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INTRODUCTION

The U.S. Judicial Conference endorsement of a “second opt-out opportunity” for class action settlements to supplement the option for pre-certification exit under Federal Rule of Civil Procedure (“Rule”) 23(b)(3) is retrograde.¹ It represents a victory for the myopic “proceduralist” way of thinking.² In operation it will impose loss on everyone whose welfare depends on federal class action enforcement of tort and other civil liability to prevent and compensate harm resulting from business risk taking (“mass pro-

¹ Professor of Law, Harvard Law School. I thank the participants at The University of Chicago Legal Forum Symposium on “Current Issues in Class Action Litigation,” (Nov 2002), David Abrams, Guy Halteck, Brett Harvey, Randy Kozel, Liz Oyer, Wesley Shih, John Snyder, Beth Stewart, and Alexander Volokh for helpful comments on earlier drafts of this essay. Background for my present argument is provided in recently published work, see, for example, Charles Fried and David Rosenberg, Making Tort Law: What Should Be Done and Who Should Do It (AEI 2003); David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv L Rev 831 (2002); David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 Va L Rev 1871 (2002).


³ “Proceduralist” refers to the approach that ignores deterrence and compensation objectives and related individual welfare effects of the substantive law in evaluating the operation and potential redesign of the civil liability system. In this case involving class action opt-out, as in many, the basic deficiency of the proceduralist mode is compounded by shoddy cost-benefit analysis, general disregard of pre-suit, ex ante conditions, and resort to deontological and even ontological claims, usually asserted in the form of vacuous and question-begging moralisms, hackneyed slogans, pseudo-traditions, and other conceptual shell games like “plaintiff autonomy,” “day in court,” and “process values.” Consider David Shapiro, Class Actions: The Class as Party and Client, 73 Notre Dame L Rev 913, 937–38 (1998) (critiquing the proceduralist support for class action opt-out in mass tort cases).
duction risks"). To be sure, the Conference merely provides explicit authority for what is already widespread practice, but that hardly excuses making matters worse. Indeed, the Conference, as the author of the basically flawed 1966 revisions of Rule 23, had—and squandered—the legislative chance to make matters much better. At a minimum, it should have applied advances in theoretical and empirical understanding of the social benefits derived from collectively adjudicating civil liability in business risk-taking cases not only to reject the “second opt-out,” but also to eliminate the requirement for pre-certification opt-out.

3 The reference to cases of “mass production risk” denotes the capacious scope of my argument for collective adjudication. It applies to the entire universe of civil actions (in law and equity) that serve (or affect) the law enforcement functions of civil liability, in particular deterrence and insurance. My analysis thus relates to all cases arising from the risk generated by governmental or non-governmental mass production processes and goods (products and services, including information and law enforcement), whether labeled antitrust, securities and other consumer fraud, contract, corporate governance, constitutional rights and civil liberties claims, torts, or otherwise. More specifically, concerning the class of cases labeled “tort” or “mass tort,” my analysis encompasses cases involving harm to property and person, actualized or risk based. It rejects the common, functionally arbitrary, and unrealistic taxonomies of mass tort law and litigation. See, for example, Geoffrey C. Hazard, Jr., The Futures Problem, 148 U Pa L Rev 1901, 1902–05 (2000) (distinguishing between mass disasters, mass accidents, toxic torts, and true mass torts). See also Amchem Products, Inc v Windsor, 521 US 591, 616 (1997) (distinguishing between small stake and large stake claims); Castano v American Tobacco Co, 84 F3d 734, 748–49 (5th Cir 1996) (distinguishing between pre-certification matured and unmatured cases); Deborah Hensler, et al, Class Action Dilemmas: Pursuing Public Goals for Private Gain 5–8 (RAND 1999) (distinguishing between securities, consumer, tort, employment, civil rights, and government-related class actions).

4 In addition to inexplicable proceduralist disregard of the deterrence and insurance functions of civil liability and general neglect of the relative effects of rule choices on individual welfare, the 1966 revisions also displayed neophytic understanding of substantive law governing mass production risks, operational dynamics of procedure, and economics of practice.

5 The following diagram depicts the litigation class action with opportunities for pre-certification and second, class settlement opt-out:
While drawing on previously published normative arguments supporting a general regime of mandatory collectivized adjudication, my present critique of class action opt-out focuses mainly on what I regard as the post-Amchem “default” conception of the Rule 23(b)(3) class action. Its defining feature is what I term the

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1. Class action is filed.
2. Class action is certified to include all putative class members except those who have elected pre-certification opt-out.
3. The defendant and class counsel reach a class settlement agreement establishing a schedule of damage payments for specified harms covering all class members except those who exercise the second opt-out opportunity.

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6 See, for example, David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv L Rev 831 (2002).
7 By “default” conception, I mean that the Supreme Court’s interpretation of Rule 23 is best explained as establishing certain practices—in particular, the “anti-redistribution principle” discussed in the following text—as the norm for federal class action unless and until expressly modified by the Judicial Conference and Congress or, regarding the state-created causes of action, by state courts or legislatures. An alternative explanation would view the Court’s constraints on class action in light of contemporaneous rulings on pre-emption, expert testimony, punitive damages, and other areas bearing on civil liability as covertly implementing its skepticism or dislike of the burgeoning role of tort cases in policing mass production risks, and of the consequent burden on federal courts through diversity jurisdiction. This explanation is plausible, if rather facile. It rests largely on speculation about unverifiable motives for judicial opinions. Moreover, the explanation is of little interest even if true, because such motivations would evidently derive from visceral reactions rather than careful and systematic study on the Court’s part. While students of constitutional law seem content, indeed, enthralled to spend their days seeking and re-
“anti-redistribution principle.” To a great extent, this principle determines the “fairness” of using Rule 23(b)(3) to resolve claims by trial or settlement. Its distributive baseline is the expected recovery value a claim would have if prosecuted in the standard separate-action process—a process largely driven by market forces. Accordingly, the “fairness” test requires structural as well as substantive assurances that class members’ recoveries should, as far as practical, reflect the litigation strength of their claims in the absence of class action. This prescription for claim-related wealth maximization implies the general subordination, if not irrelevance, of insurance theory and objectives in the allocation of damages among class members. In reality, of course, the anti-redistribution principle’s greatest significance is in class actions comprised of classable claims, which, litigated separately or jointly, have net recovery value in the standard market process. More specifically, the anti-redistribution principle is important to those claims that plaintiff-attorneys find financially worth litigating in the absence of a class action mechanism. Generally, as explained below, the marketability of a claim in the standard process depends on the net return an attorney expects from (i) acquiring a financial interest in some fraction of the classable claims and making a commensurate “mass production” investment to develop them, and (ii) free riding on the work product of other attorneys investing in the litigation of similar claims.

