 551. But whatever he means by "vigorously," and beyond his implicit concession that the lawyer *may not* have sufficient incentive, Erichson misses the central point. No investment in litigation, however "vigorous," is optimal when scale efficiencies remain untapped, and scale efficiencies always remain untapped when the plaintiffs' attorney expects to recover less than the full value of all claims. Hence, though "vigorous," the lawyer whose representation forsakes available scale efficiencies is inadequate as measured by the social objective of mass production liability – minimization of total accident costs through optimal deterrence and insurance. Extracting full value from available scale efficiencies is a basic principle governing all types of business investment. *See* Robert S. Pindyck & Daniel R. Rubinfeld, MICROECONOMICS 197-99 (4th ed. 1998). Its direct and unqualified application to plaintiff attorney investments in mass production litigation would seem all the more imperative in view of the high risks and outlays involved. (Erichson mistakenly focuses on the gross and absolute payout, the "large recovery," rather than realistically assessing the return as an expected net value, which may very well reduce the prospect of the large recovery to a pittance.)

While accepting the standard theory of business investment and its application to mass production litigation, Erichson nevertheless suggests society can get along without universal aggregation of mass production claims because a lawyer with some fractional share of the claims may hit the jackpot without making the optimal investment. Even assuming the lawyer could win this game of chance, an unreal prospect, turning law enforcement into such a lottery is hardly a prescription for the rational, let alone socially responsible, design of a civil liability system aimed at protecting the life, limb, and livelihood of people. However, it is sheer fantasy to suppose a plaintiffs' attorney could win such a game of chance (winning in the sense that a sub-optimal investment could achieve the social objective of optimal deterrence and insurance). Indeed Erichson offers no evidence or example of this occurring. On the "quality" dimension of scale efficiencies, the reality is that plaintiffs' attorneys have continuous opportunities for investing time and money to increase the probability of success at trial and correspondingly the payout from settlement. As such, the diminishing marginal return from litigation scale shifts from positive to negative at the point when the net aggregate recovery from all mass production claims is maximized. That shift will occur sooner, auguring lower deterrence and insurance value, when the net aggregate recovery derives from less than all such claims. On the "cost" dimension of scale efficiencies, only universal aggregation can provide the vehicle for optimally investing not only to reduce litigation cost, but also to spread it across claims. The latter benefit is particularly significant for settlement. Absent universal aggregation, the defendant's superior scale efficiencies enable it to reduce per claim costs more effectively than can the plaintiff and thus to shift the settlement mean in the direction of the plaintiff's minimum demand, again auguring lower deterrence and insurance value. See David Rosenberg, Mass Tort Class Actions: What Defendants have and Plaintiffs Don't, 37 HARV. J. LEGIS. 393, 415-418 (2000).

In short, total aggregation is necessary to provide plaintiffs and courts a full opportunity and incentive to exploit scale efficiencies in litigation to counter the asymmetry in litigation power favoring defendants that results from their ability to exploit de facto class action scale efficiencies in the standard

class action mechanism would have the added benefit of motivating courts to invest optimally in adjudicating such claims, which typically involve complex matters of fact, law, evidence, and policy. Class actions thus offer the only avenue for optimizing both litigant and adjudicative investment in mass production litigation.

1. Optimal Litigant Investment

It is a widely shared belief that class actions should be available to plaintiffs whose individual claims are so small that litigating them individually would be uneconomical.[22] Only by aggregating these claims and spreading the cost of prosecuting them across the entire class—exploiting efficiencies of scale—can such plaintiffs vindicate their rights.[23] We believe this rationale holds true not merely in "small claims" cases, but in all cases. Only by exploiting the efficiencies of scale that defendants naturally enjoy can plaintiffs fully vindicate their rights (i.e., achieve optimal deterrence and insurance).[24] Put another way, the class action is desirable in all cases because it removes the artificial and unjustified advantage that defendants have in separately-prosecuted or fractionated-class claims, allowing plaintiffs to make more productive litigation investments.[25]

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separate action process. While it is more realistic to talk in terms of fractional aggregation, and we do at later points of discussion, it would not change the basics of our present analysis and conclusions.

22. *See, e.g.*, *Amchem*, 521 U.S. at 617 ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.").

23. Taking a cue from the venerable case of Barrett v. Coullet, 263 So.2d 764 (Miss. 1972), assume 50,000 individuals purchase tickets to watch a sporting event at a cost of $50 per ticket. Thanks to blundering by the vendor, the televised event has to be canceled. However, instead of refunding the price of the tickets, the vendor does nothing. Since any single plaintiff could recover at most $50 (assuming punitive damages are unavailable) for his breach of contract claim, there is little chance an attorney would take the case. However, if the ticket-buyers were certified as a class, the aggregate recovery would potentially reach $2.5 million, easily enough to provide fees to competent counsel. As is evident, the class action mechanism makes these claims economically viable by allowing the plaintiffs to spread the cost of representation across all 50,000 claimants, instead of forcing each individual to shoulder the entire cost of legal representation. While it is true the attorney will take a small portion of each individual's $50 recovery as compensation, without his services, the plaintiffs would recover nothing.

24. Bruce L. Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1382 (2000). As will be discussed throughout this section, mandatory class actions help achieve optimal deterrence and insurance by allowing plaintiffs to match whatever defendants are prepared to invest in litigation expenses. By eliminating the disparities in investment that inhere in the standard market process of litigating claims individually, skewed outcomes in favor of defendants will decrease and defendants will internalize the proper cost of precautions, instead of relying on their superior litigation abilities to afford them the luxury of taking unreasonable risk in mass-production decisions.

25. By more productive, we mean more cost-effective. In the standard process of litigating claims individually, each plaintiff wastes vast resources duplicating the efforts of similarly situated plaintiffs in parallel suits. Class action eliminates this wasteful duplication. In fact, the cost to each plaintiff would decrease by even more than what is wasted on duplicative litigation—plaintiffs could spread all litigation costs over the entire class, thus reducing the marginal cost of all litigation expenses borne by each individual plaintiff. Furthermore, the quality of representation would be vastly improved by mandatory class actions. Although the overall cost per claim in absolute dollar terms would likely increase, since optimal investment might warrant, for example, retention of better and often more

When claims are litigated individually, the defendant enjoys an automatic "upper hand," thanks to an ability to take advantage of efficiencies of scale. Whether the potential recovery of each plaintiff is a hundred, a thousand, or a million dollars, the defendant will treat any common issues as a single litigation unit, making a substantial investment and then spreading the cost across however many cases plaintiffs bring. Individual plaintiffs, on the other hand, are hampered by their inability to spread litigation costs. Each plaintiff must internalize the entire cost of litigating both the common questions and those issues particular to his claim. Since the defendant's marginal cost of litigating the common issues is much lower, he is able to invest much more in defending them than any single plaintiff could. Furthermore, thanks to the reduced marginal cost of the common issues, defendants can also spend much more litigating the issues particular to each plaintiff. The defendants' litigation position is therefore strengthened not because of anything having to do with the merits of the lawsuit, but solely because the plaintiffs are atomized.[26]

To illustrate this point, let us return to the insurance company example above. This time, however, assume that 25,000 individuals have purchased the insurance and that the level of harm inflicted on ten percent of the purchasers is $100,000 per individual—seemingly enough to make each claim economical. Thus, aggregate liability would equal $250,000,000.[27] Each case presents common issues, such as the level of warnings and whether or not the advertising practices actually caused the plaintiff any harm. Since the defendant treats liability in the aggregate, it will invest a large amount of money—say $10,000,000—defending against any allegations that are common to the class. Defendant's marginal cost of defending against these allegations is thus $4,000 dollars per plaintiff ($10,000,000/2,500 plaintiffs). An individual plaintiff, on the other hand, cannot spread his costs. Thus, with a maximum potential recovery of $100,000, a plaintiff would be able to spend only a small fraction of what the defendant has spent on proving/disproving common issues. Furthermore, the defendant will easily be able to outspend individual plaintiffs on the issues particular to each case because the defendant's marginal cost of defending the common issues is so low.[28] With such a disparity in investment, there is little doubt that skewed outcomes will ensue.

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expensive experts, the greater cost would be more than offset by the greater expected return, since optimal investment in the litigation will generally raise the aggregate and thus per claim expected recovery.

26. In effect, the defendant is able to use the plaintiffs' numbers against them. Even though tortious harm could reach into the millions of dollars, the defendant may be able to skirt liability altogether, so long as it disperses this harm across enough individuals. Hay & Rosenberg, *supra* note 24, at 1379-80.

27. 2,500 individuals x $100,000/individual = $250,000,000.

28. For example, in the hypothetical at hand, the defendant's marginal cost of defending the common issues is $4,000/plaintiff. Each plaintiff, on the other hand, must spend much more to prosecute the common issues to even approach a fraction of the $10 million the defendant initially expended. Hamstrung by this attempt to match his adversary's investment in litigation expenses, the individual plaintiff will have very little money left over to prosecute the non-common issues.

Class action aggregation helps reduce this asymmetry, giving plaintiffs the opportunity to exploit the scale efficiencies defendants already possess. However, once plaintiffs begin opting-out of the class or the class is fractionated, by sub-classing, for example, the asymmetry of investment begins to accrue, skewing outcomes in favor of the defendant once more.[29] Such non-mutual access to scale efficiencies undermines the primary goals of the legal system—effective and administratively efficient deterrence and compensation. Defendants simply do not have the proper legal incentives to prevent unreasonable risk when the benefit of reduced liability from outspending individual or fractionated groups of plaintiffs outweighs the cost of taking proper precautions.[30] The only way to provide defendants with proper incentives is through collective adjudication, thus ensuring optimal investment on the part of plaintiffs. In approving the availability of class actions to aggregate "small" claims that have no economic viability as separate actions, the Supreme Court implicitly accepts this point but apparently fails to recognize its general significance.[31] The central rationale for class action aggregation applies not merely to cases comprised of uneconomical claims, but to all cases involving numerous claims for damages, so long as the claims arise from a single tortious transaction or occurrence.

Class actions have the potential to force defendants to internalize the proper level of risk (i.e., achieve optimal deterrence) by eliminating the skewed outcomes that result from systematic plaintiff under-investment. In addition to achieving optimal deterrence, this parity of investment would also further the goal of optimal insurance by providing plaintiffs with the greatest and surest replacement of their loss. In other words, in cases where plaintiffs suffer harms as a result of sanctionable risk-taking, they

29. As an illustration, let us revisit the example from above. However, this time, plaintiffs gather together in groups of 250 plaintiffs each. Cognizant of the scale efficiencies afforded to plaintiffs by partial aggregation, the defendant decides to spend 10% of its aggregate estimated liability ($25,000,000) defending common issues, raising the marginal cost to $10,000 per plaintiff ($25,000,000/2,500 plaintiffs). To match this investment, plaintiffs must spend $100,000 each ($25,000,000/250 plaintiffs)—something they are unlikely to do, since the total value of each individual claim is only $100,000. As is evident, even large groups of plaintiffs will not suffice to match the resources available to defendants.

30. That is, if defendants are able to externalize part of costs of unreasonable risk-taking thanks to superior litigation capacity, they will do so, as long as the externalized costs are greater than the costs of litigating the claims.

31. *See Amchem*, 521 U.S. at 617. The Court's purported distinction between "small" and "high stake" claims is completely unrealistic. Many cases of severe injury or death involve complex issues of science, public policy, fact, and law that render them uneconomical as separate actions. Indeed, as discussed in the text, no mass production claim is prosecuted as a pure "separate action." The standard separate action process is instead characterized by well-organized plaintiffs' attorneys investing on the basis of actual or expected holdings of large inventories of claims in order to exploit scale efficiencies. Some "boutique" firms specialize in claims with the high recovery values, normally comprising a tiny fraction of all potential claims. However, the existence of "boutique" services hardly indicates an individualist impulse, let alone a rational, well-informed choice, among plaintiffs to bear the enormous expense and risks of going it alone. Claims remaining outside large-scale aggregations are more plausibly explained by collective action barriers, especially high costs of locating and acquiring widely dispersed mass exposure claims, incentives to free ride and self-dealing by plaintiffs' attorneys. The problem, as noted above, is that the market supply falls short of demand because of free riding and other impediments and costs to effective coordination. Hay & Rosenberg, *supra* note 24.

would not have their recoveries reduced or eliminated simply because their numbers preclude them from matching the defendant's investment in litigation.

2. Optimal Adjudicative Investment

To the extent that judges rationally allocate judicial resources, class action scale efficiencies are essential in motivating courts to optimize adjudicative investment, which maximizes the prospect of achieving the social objectives of deterrence and insurance from mass production liability.[32] Mistaken decisions by courts in mass production cases entail potentially high social costs, including possible distortion of incentives. Such risks threaten the benefits and even availability of mass production goods and processes upon which the lives and livelihoods of most people depend. These costs of error often justify courts' independently developing relevant information, as well as supplementing and verifying the party-created record, to establish a comprehensive and reliable basis for making judgments.[33] Establishing an independent role in the litigation, however, is costly for courts, given the highly specialized information they must acquire, evaluate, and apply to adjudicate mass production claims. This information includes theoretical and empirical knowledge concerning matters of science, technology, macroeconomics, statistics, regulation and law enforcement, insurance, distributive policy, market conditions, and the organization, finance, and practice of business.

Courts are apt to invest much less in developing and using information to decide any fraction of classable claims in the standard market process. Similar to free-riding attorneys, courts often merely copy—under rules of stare decisis, estoppel, and precedent—what other courts have done or incorporate other courts' work by reference. Class action scale efficiencies are thus necessary to motivate as well as to warrant the judicial investment that maximizes the social value of class action adjudication of mass production claims.

D. The Need for Mandatory Class Actions

Given the benefits outlined above, why do plaintiffs not voluntarily aggregate all their claims to take advantage of the scale efficiencies defendants automatically enjoy? Indeed, the real world of class action litigation is characterized by well-structured organizations of plaintiffs' attorneys that aggregate large numbers of claims, as well as sometimes share information

32. Although judges obviously have different motivations for investing in litigating mass production cases, it is not unrealistic to assume that judges more or less consciously allocate judicial resources to best effectuate the social objectives of the law they make and apply, and therefore, to some extent exploit the value-enhancing opportunities of class action scale efficiencies.

33. For example, maximizing adjudicative investment may compel courts to appoint neutral experts more frequently. A practice outlined (but barely used) in Federal Rule of Evidence 706. FED. R. EVID. 706 (dealing with court appointed experts).

and costs.[34] These attorneys thus exploit scale efficiencies to some extent in preparing common questions together. However, shifting preferences, the high cost of voluntary organization, and a host of other factors prevent plaintiffs from ever achieving optimal scale efficiencies.[35] Making class actions mandatory eliminates these problems by overriding the collective action problems that plague the separate action and fractionated class action methods of adjudication.

The fundamental barrier to voluntary aggregation of all claims stems from the divergent preferences that arise once the future is revealed. Think back to the behind-the-veil-of-ignorance perspective. Behind the veil of ignorance, individuals' preferences are impartial and uniform—maximization of well-being across all people in all states of the world. However, once the veil of ignorance is raised, individuals are motivated not by a collective interest in maximizing overall welfare, but by an individualized interest in maximizing claim-related welfare. Behind the veil of ignorance, the rational individual seeks to minimize the sum of accident costs by treating mass production claims as a collective asset to be allocated and redistributed in order to achieve that purpose. Once the future is revealed, however, the profit motive of "lucky" individuals (those who have strong legal claims) impedes the level of voluntary cooperation needed to achieve optimal deterrence and insurance.

In particular, individualized profit motives increase the transaction costs of voluntary aggregation and encourage free-riding. First, the process of voluntary joinder of claims entails substantial transaction costs due to the wide dispersion of claims across time and territory. Not only are the costs of search, evaluation, and acquisition of such claims prohibitive, but also the costs of working out the terms of any voluntary aggregation largely consume the benefits that would otherwise accrue from exploiting scale efficiencies. Second, free-riding plagues voluntary joint ventures. Much of a lawyer's work product falls in the public domain, creating an incentive for other attorneys who hold similar claims simply to exploit that work product rather than pay the full price of developing the claims they hold. This danger is especially real in fractionated class actions, where attorneys attempt to convince individuals who have high potential recoveries to opt-out of a class that is certain to be prosecuted whether these class members remain or exit.