Affording class members the choice of remaining in the class action or opting out to prosecute their claims in the standard market process is conventionally viewed as necessary to effectuate the anti-redistribution principle. Thus, the Conference rationalized the “second opt-out” as principally providing class members with the “self-determination and control” they would have in “traditional litigation” to appraise the value of settlement in light of materially changed circumstances, “reliev[ing] individuals from the unforeseen consequences of inaction or decisions made at the time of certification, when limited meaningful information was available.” Moreover, the Conference concluded, the second opt-out provides “added assurance to the supervising court that a settlement is fair, reasonable, and adequate [—] just the
sort of 'structural assurance of fairness,' mentioned in *Amchem Products*, that permits class actions in the first place.\textsuperscript{10}

The Conference rationalization of opt-out, and the prevailing consensus it expresses, is mistaken. Effectuation of the anti-redistribution principle—assuming that the appropriate default conception of Rule 23(b)(3) should embrace this principle—does not require opt-out prior to certification, at the time of class settlement, or at any other point. Rather, providing any opportunity for exit from the class action will undermine not only the anti-redistribution principle—increasing litigation costs and risks from strategic behavior as well as reducing the recoverable wealth that class action scale advantages make possible—but also the basic deterrence objective of collective adjudication together with any insurance benefit.

My argument, in short, is that allowing opt-out from Rule 23(b)(3) class actions—first, second, or in any number or phase of the process—is unnecessarily destructive of individual welfare. Part I briefly summarizes the normative general theory justifying mandatory collectivized adjudication—in practical terms, adjudication by mandatory litigation class action—of mass production risk cases. Positing that the social objective for the law is to enhance individual well-being and that individuals seek maximum well-being, Part I explains that these conditions imply use of the legal system to minimize the sum of accident costs—specifically, the total costs of precautions against accident, unavoidable harm, risk-bearing, and administration of the legal system—and, assuming the need for courts to play a role in this law enforcement effort, the use of mandatory litigation class action to adjudicate mass production risk cases.

In light of the general normative case for mandatory class action, but deferring for later consideration any insurance objective, Part II shows that that applying Rule 23(b)(3) on a mandatory basis would secure optimal deterrence while fully comporting with the anti-redistribution principle and facilitating related pursuit of individual wealth maximization. Both are readily accommodated simply by decoupling these functions, essentially separating the class action into two basically distinct stages of decision-making and fee-awards: first, common-question determination of aggregate liability and damages for deterrence purposes, and second, contingent on first-stage judgment for the class, non-

\textsuperscript{10} Id.
common question distribution of damages by conventional individualizing process and standards.

Part III then assesses the various instrumental rationales for allowing any opportunity to opt-out from a Rule 23(b)(3) litigation class action—that is, complete exit from the class action to prosecute a claim on both common and non-common questions in the standard market process. It concludes that opt-out is not merely unnecessary, but would be counterproductive. The principal problems for which opt-out provides a supposed solution, particularly in checking deficient representation of class interests by class counsel and enabling class members to maximize individual recoveries, are either unaffected by opt-out or far better remedied without it. Moreover, beyond adding considerable unnecessary expense, opt-out promotes opportunities and incentives for class counsel defalcations and generally undercuts the anti-redistribution principle as well as the deterrence function.

Bringing into play an optimal insurance objective to mass production liability, Part IV extends the critique of opt-out class action to several designs for class settlement of risk based claims that incorporate a “back-end opt-out,” essentially the “second opt-out” endorsed by the Conference. This discussion demonstrates the perversity of the second opt-out and ultimately of the anti-redistribution principle. It will be seen that nothing could be more detrimental to the welfare of individuals in need of insurance supplied by civil liability recoveries than to enforce that principle through opt-out or otherwise.

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11 Id.
12 While mandatory-litigation class action greatly improves the capacity of the civil liability system to achieve deterrence and insurance objectives, that gain does not imply any productive superiority of the judicial system over other alternatives, in particular administrative regulation and first-party commercial and governmental (social) insurance. See Pegram v Herdrich, 530 US 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 Carle from other HMOs.”). Indeed, quite the opposite is the case: the general, well-documented advantages of these “alternatives” dictate resorting to courts only to the extent of systematic failure of administrative regulation to control risk appropriately and of government and commercial first-party insurers to cover loss adequately. The judicial system lacks the capacity and resources to make socially appropriate decisions in mass production risk cases. These cases typically present daunting questions of science, technology, business and government finance, organization and operation, and economics and other fields of public policy. Reliable resolution of these questions demands far more experience and training than the judicial system’s lay personnel (judges, lawyers, and juries) possess and far more information than its adversarial processes deployed strategically and in accord with the means and self-interests of stakeholders (litigants, lawyers and others) are willing, or, indeed, able to supply. See David Rosenberg, The Path Not Taken, 110
I. GENERAL NORMATIVE THEORY JUSTIFYING MANDATORY COLLECTIVIZED ADJUDICATION

The following sketches the argument for mandatory collectivized adjudication—in practical terms, for mandatory litigation class action. The argument proceeds from the premise that the legal system should be designed to enhance individual welfare. In short, the legal system should resolve mass production risk cases according to the mode of adjudication that an individual seeking maximum welfare would prefer. To discern that preference, I posit a single individual who has the opportunity to choose the legal system for managing accident risk before knowing his or her own prospects in that world regarding incidence of accidents, access to resources, and advantage in the chosen legal system. 13

Essentially, the individual internalizes all possible fates, including actual preferences of all possible people in all possible states of the world. Aiming to maximize well-being regardless of

Harv L Rev 1040, 1044 (1997) (noting that law schools are “tracking in the path of increasing social irrelevance and irresponsibility”). Indeed, to correct these deficiencies would require not only a vast infusion of tax revenues and a transformation in the curriculum and faculty of “law schools” (more accurately, “court law schools”), but also education of the public to accept the notion that lawmaking by courts, like any other state agency, entails the “tragic choices” of cost-benefit tradeoffs. Consider Guido Calabresi and Philip Bobbitt, Tragic Choices (Norton 1978) (analyzing societal choices to distribute scarce resources for net social benefits that thereby necessarily incur social costs). See also W. Kim Viscusi, Jurors, Judges, and the Mistreatment of Risk by the Courts, 30 J Legal Stud 107, 118, 127, 134–35 (2001).

13 In deriving the objectives and means of the legal system based on the rational preferences of a single, welfare-maximizing individual, this analysis draws on work developing and applying the ex ante perspective in normative theories of individual rational choice, most notably John C. Harsanyi, Morality and the Theory of Rational Behavior, 44 Soc Res 623 (1977). See also John Rawls, A Theory of Justice 136–37 (Harvard 1971); Charles Fried, An Anatomy of Values: Problems of Personal and Social Choice 204 (Harvard 1970); Ronald Dworkin, What Is Equality? Part 2: Equality of Resources, 10 Phil & Pub Aff 283 (1981). The “behind the veil” approach has been criticized for adopting or implicitly assuming certain processes and conditions for conducting multi-party bargaining in the “original position.” See, for example, Michael J. Sandel, Liberalism and the Limits of Justice 126 (Cambridge 1982) (criticizing Rawls’s “veil of ignorance”). However, this criticism is misplaced here. Postulating a single individual stating personal, rational preferences eliminates any need to explain or justify the method by which multiple parties, possibly with varying traits (and interests) would bargain and reach agreement. It does not entail making interpersonal comparisons of utility. Nor is it subject to the criticism that the individual ex ante is unrealistically or arbitrarily assumed to be a detached, neutral decision-maker, who has no personal stake in his or her choices or preferences for the ex post legal system. To the contrary, the posited “original position” implies not only that the individual ex ante decides with knowledge of how living under one or another alternative legal regime will affect a person’s welfare, given his or her accident, distributive, and other relevant fates, but also that the individual ex ante necessarily will live under the chosen regime and bear the consequences.
what fate has in store, the individual rationally selects a legal system that minimizes the sum of accident costs. Any and every one in the same, original position would choose the same legal system. Specifically, the preferred system would employ civil liability to provide two goods: optimal deterrence that prevents unreasonable accident risks (risks that are more costly to bear than to avoid) and optimal insurance of the residual, reasonable accident risk. Of central importance, the individual ex ante would, given the opportunity, select a system that prioritized optimal deterrence over compensating loss from otherwise preventable unreasonable risk, or any other litigation-related interest, such as personal control over the prosecution of claims. These conclusions reflect the overwhelming evidence of peoples’ revealed and expressed preferences and follow logically from the proposition that efficient reduction of accident costs increases the individual’s expected net welfare across all possible states of the world.

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14 My 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 under girds the basic theories of law enforcement (including general deterrence) and insurance. See generally Harsanyi, 44 Soc Res at 623 (cited in note 13) (explaining the components of rational behavior). First, I 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, I 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, I 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’ valuations 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.

15 I will assume that application of the anti-redistribution principle precludes using class actions to supply optimal insurance. Therefore, I will concentrate on the deterrence objective, and defer to Part III discussion of optimal insurance theory and its implications for the design of class actions.

16 This result depends on full insurance coverage of reasonable risk. Were coverage of reasonable risk less than full, a highly risk-averse individual might sacrifice optimal deterrence of unreasonable risk for higher levels of deterrence or compensation to reduce the overall gap in coverage. This point is significant for the practical design of the legal system. However, it does not diminish the need for deriving the best benchmark against which to gauge both the degree of individual welfare sacrificed by settling for second-best and the worth of efforts at improving the system.

17 Of course, it is always possible to premise lawmaking on some alternative postulate than the aim of maximizing individual welfare and the axioms of rational choice theory. However, I suspect that few would find the results appealing. For an extended argument in this vein, see Louis Kaplow and Steven Shavell, *Fairness versus Welfare: Notes on the Pareto Principle, Preferences, and Distributive Justice*, 32 J Legal Stud 331, 342–51 (2003). Thus, suppose an individual, after consulting weather reports on the chance of rain, decides not to carry an umbrella to work for reasons of convenience or
Also, as elaborated in my previous writings, the individual ex ante would prefer collectivized adjudication of mass production liability to maximize the gains from scale investment as well as scale economy. Because of its scale benefits, collectivized adjudication synergistically increases the social value of mass production liability relative to any other mode of adjudication: the whole is greater than the sum of its parts. As will be explained shortly, in the absence of collectivized adjudication defendants possess an asymmetric scale advantage that skews litigation outcomes in their favor and therefore undermines deterrence and insurance objectives. Only collectivized adjudication assures that mass production liability will minimize total accident costs through optimal deterrence and insurance.

The practical import of this normative argument is that the legal system should mandate litigation class action without any opportunity for exit or opt-out (or its functional equivalent) to enforce mass production liability. Collective action to achieve optimal tort deterrence and insurance on the plaintiffs' side requires this mast-tying mechanism barring opt-out for two related reasons. First, the standard claims market generally fails to achieve equivalent collectivization. Collective action costs—in incurred, for example, in organizing, managing, allocating risks and benefits, and monitoring performance and allegiance to the joint venture—and problems (in particular the problem of free riding) will likely prevent the level of collectivization that would otherwise. If it rains, this person might well regret that decision. But I doubt anyone would urge passing a law that required people to carry around umbrellas when they would not want to because they might otherwise regret their decisions. Rejecting the ex ante perspective when evaluating more complex, but vital, decisions might lead to similarly anomalous results. For example, rejecting the ex ante perspective might lead to outlawing the purchase of insurance in order to protect those who do not experience an insured loss during the policy period from feeling regret over having paid the premium. Similarly, it might entail forbidding consumers from buying safer cars because they might nonetheless get hurt in an accident and regret paying extra without avail. Indeed, we would have to bar business investments because an investor might be unhappy if a venture fails.


Suppose, for example, lawyers A and B have similar claims, each for $100, and incur litigation costs of $10 on the common questions. A and B are each better off merging representation, with A doing the work once for both claims. The costs of bargaining over how to split the surplus of $10, however, will drain value from, and may well preclude, a mutually beneficial agreement.

At the limit, when only one claim will be prosecuted to final judgment and the underlying work product is costless to copy and use in subsequent cases, free riding
maximize the benefits of scale economies and investment to achieve optimal deterrence and insurance.\textsuperscript{21}

Second, the deficiencies in plaintiffs' scale incentives from fractional aggregation are greatly magnified because, as a practical matter, mass production defendants normally exploit the scale opportunities afforded by universal aggregation. Naturally aggregating its interest in classable claims, a mass production defendant has full scale incentives to make and spread the costs of an optimal investment in developing the defense side of the common questions.\textsuperscript{22} Defendant's asymmetric scale advantage—the functional equivalent of a de facto class action—translates
into a greater chance of its prevailing on the common questions.\footnote{A settlement example usefully illustrates the general adverse deterrence effects from systemic bias favoring defendants. Assume that a firm's activity poses a risk to one hundred individuals, each of whom will suffer a $500,000 loss in the event of accident; the firm can avoid the risk by spending twenty million dollars on precautions. Suppose that the parties can make only two levels of investment on the common questions: $100,000 or five million dollars. Further, should both sides invest five million dollars, each will have a 50 percent probability of recovering or avoiding total damages at trial, but if not, then the party investing five million dollars will gain the advantage of a 70 percent probability of success against the party investing $100,000. (For sake of simplicity, I have eliminated the possibility of both parties investing $100,000.) Since most cases settle, consider the parties' relative bargaining positions if plaintiffs prosecute their claims through either of two “market” modes: (a) a series of separate actions or (b) a joint venture comprising a sufficient number of claims to make the five million dollar investment. (I use the standard, symmetric information model of litigation settlement and the parties' respective reservation points in bargaining. See generally Steven Shavell, \textit{Suit, Settlement, and Trial: A Theoretical Analysis Under Alternative Methods for the Allocation of Legal Costs}, 11 J Legal Stud 55, 56-58 (1982) (utilizing a model that assumes parties view litigation and settlement as a financial matter). In the model, defendant's maximum offer equals the expected judgment at trial plus litigation costs; plaintiffs' minimum demand equals the expected judgment at trial minus litigation costs. Assuming equal bargaining power, that the parties have roughly the same information and aversion to risk, and that there is consensus on the expected judgment, on-average settlement will occur at the mean point between the maximum offer and minimum demand.)}