The only way to overcome these impediments to optimal collective action is by installing a legal system that makes class action aggregation mandatory. Essentially, the legal system would mimic a contract in which

34. For a full discussion of how claims are aggregated whether or not formal aggregation procedures exist, see generally Howard M. Erichson, *Mississippi Class Actions and the Inevitability of Mass Aggregate Litigation*, 24 MISS. C. L. REV. 285 (2005).

35. *See* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 394 (2000).

individuals were bound to honor their behind-the-veil-of-ignorance preference for overall wealth maximization. Without such a mechanism, the normative goals of optimal deterrence and insurance are undermined, and all individuals in society are left worse off.[36]

E. Mandatory Decoupled Class Actions

Our model for a mandatory class action mechanism consists of three basic elements. First, to allow plaintiffs to exploit the scale efficiencies defendants naturally possess, courts should automatically and immediately aggregate all potential and filed claims arising from a mass production tortious event into a single, mandatory class action, allowing no class member to opt-out. Second, to achieve optimal deterrence, courts should determine total aggregate liability and assess damages equal to the total level of sanctionable harm (the "deterrence" stage). Third, to advance the goal of optimal insurance, courts should distribute damages to class members according to the relative severity of their loss rather than the relative strength of their legal claims[37] (the "compensation" stage). By separating

36. It has been suggested that cost-spreading effectuated by fractional aggregation may reduce per claim litigation costs sufficient to render free riding largely unprofitable. *See* Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 550 n. 117. Erichson offers no empirical support for his conjecture. It is also analytically dubious. If the differential in per-claim cost is narrowing to discourage free riding, the more plausible reason can be found in basic economic theory, which generally predicts a decrease in incentive to invest when the resulting information or innovation is a public good. Consistent with that explanation, the plaintiff attorney holding a fractional share of the claims will invest less, thereby reducing per-claim cost and the potential for marginal gain from free-riding. Of course, this strategy also reduces the deterrence and insurance benefits from mass production liability. Indeed, there is some evidence to contradict the supposition that the increasingly sophisticated use of fractional aggregation over the past two or three decades has lowered per-claim costs. *See, e.g.*, Tillinghast-Towers Perrin, TORT COSTS TRENDS: AN INTERNATIONAL PERSPECTIVE (1995)(reporting 46% as U.S. plaintiffs' average recovery after attorneys' fees and costs subtracted from defendants' payments); Tillinghast-Towers Perrin, TORT COSTS, 2000: TRENDS AND FINDINGS ON THE COSTS OF THE U.S. TORT SYSTEM (2002)(reporting 42% as U.S. plaintiffs' average recovery after attorneys' fees and costs subtracted from defendants' payments). Erichson also commits the common mistake of ignoring a major benefit of scale efficiencies from aggregation, namely that the plaintiff attorney holding a fractional share of the claims may in fact invest more to increase the quality of the case than he or she would if the share were smaller. Consequently, per claim costs may rise substantially, albeit warranted by the greater increase in marginal expected payoff per claim. On the realistic assumption that much of the increased benefit from such a fractional aggregate investment will fall into the public domain, incentives to free-ride will remain strong, resulting simultaneously in a reduction of expected return and thus motive for investment by plaintiffs' attorneys and, generally overlooked by courts and commentators, in an increase of the number of separate actions and thus of the defendant's asymmetric investment advantage over the plaintiffs. *See* Randy J. Kozel & David Rosenberg, *Solving the Nuisance Value Settlement Problem: Mandatory Summary Judgment*, 90 VA. L. REV. 1849, 1886 (2004). Ultimately, this collective action problem poses a set of empirical questions such as how much aggregate claimholder investment and net free-riding harm (less its network and other potential investor benefits, if any) occurs. Of course, social welfare would not fare well even if there were no free riders, but rather multiple plaintiffs' attorneys actually investing in competition with one another, rather than merely copying each others' work product. The result in that situation is not only sub-optimal investment, but also inflation of litigation cost from wasteful duplication of effort. There is no escaping the need for universal aggregation on a mandatory basis.

37. An exception to this distribution principle arises, however, when courts further individual deterrence by, for instance, sanctioning contributory negligence. We discuss this process in more detail below.

the determination of aggregate liability from the distribution of damages, this model "decouples" the deterrence and insurance functions of mass production adjudication. Decoupling performance of these two functions eliminates the traditional integrated approach, which generally results in the defeat of either or both objectives.[38] Decoupling adjudicates all common questions at the deterrence stage, where aggregate liability and damages are determined. This exclusive focus on common questions not only maximizes benefits from scale efficiencies, it also assures that the class action will achieve optimal deterrence even when the costs and risks of litigating individual questions preclude recovery by some fraction of the class. In other words, decoupling deterrence from compensation promotes the latter goal without sacrificing the former, implementing a regulatory priority that leaves all individuals better off.

1. The Deterrence Stage

At the deterrence stage, the court achieves optimal deterrence by making an aggregate determination of the mass production defendant's class-wide liability and damages. As explained above, this aggregate liability determination provides mass production defendants with the appropriate incentives to invest optimally in precautions by threatening them with monetary sanctions equal to the aggregate loss caused by their tortious conduct. Assuming this first stage of aggregate liability and damage determination results in a judgment for the class, the court would then order the defendant to pay these aggregate damages into a fund. The court would also award attorneys' fees to provide class counsel with the appropriate incentives to invest optimally in litigating the common questions, which are determinative of aggregate liability and damages, and ultimately deterrence.[39]

38. On the general concept and uses of decoupling to achieve optimal deterrence while lowering enforcement costs, see A. Mitchell Polinsky & Yeon-Koo Che, *Decoupling Liability: Optimal Incentives for Care and Litigation*, 22 RAND J. ECON. 562 (1991) (developing the approach based on theories of law enforcement theory). Decoupling has been proposed to avoid excessive tort insurance from punitive and nonpecuniary damages and to solve problems of under-deterrence resulting from strategic judgment proofing by firms. *See* Keith H. Hylton, *Punitive Damages and the Economic Theory of Penalties*, 87 GEO. L.J. 421, 449 (1998); Tracy R. Lewis & David E.M. Sappington, *Using Decoupling and Deep Pockets to Mitigate Judgment-proof Problems*, 19 INT'L REV. L. & ECON. 275 (1999); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 921-23 (1998); W. Kip Viscusi, *Pain and Suffering: Damages in Search of a Sounder Rationale*, 1 MICH. L. & POL'Y REV. 141, 157 (1996).

39. Since the goal of awarding attorneys' fees should be to motivate class counsel to invest optimally in the litigation, the court should always determine attorneys' fees according to the aggregate liability or settlement proceeds, whether or not a portion of these funds goes unclaimed. Those advocating that courts should correlate class counsel fees to actual recovery, not aggregate judgment or settlement value, seem motivated by concern that returning unclaimed funds to the defendant will undercut deterrence. *See, e.g.*, Howard M. Erichson, *Comments on a Class Action Rule for Mississippi*, 24 MISS. C.L. REV. 309, 317 (2005). While the deterrence concern is well taken, the proposed solution is not. Reducing class counsel fees as proposed could undermine deterrence just as would giving defendants a reversionary interest in unclaimed funds. Even assuming courts could calculate the correct fee discount, they must first determine whether class counsel failed to effect reasonable distribution of the class settlement proceeds. In many cases, distributing damages to all class members simply costs too much and class counsel should not be forced beyond the efficient point of distribution by threat of a fee

For deterrence purposes, aggregate liability targets the mass production decision, which generates the systematic risk giving rise to all claims. That is, it targets the decision whose manifestation in a mass production process or good systematically imposes an elevated level of risk on large number of individuals. For purposes of deterring unreasonable risk-taking in the design of mass production processes and goods, therefore, the only relevant questions are those common to all claimants. Indeed, achieving optimal deterrence in mass production cases does not require individualizing inquiries into, and evidence of, a defendant's liability and damages in relation to a specific plaintiff or even any actual plaintiffs. Aside from background historical issues such as whether, and if so, how the defendant created the risk at issue, all the common questions that determine aggregate liability and damages are statistical as well as aggregate in nature. Thus, aggregate liability can be resolved based on streamlined methods of scientific proof, including statistical sampling, modeling, and extrapolation. Moreover, employing scientific methods produces synergistic gains from scale efficiencies and investment, thereby increasing the overall effectiveness and reliability of adjudicating mass production liability. In short, the unitary nature of the mass production decision lends itself nicely to adjudication through a mechanism that decouples aggregate liability from individual damages determinations.

2. The Compensation Stage

At the compensation stage, the court achieves optimal insurance by averaging out claim-specific variables unrelated to severity of loss, thereby redistributing claim-generated wealth from less to more severely harmed class members. This redistribution of claim-related wealth reflects the individual's behind-the-veil-of-ignorance preference for a legal system that offers him or her the fullest and most reliable opportunity to recover any tortious loss—a system where damages awards depend on severity of harm. In need of tort insurance,[40] the individual standing behind the veil of ignorance would not want compensation to reflect the strength of his or her legal claim, which depends on numerous variables uncorrelated with severity of loss, such as differences in proof of defendant's causal responsibility,

reduction. For Erichson's fee-adjustment proposal to work, at least in principle, courts must be capable of sorting slack from efficient performance by class counsel in cases of incomplete distribution. But courts attempting to make such discriminating decisions would incur prohibitive information costs. There is, however, a simple, straightforward solution: award class counsel fees based on aggregate judgment or settlement value and, to the extent reversion of unclaimed funds would undercut deterrence, deny reversion. If distribution of settlement proceeds serves a social goal, class or other counsel should receive a separate appropriate fee to motivate efficient disbursement of the funds. Unclaimed monies could be used for a number of different purposes, including funding the judicial system overall, thus lowering taxes. For development of this argument and various proposals for effectuating efficient distribution of class action liability or settlement funds, see David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 VA. L. REV. 1871, 1895, 1917 & n. 81 (2002).

40. We assume a systematic failure in the supply of first-party insurance from government as well as commercial sources, and therefore a need for "tort insurance" to compensate accident loss.

governing law, and competence of counsel. Rather, the individual would prefer a legal system that bases compensation solely on severity of loss, since such a regime would offer him the best chance of full recovery for tortious loss. In essence, by basing individual recovery on severity of harm, the court would be effectuating the insurance plan that the individual would have personally established by contract with the defendant before any harm had occurred, if not for bargaining and information costs.

To insist that "fairness" requires customizing awards according to variables other than severity of loss—such as claim strength—is to impress upon individuals a system that makes everyone worse off. Standing behind the veil of ignorance, the individual would never choose a system of insurance in which the amount of compensation varies according to the outcome of some event unrelated to severity of harm and need for compensation. For example, the individual would never choose a system in which the compensation covering medical costs of treating cancer depended on a coin flip—$100,000 if heads, $200,000 if tails (or worse still, all-or-nothing). That system would be inferior, in the eyes of a risk-averse individual, to one that simply paid $150,000. This basic tenet holds not just for coin flips but for any uncertain event that is unrelated to the severity of loss—be it the outcome of a sporting event or the conclusion of a causation study. Rather than chancing recovery of loss on a system of variable payments (in which the amount paid depends on the outcome of an uncertain event), an individual standing behind the veil of ignorance would always prefer a straight fixed payment equal to the expected value of the variable payments. For this reason, any proposed system providing variable payments—except when their variation tracks the severity of loss—is, from an insurance standpoint, unambiguously inferior to one providing the average of the variable payments with certainty.

The only individualizing factor besides severity of loss that would affect individual damage awards would be reasonableness of plaintiff conduct. In order to provide plaintiffs with the appropriate incentives to act reasonably, individual awards would be reduced according to the portion of loss attributable to the specific class member's unreasonable conduct. Assessment of the defendant's aggregate liability in the first stage could be discounted by the average expected deduction that would be imposed for unreasonable risk-taking (e.g. contributory negligence) by plaintiffs. Alternatively, no such reduction would take place until the compensation stage. This would promote optimal deterrence in many cases by confronting the defendant with damages equal to total tortious loss without a deduction for the proportion that could have been avoided had plaintiffs taken reasonable precautions. Hence, even though certain class members' recoveries may be reduced or eliminated due to contributory negligence, the defendant will nevertheless be optimally deterred from imposing unreasonable risks.

Averaging or redistribution thus applies fully to every factor—factual, legal, litigation, strategic, and otherwise—unrelated to severity of loss and

individual deterrence. The implications of this principle are significant for distributions from an aggregate damage award in a class action judgment or settlement. It applies to all the paradigmatic mass production cases, regardless of the defendant's solvency, the amount of individual loss and related damages at stake, and the differences in claim values and the time when loss is incurred. Optimal insurance theory therefore censures efforts to individualize mass production liability in the name of "plaintiff autonomy" or other conceptions of self-determination that disregard effects on individual welfare, particularly on the well-being of those relying on tort liability to supply insurance.

II. THE RULE 23 MODEL

From its promulgation in 1966, Rule 23 has set the basic pattern for state class action rules. Indeed, most states modify their rules and practices in accord with changes in terms and interpretations at the federal level. While state rules deviate from the federal model and vary among themselves in significant ways, they retain key features of Rule 23 that preclude our proposal for mandatory collectivization. In particular, most restrict use of mandatory class actions to a category of cases encompassing only a portion of those arising from mass production risks. Furthermore, most states have affirmatively adopted provisions of Rule 23(b)(3), at least as currently interpreted, that require courts to allow plaintiffs to opt-out before the court considers initial certification, and most states follow the federal practice of allowing opt-out prior to judicial review of a proposed class settlement; at least one state has adopted the recent amendments to Rule 23 that encourage courts to afford opt-out before the settlement hearing and at other later points in the litigation.[41]

The foregoing analysis shows that mandatory collectivization is necessary to achieve the law enforcement objectives of civil liability and therefore to improve the lot of everyone whose lives and general well-being depend on the benefits of mass production and optimal deterrence and insurance of its risks. Consequently, this Part will argue that Mississippi should reject the Rule 23 model and take a new path. We begin by discussing the expansion of the scope of mandatory class action under Rule 23(b)(1) and (b)(2) in recent decisions by the Fifth Circuit Court of Appeals. While the greater use of such class actions serves deterrence goals in accord with the priority for preventing unreasonable risks, the courts' general insistence on distributing damages according to claim strength precludes allocation of damages to promote insurance objectives. At its best, moreover, the expanded scope of mandatory class action under Rule 23(b)(1) and (b)(2) continues to leave a large law enforcement gap by subjecting a major type of mass production cases to adjudication under Rule

41. Robert H. Klonoff, *The Adoption of a Class Action Rule: Some Issues for Mississippi to Consider*, 24 MISS. C. L REV. 261, 271 (2005).

23(b)(3). Essentially, this gap encompasses most, if not all, mass production cases in which plaintiffs present claims for varying and relatively "high" amounts of compensatory damages. When Rule 23(b)(3) criteria are not read to preclude certification of such cases outright, its opt-out provision undermines the enforcement value of their class action treatment. We show that both the certification criteria and opt-out requirements of Rule 23(b)(3) provide nothing of instrumental or individualistic benefit to class members, let alone society. Rather, this subsection promotes socially detrimental behavior, free-riding by plaintiffs seeking gain at the expense of other plaintiffs, and self-dealing by lawyers seeking profit not only from free-riding, but also from charging fees for valueless service.

A. Mandatory Collectivization Under Rule 23(b)(1) and (b)(2)

Rule 23(b)(1) and (b)(2) set forth different tests for convening mandatory class actions, yet all are grounded on a core justification for precluding opt-out. Under Rule 23(b)(1)(A), class actions can be convened for cases in which separate actions by or against individual class members would risk establishing "incompatible standards of conduct for the party opposing the class."[42] Rule 23(b)(1)(B) covers cases where the prosecution of one or more separate actions would "as a practical matter be dispositive of the interests" of nonparty class members or "substantially impair or impede their ability to protect their interests."[43] Rule 23(b)(2) targets cases where "the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole . . . ."[44]

We focus on the core justification for mandatory class actions underlying these several provisions. For, while the drafters of Rule 23 apparently formulated each test with some paradigmatic type of case in mind, the exemplars are far from mutually exclusive. Indeed, they indicate substantial overlap in the prescriptions and animating rationales for mandatory collectivization. The unifying predicate is that the class exists as an integral whole. That is, according to the Fifth Circuit, the class constitutes a "cohesive group with few conflicting interests among its members."[45] This core justification of cohesive group interest, as decisions in the Fifth Circuit indicate, provides a foundation for significantly extending the Rule 23 authorization for mandatory class action in mass production cases. We briefly sketch out this broadened authorization and its apparent bounds.