\textit{Separate action.} Exploiting scale economies of a de facto class action, the defendant invests five million dollars for a 70 percent probability of success at trial because each plaintiff it confronts will have an individual incentive to invest only $100,000 on the common questions. Thus, given a 30 percent probability of success, the expected judgment in any given case equals $150,000 (= 30 percent x $500,000). Spreading the five million dollars cost for its unified defense across all one hundred potential claims, the defendant effectively invests $50,000 per claim and therefore will settle with each plaintiff for no more than $200,000 (= $150,000 + $50,000). Separately bearing the concentrated cost of the $100,000 investment on common questions, each plaintiff will settle for as little as $50,000 (= $150,000 - $100,000). All else being equal, the parties will settle at the mean of their reservation points: $125,000 per claim (= ($200,00 + $50,000) x 50 percent).

\textit{Joint venture.} A minimum of fifty of the one hundred plaintiffs must band together to make the five million dollar investment worthwhile. (At forty-nine claims, the joint venture is indifferent because both investments promise net aggregate recovery from trial of $7.25 million.) Should the unlikely event occur that 50 percent of the plaintiffs proceed jointly (and ignoring collective action costs), both parties would make equal investments yielding each a 50 percent probability of success at trial. Nevertheless, while the defendant would spread the cost across all claims effectively reducing its per-claim expense to $50,000, plaintiffs could spread the cost only over fifty claims equaling $100,000 per claim. Consequently, given consensus on the expected judgment of $12.5 million (= fifty claims x $500,000 loss x 50 percent probability of success), defendant's maximum settlement offer equals fifteen million dollars (= $12.5 million + $2.5 million (half the litigation costs)). Plaintiffs' minimum demand equals $7.5 million (= $12.5 million – five million dollars in litigation costs). If the parties settle at the mean point, plaintiffs' aggregate recovery would be $11.25 million, or $225,000 per claim.

Note that neither separate actions by one hundred claimants nor a joint venture by half and separate actions by the remaining fifty (ignoring potential for free riding) will confront the defendant with sufficient threatened liability to motivate the optimal investment of twenty million dollars in precautions. Separate actions result in total threatened liability of $12.5 million. When the joint venture is coupled with fifty separate actions, the
plaintiffs, poses a major obstacle to achieving optimal tort deterrence and insurance. A defendant will make investments in litigation on the merits—or even in abusive litigation—that the plaintiffs' attorney cannot match or counter, and that a court presiding over a fraction of the claims would be unable to assess and remedy effectively. In an adversarial process, asymmetry in litigation power exacts social costs by skewing outcomes. Here outcomes are skewed in defendants' favor, thus undermining the social objective of optimal tort deterrence.

II. MANDATORY DECOUPLED CLASS ACTION SERVES DETERRENCE PRIORITY AND ANTI-REDISTRIBUTION PRINCIPLE

This Part shows that Rule 23(b)(3) class actions can be adjudicated on a mandatory basis with no opportunity for opt-out to achieve the priority for optimal deterrence, while fully comporting with the anti-redistribution principle. Two key assumptions shape this analysis. First, opt-out is taken to mean a class member's prerogative of unconditional self-exclusion from the class action to prosecute (or forgo) suit on all questions—common and non-common—in the standard market process. In particular, I assume that opt-out affords class members the opportunity to exit before class trial or settlement of the common questions without bearing any obligation to pay the full pro rata share of class counsel's fee for prosecuting the class claim on the common ques-
tions. Second, because we are not concerned with the instrumental reasons for opt-out—in particular, its supposed utility as a "market check" against conflicts of interests between the class and class counsel and among class members—it is appropriate to confine the present analysis to a case of well-motivated class representation. This Part seeks only to show that, when well motivated by properly determined court-awarded fees, class counsel will fully exploit scale to make and spread the costs of an optimal investment in prosecuting the class action.

A. Decoupling Deterrence and Damage Distribution Functions

There is a readily available design for mandatory Rule 23(b)(3) class actions that would promote the priority of optimal deterrence without violating the anti-redistribution principle. That rule design would decouple determination of deterrence from distribution of damages. As I have shown elsewhere, decoupling enables class actions to achieve both optimal deterrence and insurance. However, the decoupling design can be used even when the anti-redistribution principle dictates distribution of damages to maximize individual wealth rather than welfare. The decoupling design for class actions entails simply separating the class action into two basic stages.

In the first deterrence stage, the court would determine the defendant's liability and damages in the aggregate. For purposes of deterring unreasonable risk taking in the design of mass production processes and goods, the only relevant questions are those common to all claims. Indeed, with the exception of background historical issues, for the most part regarding whether and, if so, how the defendant created the risk at issue, all of the common questions that determine aggregate liability and damages, such as the marginal benefit-cost reasonableness of the risk

26 But see In re Linerboard Antitrust Litigation, 2003 US Dist LEXIS 18141 (E D Pa 2003) (requiring class members who opt out of antitrust class action to set aside percentage of any settlement or judgment they win to compensate class counsel for five years of work developing plaintiffs' case on the common questions).
27 The supposed instrumental utility of opt-out will be considered in Part III.
28 For recent development of the decoupling design for class action, see David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss, 88 Va L Rev 1871 (2002) (noting that the "integrated judgment" holds class action deterrence benefits hostage to the costs and contingencies of individualizing compensation for class members, and in the process thwarts both objectives, and proposing to solve this problem by decoupling deterrence from compensation functions of mass tort class action.)
and extent of actual or projected causally connected, sanctionable harm, are statistical as well as aggregate by nature. As such, the court can resolve these questions by using streamlined processes and methods of scientific proof, including statistical sampling, modeling, and extrapolation to determine aggregate liability and damages on the scientifically sound basis of probabilistically proportioned estimation. Moreover, employing statistical methods produces corresponding synergistic gains from scale economies and investment, thereby increasing the overall efficacy and reliability of class action adjudication of mass production tort liability. Assuming the first stage aggregate liability and damage determination results in judgment for the class, the court would order the defendant to pay the aggregate damages into a fund. It would also award class counsel fees calculated to provide the lawyer with appropriate incentive to invest optimally in litigating the common questions determinative of aggregate liability and damages, and ultimately deterrence.