Generally, the dispute in cases warranting mandatory class action centers on a compound of collective conduct by the prospective defendant and

42. FED. R. CIV. P. 23(b)(1)(A) .

43. FED. R. CIV. P. 23(b)(1)(B).

44. FED. R. CIV. P. 23(b)(2).

45. Allison v. Citgo Petroleum Corp., 151 F.3d 402, 413 (5th Cir. 1998). Please take note that Rosenberg has recently invoked the "cohesion" concept to support a motion to certify a Rule 23 mandatory class action of deceptive lending practices claims, which is still pending. Baker v. Washington Mutual Finance of Mississippi, LLC, Civ. Act. No. 1:04CIV137GRO (S.D. Miss. ____).

collective relief sought against it. The key to mandatory collectivization is thus the inability of courts to resolve such disputes in any particular separate action without necessarily, or as a practical matter, materially affecting everyone's interests. That result, however, can be of two sorts: substantial or insubstantial. In some cases, group members' interests vary in expected value, and in others, these interests are virtually uniform. Yet, in both types of cases, group cohesion calls for mandatory collectivization.

At the extremes, the collective nature of one component—collective conduct or collective relief—may dominate sufficiently to offset less unity of interest in the other. Thus, cases involving limited common funds are typically collectivized without allowance for opt-out even though group members' claims against the fund are at base "individualistic" in nature, presenting non-common questions that often result in claims of varying value. Similarly, mandatory collectivization is the norm for shareholder suits aimed at compelling the defendant corporation to declare a dividend, despite the fact that each shareholder has an "individual" stake, which he or she could readily enforce by separate action. The reason these cases receive mandatory class action treatment stems from the collective conduct of the defendant involved. That is, no separate action could go to judgment without inevitably affecting the interests (allegedly protected by law) of others in the group. In the case of a limited fund—where the collective conduct consists of management's refusal (explicit or implicit) to distribute monies pro rata instead of first-come, first-served—it is evident that a separate action demanding pro-rata payout or the reverse will, relative to the fund's policy, necessarily decrease the payout for some to increase the payout for others. Likewise, the corporate dividend case involves collective conduct that necessarily affects the interests of the stockholder group as a whole. Thus, a separate action challenge to management's judgment to use cash reserves on some long-term corporate project rather than pay it out in dividends cannot avoid threatening to devalue the stockholdings of those who would prefer investing the money in a project that comes with risk and cost, but promises a greater payoff in the future.

Of course, while such "group cohesion" is an interdependency of interest created by defendant's collective conduct, it is evident that not only are members' interests individualistic in the sense that each seeks a particular payoff (and indeed could sue for a judgment to that effect), but also in that their interests are likely to conflict with one another. Nevertheless, mandatory class action is called for precisely because these individualistic, conflicted interests in how the court should ultimately resolve the question of liability renders adjudication of a discrete claim impossible or impracticable. In essence, despite often sharply differing interests among individuals, no such thing as a discrete individual claim exists. To be sure, as the drafters of Rule 23 noted, the conflicts among the class in such a mandatory

class action may require sub-classing (and, what they failed to note, distribution of damages contrary to the prescriptions of insurance theory and the real needs of class members).[46]

Analysis of the other extreme—where a collective remedy dominates—yields the same conclusions. Thus, suits for declaratory judgments or injunctions testing the legality of governmental conduct, such as a hike in the tax rate applied to property, do not involve collective conduct in the sense developed above. Each property owner can sue separately for a prohibitory injunction against application of the higher tax rate to his or her particular property. Those claims can be resolved separately without necessarily affecting the interests of other property owners. If some owners succeed in separate actions to void application of the tax to them, those owners who favor the tax hike are not thereby aggrieved as property owners, but rather, they suffer detriment to their interests as members of the broader group of citizens. The collective character of the remedy being sought not of the defendant's conduct creates the group cohesion that justifies mandatory collectivization of these cases. In the tax case, the interests of all property owners are necessarily resolved in a separate action because it is a political if not a formal requirement for government, which is otherwise bound to treat similarly situated group members alike, to generalize a judgment for any one member as a judgment for all (or against one and therefore all). Similarly, it is the collective character of the potential remedy that justifies no-exit class action in certain types of employment discrimination cases against business or government. For example, in cases based on vicarious liability or on defendant's failure to adopt a policy of restricting the discretion of local supervisors, employees may sue separately for damages without necessarily affecting the interests of other employees.[47] However, mandatory collectivization is warranted if an employee seeks an injunction or declaratory judgment that would require the employer to readjust the benefits, opportunities, or other conditions of employment for other employees, for example, in placing the plaintiff ahead of some other employee on the seniority roster.

Some types of mass production cases lie at or near these extremes; indeed, the classic exemplars are all mass production cases according to our definition. However, the principal significance of Rule 23 mandatory class action is measured by the case at the mean of all cases authorized for such collective treatment. Between the extremes there is a wide spectrum of cases involving some ratio of collective interest to disaggregated interest in the conduct and remedy. Many types of mass production cases, even those presenting "small claims," have been denied mandatory class action treatment. The basic explanation is that, excepting limited fund cases, civil actions for damages generally do not present a problem of inconsistent

46. FED. R. CIV. P. 23(c).

47. Of course, this is true only under the standard conception of civil liability that neglects the collective interest in deterrence.

judgments that would subject defendants to incompatible standards or impair the ability of non-parties to protect their interests as required by Rule 23(b)(1). Nor do these actions usually qualify under Rule 23 (b)(2), which has been read to require that injunctive and declaratory relief predominate over the demand for damages.[48] The fundamental error in this position is its exclusive focus on the individual rather than the collective interests at stake in mass production cases. The important advance in the Fifth Circuit approach (as we see and read it) is to correct this error by redirecting the inquiry to the question of "group cohesion." This approach effects a substantial shift in the mean point of cases accepted for mandatory class action treatment under Rule 23.

The signal Fifth Circuit case is *In re Monumental Life Insurance*,[49] a suit by black insureds charging the defendant insurer with racial discrimination in the sale and administration of its policies. The court approved Rule 23(b)(2) certification of what it characterized as the "ultimate negative value class action."[50] The question at the heart of the case was whether the requested injunctive relief predominated over the demand for damages, which sought significant amounts in restitution.[51] That question, according to the court, was answered neither by trying to divine the plaintiffs' "primary goal" nor by engaging in the "wasteful and impossible task" of determining predominance in "some quantifiable sense."[52] The better approach, according to the court, was to assess class cohesiveness with the focus on "defendants' alleged unlawful conduct, not on individual injury."[53] The court pursued the logic of its pragmatic position to the end in concluding that when the demand for damages does not sunder the cohesiveness of group interests in challenging defendant's conduct, then mandatory class certification may well be sustained notwithstanding the predominance of the monetary remedies.[54] One type of case where that could be true arises when the monetary relief serves as a "group remedy," that is, it "flow[s] directly from liability to the class *as a whole* on the claims forming the basis of the injunctive or declaratory relief."[55] Punitive damages might well qualify as such a "group remedy"; notably, Mississippi law restricts the

48. *Allison*, 151 F.3d at 412-13.

49. 365 F.3d 408 (5th Cir. 2004).

50. *Id.* at 411.

51. While the injunctive relief would prohibit collection of excessive premia on and reformation of the policies in force, affecting a far from inconsiderable number of individuals (estimated between one and 4.5 to 5.5 million), many if not most of the policies had been modified or claims settled to the satisfaction of the policy holders prior to the filing for class action. Yet, as the court noted, even if the injunctive relief were sufficient to deem it properly invoked on behalf of the class as a whole, the question of predominance remained.

52. *Id.* at 415.

53. *Id.*

54. This conclusion is significant because generally injunctions are best understood as simply avoiding the costs of post-harm adjudication. In most cases, damages are sufficient for deterrence purposes and to supply needed insurance, but the expense of determining liability and damages justifies seizing the opportunity, should it arise, to preempt the risk before actualized harm occurs.

55. *Allison*, 151 F.3d at 415.

award of punitive damages to punishment and deterrence ends and explicitly denies plaintiffs any "right" or compensatory interest in such recovery.[56]

Under *Monumental*, the test and ultimate bound for mandatory class action is that the monetary relief must be incidental, meaning that it is "capable of computation by means of objective standards."[57] Group cohesion is thus not lost merely because of differences, however marked and widely varying, in the damages sought by each class member. Indeed, the court found no impediment to certification even though damage calculation and distribution might entail working up thousands of "restitution grids . . . to account for the myriad of policy variations," dismissing the burden with the comment that "the monetary predominance test does not contain a sweat-of-the brow exception."[58] Rather, the limit is reached when individualized determinations entail the gathering and evaluation of "subjective evidence." Cohesion is subverted and opt-out required by claims for compensatory damages that import "in any significant way . . . intangible, subjective differences of each class member's circumstances."[59]

The "cohesive group interest" approach as elaborated in *Monumental* has important implications for the use of mandatory class action in mass production cases. Mass production, as we have shown, entails collective interests of particular groups and of society overall in the provision of life-sustaining goods and law enforcement. The cohesive group interest in these cases would qualify under the pragmatic test for Rule 23 mandatory collectivization as outlined by the Fifth Circuit. Indeed, in a recent decision, the court indicated just such an application of this test in summarily sustaining the district court's convening of a mandatory class under Rule 23(b)(1)(A).[60] The class, comprised of thousands of small loan debtors, charged the defendant with marketing the loans by deception and overreaching, and sought punitive and restitutory damages, as well as an injunction aimed at stopping, reforming, and undoing defendant's allegedly unlawful business practices. While the district court did not mention "mass production," the collective nature of the interest involved appeared to animate the decision. In examining the potential for separate actions seeking injunctions and punitive damages to generate judgments imposing inconsistent and contradictory standards of behavior on the defendant, the court emphasized the uniformity of the lender's policies and practices. Thus, as the court concluded, "[t]his controversy squarely falls under Rule

56. *See* McGowan v. Estate of Wright, 524 So.2d 308, 310 (Miss. 1988); *see also* Wesson v. United States, 48 F.3d 894, 899-900 (5th Cir. 1995) (examining nature of punitive damages under Mississippi law). This prescription of purpose and plaintiff's interest was recently codified in Miss. Code Ann. § 11-1-65(4). *Monumental* noted however that punitive damages may sometimes turn on "subjective differences of each plaintiff's circumstances," as in the Title VII case before the court in *Allison*. *See Monumental*, 265 F.3d at 416.

57. *Id.* at 416.

58. *Id.* at 419.

59. *Id.*

60. Smith v. Tower Loan of Mississippi Inc., No. 03-60339, 2004 WL 507572 (5th Cir. March 16, 2004) .

23(b)(1)(A) . . . [as the 'thrust' of plaintiffs'] action is for equitable relief coupled with a demand for punitive damages flowing from a requested judicial condemnation of [Defendant's] uniform way of doing business."[61]

B. Rule 23(b)(3) Opt-Out Class Action

Rule 23(b)(3) provides the "catch all" for cases that fail to qualify for mandatory collectivization under Rule 23(b)(1) and (b)(2). Whether or not the expansive authorization we discern in Fifth Circuit decisions for mandatory class action proves out, Rule 23(b)(3) will undoubtedly determine the question of collectivization for many cases. At a minimum, Rule 23(b)(3) will govern those cases the Fifth Circuit expressly excluded from the purview of mandatory collectivization—namely, mass production cases presenting claims for compensatory damages based on significantly varying "intangible, subjective differences."

Under Rule 23(b)(3), these types of cases are fated not only to be burdened with opt-out requirements that undermine law enforcement efficacy, but also with the high probability that they will either be decertified or denied certification in the first place, thus relegating them to the process of separate adjudication. Both outcomes are justified on a basic presumption that the claims typically involved in these cases are economically viable as solo suits and many, if not most, plaintiffs possessing such claims would prefer to go it alone. In dictating rejection or imposition of opt-out requirements on certification, Rule 23(b)(3), according to the standard view, serves this individualistic preference, while sacrificing little if any benefit from class action treatment. Indeed, conventional wisdom has it that Rule 23(b)(3) enables courts to avoid, or at least minimize, the management burdens and conflicts of interest that collective litigation of such claims entails.

Having argued that the law enforcement benefits of collective action always exceed those from all claims being prosecuted in separate actions (even if the actions are brought in fractionated groups), we confine our discussion here to the presumption and benefits that are invoked to support the limited use and opt-out requirements of Rule 23(b)(3) class actions. After showing that the presumption lacks reality, we conclude that Rule 23(b)(3) provides no individualistic benefits, nor does it serve any instrumental needs. Whatever role the chance to "go it alone" might play can be fully accommodated by our proposed decoupling structure without any sacrifice of the deterrence value provided by mandatory collectivization. In the final analysis, Rule 23(b)(3) is not merely a benign appendage or relic; rather, its narrow authorization for class action treatment and opt-out requirements actually make matters much worse for everyone and the system of civil liability overall.

61. Smith v. Tower Loan of Mississippi Inc., No. CIV.A. 1:98CV212BrR, 2004 WL 507572 (S.D. Miss. March 27, 2003), *aff'd*, No. 03-60339, 2004 WL 507572 (5th Cir. March 16, 2004) .

1. Presumption of Economic Viability and Preference for Solo Suit

The unreality of the supposition that claims seeking very high damages are economically viable for solo suit has already been discussed. Claims for damages, of course, determine neither the proof nor the profit of litigation. The absurdity of the presumption that any attorney, let alone any plaintiff, would undertake solo litigation of a mass production claim becomes clear once the meaningless dollar amount at stake is put aside for a more realistic evaluation. Generally, mass production claims are exceedingly risky and costly to prosecute. Significantly, establishing liability requires each plaintiff, assisted by a cadre of expensive experts, to present evidence and arguments on a compound of complex questions that implicate disputes over matters of social and natural science, the evolution and current posture of relevant technology, business organization and finance, and an array of interrelated legal, institutional, and social policies. Moreover, the circumstances of each plaintiff have no relevance in assessing the reasonableness of the defendant's conduct (process, product, or service). Liability is always determined on a class-wide basis, mostly on the basis of statistics, regardless of whether the suit is structured as a class or separate action.

The same compelling empirical evidence belies both prongs of the presumption: that solo suit is economically viable and that plaintiffs prefer such a method of adjudication. By all accounts, no one litigates a mass production case alone. These claims are prosecuted either as part of actual or anticipated aggregate actions (often quite large) or by free-riding on other plaintiffs' work product, or both. While solo suit is touted for enabling each plaintiff to have a "day in court" and control over his or her attorney and case, the opposite is true. The cost of solo suit would effectively price virtually all plaintiffs out of court and would increase (if that were possible) the exceedingly high rate of triable claims settling before trial.[62] Furthermore, going solo generally does not enhance the ability of a plaintiff to evaluate and manage his or her attorney's handling of a case. Indeed, because plaintiffs bear greater costs and pressures in solo litigation relative to class action, they would be more likely to cede control over the case to their attorneys.

2. Individualistic Benefits

The restricted scope and opt-out requirements of Rule 23(b)(3) are said to promote the individualistic benefits alluded to above: plaintiffs' preference for going solo to have one's own "day in court" and to control one's own attorney and litigation. However, the inference fairly drawn from the evidence presented above strongly suggests that no one actually wants (or can afford) to sue solo. Indeed, the fact that virtually all mass

62. Even in the case of fractional aggregation, per claim litigation cost is relatively high because preparation of the plaintiffs' case entails high financial outlays and risks required not only because of the "class-wide" complex science, technology, economic, business organization, and distributive and other public policy questions posed by the cost-benefit analysis required for liability, but also because the defendant will be fully exploiting scale efficiencies in marshalling a counter case on liability.

production litigation proceeds by en masse representation—that is, when it is not some single claimant free-riding on some mass-produced work product—implies that the absence of greater mandatory collectivization in the marketplace is not for lack of demand, but rather, as previously discussed, because of standard collective action problems and costs. Having a "day in court" seems of interest only to academic lawyers.

Of course, denying the reality of benefits does not deny the reality of costs. From the individualistic (as well as social) perspective, Rule 23(b)(3) is a device for self-destruction. By denying class certification and by creating an opportunity for free-riding and deceptive practices by plaintiffs' attorneys, its policy and application promotes separate, as opposed to collective, action, making everyone worse off. In the separate action process, plaintiffs lose the benefits of scale efficiencies, thus undermining optimal deterrence and insurance.

That the postulated preference for and benefits from solo suit are controverted by overwhelming evidence, however, is of little moment to many who advocate Rule 23(b)(3) on individualistic grounds. They are apt to overlook, ignore, or, on the very rare of occasion of admitting some reality into the picture, dismiss the costs as irrelevant. According to most critics, the individualistic "benefits" of Rule 23(b)(3) are not really meant for human use. Rather, they are deontological "goods"—proclaimed with high sounding, moralistic (yet undefined) concepts of individual "fairness," "justice," "autonomy," "day in court," and the like[63]—and meant therefore to be established and enforced by the legal system even if no one actually wants them and they make everyone worse off.[64] Were proponents of Rule

63. Beyond asserting that these concepts derive from or resonate with strongly felt and deeply rooted legal traditions, advocates never offer anything approaching a precise definition of their moral requirements. Vagueness and rhetoric thus shield these "goods" from analytic examination of the moral requirements, let alone, from any assessment of the social cost that must be born to satisfy them.

64. Those who press the case for Rule 23(b)(3) on such grounds fail to consider that the choice between exit and no-exit class action should, like any choice among competing designs of the legal system, depend on their relative effects on individual welfare ex ante. As we have shown above, this way of thinking is a prescription for making everyone worse off. Giving independent weight to a postulated good like the preference for solo suit regardless of its effect in raising the sum of accident costs depreciates the individual's expected welfare as a matter of course. It must be said that the individualistic preference urged on behalf of Rule 23(b)(3) represents a narrow, unworldly, and professionally self-serving conception of how individuals might enhance their well-being through self-determination. Aside from equating self-determination with the esoteric and rather fanciful "freedom" of an individual of ordinary expertise and income to take control of litigation, let alone saddle it with the enormous costs and risks of failure entailed by solo suit, the concept excludes every conflicting expression or understanding of individual autonomy from consideration. Notably, it excludes every preference for deterrence and insurance that is substantiated by the actual behavior people demonstrate in spending trillions of dollars annually to prevent and hedge against serious injury. While hypothesizing that an individual may derive value from controlling litigation and suing solo, proponents of Rule 23(b)(3) give no weight to the mast-tying choices an individual would have made ex ante to secure the most basic goods of mass production liability—effective deterrence and insurance of accident risk—which safeguard real autonomy, indeed health and life, ex post.

23(b)(3) to account for its social costs, say by tallying the price (opportunity cost) of opt-out in the quantitative, worldly terms of the resulting increased chance of death, disability, and destitution, we might well hear less pontification about the virtues of suing solo.[65]

In addition to the unreality (in both material and metaphysical senses) of the individualistic benefits from Rule 23(b)(3), the "moral" argument for upholding the preference for solo suit (regardless of the consequences or even with hope of someday overcoming the adverse effects) rests on an analytically incoherent conception of the inherent legal predicate for civil liability. The determination of civil liability is conceived essentially as an individualized accounting of legal rights, wrongs, and remedies. Such an accounting is premised on an a priori construct of some discrete, situationally specific "right-duty" relationship. This relationship exists ex ante (before the risk is taken or incurred) between the prospective plaintiff and the defendant, and the relationship defines whether and to what extent harm suffered by the former should be deemed having been "wrongfully inflicted' by, and hence the responsibility ("fault") of, the latter. The system on this account does and thus should[66] accord the parties a full opportunity to present particularized proof of the terms and conditions of the individuals' ex ante relationship and to have the judgment measure out and pronounce the exact ex post degree of wrong done and suffered thereby.

But whatever might be said about its account of legal reality in general, the conception of an individual "right-duty" relationship amounts to complete fantasy in mass production cases. Mass production precautions, like its processes and goods, derive from the mass producer exploiting welfare-enhancing scale efficiencies and investment opportunities by means of cost-benefit projections and designs that define and address the at-risk population in the aggregate (statistically and indivisibly). These decisions cannot customize—that is, they cannot specifically reflect or affect the specific, subjective interests, preferences, and fortunes of any individual—without destroying the welfare-enhancing benefits of mass production. In essence, mass production liability based on "fault" (unreasonable risk- taking),[67] turns on a statistical, not an individualized, standard of optimal precautions. In purportedly disaggregating precautions and particularizing the degrees of wrong done to a given plaintiff, courts make everyone worse off

65. For example, proponents of Rule 23(b)(3) could estimate the consequences of raising the likelihood of death among class members or of forgoing some number of hospitals or elementary schools, in consequence of inappropriate levels of deterrence and insurance.

66. We pass on the questions that might be put to this type of argument, in particular, regarding what actually "is" and why and how whatever "is" can be automatically equated with what "should" or ought to be.

67. We assume that the conception of "wrong" incorporates at minimum some notion of "fault" (negligence) implying liability grounded on "unreasonable" risk, not simply causing risk and harm (strict liability). Ex ante, no one would rationally choose a system that countenanced unreasonable risk taking, but everyone would rationally approve a system that permitted, indeed, encouraged reasonable risk taking, provided that it also supplied optimal insurance.

ex ante.[68] Thus, to decide the proper or reasonable level of precautions, the prospective defendant (for simplicity we ignore the prospective plaintiffs' contributions to precautions) necessarily aggregates the costs and benefits all possible accident scenarios and all possible marginal investments in precautions. If appropriately motivated, the defendant will minimize the sum of accident costs: most notably, the investment in precautions and related accident risk. The defendant will take precautions at the level that represents the point when making the additional marginal investment in precautions costs more than the benefit derived from avoiding the corresponding unit of accident risk. The prospective defendant cannot know or predict how and to what degree contemplated conduct will benefit or harm anyone in the potentially affected population. The possibilities are infinite and "knowable" only as statistically weighted probabilities. For deterrence purposes, the only useful knowledge of those probabilities is their aggregate summation. Most important, countless key components of that investment in precautions are beyond the practical power of the prospective defendant to adjust to any given probabilistic scenario. In particular, defendants cannot customize their risk-taking decisions to the individual needs and interests of any given prospective plaintiff under any given set of circumstances.

Our final point employs two standard tests of the validity of the type of moral, individualistic argument advanced on behalf of Rule 23(b)(3). First, to command acceptance as a moral imperative, any claim of an individual "right" by one person must be exercisable on a completely independent basis. That is, it must be exercisable without inflicting harm or appropriating benefit from another. Second, the moral imperative of any claimed "right" depends on its generalizability—its capacity for being fully and equally available to everyone similarly situated. By these basic tests, the individualistic norm attributed to Rule 23(b)(3) is morally condemnable.

Focusing, for example, on the claimed "right" to opt-out (or of self-exclusion from collective action) and sue solo, these tests require that the claimed "right" of one person to exit or remain in the class cannot come at

68. This point, that mass-production decisions about precautions (like every other dimension of the undertaking) are probabilistically and indivisibly unitary, is not dependent on transaction costs or imperfect information. It is important to realize that the ex ante choice in favor of mass-production precautions is not a creature of market defects. Rather, that choice stems directly from the premise that each individual desires maximum expected welfare in a world of scarce resources and uncertainty about his or her accident fate and prospects in the chosen legal system. The preference for mass production holds even if we assume that individuals in that world could costlessly make market arrangements with perfect information about all possible accident risks and related levels of precautions. Maximizing individual expected welfare is the priority of each person behind the veil of ignorance, no one would rationally prefers a legal system that mandated individually bargained, customized arrangements in lieu of the opportunity for scale-efficiency gains from standardized, averaged mass-production arrangements. Consequently, a decision-maker's attempt to disaggregate the synergistically related statistical average estimates of accident risk and optimal precautions is not just an intellectually incoherent exercise and a waste of system resources. It also undermines the fundamental social objective of minimizing the sum of accident costs because brute disaggregation threatens to destroy, to everyone's detriment, the standardized means of mass production.

the expense of any other class member and that this "right" is fully and equally exercisable by all class members. However, these conditions cannot hold. Opt-out by any single class member undermines law enforcement, decreasing both the deterrence and insurance value of the litigation for everyone else. Moreover, given the possibility of unraveling, no class member can gain the benefits of opt-out unless all other potential class members are barred from opting-out too (or refusing to join the collective). For purposes of applying the test of independence, we assume that everyone in the class harbors some preference to sue solo and would trade some deterrence benefit—that is, would bear some increased chance of being harmed—for the opportunity to exit the class. It is further assumed that this preference is continuously distributed in varying degree across the class, so that at least one class member will assess the marginal loss of deterrence and insurance value from exit as more than offset by the benefit from suing solo. Under these realistic conditions, as we have shown, the test of independence can never be satisfied in a mass production risk case. Although a class member who values the marginal loss of deterrence and insurance less than the marginal gain from solo suit and therefore would elect to opt-out, the exercise of that prerogative cannot occur except at the expense, by lowering the deterrence and insurance value from the litigation, for everyone else.[69] Indeed, the first to exit gets an an "unequal" or "unfair" jump on the others, including those who might value solo suit. The law enforcement power generated by scale efficiencies implies that the deterrence and insurance loss he or she inflicts on all potential class members will be greater than the loss the next person would inflict on others, and so on, with aggregate and resulting individual loss continuously decreasing (at a diminishing marginal rate).

The diminishing marginal rate of lost deterrence value from each succeeding opt-out also explains why a claim of "right" to opt-out cannot be exercised unless conditioned on no one else having the same freedom of choice. Here again we assume continuously varying preferences for solo

69. In theory, requiring anyone who exits to "make the class whole" can rectify the harm done. Presumably, the court might assess an exit fee paid over to class counsel. That fee would be calculated as the difference between the optimal investment the class member will make in prosecuting his or her claim solo and the marginal litigation investment class counsel would have made had the class member not exited. While the class members' surplus welfare from exit should exceed the welfare loss from paying the fee, the practical difficulties of calculating the fee and the class member's (or more realistically, his or her non-class counsel's) willingness to pay it are open questions. Ignoring the overwhelming evidence that people prefer to avoid unreasonable risk rather than to incur it for the chance of suing solo, it can be posited that insistence by many class members on remaining in the class for its law enforcement benefits inflicts harm on the person who prefers a solo suit. The remedy again is either for the class member to pay a fee to exit or for the class to pay the member preferring opt-out for the loss of "autonomy" from being denied exit. Again, there would be considerable practical problems of calculation and identification of welfare losses from being denied opt-out. The simple solution is to adopt a variation of our proposed decoupling structure that would—albeit at the sacrifice of the insurance value of mass production law enforcement—allow "opt-out" at the second, damage-distribution stage for class members to seek recoveries based on the litigation value of their claims. *See* discussion *infra*, Part II.B.3.b.

suit (though we could assume equal preferences without affecting our conclusion). The point to note is that when one person finds marginal benefit from solo suit exceeds marginal loss of deterrence and thus opts-out, the diminishing rate of that loss will prompt another, who would not have stepped out first, to now recognize net benefit from going it alone and so on. In theory, the unraveling would continue to complete disintegration of the collective.[70] It should be noted that unraveling—assuming it occurred—would not necessarily signify a preference for a "day in court" over proceeding by aggregate means. The exit of succeeding claims would at base express nothing more than the fact that the preceding or prospective exit of others has so far diminished the marginal benefits from collective litigation as to make it worthwhile to opt-out for the marginal "autonomy" gain. For those in the collective, the prospect of its continuous unraveling leaves them with little (and ultimately nothing) left to lose by exiting. Thus, even if one person ranked marginal plaintiff "autonomy" over marginal optimal deterrence, it is doubtful that the person would rank the marginal benefit of solo suit over the aggregate loss of deterrence from unraveling of the class action. In other words, no one would rationally choose to opt-out for a separate action unless everyone else were forbidden from exercising the same freedom of choice.[71]

3. Instrumental Benefits

The prevailing rationales restricting certification and requiring opt-out under Rule 23(b)(3) class actions are instrumental. In contrast to a deontological conception of opt-out as an intrinsic good (regardless of its effects on individual welfare), the instrumental justification draws on analytical and empirical appraisals of the benefits of giving free rein to the preference for suing solo. In effect, proponents of Rule 23(b)(3) believe opt-out serves as a market device that enables class members to maximize claim-related wealth by choosing between competing modes of adjudication, class and separate action. Thus, Rule 23 now encourages courts to provide a second opportunity for opt-out at class settlement. As the U.S. Judicial Conference explained, this second opt-out opportunity affords class members a better-informed basis for comparing their respective anticipated recovery from, and in the absence of, class action. In addition, providing class members this market choice is also designed as a means of checking class counsel from selling out all or some sub-group of class members.

In addressing the proffered instrumental benefits—in particular the informational benefits—of this market device, we focus on the utility of opt-

70. The focus on deterrence is appropriate because the unraveling effect will not make the first to opt-out any worse off from an insurance point of view than he or she will be upon exiting. To opt-out, the individual logically prefers solo suit to some degree of greater deterrence and insurance from collective action. Presumably, given the overwhelming evidence that everyone is risk averse, the exiting class member has other, collateral sources of insurance to make up for the coverage shortfall.

71. The expectation of incurring harm when others do the same leads individuals to create or maintain mast-tying arrangements by means of constitutions, contracts, and family, religious, and other close-knit organizations.

out and proceed on two important assumptions. First, we adopt the standard definition of opt-out as encompassing all questions, common as well as non-common, that relate to liability, damages, and any ancillary matters, such as personal jurisdiction. Second, we assume that civil liability aims to foster wealth maximization by assuring plaintiffs the opportunity to recover the expected value of their individual claims regardless of whether they proceed by class or separate action. In other words, the aim is not to foster welfare maximization by assuring plaintiffs effective insurance coverage in the event of suffering major loss. We examine two uses of opt-out below: first to check class counsel self-dealing, and second to overcome bargaining breakdowns in the negotiation of class settlements.

Our conclusion on the first use is that information costs will generally preclude the market choice between class and separate action from achieving effective results in checking self-dealing by class counsel. Moreover, we show that this market mechanism is part of the problem rather than part of the solution.[72] Regarding bargaining breakdowns, we offer a fully effective decoupling solution in place of opt-out. Our solution serves the priority for optimal deterrence, while, consistent with the assumption stated above, carrying out the mandated wealth-maximizing function.

a. Check on Class Counsel Self-Dealing

We focus first on the problem of monitoring and motivating class counsel to assure that the class claim is effectively prosecuted.[73] The reason opt-out is unlikely to solve this problem arises from the fact that opt-out itself undermines class counsel's incentive to make the optimal investment in prosecuting the class claim. Class counsel's investment is driven by the expectation of receiving a certain return, that is, the appropriate share of the total expected recovery of the class claim. Once that return falls below that level, class counsel no longer has an incentive to invest optimally. Class members opting out singly or in groups will lack just such an optimal return that would drive the investment needed to evaluate class counsel's actual investment against the optimal investment he or she should have made.

Opt-out is considered most useful at the point of class settlement, and it is thought to be especially (if not exclusively) effective at protecting so-called "futures"—those individuals that have not yet sustained actualized harm—from having their claims devalued by self-dealing class counsel. The very fact that a large number of futures opt to exit or remain in the class is said to provide an important signal for courts to review the settlement. However, the signal's reliability is compromised, as noted above, by

72. We defer discussion of our proposed solution for "sweetheart" and "blackmail" class settlements. See infra at III.D.

73. Included is the hypothesized case of class counsel acquiescing in or promoting inter-class transfers, shifting wealth from high-value claims to low-value claims. *See* Judith Resnick, Dennis E. Curtis & Deborah R. Hensler, *Individuals Within the Aggregate: Relationships, Representation, and Fees*, 71 N.Y.U. L. REV. 296 (1996). The existence of the supposed problem is based on rumor; it has never been substantiated by any informed, careful study.

being based on insufficiently informed class members (and their lawyers) and possibly skewed by free-riding motives and deception by non-class counsel. Moreover, opt-out is not likely to provide a useful signal even when neither of these distorting factors is involved. It would provide no meaningful indication of whether class settlement appropriately estimates and allocates the aggregate expected value of several major variables, including the number and distribution of future claims, changes in science or other circumstances, and other gambles. An appropriately motivated class settlement offer reflects the weighted average of these variables, discounted by the probability of a pro-plaintiff development resulting in opt-out and commensurately higher-average settlements in the standard market process. Thus, in the event of a pro-plaintiff change in circumstances, class members will exit the class settlement in large numbers regardless of how well-motivated, calculated, and allocated its terms are. There is also the possibility of false negatives. Depending on how steeply claim values drop, class members may remain in the class settlement even if its fixed offer is tainted by class counsel's self-dealing. Class members are likely to remain in the class as long as the cost of exit and ensuing litigation exceeds the amount misappropriated by class counsel.