Consider the complex statistical and informational demands of the prevailing standard for judging the reasonableness of product design. See Restatement (Third) of Torts: Products Liability § 2 (ALI 1998). To judge a product defective, the court and jury must find that:

[T]he foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and [that] the omission of the alternative design renders the product not reasonably safe.

Id. § 2(b). Indeed, this reasonableness (risk-utility balancing) test governs negligence cases generally. See United States v Carroll Towing Co, 159 F2d 169, 173 (2d Cir 1947) (setting out standard for negligence that weighs probability and magnitude of harm against the cost of preventive measures). Applying the test requires courts to engage in complicated fact-finding and make debatable policy judgments regarding the net benefits of competing allocations of scarce social resources. The courts' role includes evaluating the distributive consequences for individuals of varying wealth. Each case asks the court and jury to weigh the relative benefits and costs of the product design in question against those of competing designs, whether or not these are commercially available at the time of sale. This task entails making a benefit-cost assessment of industry custom versus the most advanced safety technology available or in development and determining whether an alternative design was practicable, that is, whether consumers could afford the costs of additional precautions. Because riskless products are generally unaffordable and often impractical, if not impossible, to use for their intended purposes, judgments in product design cases strike a balance along many dimensions that effectively raises some risks while reducing others—for example, a safety latch on car doors designed to keep them closed in a collision may limit egress in case of fire. For a recent judicial concession that such decisions are beyond the capacity of courts in the standard civil system. See Pegram v Herdrich, 530 US 211, 220–22 (2000) (recognizing that all HMO schemes raise some risks while reducing others).
At the second stage, the court would distribute the fund of aggregate damages based on individualized trials or settlement assessment of the non-common questions. Indeed, the mechanism used to allocate compensation will result in the evaluation of the full array of conventional claim-specific law, fact, and other litigation variables that determine the relative recovery value of claims in the standard market process. Mandatory Rule 23(b)(3) class actions thus accommodate the anti-redistribution principle because decoupling promotes the fundamentally crucial priority for optimal deterrence in the first stage without prefiguring the criteria and mode of distributing damages in the subsequent, separate stage. Class action judgment for the aggregate tortious or otherwise sanctionable loss suffices to motivate the mass producer’s ex ante investment in optimal precautions. How damages are distributed among class members—whether averaged, allotted by need, apportioned according to some other criterion, or not distributed at all—is generally (with the exception of its effect on plaintiff incentives) irrelevant to achieving deterrence. Thus, class members could seek to individualize recoveries against the fund in “mini trials” of the non-common questions prosecuted on their behalf by class counsel or, by exercising the option to “intervene as of right,” they can personally choose and proceed through their own counsel.

As in the standard market process, competition among counsel for business and bargaining with clients would determine the fees for representation, motivating counsel to invest optimally in prosecuting claims on the non-common questions. Operating under cost and free riding constraints on collective action in the claims market, counsel will also aggregate claims for returns from scale economy and invest in developing generalizable methodologies of proof as well as discovery and evidence, such as economic models for estimating lost income, bearing on the non-common questions. 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, because of the class action scale advantages in the first stage prosecution of the common questions, the average expected recovery value of class members’ claims will substantially exceed what they would be worth if prosecuted on a fractionally aggregated basis in the standard market process. In
any event, the anti-redistribution principle implies that the “luck of the draw” should govern the distribution, number, and level of recoveries. The decoupled mandatory Rule 23(b)(3) class action fosters, with greater litigation effectiveness than the market alternative, individual pursuit of maximum wealth. Yet, regardless of how many class members recover and how much they individually recover from the aggregate damage fund, the decoupled determination and assessment of aggregate liability and damages in the first stage assures that class counsel can fully exploit scale economy and investment opportunities, negating the systemic bias favoring mass producer defendants over plaintiffs and courts, and consequently improving everyone’s welfare by effectuating the priority for optimal deterrence.

B. Solely Illicit Motives Prompt Opt-Out

The readily available decoupling design for implementing Rule 23(b)(3) litigation class actions on a mandatory basis overrules the objection that opt-out is needed to serve the anti-redistribution principle. Given well-motivated class counsel, mandatory litigation class action makes everyone better off ex ante by securing optimal deterrence, while fully comporting with the anti-redistribution principle to enrich those with strong legal claims ex post—achieving both results far more effectively than would the alternative, standard market process.

However, if class action actually enables individuals to maximize their wealth more effectively than the standard market process, then it would seem unnecessary to make collectivization mandatory. Self-interested class members would reject the option to exit. This seeming paradox disappears on recalling the collective action costs and problems noted above. Despite the potential for mutual gain from collective action, illicit inducements for class members to opt out remain prevalent and forceful. The most salient are deception by non-class counsel and free riding.

The class member is likely to become the victim of misrepresentation by non-class counsel promoting services that the class action has rendered otherwise unnecessary or unmarketable. These attorneys might, for example, peddle the canard that “aggregation will transfer money from high-value claimants to low-value claimants—all paid from a common pot.”  

members and non-class attorneys could team up to reap opportunistc gains. They might threaten opt-out to extract a disproportionate share of the class action surplus as the price for joiner. This ploy will increase costs and create holdout and other bargaining problems, and if successful, would decrease average per-claim recovery. Indeed, free riding presents the greater danger. The well-recognized prospect of free riding on collectively produced work product that is a problem in the contexts of federal multi-district consolidation or non-mutual collateral estoppel would also plague non-mandatory class action under Rule 23(b)(3). Class counsel will reduce the collective investment in light of the lower net return resulting from free riding opt-outs, thereby undermining optimal deterrence to make everyone worse off ex ante. The Conference endorsement of the opportunity to opt-out of class settlement greatly exacerbates the free riding problem. Because settlement of a litigation class action will likely occur after class counsel would have developed most, and possibly all, of the common question work product in preparation for trial, the second opt-out undermines the incentive for making this major investment by diverting the returns to free riders.

III. OPT-OUT LACKS INSTRUMENTAL UTILITY

The prevailing rationales for allowing opt-out from a Rule 23(b)(3) class action 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 allowing opt-out. Thus, implicitly positing the anti-redistribution principle as the test of class action "fairness," the Conference determined that adding a second opportunity for opt-out at class settlement would enable class members to maximize their individual claim-related wealth by affording them a better-informed basis for comparing their respective anticipated recovery from and in the absence of class action.31 The foregoing argument demonstrates that effectuation of the anti-redistribution principle does not depend

(relying on John Coffee's assertion in The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action, 54 U Chi L Rev 877, 904-10 (1987)).

on opt-out, and thus does not entail sacrifice of the deterrence priority.

This Part refutes other asserted instrumental needs for any opt-out from a Rule 23(b)(3) class action. In particular, it responds to claims made by the Conference that the second opt-out serves not only to alert the presiding court to potential "unfairness" in the class action representation or structure, but also to provide a market-process check against class counsel and the defendant making a "sweetheart" settlement misappropriating the claim-related wealth of absentee class members. These arguments are often made to justify pre-certification opt-out, and, indeed, could be extended to support opt-out at any other point in the process—for example, after summary judgment or class-wide trial of the common questions. Advanced in the proceduralist mode, these arguments never consider the adverse effects of opt-out on the deterrence objective of mass production liability.

Moreover, allowing opt-out—that is, complete exit from the class action to prosecute a claim on both common and non-common questions in the standard market process—is neither necessary nor even useful to address these problems, and indeed, would prove counterproductive in several major respects.

The following shows that this conclusion holds for the most salient concerns regarding class settlements. First, I evaluate the need for and utility of opt-out in guarding against deficient class representation negotiating class settlements, in particular the danger that class counsel will settle all or some claims for less than the "true" aggregate expected value because of a "sweetheart" or "kickback" deal, or because of risk aversion. I then con-

2 While it might seem obvious that allowing opt-out late in the process, such as after summary judgment, would encourage free riding, provision for late-stage opt-out may also, if intervening court rulings dim class prospects, promote "one-way intervention," spawning a multiplicity of separate claims or even more class action filings. Proliferation of claims distorts incentives not only of class counsel by eroding class action scale economy and investment benefits, but also of the defendant by confronting it with multiple class action applications. Essentially, depending on the number of independent applications for class certification and level of probability of success (whether constant, rising, or even declining), the chance of certifying the class cumulates over the number of possible applications—nearing certainty when the number is large—and therefore will exceed the true (and presumed socially appropriate) probability of class certification. Thus, if the true chance of a court exercising discretion to convene a class action is 50 percent and the plaintiffs can apply twice, the cumulative probability of class certification is 75 percent (50 percent chance of certification on the first application plus 50 percent of a 50 percent chance of certification on the second application). The court in In re Bridgestone/Firestone, Inc, Tires Products Liability Litigation, 2003 WL 21418413 (7th Cir) appears to have independently developed the same point.
Consider the need for and utility of opt-out in the situations of bargaining breakdown or otherwise that lead any given class member to prefer going to "mini trial" rather than accepting the proffered class settlement terms. This Part closes with a brief note on the deontological justifications for opt-out.

A. Deficient Class Representation

1. The problem of class settlement abuse.

   a) "Sweetheart" deals. Appropriately structured fee awards for class counsel fully align attorney and class interests, rendering opt-out policing unnecessary. In litigation class actions, structuring class counsel's fee to motivate an optimal investment and deter "sweetheart" deals is a straightforward matter of basing the fee award on the attorney's opportunity cost of class settlement, which is the attorney's forgone return from going to class trial rather than settling.\(^3\) In short, to align the interests of class counsel and class, class counsel's fee from the class settlement must not exceed the share of the class recovery that class counsel would have received in return for winning a judgment at class trial.\(^4\) If the fractional share of a class settlement is no greater than the fractional share of the proceeds received from going to trial, then in general class counsel will have no incentive to seek less from class settlement or from class trial than the class mem-

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\(^3\) Bruce L. Hay and David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L Rev 1377, 1394–98 (2000). The caveat "all else held constant" applies with special force here because the implicit assumption of judicial fee-setting competence is contestable. The proposed restructured fee-award eliminates the need for courts to review bargaining setup, process, and substantive outcome for signs of deficient representation. Even in the absence of class counsel and defendant machinations, courts lack the resources to gather, evaluate, and apply the information entailed by such review—for example, in auditing the class settlement to assure that it provides the maximum expected aggregate net judgment value of the class claim. This determination depends, as do all other assessments of the class settlement, on the courts accurately estimating the optimal level of investment by class counsel that maximizes net benefit for the class as a whole and the subgroups and individuals comprising it. It is doubtful that a judge could effectively approximate, let alone replicate, the analysis and judgments of appropriately motivated class counsel. The problem for fee-setting, of course, is precisely that the court must determine not only the optimal investment level, but also the optimal reward to motivate that investment. Auctioning the class action (not the position of class counsel) represents a promising means of overcoming many defects in the process of civil liability law enforcement, including the daunting, probably insurmountable, informational barriers to effective judicial regulation of class action. For further discussion, see note 42.

\(^4\) See id at 1392–98.
bers' claims are worth. That is, self-interested class counsel will maximize profits by "holding out" for class settlement that gives the class members the full value of their claims. Accordingly, the court can eliminate any incentive to settle for too little by regulating the attorney's fee in such a way as to ensure that the attorney's fractional share of a settlement is no greater than his fractional share of the recovery would have been had the case gone to trial.

The point may be illustrated with a simple numerical example. Assume that the class's claims as a group are worth one hundred million dollars and that class counsel will receive a fee equal to 10 percent of the class recovery if the case goes to trial. (For simplicity's sake, assume that class counsel is risk neutral and that going to trial and settling are equally costly for class counsel.) Then the class counsel will refuse any settlement offer that gives the class less than one hundred million dollars, provided that the attorney collects no more than 10 percent of the settlement amount. To see this, observe that in this example going to trial will yield class counsel ten million dollars. If class counsel is allowed only 10 percent of the settlement recovery, then the settlement must be at least one hundred million dollars for the attorney to match the fee from trial. Note, however, that if the fee for settlement is greater than 10 percent, class counsel will perhaps be willing to settle for less than one hundred million dollars.\(^3\)

As this example suggests, the court can prevent class counsel from having an incentive to settle for less than the class's claims are worth by appropriately regulating counsel's distributive share of the settlement amount. To do this, the court must determine the fractional share that class counsel would receive in the event the case were tried and the class were to recover at trial, and apply that share to any recovery from settlement. Notably, the court does not need to know the actual amount that the class would

\(^3\) This example assumes the usual situation in which class counsel recovers financial outlays for class trial from the judgment in addition to a percentage or lodestar assessment compensating the attorney's expenditures of time and costs of risk-bearing. It should be noted that this conventional allocation of payments to class (or for that matter, separate) action counsel, while providing the lawyer with the appropriate motive to hold out for a class settlement offer at least equal to the expected class judgment from trial, imbues the class with an excessive preference for settlement over trial. To correct this distorted incentive, class counsel should, all else being equal, have final say over the timing and terms of settlement. The proposal for structuring class counsel's fee award to avoid sweetheart deals is developed in Hay and Rosenberg, 75 Notre Dame L Rev at 1394–98 (cited in note 33).
receive at trial; thus in this example, it is not important for the court to know that the value of the class’s claims is one hundred million dollars. All that the court needs to determine is the fractional share of the recovery that the counsel would receive of the proceeds from trial—in this example, 10 percent.

b) “Kickback” deals. Class counsel, however well motivated by the court-awarded fee, may still be tempted to manipulate and otherwise sub-optimally prosecute the class claim or an element of it in return for a “kickback” from the defendant or an illicitly benefited sub-group of class members. It is important to distinguish kickback agreements with the defendant from those made with some agent representing a sub-group of class members. Intra-class kickback schemes may violate the “default” principle of anti-redistribution, but generally they represent only wealth transfers that have no correlation with enhancement of individual welfare. Optimal deterrence is the priority and that goal is, all else being equal, unaffected by the intra-class distribution of claim-related wealth. In other words, outside of some fetish for zero-tolerance of deviation from the default anti-redistribution principle, there is no compelling reason to expend legal resources to monitor and prevent intra-class kickback arrangements. Kickback deals between class counsel and the defendant, however, usually result in the latter paying less than the aggregate tortious or otherwise sanctionable loss, and thus, to the extent the firm predicts this route of escape ex ante, in underdeterrence.