This unreliable check against class counsel perfidy comes at a high price; in particular, opt-out entails two types of cost: law enforcement and collective action. Law enforcement cost refers primarily to information problems incurred in the appropriate use of opt-out to police class counsel's representation. In particular (assuming the prevailing rule that restricts each dissident class member to individually prosecuting his or her claim and not as—or through—a "class representative" of dissident, absentee class members), recruitment of opt-outs will involve considerable expense for dissident counsel and the court to communicate the necessarily complex information to class members. Collective action costs primarily relate to the adverse effects on deterrence from the opportunity created by opt-out for strategically motivated exit: specifically, as discussed above, class members being deceived by fee-seeking attorneys or joining with those attorneys to profit from free-riding.

Lastly, opt-out is part of the problem. As noted, it fosters free-riding and deceptive practices by non-class counsel. Furthermore, opt-out at class settlement provides class and "associated" counsel with the opportunity to charge duplicative fees—one fee in connection with settling the class action and the second fee for representing opt-outs. It will also be costly for courts to allocate fees at the time of class settlement and over time in such a way as to prevent this abuse. And finally, defendant and class counsel (together with "associated" counsel") can use opt-out following court approval of class settlement as the vehicle for carrying out a sweetheart deal.[74]

74. The Court in *Amchem* expressed concern about the appearance if not actual self-dealing involved in class counsel settling their claim "inventories" prior to class settlement. That concern was entirely misplaced. Any deviation of the price for inventory settlement from that which is offered by

b. Bargaining Breakdown

Even when class counsel performs competently and faithfully, differences of opinion may arise about the value of a particular claim in settlement. Class settlements, like litigation settlements generally, rarely incur significant difficulties in compromising claims on terms of mutual satisfaction to the defendant and particular class member. Generally, the parties prefer to average out their differences over the likely result of trial of the non-common questions, rather than bear the costs and risks of trial to further individualize a given class member's recovery. However, asymmetries in information and evaluation, excessive optimism regarding trial outcomes, and other factors affecting the parties' respective dispositions to settle may result in bargaining hold-outs, and in some cases, to bargaining breakdowns and demand for trial on the non-common questions that determine relative, individual recovery.

No matter how well-motivated class counsel's representation and the resulting aggregate class settlement, some class members may disagree with the individualized assessment and settlement offer of their claims. Bargaining breakdowns leading to trial are rare in the standard market process and no more likely to occur in the context of class action. However, while individualization is unnecessary for deterrence purposes (except for individual deterrence purposes, such as reducing payouts to account for a class member's contributory negligence), imposing class settlement terms in disregard of a class member's desire for trial on the non-common questions might contravene the mandate for plaintiffs to maximize claim-related wealth. This mandate can be read broadly to afford class members the option they would have had in the standard market process of rejecting a settlement offer and going for broke to maximize claim-related wealth. Nevertheless, opt-out is unnecessary to satisfy this trial demand. Instead, the court can employ the decoupled class action outlined above. During the first stage, the court would determine aggregate liability and damages, furthering the priority for deterrence, and depending on the outcome, the court would conduct a second stage of litigation where individual damages are distributed. However, instead of distributing damages according to severity of harm, the court could distribute them according to the relative strength of class members' claims on the non-common questions.

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the class settlement would have raised an immediate red flag. Indeed, the district court in *Amchem* examined the settlement to detect just such a differential. The Supreme Court ignored the lower court's extensive findings of fact substantiating the judgment that no such difference existed. Yet, no concern about self-dealing was voiced about the recent class settlement of the phen-fen litigation that provided multiple opportunities for opt-out after approval of the class settlement. Indeed, oblivious to the potential for abuse, the courts involved and commentators have hailed the phen-fen class settlement as a model for the future. However, the post-settlement opportunities for opt-out provided class counsel and other lawyers supporting the settlement a completely unmonitored vehicle for self-dealing. For further critical analysis of a class settlement model exemplified by the phen-fen class settlement, *see* David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 867 (2002).

The cost of opt-out, as discussed above, is loss of the collective, optimal investment that maximizes the deterrence value of adjudicating mass production claims. Of course, class members ex post have little or no concern about that cost. However, wealth-maximizing class members are nevertheless concerned about the loss of the collective optimal investment. That investment maximizes aggregate net recovery on the common question component of the claims and, therefore, the net recovery everyone receives. Wealth-maximizing class members would prefer to retain collective optimal investment on the common questions, while preserving the option of trial on the non-common questions in the event that they disagree with the individualized settlement offer.

Class members dissatisfied with proceeding through class counsel or with their respective settlement offers in the second stage can be given the option of hiring their own attorneys and demanding a "mini" trial on the non-common questions against the aggregate fund established for deterrence purposes. To be sure, litigation of the non-common questions entails costs and risks that will winnow down the number and level of recoveries by class members. Many claims will simply fail by default because their relatively low return renders them unmarketable to class counsel or other competent attorneys. However, these results merely replicate the standard, separate action process. Indeed, class members are better off because of the class action scale advantages in the first stage prosecution of the common questions. Collective litigation of the common questions will increase the average expected recovery value of class members' claims above what they would be worth if the class member had opted out. Thus, the decoupled mandatory class action fosters—with greater litigation effectiveness than the conventional alternative of individualized adjudication—the pursuit of claim-related wealth.[75]

75. Professor Erichson argues that courts should allow opt-out for those class members who want "a stronger client-lawyer relationship . . . and . . . greater opportunity for expression through pleadings, at trial, or otherwise." Erichson, *supra* note 39, at 315. However, he does not address studies showing that lawyers rarely provide such "individualized" service in any setting. While some suggest that lawyers are thereby neglecting their professional obligations, the more plausible explanation is that there is little or no demand for such services at the price lawyers would charge to supply it. Indeed, there is no compelling reason why class counsel would eschew a closer lawyer-client relationship with any class member were he or she willing to pay for it. Moreover, Erichson fails to explain exactly what a given claimant's individual situation might add by way of relevant information in the "pleadings, at trial, or otherwise" regarding the common questions of law and fact that comprise the entirety of the class claim of mass production liability. As we have noted, the nature and social value of mass production require the unitary, collective adjudication of those questions for the class as a whole. Finally, Erichson ignores the main thrust of his own argument that few if any claimants prefer individualized litigation relationships and opportunities to the greater benefits of collective representation. Given lack of demand, it is difficult to justify the high price of creating an opt-out process, which includes the expense for notice and consultation with class members in addition to encouraging free riding, which undermines deterrence benefits of collective law enforcement. While studies indicate that on average only a small fraction of class members opt-out, the cost of free riding is exacted largely by the credible threat to exit and pirate the class action work product and class counsel's anticipatory reduction in litigation investment and consequent costs to minimize the profit margin for freeloaders. Professor Erichson acknowledges that he has not considered our proposal for decoupling deterrence and compensation functions of class actions. As we have shown, decoupling these functions effectively preserves the deterrence benefits of

III. CORE QUESTIONS

Having developed our argument for mandatory class actions and against adoption of any class action rule that is modeled after Federal Rule 23, we now turn to several core questions bearing on the structuring, operation, and scope of collectivization. In particular, we begin our argument by explaining that class actions should be convened automatically and immediately based on the filing of the first, actualized harm claim, encompassing all potential claims, without delay for "maturation" through pre-certification separate actions. We then go on to argue that litigation class actions are superior, and in all ways preferable, to settlement-only class actions. Third, we discuss the conditions under which Mississippi should conduct multi-state class actions. And finally, we proffer remedies for the problems (assuming their reality) of "sweetheart" and "blackmail" class settlements.

A. Timing and Scope of Collectivization

A basic consideration for the law enforcer is when and how far to intervene in overseeing a mass producer's decision about what precautions should be taken to reduce the risk of a proposed undertaking. The course of a mass production risk from its inception in design planning through to final effects on some exposed population generally follows a relatively linear time-line: (i) mass producer evaluates its potential payoffs from some range of design options, which present various combinations of social benefit, risk, and precautions against accident; (ii) mass producer selects and then implements the design option (including "do nothing") that promises maximum payoff for the government or business enterprise; (iii) in operation, the design results in exposure of some population to systematic risk; (iv) some number of individuals suffer actualized harm ranging from minor to serious; (v) civil liability claim(s) for actualized harm and any continuing risk are threatened, filed, litigated, and resolved by judgment, settlement, or withdrawal. Intervention at any point on this time-line also affects the relative scope of oversight. Take the extremes of earliest and latest intervention. At the earliest, the law enforcer can sweep the whole process of risk-taking—pre- and post-design selection—within the ambit of law enforcement for comprehensive oversight. At the latest, scrutiny may be limited to cases of actualized harm if or as they arise, and eschewing collectivization, the court can proceed case-by-case to determine the existence of sanctionable risk or loss and levy fines or damages accordingly.

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class action law enforcement by enabling collectivized adjudication of the wholly common and collective questions of liability in the first stage, while in the second stage governing damages distribution, class members seek recovery on an individualized basis, pressing their case to the limits of economic viability through counsel and in venues of their own choosing. To avoid being misinterpreted, we do not recommend turning the second stage of the class action over to this form of wealth-maximizing game, which squanders social resources that could otherwise be used to provide insurance for those suffering catastrophic loss. The better approach, we maintain, is to distribute damages in the second stage in accord with the social objective of providing needed insurance protections.

Intervention can occur at one or more points on this time-line with varying enforcement costs and expected benefits. Thus, as with the use of any law enforcement structure and strategy, the appropriateness of timing and corresponding scope of intervention depends on the law enforcement payoff in terms of cost-effective risk management. For example, the earliest option for intervention, so-called "command and control" regulation, is frequently employed as part of a licensing process that includes direct monitoring and mandates dictating constraints on the process and substance of the mass producer's design and other pre-implementation decisions. Such anticipatory intervention is usually the most expensive of all law enforcement options, particularly because ferreting out activities that warrant such heavy-duty oversight from among the welter of mass production enterprise inevitably expends scarce resources on many "dry holes"—activities that turn out not to present any reason for intervention. For this reason, command and control regulation is used sparingly and usually to target activities likely to yield a relatively high enforcement payoff, such as where inadequate precautions, say in the construction or operation of a nuclear power plant, could result in catastrophic loss or where financial instability or management turnover may dilute the deterrent effects from threatened fines or damages for actualized harm.

There is no categorical, let alone conceptual, bar to courts exercising otherwise appropriate "command and control" jurisdiction through, for example, a private or public nuisance suit for injunctive relief. However, given the existence of other law enforcement agencies with greater powers of investigation and supervision as well as expertise and resources, it makes sense for courts, limited on all counts, to intervene at more remote points in time when general jurisdiction can be productively exercised.

However, there is a point of negative marginal return from such a strategy, and the courts seem to have gone well past that point in deploying civil liability predominantly on a case-by-case basis for claims of actualized harm. While this approach may prove effective in managing the risks of driving cars, though this supposition is far from obvious, making actualized harm a prerequisite for civil liability and imposing sanctions on a case-by-case basis is not only wasteful but positively counterproductive in managing risks of mass production.

The following explains why and how courts should advance intervention relative to the standard case-by-case mode of actualized harm adjudication. In sum, courts should convene mandatory class actions that encompass not only the totality of actualized harm but also the entire outstanding risk thereof (inclusive of psychological and mitigatory aspects). We develop the case for mandatory class action treatment, focusing on "mass exposure cases," litigations involving "latent" risk, such as a pharmaceutical with a delayed adverse side effect, or serial risks exemplified by the typical products liability case. We then examine two options for modulating the timing and scope of the mass exposure class action. In particular, we look at two alternatives for triggering class action intervention—risk

alone or first-filed claim of actualized harm. Finally, we address arguments for delaying class action treatment to allow for "maturation" of claims through separate action litigation.

1. The Need for Anticipatory, Risk-Based, Intervention by Class Action

For cases in which all members of the class presently suffer from actualized harm, the law enforcement benefits of immediate and complete collectivization are evident from the argument developed throughout this article. Proceeding claim-by-claim or in any combination of claims short of full collectivization sacrifices scale efficiencies otherwise available to enhance the productivity of judicial as well as plaintiff law enforcement efforts. Mandatory class action enables plaintiffs and courts to exploit in full measure available scale efficiencies and thus corrects the systemic bias that would otherwise threaten to distort deterrence and insurance results of civil liability.

Of particular interest here is the case that involves latent or serial risk resulting in the incidence of actualized harm over time among some fraction of those exposed. Justification for collectivization of these "mass exposure" cases requires little extension of the general argument. Regardless of the enforcer—judicial, administrative, or executive—hastening intervention can be advantageous by avoiding various unnecessary costs associated with uncertainty resulting from protracted litigation. These savings inure to the benefit of the actual and potential litigants and beyond them to larger populations of "third parties," including consumers, workers, and insureds. A quick resolution of liability also removes the cloud of uncertainty associated with litigation that burdens defendants in various ways, including magnifying deterrence to excess against businesses in competitive markets, diverting key personnel and needed resources from productive enterprises, undermining the business' reputation, related financial positions, customer trust and goodwill, and hampering the business' competition for labor, material, and capital.

However, the principal reason to accelerate intervention is to assure that adjudicative outcomes are shaped by symmetrical opportunities for the court, plaintiffs, and defendants to exploit scale efficiencies. The need to correct systemic bias implies that the class action must encompass the totality not only of actualized harm, but also of legally cognizable risk. In particular, class action must encompass increased risk (assessing damages equal to the sanctionable harm times the probability of such harm occurring); psychological harm (*e.g.* "fear of cancer"); and mitigation (*e.g.* asbestos removal). In short, effective law enforcement in mass exposure cases requires collectivization of all risk-based as well as actualized harm claims.

Consistent with the priority for deterrence, the principle gain from advancing intervention is to assure that mass producers internalize and account for the total cost of sanctionable harm in their pre-decision, risk-precaution calculus. However, structuring the mandatory class action to encompass risk-based claims may also prove useful in distributing damages.

As previously noted in connection with development of the decoupled model of mandatory class action, distribution of damages generally serves to enhance individual welfare when confined and structured by four purposes: providing needed insurance; improving the well-being of risk-averse individuals (everyone); rewarding and reimbursing the bearing of litigation cost; and avoiding distortion of consumption and investment choices. The mass exposure class action proves useful not only, as we have shown, to provide "insurance fund" coverage based on relative severity of loss rather than on relative litigation value of a claim, but it can also provide risk-averse class members who have adequate insurance from collateral sources with an immediate cash payment equal to the expected value of their contingent claim. Regardless of risk aversion and insurance considerations, such an expected value payout avoids distortions of consumption and investment incentives that might arise, were individuals threatened with incurring sanctionable loss without expectation of repayment.[76] Moreover, the mass exposure class action reduces class members' bearing of litigation costs and therefore their demand for reward and reimbursement.