Yet the threat posed even by such kickback deals is overstated. Given that the supervising court sets class counsel’s fee award, direct side payment represents the most likely means of kickback. However, while direct side payments of money from defendants or an agent for some subgroup of class members to class counsel cannot be ruled out, the incidence probably is very low, if not negligible. In any event, disclosure requirements, court surveillance, and the difficulty of concealing the transaction pro-

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30 The “intra-class” scheme under consideration differs from situations in which class counsel and defendant implement a sweetheart deal by short-changing some class members relative to others. The illicit beneficiaries are class counsel and defendant, not the unaffected class members. This problem is alleged to occur or at least arise frequently in class settlements encompassing a large number of “future” loss claims, for example, by under-stating their aggregate expected value. In contrast, intra-class “sweetheart” deals generally do not involve defendant, but rather are confined to (mis)allocating the aggregate settlement payout among competing factions of class members. (Defendant’s participation would raise deterrence questions.) Moreover, it is difficult to imagine any realistic conditions under which such a deal could occur, and to my knowledge at least, no one has specifically alleged let alone proven its occurrence.
vide considerable disincentive. Temptation to make such an arrangement is largely if not wholly overcome by the courts’ requiring class counsel to disclose fully and continuously (throughout the process of obtaining and distributing any class judgment or settlement recovery) agreements with anyone relating to the case. Additional disincentives for making such arrangements include professional discipline, contempt, criminal and civil penalties (possibly involving tax fraud), and other formal as well as informal sanctions (such as loss of business credit and reputation). There is, moreover, a further powerful deterrent to kickbacks, even assuming some chance of concealment. Because courts would not enforce the agreement, the parties lack a credible means of committing themselves to the deal; the party who “performs” first would have no legal recourse to compel performance by the other party.

2. The problem of risk aversion.

Attorney risk aversion presents another potential source of defective representation but no need for policing by opt-out. A long-standing supposition holds that class counsel is likely to be especially averse to risking the class claim at trial. (Here, I refer to the fear of loss of a substantial amount of the attorney’s wealth, and not to the more particular concern about betting everything, all-or-nothing, on a single class-wide verdict. The latter is often characterized as setting up “blackmail” settlements, although many erroneously claim that defendants are the exclusive or even the systematically likely “victims” of such excessive bargaining leverage.) It is posited that the attorney might well pre-

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37 Side payments are quite difficult to conceal given court-ordered reporting, pangs of conscience, and the nagging fear of detection among lawyers with knowledge of or involved in the deal. Of the many lawyers and others likely to be involved in the collusive arrangement, there is a good chance that at least one will truthfully respond to the judicial inquiries rather than chance severe punishment. Blackmail by those who know about the side payment would probably make the deal unprofitable.

38 See In re Rhone-Poulenc Rorer Inc, 51 F3d at 1299 (finding that defendants confront a class action ‘blackmail’ effect that “force[s] them . . . to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability”). See also Hay and Rosenberg, 75 Notre Dame L Rev at 1392–98 (cited in note 33) (questioning the purported class action “blackmail” facing defendants and proposing multi-class trials as the solution). It should also be noted that, because class-wide trial normally determines common questions relating to the prima facie case of liability, only plaintiffs face the prospect of catastrophic loss of a single all-or-nothing trial verdict. While defendant also faces the prospect of an unfavorable verdict on class-wide liability, including common questions relating to defenses, in contrast to plaintiffs, it generally incurs actual loss, if any, on assessment of damages, which typical bifur-
fer settling for a certain, if lower, return on a sizable pre-trial investment rather than gambling on losing everything at trial. Sweetheart settlements, Judge Henry Friendly surmised, result from an inverse relation between class counsel’s increasing investment of time, money, and other resources in preparation for class trial and the decreasing resolve to go to trial. Because of risk aversion, the certainty of a fee in class settlement becomes all the more attractive to class counsel with the looming prospect of trial and “loss of years of costly effort by himself and his staff.” Obviously, if this hypothesis were accurate, then there would be reason for concern, because settlements for less than the expected value of the aggregate sanctionable loss to the class threaten the deterrence value of class action.

However, there is no logical basis and, today at least, little practical need for special concern that risk aversion will lead class counsel to fold on the eve of class trial in fear of losing a major pre-trial investment of time and money. To be sure, class counsel’s pre-trial investment typically entails many millions of dollars and requires thousands of hours for research, dispositive motions, discovery, advice and preparation of experts, and other work in developing common questions and proof for class trial. But experienced, adequately financed, and competent class counsel would not undertake these burdens unless, judged from the ex ante perspective, the anticipated fee award exceeds the total expected litigation investment—pre-trial as well as trial—including the costs of bearing the risk of losing. In short, the actual expenditure of resources in preparation for class trial should not affect class counsel’s calculation of costs and benefits respecting the choice to settle or go to trial.

Indeed, in settlement negotiations on the eve of trial, class counsel would regard pre-trial expenditures as irretrievable,
sunk costs. Consequently, at this point the hazards of trial should be of less concern to the attorney than they were originally, before undertaking the case and making those expenditures. Having made the pre-trial investment, class counsel rationally compares the expected recovery from class trial to the incremental (though substantial) costs of proceeding to trial. That resulting ratio will likely yield an expected net return from class trial that is far more favorable than the comparison of the expected trial recovery to total litigation costs that class counsel considered sufficiently profitable to commence the class action in the first place.\footnote{Settlement rates for class and separate actions are comparably high and, all else being equal, suggest no excessive propensity on the part of class counsel to forgo trial. The “sunk cost” point applies, of course, to class counsel’s marginal investment at any stage of the process. Beyond hoping to recover that expenditure in pre-trial settlement, class counsel has no necessary bargaining power to extract the payment and has only one means of recouping the loss: credibly in threatening trial.}

Moreover, courts are well situated to evaluate the financing, experience, portfolio diversification, and other factors relating to class counsel’s risk-bearing costs and capacity. The most difficult problem for courts will be choosing among two or more well-heeled and -hedged firms. In this regard, there is no dearth of adequately prepared lawyers. Whatever may have been true in Friendly’s time or even a decade ago, these days class counsel is usually capable of marshalling the economic wherewithal for effective prosecution of large-scale class actions. The segment of the plaintiffs’ bar that specializes in such litigation is growing, but it continues to be dominated by large, corporately structured, mega- or multi-firm organizations that compete against each other for “market shares” of classable claims in the separate action process, and ultimately for appointments as class counsel in trial and settlement class actions. These “entrepreneurial lawyers” amass the huge resources necessary for adequately funding and make arrangements necessary for effective diversification of the risks of litigating a complex class claim through trial in a trial class action or their large respective shares of the classable claims through trial in separate actions.