2. Options for Triggering Collectivization

We now examine two trigger options: risk alone or first-filed claim of actualized harm.

a. Risk-Triggered Collectivization

Intervention based on the incidence of risk alone—before the incidence of any actualized harm—is a standard enforcement strategy. The conditions warranting early imposition of sanctions relate primarily to concerns about the adverse consequences of the elapse of time on deterrence effects. Thus, triggering judicial regulatory intervention on risk alone promotes optimal deterrence and insurance particularly when the amount of sanctionable loss could be very large and the firm would likely lack sufficient assets to pay the total amount. Assessing liability equivalent to the aggregate sanctionable risk imposes damages in an amount that is at once appropriate for deterrence purposes, but also that is usually far less than the total loss, hence affordable by the mass producer. At the same time, the assessed amount could supply the premium for insurance to replace sanctionable loss incurred by those who suffer serious harm. Advancing the day of judgment will also curtail opportunism by managers who might otherwise gamble that the brunt of liability will fall on their successors many years later. Moreover, risk-based intervention is especially useful in cases involving evidence that can disappear, degrade, or become far more expensive to acquire over time, increasing the probability of the firm escaping liability. For example, causal indeterminacy plagues many industrial pollution cases because the lapse of time often obstructs efforts to track down

76. In addition, in many cases, class members needing more insurance to cover the defendant's risk can use the proceeds of accelerated distribution to buy additional coverage more cheaply on the commercial market—and often, from their own first-party insurers.

the source of excessive effluent or to determine which of several possible sources contributed to the actualized serious harm in question. Furthermore, as explained above, immediately converting long-term risk of divergent outcomes into a determinate expected value enhances the welfare of risk-averse parties, defendants, plaintiffs, and their respective attorneys.

b. Collectivization Triggered by First-Filed Claim of Actualized Harm

While mass exposure class action improves investment incentives, civil liability is unlikely to rival the effectiveness of administrative regulation. A major reason is the general divergence between "social" and "party" stakes. Namely, "private" and "public" motives for suit align in purpose and commitment of resources only by happenstance.[77] In addition, courts lack the resources and comprehensive perspective typically available to administrative agencies. Moreover, as noted above, there is a corresponding divergence in litigation investment affecting law enforcement outcomes. Government agents are more likely to have better access, information, and expertise in detecting and evaluating sanctionable risk-taking before any incidence of actualized harm.

Given these constraints, convening the mass exposure class action upon the filing of the first actualized harm claim may well serve law enforcement ends best in the absence of special circumstances warranting advancing intervention to the risk-only stage. The key benefit of using this trigger is that it not only enables collectivization of all contemporary and ensuing actualized harm and risk claims—contemporary and ensuing, as well as pre-existing risk—but, it also entails no greater cost and scope of adjudication than courts normally incur in the standard separate action process. Convening a mass exposure class action based on the first-filed actualized harm claim presents, as noted at the outset, determination of precisely the same questions of aggregate risk-taking, benefit, and savings from precautions on the margin that a court must decide in any event to resolve the actualized harm claim in the standard separate action process. The decoupled class action structure provides courts flexibility in organizing the method and timing of any distribution of aggregate damages.

3. No Need to "Mature" Claims Through Separate Action Process

Collectivization of mass production claims usually presents a number of material, sharply contested questions of law and fact (and law-fact applications) that involve a compound of complex, costly to resolve, issues of natural and social science, technology, business organization and finance, insurance, and matters of distributive and other public policy. At the outset

77. For a complete discussion of the divergence between "private" and "public" motives for suit, *see* Steven Shavell, *Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575 (1997). Private litigants will only be motivated to bring suit when their potential recoveries exceed their litigation costs. However, certain socially desirable cases—that is, cases where a defendant has imposed an unreasonable risk on a population—will not be brought because the cost of suit is too high.

of litigation, the outcome of these disputes is uncertain. The nature of the proceedings, class action or separate action, is totally irrelevant to the nature of the questions regarding either their content or their chance of being resolved one way or another at trial. Nevertheless, uncertainty about the resolution of science and certain other questions posed by mass production cases has led a number of courts and commentators to conclude that convening a class action should be delayed for some period to litigate the claims in the separate action process to reveal their "contours," if not their merit.[78]

This "maturation" prerequisite is costly and nebulous, for it entails multiple, separate action trials held over many years simply to decide whether the case should be tried by class action. Moreover, it affords no basis for a court, even after expending substantial resources, to say that the desired contours have or have not been adequately determined. Expense and capriciousness is not the least of the problems with the maturation requirement. If the object is not really to avoid permanently confronting the class action question, then sending the parties on the expensive and indeterminate quest must find justification in the sought-after information. However, whatever value there is to this information, seeking it through separate action "maturation" is unnecessary. Indeed, resorting to that process is positively antithetical to law enforcement objectives.

Two general reasons are given by maturation proponents for wanting more definite knowledge of the "contours" of the claim: the need to establish "predominance" of common issues and the desire to temper the variance of potential outcomes from class trial. For some courts and commentators, the contours in question relate to the Rule 23(b)(3) requirement that common questions predominate over non-common questions. However, determining predominance of common questions serves no purpose in the mandatory class action regime. As we have shown, mandatory collectivization enhances adjudicative effectiveness in terms of the social objective for civil liability, most notably by affording the class and the court the opportunity to exploit the scale efficiencies that the defendant always possesses. To be sure, litigation typically clarifies the scope and substance of the dispute, but no one should trust the results of the presently biased process for adjudicating separate actions.[79] Mandatory collectivization

78. *See, e.g.*, In re Rhone-Poulenc Rhorer, Inc., 51 F.3d 1293 (7th Cir. 1995); *see also* Francis E. McGovern, *Symposium: National Mass Tort Conference: An Analysis of Mass Torts for Judges*, 73 TEX. L. REV. 1821 (1995).

79. Although some commentators believe that the separate action process may actually help plaintiffs by allowing them to "gain an advantage by pushing stronger cases to trial first," Erichson, *supra* note 39, at 9, we believe this conclusion to be false. In fact, just the opposite would likely occur. As Prof. Silver points out, "[b]y settling good cases for large amounts and defending bad ones aggressively, defendants can manipulate the trial record to their advantage and drive down settlement values in pending cases." Charles Silver, *"We're Scared to Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1378-79 (2003). Of course, there is no necessary relationship between tactical partisan advantage and promoting the social objectives of the legal system. The whole point of collectivized law enforcement is not to change the balance of tactical litigation advantage. The aim of mandatory class action, as we have argued, is to enable the law to improve the well-being of everyone

yields the needed information far more cost-effectively and reliably. The decoupling structure we propose also obviates concern about claim-specific variables giving rise to potentially debilitating intra-class conflicts. Potential conflicts among class members are eliminated if distribution of damages in the second stage of the class action accords with insurance theory and payouts are based on severity of loss and need. In fact, as we demonstrated earlier, a decoupled class action can achieve deterrence priority even if damages are distributed through claim-by-claim litigation (at the compensation stage) to maximize individual wealth rather than welfare.

For other courts and commentators, gaining more definite knowledge of the class claims' "contours" involves reducing uncertainty regarding common questions not to determine predominance, but simply to temper the variance of potential outcomes from class trial. Often spotlighted are scientific disputes, particularly those focusing on so-called "general causation"—the causal connection between defendant's mass production activity and the harm(s) alleged by the class. It is thought that these uncertainties should be resolved before submitting the case for class action treatment and that separate action litigation should be used for this purpose. Neither prescription holds up to functional analysis. Given that advocates of maturation for these purposes would have these cases decided in separate actions despite uncertainties that presumably are too great for class action to handle, it is important to isolate and consider what supposedly relevant distinctions render class action less suitable than separate actions for adjudicating mass production cases from the outset.

It might be supposed that because they stem from individual claims, separate actions enable courts to render the science and similarly complex questions more manageable and amenable to reliable resolution by framing them in narrower, disaggregated terms. That supposition is false. The liability questions in mass production cases are identical regardless of adjudicative format. Given the comparative lack of resources available to plaintiffs and courts in separate actions, class action is by far the superior mode for orderly and reliable resolution of these cases. The liability questions posed in a mass production case are entirely common, mostly statistical, and, as we have emphasized, class-wide in scope and substance. To treat them otherwise is to threaten destruction of the social value from

by maximizing the combined goods of law enforcement and mass production. In any event, those asserting an advantage for separate actions not only ignore the self-destructive effects of fractional aggregation, let alone going solo, but they also fail to explain why the individuals with stronger cases would take the risk of losing just to raise the average settlement value for others with weaker cases, presuming it would cost too much for defendants to sort out the weak ones. Furthermore, these commentators assume without basis that class action is endemically constrained from affording the same or functionally equivalent social advantages that might be available in the separate action process. Thus, to the extent exemplar cases are relevant in determining the common questions of liability, class counsel surely would have not only the incentive, but also the collective means of employing the stronger cases for maximum benefit at trial to enhance the overall value of the class claim. Mandatory class action assures that claimants with stronger cases would not bear all the risk of losing the separate action while others share the rewards of their success; rather, these cases would go to trial in solidarity with the resources and interests of the entire class.

mass production processes and goods that sustains the lives and livelihoods of most people in the world. The assumed reliability of the maturation process is also misplaced, as the results are subject to being distorted by the systemic bias in the separate action process favoring mass production defendants.

Similarly, it would be error to believe that separate action litigation will hasten or necessarily coincide with developments in science. Science usually does not march to the drumbeat of litigation, and it is least reliable when it does. Of course, it is always possible that science could report relevant information while the maturation process is continuing. Yet, the report also might be received while the class action is pending, particularly during the lengthier second stage devoted to distribution of damages.

Ultimately, there is no necessity to resolve uncertainty—scientific or otherwise—as a condition for convening a class action. Mass production liability is appropriately determined based on the probabilistic assessment of aggregate sanctionable risk or loss. Indeed, this is precisely the determination that must be made in every case, class action, or separate action. It is the fundamental question posed by any claim or defense that calls for assessment of liability based on negligence and under virtually all rules and applications of strict liability. Once aggregate expected risk or loss has been determined by class action—however much that decision has been expedited by collective action processing—the advent of new information, regarding science or otherwise, is irrelevant to achieving the objectives of civil liability. No adjustments should be made to the assessment of aggregate expected sanctionable risk or loss that determined the mass producer's liability. This determination already accounts for the weighted probability of all relevant contingencies, such as subsequent scientific findings respecting causation. An insurance fund judgment founded on those estimates accounts for all post-judgment contingencies. As such, it fully and effectively achieves insurance as well as deterrence ends. It can readily support distribution of damages for purposes, however socially detrimental, of allowing class members to maximize claim-related wealth, often at the expense of others who have been severely harmed and may be in need of insurance.

Finally, maturation is favored for the benefits of multiple trials. Multiple trials may supply additional information that can usefully reduce high variance in estimates of potential outcomes from trial that might obstruct socially appropriate settlement of mass production cases. When the parties are far apart in the estimates of expected liability and damages, taking the average of multiple trial outcomes can close the distance sufficiently to reveal common ground for compromise and settlement. Also, the divergence of outcomes presented by a single all-or-nothing trial can pressure risk-averse parties, plaintiffs as well as defendants, to surrender on terms that deviate significantly from the "true" merits of the case. Affording the parties an opportunity to have liability determined as the average of multiple trial outcomes will, regardless of its exercise, relieve them from the pressure to capitulate too soon or too much. But it would be a mistake to favor

maturation on the assumption that class action implies a single class action trial, and therefore the benefits of multiple trials are only available through separate actions. Indeed, the most straightforward and efficacious means of providing this option is through class action. Generally, the court need only convene the class action and then allow the parties to conduct as many trials as they would in the absence of class action. While the option for the parties to conduct multiple class action trials is potentially more costly than a single class action trial, the provision of that option will generate greater benefits by reducing high variance in potential outcomes on liability as a whole or any specific question, such as the scientific estimate of the causal connection. Moreover, providing this option through class action has the great advantage of empowering the class and court to marshal all available scale efficiencies in performance of their law enforcement roles and thereby eliminating the systemic bias favoring mass production defendants.

B. Litigation v. Settlement-Only Class Action

Unlike litigation class actions, settlement-only class actions do not result in class action trial should the parties fail to reach, or the court refuse to approve, a class settlement. In the absence of settlement, the class action dissolves, and all claims return for trial through the standard market process of separate actions. By contrast, the litigation class action creates an incentive for the defendant to settle class members' claims by confronting it with the threat of a collectively prosecuted class trial that eliminates the defendant's asymmetric scale advantages, thereby raising settlement values above those generated in the standard market process. This key difference makes settlement-only class actions inferior to litigation class actions. Settlement-only class actions deny plaintiffs the opportunity to exploit the scale efficiencies that drive optimal investment in litigating the defendant's mass production liability. Thus, any settlement in a settlement-only class action reflects claim values depressed not only by the plaintiffs' suboptimal investment incentive, but also by the defendant's superior litigation power. Since elimination of mass production defendants' asymmetric investment advantages is absolutely essential to achieving the normative goals of optimal deterrence and insurance, we believe that Mississippi should limit class certification to mandatory litigation class actions.

1. Limited Benefits of Settlement-Only Class Action

Contingent on the circumstances of each case, settlement-only class action may slightly improve upon settlements in the separate action process. To the extent that the defendant credibly commits to settling claims only within the framework and terms of the class settlement, it could avoid the costs of strategic bargaining the firm would confront in the standard market process. In particular, it could thwart hold-outs in the standard market process that demand excessive recovery or that prevent a risk averse defendant from concluding "global" settlement to relieve itself of

the (presumably socially inappropriate) burden of long-term, massive exposure to liability, especially when it includes the prospect of open-ended or redundant punitive damages. Indeed, the defendant is likely to pay class members a small "bonus" representing some share of the surplus from avoided holdout costs, particularly in the latter case. Any savings retained by the defendant, moreover, may have the beneficial effect of lowering the level of excessive deterrence that would otherwise obtain were hold-out bargaining unabated.

2. Superiority of Litigation Class Action

On the other hand, settlement-only class actions offer no additional scale efficiencies for development of the merits of plaintiffs' claims above the scale opportunities that standard market processes provide. This type of class action, therefore, merely reproduces the claim recovery values generated by the individualized adjudication process. This limitation arises when a class action convened solely to effect class-wide settlement could not satisfy prerequisites (e.g. common question predominance) for certification for all litigation purposes, including trial as well as settlement. Failure to achieve such settlement in such a settlement-only class action—because the parties cannot reach agreement or because they fail to obtain judicial approval—automatically dissolves the class action and disaggregates the claims, returning (or, effectively leaving) them for disposition in the conventional separate action process. Litigation class action is operationally, and therefore functionally, distinct from settlement-only class action because failure to achieve class-wide settlement does not result in dissolution of the litigation. Instead, the case proceeds to trial based on class-wide aggregation of all classable claims and with the benefit of the corresponding optimal investment. In contrast, plaintiffs' bargaining power in settlement-only class actions derives from whatever truncated scale efficiencies and investment opportunities they can marshal through disaggregated litigation in the market. Consequently, settlement-only class actions deny plaintiffs the opportunity to exploit investment scale efficiencies optimally to maximize aggregate benefit from the defendant's mass production liability. The end result of this weak bargaining position is, at best, a settlement that offers plaintiffs suboptimal deterrence and insurance.

In sum, whatever the benefits settlement-only class action may provide relative to fractional aggregation in the separate action process can be provided by the litigation class action fully and more cost-effectively. And, as we have shown, only through mandatory litigation class action can plaintiffs confront mass production defendants with the threat of a collectively prosecuted class trial that eliminates the defendant's asymmetric scale advantages. In other words, mandatory litigation class action is the only avenue for securing the normative goals of optimal deterrence and insurance, and ultimately overall welfare-maximization.

C. *Multi-State Class Actions*[80]

Extension of Mississippi class action treatment to claims of non-residents arising outside Mississippi ("multi-state class action") poses a question that is largely a matter of "should" and "how" rather than "can." With the chief exception of possible constitutional limitations on use of mandatory class action, resort to multi-state class actions calls for a judgment of public policy. The most salient policy consideration, as we have stressed from the beginning, is the effect of the choice—for or against or somewhere in between—on achieving the law enforcement objectives of civil liability. We begin by briefly noting the collective interests that not only support mandatory collectivized adjudication of mass production cases, but also call for employing, as far as practical, multi-state class actions. We then consider design options for conducting multi-state class actions, for financing collectivized adjudication of claims by non-resident class members, and for satisfying constitutional conditions on the use of mandatory, multi-state class actions.

1. Collective Interests in Mass Production and Multi-State Class Action

Mass production and its effective governance necessitate social solidarity to assure that the production of both "primary" goods (products and services) and "secondary" goods (deterrence and insurance) maximizes social welfare by fully exploiting all available scale efficiencies. This collectivity or unity of interest has several components. Two have been repeatedly relied upon to support our argument for mandatory class action: (1) securing the benefits from mass production processes and goods and (2) managing mass production activity effectively by reducing and insuring risk to socially appropriate levels. The third, specifically related to the present question, concerns the unitary, indivisible law enforcement interest among states subject to boundary-crossing (inter-state or multi-state) mass production risk.

a. Securing Mass Production Benefits

The social benefit of mass production is wholly contingent on everyone being committed to bear its costs. These costs include not only the price of production, but also the tradeoff necessitated by a world of scarce

80. Notwithstanding passage of the Class Action Fairness Act of 2005, our argument for nationwide class certification is still important to Mississippi, since under the terms of the Act federal courts do not have jurisdiction to hear a case in which the "primary defendants" and two-thirds of the plaintiffs are Mississippians, no matter what the aggregate amount in controversy. 28 U.S.C. § 1332(d)(4)(B) ("A district court shall decline to exercise jurisdiction under paragraph (2) . . . over a class action in which . . . two-thirds or more of the members of all proposed plaintiff classes in the aggregate, and the primary defendants, are citizens of the State in which the action was originally filed."). Furthermore, even if only "small" class actions are left in state court, our arguments remain the same: just as a defendant should not be able to skirt full liability by using plaintiffs' numbers against them, defendants should not be able to avoid full liability because the harm is widely and thinly dispersed geographically. And finally, our proposal for certifying multi-state class action is probably even more effective on a national level than a state level, although we believe that states should nonetheless certify nationwide classes for the reasons enumerated below.

resources. This tradeoff compels sacrificing some personal preferences to a collective, average preference. The individual accepts the exchange because it promises greater well-being. For the vast majority of people, preserving the collective goods of mass production generally implicates their most vital interests, including prospects for earning a livelihood, opportunities for self-determination and self-fulfillment, freedom from stultifying fear of grave injury and being left without means to obtain medical and other necessities, and ultimately, the chance for survival.

If the collective goods of mass production are to be preserved, the legal system must not allow individuals to opt-out of this commitment. Courts, however, are under constant pressure to relent in determining liability based on aggregate average assessment of reasonableness. The focus, it is often said, should be on the plight of the individual plaintiff, who after all has usually suffered some severe harm that everyone else in the courtroom dearly hopes to avoid. For example, the driver of a compact car who is injured in a collision with a full-sized sedan might sue the compact car manufacturer, alleging the car's standardized small size was a defective design, not for the average uses and interests of the projected consumer class, but rather for plaintiff's individual uses and interests. Yet, if courts were to deem such after-the-fact demands for customization sufficient for civil liability and damages, they would preempt mass producers from exploiting scale efficiencies, making everyone worse off, including the plaintiff at the earlier point in time when he or she purchased the car for anticipated benefits over and above the risks.

b. Effective Management of Mass Production Risk

Similar to allowing individuals to opt-out of the joint venture of mass-producing beneficial goods, rejecting mandatory class action would jeopardize the social benefits from effective reduction and insurance of mass production risks. Opt-out from class action undermines everyone's interests in protection from unreasonable risk and from being severely harmed with nowhere to turn for needed insurance benefits. Despite being characterized as an expression of autonomous individual choice, opt-out to sue "solo" against a mass producer actually deprives everyone else of having an equivalent choice, not in mere form but rather in substance. As with any Hobbesian each-against-all conception of "fairness" or "liberty," moral generalization is impossible; no one can choose to sue alone, or exercise any other individual prerogative, without necessarily devaluing another's choice to do the same.

This consequence is unavoidable in the present context because of the defendant's natural, "de facto" class action scale efficiencies in mass production cases. This condition arises only when the mass producer confronts or contemplates more than one separate action being filed against it. Thus, the mass production defendant has no scale advantage if only one suit were filed; it is the filing of a second solo suit or the prospect of such filing that

affords the defendant superior litigation power over both plaintiffs. Indeed, if numerous injured individuals all sued separately—realizing the "ideal" of everyone having a "day in court"—they would, precisely because of their large number, recover less at trial or in settlement than they would have if fewer of them had sued. In effect, the defendant is able to use the plaintiffs' numerosity against them, so that the value of their claims is reduced for no reason other than the fact that they sue in large numbers. This paradoxical negation of the notion of an "autonomous" choice to sue "solo" is an arbitrary and, from the standpoint of legal policy, undesirable result.

c. Inter-State Unity of Interest

In addition to the duality of collective interests in gaining benefit from mass production that law enforcement maximizes by eliminating all reasonably avoidable risk and insuring the balance, there is a further unity that relates to multi-state cases involving business enterprise. The general view of state regulation (through civil liability) of mass producer conduct is that all material effects are equivalent regardless of whether the conduct generates a risk wholly within the state or across boundaries in multiple states. In fact, regulatory effects of a state's law are significantly different when the risk spreads inter-state from those when the risk is confined to one state.

In the latter, the state may exert direct, singular law enforcement authority over the mass producer. Thus, the state may use civil liability to induce or even command the firm to take independent, state-specific precautions and, if necessary, prepare to provide insurance against reasonably unavoidable risk. In functional terms, the state may be said to exercise "sovereign" power in the intra-state case.

In the multi-state case, however, a given state's authority is neither "sovereign" in this sense, nor, given the object of civil liability, should it be exercised as such. Again, the nature of mass production creates a paradox of numbers. Essentially, operating in the environment of multiple varying laws, the mass producer regards differences in law as representing a distribution of probable litigation outcomes and internalizes their sum to determine its profit-maximizing investment in precautions. The firm responds to this aggregate expected liability, just as it does to every other potential cost and benefit of doing mass production business, by exploiting available scale efficiencies through standardized adjustments to the safety and price of its product, service, or process. In effect, the firm converts the varying laws of each jurisdiction into the "average law," equivalent in substance to the mean expected liability of the firm's total liability exposure under all laws.

Thus, there is no such thing as individualized or particularized sovereign-related contacts or interests in the world of multi-state mass production. Each jurisdiction's law is merely an input to the mass producer's calculus of the aggregate expected liability. This aggregation of law creates an inevitable mutuality of interest among the states with each contributing

a share of expected liability to the making of the aggregate law and, in consequence of such contributions by the others, receiving an average level of deterrence benefit from the firm's standardized response to its collective liability exposure. The indivisibility of this aggregate is thus dictated by social welfare as well as by business economics and statistical analyses. It is possible, of course, to disentangle this solidarity of legal, economic, and social interest, but not without jeopardizing the enormous welfare value derived from the goods and processes of mass production.

d. Social Solidarity and Multi-State Class Actions

The social solidarity implicit in the furtherance and governance of mass production justifies the use of state-convened multi-state class actions. The argument that mandatory class action is needed to marshal scale efficiencies for effective management of mass production risks is by now familiar to the reader and, given the absence of other means of collective adjudication, the requirement for multi-state class actions follows virtually *a fortiori.*

Thus, in addition to overcoming potential limits of states' "sovereign" interests, multi-state class action must also overcome the propensity of states—as a practical matter—to assess the reasonableness of mass production risk based on their respective needs and interests, rather than based on the aggregate (or collective), inter-state needs and interests involved. Failure to overcome this propensity may result in a firm marketing products or services or otherwise conducting inter-state activities that would be found reasonable when the benefits and costs are assessed on a state-specific basis, but unreasonable when benefits and costs are assessed in the aggregate, across all affected states.

Take a car designed without airbags, which is marketed and generates a risk to passengers in two states. Suppose that the risk in each state totals $50 and it costs $80 for a standardized design of a car that could deploy airbags, which would avoid the risk entirely. If the courts of each state determine liability based on the reasonableness of the design, but compare the cost of $80 to supply airbags against the expected loss of $50 in their respective states, each might well sustain the reasonableness (or non-negligence) of the standardized design without airbags. However, the outcome of such separate, state-specific decisions would deprive society of a reasonable investment in safety, as $100 in aggregate expected loss would be avoided by spending $80 to outfit the car with airbags. This socially detrimental outcome can be remedied most effectively by convening a multi-state class action to evaluate the case from an aggregate, multi-state perspective.

Of course, the example could easily be changed so that each state (or a sufficient fraction of states) would prefer customized to standardized precautions with the result that the socially beneficial standardization would be rendered economically unfeasible even though its adoption for all states would minimize the sum of accident costs and make everyone in all states

better off. In the reality of numerous and substantial variation in the differences among states, many (if not the great majority) of mass production cases will require assessment of one or more standardized designs to determine which if any minimizes total accident costs. To perform this task best, a state must be willing to convene (or participate in) a multi-state class action.

2. Design Options for Multi-State Class Actions

a. Structure

We consider two types of inter-state cases of mass production risk: (1) those involving standardized goods (products or services), and (2) those involving either standardized or some mix of standardized and customized goods. This division provides a useful proxy for the complexity and cost, including the need to enforce varying state laws, entailed by collectivized adjudication of multi-state cases.

In the wholly standardized case, the liability questions presented concerning reasonableness of the safety features are relatively straightforward, at least in the sense that a Mississippi court is not called upon to determine the reasonableness of customized precautions for some or all of the states involved. Consequently, the motivation for, as well as structuring of, the multi-state class action derives directly from the inter-state unity of interests discussed above. Thus, it is imperative that, in calculating civil liability sanctions, the court employ an aggregate, inter-state assessment of the benefits and costs of alternative safety measures that were or could have been adopted by the firm. It is evident that convening a Mississippi-based multi-state class action provides the best, most scale efficient means of accomplishing this law enforcement task. The application of Mississippi "law" class-wide would further enhance the effectiveness of collective adjudication. Because of the collective interests that require aggregate, class-wide assessment of the reasonableness of the product or service in question, Mississippi has good reason to apply its law to adjudicate the entire case. In any event, because the states' interests are necessarily unified by the mass production enterprise and the need to maximize social benefit from it, there is little likelihood that any significant variance let alone "true conflict" will arise regarding the basic legal and factual elements of the reasonableness test required by the laws of the several states involved.

Even though Mississippi could apply its law throughout, it may choose to recognize and enforce controls other states use to limit or expand (relative to Mississippi) imposition of liability and damages regardless of a finding that the mass production risk is unreasonable. For example, some states may limit liability to foreseeable risk, while others may apply a "hindsight" test; some may authorize punitive damages, while others may deny such awards in whole or in part; some may use a "discovery" test to

toll time-bars, while others may not. Such legal and related factual variances can readily be managed and effectuated by sequencing and synchronizing the multiple stages of pre-trial and trial proceedings, and by requiring the jury to issue special findings and verdicts.

More complications are involved in the adjudication of the second sort of case, where conditions in some fraction of states including Mississippi may require customization. However, the additional complexity and cost should not preclude use of multi-state class action. At the very least, collectivization is required to determine whether and the extent to which standardized precautions could minimize total accident costs. For these purposes, the class action structure outlined above should suffice. Concerning customized precautions, a Mississippi class action court could adopt either of two approaches for determining the socially appropriate level of customized safety. First, the court could assess the reasonableness of the various customized safety features, choosing and applying the laws of the affected states. Second, the court could "farm-out" the customized safety cases for resolution by class action in the states involved. If any state refused to undertake the task, then the Mississippi class action court would do the work. Under either approach, the Mississippi court would aggregate the recoveries by judgment or settlement in Mississippi and in the other states, and then distribute them in accord with insurance theory to maximize individual welfare.

The court could, of course, dismiss the suit regarding other state-based claims following resolution of the defendant's Mississippi liability (regardless of whether liability requires standardized safety features for Mississippi itself and some fraction of other states or whether it requires completely customized treatment). However, truncating the class action would subvert the collective interest in fully marshalling and exploiting scale efficiencies. Despite variations of law and fact, there are virtually always significant cost and quality gains from collectivization. Because of the enormous costs that a court and the parties would incur in evaluating the potential gain from collectivizing a given mass production case, as we have shown, it is best to collectivize the case automatically. Because class counsel has no motive to exploit non-existent scale efficiencies, the multiple mass production cases will proceed as multiple class actions (or otherwise) in Mississippi or other states just as they would in the absence of class action.

b. Financing

There is a chance that multi-state class action could substantially burden Mississippi's resources for the benefit of non-residents, resulting in a discouragement of its use.[81] However, the proposed designs for handling multi-state class actions mitigate these burdens. Similarly, Mississippi's

81. Indeed, increased cost alone has prompted at least one court to limit class certification to resident class members. R.J. Reynolds Tobacco Co. v. Engle, 672 So.2d 39, 42 (Fla. Ct. App. 1996) (restricting class to Florida residents "so that the Florida judiciary can efficiently manage the litigation without undue burden to the taxpayers").

costs could be reduced further by modifying the general decoupling structure developed in Part I for multi-state class actions. Under this modification, the Mississippi class action court would determine class-wide liability, and, depending on the outcome, assess the state's share of liability for distribution among resident class members. The class-wide judgment on liability would also bind non-resident class members. If favorable, it would then support suits by such class members for recovery against the defendant in the class members' home states. The laws of those states and the non-common questions, such as time-bars or contributory negligence defenses, would determine final resolution of non-resident claims. In effect, a Mississippi-based multi-state class action would function as fully mutualized ("two-way") mode of collateral estoppel.[82]

Even so, Mississippi would undoubtedly still incur increased adjudication costs for the benefit of non-residents. As discussed, multi-state class action provides the opportunity for the Mississippi court to exploit far greater scale efficiencies than would be available were the case restricted to a statewide compass. Yet, fully exploiting these opportunities for reducing the cost and raising the quality of adjudication entails commitment of judicial resources, including expenditure of funds, for example, to set up a computerized filing system, employ a special master, or empanel a group of scientific experts. Most importantly, the court may incur added cost to expand the scope of adjudicating liability from a state-specific to a multi-state assessment of the benefits and costs of various safety options. To be sure, Mississippians will also share in proportion with residents of other states the collective safety and insurance gains derived from scale-enhanced law enforcement. Furthermore, Mississippi should expect that, as in other instances of mutually-beneficial, inter-state law enforcement efforts, other states would lend it some support, including contributions of resources, and reciprocate by sponsoring inter-state class actions in other cases.[83]

Nevertheless, some financing gap may remain due to free-riding by other states, and like the parties, a Mississippi court may well require greater assurance of a return for the added investment in judicial resources devoted to benefiting non-residents—people who do not pay taxes to fund the Mississippi system of civil liability. The solution for such a problem is simply for the Mississippi court to assess class counsel for the costs of adjudicating the non-Mississippi claims with provision for counsel to recover those costs from the defendant in the event the class succeeds in winning a

82. *See* David Rosenberg, *Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market* (Harvard Law & Economics Discussion Paper No. 394, 2002), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354100.

83. Notable examples of states working together in mutually beneficial law-enforcement efforts include the Master Settlement Agreement, in which forty six state attorneys general agreed to settle suits seeking reimbursement for smoking-related medical costs from several large tobacco companies (the Master Settlement Agreement and its amendments are available at http://caag.state.ca.us/tobacco/msa.htm), and the Microsoft antitrust litigation. United States v. Microsoft Corp., 87 F. Supp. 2d 30 (D.D.C. 2000).

judgment for class-wide liability.[84] Another version of the cost-shift component would tax the defendant for half the costs despite winning judgment at trial, if the court had previously refused to enter summary judgment or directed verdict against the class. Beyond the law enforcement benefits from multi-state class actions, this cost-shift mechanism furthers deterrence objectives by compelling mass producers to internalize, as part of the potential accident costs resulting from a risky decision, the expense incurred by courts to manage and adjudicate a multi-state class action.[85]

c. Constitutionality

Questions of constitutional interpretation, as such, are beyond the scope of this paper. However, we nevertheless explain how our proposal for Mississippi-based multi-state class actions responds to intimations in current U.S. Supreme Court decisions that suggest limits affecting both its scope and mandatory nature. Specifically, the Court has asserted that there may be "due process" bounds to a class action court applying forum state law to govern all claims, including those of non-residents, and to exercising personal jurisdiction over non-resident absentees without affording them the chance of opting-out.[86]

Before addressing how our proposal responds to these potential limitations on a Mississippi-based multi-state class action, it is important to underscore that the Court has neither recognized the collective interests involved in a mass production case nor actually applied its due process rulings to such as case. The only case that involved mass production risk was *Ortiz v. Fibreboard*,[87] and there, the Court expressed the principle that would sustain the use of multi-state class actions for law enforcement purposes. To be sure, the context was use of mandatory class action to carry out an equitable distribution of money from a common fund by adjudicating "rights of all participants in a fund in which the participants had common rights."[88] It would pervert the notion of law in service of individual well-being to deploy mandatory class action for protection of separate monetary claims against an investment fund or the like, while refusing its evident benefits to those whose unity of interests in security against risks of catastrophic loss, including death, is not only an indivisible but also incomparable whole, greater than the sum of its parts (were such conceivable).

84. Non-resident class members would not be injured by such a tax, since the expected value they derive from mandatory class actions would eclipse the amount they would have to pay Mississippi for providing the service.

85. Steven Shavell, *The Fundamental Divergence Between the Private and the Social Motive to Use the Legal System*, 26 J. LEGAL STUD. 575, 588 (1997).

86. Of course, this proposition implicitly presumes that the law creating the non-residents' "claims" precludes mandatory application of the forum-state law in a multi-state class action even when barring opt-out would best promote optimal deterrence and insurance. In view of the deterrence and insurance rationales on which states generally justify the civil causes of action they create, courts should determine rather than presume whether non-forum law dictates the socially destructive consequences of opt-out.

87. 527 U.S. 815 (1999).

88. *Id.* at 836, n. 14.

Indeed, mandatory class action represents the only means within practical reach for enforcing these "common rights."[89]

In any event, our proposed designs for Mississippi-based multi-state class action should satisfy constitutional muster. Specifically, our design responds to due process limitations on application of forum state law to resolve non-resident claims. First, the limits take hold only if there is a "true conflict" between the laws of the forum and other states. In all probability, no such conflict exists regarding the Mississippi law that would govern the core of common questions determining liability based on class-wide assessment of benefits and costs of the proffered safety alternatives. Any state that enforced civil liability through multi-state class actions would apply law fully or at least substantially identical in content regarding these questions. Any state that confined enforcement to statewide class actions or separate actions would generally apply law that confined the evaluation to state-specific benefits and costs. Second, the preceding collective interest analysis demonstrates that Mississippi (as does every other state affected by the threat or implementation of a mass production risk) has a "significant contact or aggregation of contacts" to the claims and underlying mass production activities rendering choice of Mississippi law entirely reasonable, let alone far from "arbitrary or unfair."[90] Finally, we stress that under our model, Mississippi law would determine only the common questions of liability relating to the reasonableness of a given standardized safety option relative to other standardized options as well as any proffered customized options. If any customized option is found superior to all standardized options for any state or group of states covered by the class action (including Mississippi), then a judgment to that effect will issue in defendant's favor relating to the standardized design bases for liability and the balance of the case will be managed according to the "farm-out" procedure discussed above.

The Court has also raised an impediment to mandatory class action, positing that non-residents absentees may be subject to the exercise of personal jurisdiction by a multi-state class action court only if "provided with an opportunity to remove [themselves] from the class."[91] Yet, that requirement applies only when the "absent class member's right of action was extinguishable" by class action judgment.[92] Only common questions that implicate collective interests are necessarily determined by the multi-state class action.[93] Under the decoupled model generally, every class member

89. Notably, the Court in *Ortiz* labored under a constraint, inapplicable to Mississippi courts, of the federal Rules Enabling Act. *See id.* at 845.

90. *See* Phillips Petroleum v. Shutts, 472 U.S. 797 (1985). Mississippi's contacts would obviously be "significant" in a situation where over two-thirds of the plaintiffs are Mississippians—as would be necessary to remain in state court under the Class Action Fairness Act of 2005 (assuming the amount in controversy exceeded $5 million). 28 U.S.C. § 1332.

91. *Id.* at 812.

92. *Id.*

93. It should be noted that the Court in *Ortiz* proceeded on the premise that when collective interests warranted class action certification under Rule 23(b)(1) or (b)(2), the due process requirement for opt-out posed no barrier to mandatory collectivization.

can prosecute his or here claim for damages on non-common questions through separate counsel, in any venue he or she selects, and by trial to judgment. Moreover, as noted above, the multi-state class action would follow the "farm-out" procedure in all cases of "customized" safety.

D. Ability of Mandatory Class Actions to Avoid "Sweetheart" and "Blackmail" Settlements

Like individual lawsuits, class actions usually settle. However, unlike individual lawsuits, mandatory class actions may involve thousands or even millions of claims, with liabilities ranging up to the billions. With so much at stake, many courts and commentators have argued that the class action settlement process will inevitably lend itself to corruption. These critics of class actions have focused largely on the danger of so-called "sweetheart" and "blackmail" settlements.[94] In sweetheart settlements, class counsel allegedly settles meritorious claims for far less than they are actually worth—essentially "selling out" the class—in order to maximize its net returns from representation.[95] In blackmail settlements, on the other hand, defendants are allegedly bludgeoned into settling cases for far more than they are worth because class counsel is able to threaten the defendant with a costly and risky trial.[96] Although these two complaints differ substantively—one argues that class actions offer plaintiffs too little, while the other argues it offers them too much—they have the complementary effect of bolstering the case against collective adjudication. In the following discussion, we will scrutinize the underlying assumptions and validity of the proposition that class actions cannot overcome the twin evils of sweetheart settlements and blackmail settlements. Our overall conclusion is that the risks posed by these phenomena have been overstated.[97] We suggest that the threat of sweetheart and blackmail settlements can be minimized through appropriate class action safeguards, and therefore, class actions, particularly mandatory class actions, constitute a fair and efficient means of adjudicating (and settling) large-scale damage claims.[98]

1. Preventing Sweetheart Settlements

Many courts and commentators assail class actions on the basis that class counsel shares a joint interest with defendant in "selling out" the class. According to this theory, class counsel and the defendant both have

94. Hay & Rosenberg, *supra* note 24, at 1377.

95. *See, e.g.*, Ortiz v. Fibreboard Corp., 527 U.S. 815, 852-53 & n.30 (1999).

96. *See, e.g.*, In re Rhone-Poulenc Rhorer, Inc., 51 F.3d 1293, 1299 (7th Cir. 1995).

97. Indeed, some commentators have suggested that the very term "blackmail" settlement makes little sense. Silver, *supra* note 79, at 1387-88 ("Neither law nor conventional morality treats settlement demands in conventional lawsuits as blackmail attempts. Nor do those who assert that blackmail occurs in class actions. They have praised settlements as alternatives to trials, and with but one exception, they have served for years as judges in a civil justice system that strongly encourages parties to settle. They reserve their ridicule for class action settlements.") (internal citations omitted).

98. This discussion of "sweetheart" and "blackmail" settlements relies heavily on Hay & Rosenberg, *supra* note 24.

strong incentives to "negotiate" a settlement that maximizes attorneys' fees, but gives class members less than fair value for their claims. In other words, attorneys from both sides will collude to increase class counsel's profits in exchange for decreasing the defendant's ultimate payment to class members. Moreover, advocates of this theory assert that courts are ill-equipped to detect such "sweetheart" settlements because the trial judge depends heavily on the parties to supply information about the value of the class' claims and therefore cannot easily verify whether a proposed settlement accurately represents the class' full value. Assuming the reality of such sweetheart settlements, we deny that the problem necessitates any restriction of the use of mandatory litigation class actions. Whatever the actual magnitude of the risk, courts have readily available means to deter class counsel from making sweetheart deals. In the following discussion, we will show how courts can discourage class counsel from "selling out" the plaintiff class without sacrificing the benefits of mandatory class action adjudication. In particular, we argue that courts can prevent sweetheart settlements (as well as other deficiencies in class representation) without resorting to opt-out, sub-classing or other means of policing attorney behavior.

To prevent class counsel from settling for less than the class' claims are worth, the court must appropriately regulate class counsel's distributive share of the settlement amount. That is, the court must ensure that class counsel's fee does not exceed the share of a class recovery that class counsel would have received in return for winning a favorable judgment at the class action trial. To do this, the court need only make sure its fee-award to class counsel pays a fractional share of the settlement recovery that does not exceed the fractional share of the judgment the court would have paid class counsel had the case gone to and succeeded in class action trial. So long the class counsel's fee-award (whether based on a preset percentage of recovery or lodestar analysis) pays a fractional share of the settlement that is no larger than the fractional share he or she would have received from the final judgment of damages at trail, the attorney will have no incentive to settle for less than the class members' claims are worth in the aggregate. That is, counsel will find it in his or her best interest not to "sell out" the class.[99]

99. Although beyond the scope of this Article, we note that motivating class counsel to invest optimally in maximizing the net aggregate value of the class claim requires pegging the fee award to the optimal level of investment, neither more nor less. To avoid the difficulty of determining fee-awards as well as the problems of sweetheart deals, courts could simply sell or auction the class claim to class counsel. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1 (1991). Better still, courts could promote an "ex ante" claims market by authorizing first-party commercial and governmental insurers to acquire by subrogation complete ownership control over the prosecution of their insured's prospective (including pre-risk) tort claims. *See* David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 729-30 (1989); Hay & Rosenberg, *supra* at note 24, n.17.

This simple fee structure contrasts with the costly and inadequate alternatives of opt-out, sub-classing, and judicial scrutiny. Opt-out exemplifies the common defects in all these information intensive alternatives. The key to making opt-out a credible and effective sanction for class counsel perfidy is determining whether class counsel has held out for the maximum expected value of the class claim at trial. Unfortunately, it is doubtful that class members could, on their own, obtain adequate information to make an informed decision as to whether they should opt-out. The only people who could make such a decision would be those who possess insider information about any potential sweetheart settlements. Even here, however, there is no reason why an insider would prefer communicating with class members by opting-out (a costly proposition) instead of simply prompting the court (in exchange for a fee, of course) to have class counsel investigated, and if found delinquent, disciplined and/or replaced. More realistically, there is no reason why the insider would prefer the "reward" of individually prosecuting his case, instead of a payment that the court can fully and efficiently exact as part of the fine levied against offending class counsel.[100] Moreover, even if class members could effectively elicit the information themselves, there is no reason why they should be required to opt-out and thus forfeit the investment benefits of class adjudication once the illicit deal was uncovered and negated. Thus, attempting to use opt-out as a mode of monitoring class counsel would have little or no upside, but substantial downside—robbing plaintiffs of the scale efficiencies provided by mandatory class adjudication.

2. Preventing Blackmail Settlements

Unlike critics who believe class actions offer plaintiffs too little, those who believe class certification amounts to judicial "blackmail" believe collective adjudication offers plaintiffs far too much. According to these critics, once a class is certified, defendants are bullied into paying plaintiffs a handsome premium to avoid going to trial, even if the defendant's chances of prevailing are very strong. Plaintiffs' recoveries, therefore, do not reflect the merits of their claim; rather, they reflect the defendant's fear of staking everything on a single trial. One of the most prominent enunciations of class certification as judicial blackmail occurred in the widely discussed case of *In re Rhone-Poulenc Rhorer, Inc.*,[101] where the Seventh Circuit overturned an order certifying a class of tort plaintiffs who allegedly contracted HIV as a result of the defendant's negligent handling of blood products. In the opinion, Judge Posner noted that since aggregate liability could run as high as $25 billion, the defendants would be forced to make the unenviable choice of either "stak[ing] their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle

100. Class members' reward might come in the form of a fine paid by class counsel or of a malpractice liability judgment against the attorney. Alternatively, if the "whistleblower" is in fact an attorney who was working with class counsel, he may be rewarded by replacing the wrongdoer.

101. 51 F.3d 1293.

even if they have no legal liability . . . ."[102] Such a choice was made all the more onerous by the fact that plaintiffs had lost twelve of the previous thirteen trials involving non-class members who pressed similar claims.[103] Even assuming that the risk aversion to a single class action trial could distort settlement negotiations to the disadvantage of the defendant rather than the class and its counsel, there is a straightforward solution: simply conduct multiple class trials to determine aggregate liability.

The entire blackmail problem, assuming it exists, is solved through the use of multiple class trials (or simply trials conducted under the aegis of mandatory class certification). Under a multiple class trial regime, the court (or courts in different Mississippi jurisdictions) would conduct a set of jury (or bench) trials sufficient in number and representativeness to yield a basis for reliably estimating defendant's aggregate liability. Whether the number, venues, and other details are set by the court or left to the parties as in the normal course of separate action litigation, the opportunity for multiple trials would reduce the risks (to both sides) associated with going to trial for the simple reason that it is unlikely either side will win (or lose) in a single class-wide trial.

To illustrate the point, assume a pharmaceutical company has developed a painkiller that approximately twenty five thousand individuals purchase. After a few years, epidemiological studies suggest a correlation between ingestion of this drug and the development of heart disease. Assume further that the plaintiffs have a twenty-five percent chance of recovering $500 thousand each (for a total aggregate liability of $3.125 billion). In such a setting, a single class trial is a highly risky proposition for both sides. The class would have a seventy-five-percent chance of recovering nothing if the case goes to trial, and the defendant would have a twenty-five-percent chance of losing a staggering $12.5 billion at trial. Suppose, however, that the court's policy is to hold a series of trials and award the class an amount equal to the average of the amounts awarded by individual juries. The odds drop substantially that the class will recover nothing or that the defendant will lose everything as the number of trials increases—the greater the number of trials, the lower the odds of an extreme outcome. If the court holds two trials, the odds that the plaintiffs will recover nothing drop to a little over 56%; if the court holds four trials, the odds drop to a little over 31%; if the court holds ten trials, the odds drop to roughly five percent, or one in eighteen, that the plaintiff will recover zero. In making it far more likely that the class will recover damages (most likely averaging to $3.125 billion), but less likely that the defendant will suffer a total loss ($12.5 billion), holding multiple class trials reduces the risk that single, all-or-nothing, trial would impose.

Two points are worth emphasizing about the policy of holding multiple trials. First, a multiple class trial regime neither increases nor decreases the overall liability exposure of defendants or recovery by classes. Rather, it

102. *Id.* at 1299.
103. *Id.*

simply affects the variance (risk) in the possible actual outcomes and makes it more likely that the class' actual recovery after concluding the series of trials is approximately equal to the expected recovery. Second, the multiple class trials approach can be adapted for both general and special verdict trials. In special verdict trials, the court could discount the ultimate damage award by the percentage of verdicts favorable to the defendants. For example, if only one-fourth of the juries return a verdict against the defendant, the ultimate award would be discounted to one-fourth the aggregate damages. And finally, conducting multiple class trials would not simply recreate the wasted costs of fractionated class litigation. Courts could streamline the process to reduce redundant trial costs, for example, by convening and averaging the judgments of more than one jury in a single trial, or employing video-taped testimony in several trials. The parties themselves might increase efficiency by confining the scope of multiple trials to contentious issues. Most importantly, in contrast to the fractionated class process, a multiple class trial regime assures plaintiffs the same scale efficiencies defendants naturally enjoy.

IV. CONCLUSION

In the end, of course, our conclusion is the same as it was in the beginning: nothing short of complete mandatory collectivization of all claims assures that civil liability can accomplish its law enforcement mission of optimally deterring unreasonable risk and, when appropriate, optimally insuring harm from reasonable risk. The use of civil liability under study governs virtually all risk-taking by mass producers—governments as well as businesses—and hence virtually all civil litigation aside from automobile accidents. Litigations involving defective products, discrimination, and toxic exposure merely exemplify the significant and varied potential for mass production designs and policies to place large populations at greater chance of death, crippling disease and trauma, destruction of livelihood and property, and invidious discrimination. It is crucial to bear in mind, however, that while mass production processes, products, and services generate systematic risk, the ability of businesses and governments to exploit the efficiencies of large-scale, standardized means of production also increases individuals' chances of surviving and prospering in this world of prevalent danger and scarce resources. Indeed, if not for the availability of mass production processes and goods, most people in the world would be impoverished or dead.

Courts thus play an important role in the overall effort by the law enforcement system to manage mass production risks. This law enforcement effort consumes trillions of dollars annually in seeking to reduce these risks to reasonable, socially appropriate levels and to insure against hazards that cannot be avoided by reasonable investment in precautions. Like administrative agencies and executive law enforcers, courts must strike the balance of benefit and risk from mass production that best enhances individual well-being. In terms of civil liability, the objective is to

minimize total accident costs, including the costs of precautions, unavoided harm, insurance, and transactions. Even under the most favorable circumstances, this task of marshaling, evaluating, and taking appropriate action upon the relevant information is daunting.

However, Mississippi has the chance to strike this balance between risk and reward more effectively than any state has before. Through adoption of a mandatory litigation class action rule, Mississippi can chart a new course in civil law enforcement, blazing a path for all other states to follow in the future.