To the extent that courts require further assurance against excessive risk aversion, they can authorize class counsel to sell his or her stake in the case to another attorney, presumably better prepared to shoulder the burdens of the litigation. Typically, the need for buy-out will not arise because profit-maximizing
class counsel has a natural incentive to merge or form a joint venture with such an attorney. More generally, courts could auction the class actions prior to certification, after some period of pre-trial development (corresponding to multi-district consolidation), or prior to approval of class settlement.42

Class action auction has a number of other functional advantages. Critics argue, however, that assigning class actions to the highest bidder rather than to the lawyer who first discovered and filed the case or to class counsel, whose work pressured the defendant to settle, would discourage investment in pre-suit detection and pretrial development efforts. Moreover, there is a danger of collusive bidding and even of potential bidders effectively forming a single firm to become a monopolist. This is not the occasion for detailed discussion of these design questions, but several points should be noted. First, class actions are not unique in posing these problems, while they are unique in motivating the optimal investment on the common questions. Claim finders and developers of cases in the standard market process often lose of transfer control to more effective counsel, and in many fields, such as air crash cases, the supply of legal representation is highly concentrated. Given this reality, it is doubtful that the opportunity costs of class action auction exceed the benefits of the optimal class action investment.

Second, these problems have ready solutions. Finders and others developing claims preliminarily often gain rewards for successful effort by selling their interest in the claim to more effective attorneys, for example through referral and franchise arrangements. If need be, courts should be able to set the appropriate reward for claim finders and developers, just as they do for the class counsel that prosecutes the class action to final judgment by trial or settlement. Compare Proposed Amendment to Rule 23 authorizing court to designate (and presumably compensate) "interim counsel to act on behalf of the putative class before determining whether to certify the action as a class action." Also, the court can structure the auction so that bidders must simultaneously submit bids to the court stating the amount they would pay the class and to the claim finder or developer to reward his or her effort. Under this system, the court would be required, while the finder or developer would be free, respectively, to accept the highest dollar bid. That is, under this "double acceptance" system bidders would submit two offers, first, to the court specifying the aggregate net damages for payment to the class, and second, to the finder or developer specifying the reward. The commitment feature of this design avoids holdout and bargaining breakdown: the court must accept the highest bid for class recovery. Thus while the finder or developer is free to demand any amount, he or she would recognize that the highest bid reward may detract from the corresponding bid of class recovery to the court. The high bid to the finder will be rendered nugatory, because some other bidder, offering less to the finder, can offer more to the court and because the court is bound to accept the highest bid it receives. Thus, for a firm to win a competitive auction, it must not only possess the capacity and commitment to invest optimally in the class claim, but also must allocate optimally the expected recovery in offers to the court and finder or developer. Because the court must accept the highest dollar bid, the claim finder or developer cannot hold out for more than the cost of his or her effort. And finally, because of the large number of qualified attorneys and sources of financing, bid rigging, oligopoly, and certainly monopoly are unlikely prospects. In any event, given the ex ante preference for optimal deterrence, the prospect of monopoly law enforcement, even if real, poses no systematic problem at all. The monopoly law enforcer has every incentive to profit maximize, which occurs only if it optimally invests in prosecuting the class claim. Courts also possess standard means to detect, deter, and remediate any socially detrimental monopolistic behavior.
3. **Opt-out as a remedy for deficient representation.**

   a) *Utility.* Opt-out is not only unnecessary in light of readily available non-opt-out remedies for deficient representation, but, in any event, allowing exit would be of dubious utility. The following evaluates the utility of opt-out as a means first to deter and detect sweetheart or kickback deals, and second to remedy the problem of class counsel risk aversion.

   The key to making opt-out a credible and effective sanction for class counsel duplicity is information. But, in the absence of judicially compelled disclosure, it is doubtful that class members could obtain adequate information on their own. Of course, those with inside information might reveal a sweetheart or kickback agreement to class members voluntarily, or, more realistically, for an appropriate reward (to motivate detection and reporting efforts) such as a fee or being designated to replace class counsel by the court. But there is no reason why the insider volunteering information would prefer communicating with class members in a costly effort to provoke opt-outs rather than with the court to have class counsel investigated, and if found delinquent, disciplined or replaced. More realistically, there is no reason why the insider seeking a reward would prefer soliciting payment from numerous, more or less dispersed class members, incurring the obvious collective action problems and costs involved, rather than from the court that can fully and efficiently exact payment as part of the fine levied against offending class counsel and defendant, and, when appropriate, as a tax on benefited class members. This mode of correcting class settlement abuse also avoids the enormous costs of the “whistleblower” informing and consulting with class members about the problem and ultimately soliciting their agreement to become clients and exercise their prerogative to opt-out. Moreover, even if class members could effectively elicit the information themselves, there is no reason why they would on their own—or, indeed, on non-class counsel’s advice—opt out and thus forfeit the optimal investment benefits of class action once the illicit deal was uncovered and negated. Class members can simply report their suspicions or discoveries to the court; class members’ reward might come in the form of a fine paid by class counsel or of a malpractice liability judgment against the attorney.

   This reporting process also avoids the judicial cost of drawing inferences from the rate of opt-out to detect the possible existence
of some nefarious deal. These costs are greatly compounded by the dubiousness of the judicial enterprise itself. Opt-out is never a reliable signal of deficient representation because perfectly reasonable class settlements (like all settlements) provide the average net value of alternative probable trial outcomes and other relevant future events. The incentive to opt out thus exists for class members who, because of their excessive optimism or because some contingent event has turned out in plaintiffs' favor, appraise their claims at above-average value. In short, opt-out is superfluous and wasteful of legal resources as a means of policing against class settlement abuse.

Similarly, opt-out probably will have little or no effect in deterring orremedying deficient representation due to class counsel risk aversion. Again, the key is information. Because of the likely surplus value generated by the collective, though deficient, investment on the common questions, it is doubtful that any class members will perceive any shortfall. Nor is it likely that they will know more than the court about the financial and other relevant circumstances of class counsel's risk-bearing costs and capacity. While class counsel's debilitation may be significant, it is unlikely to be patent or obvious. Moreover, as demonstrated above, there is no assurance that any fraction of the class will have sufficient incentive to make the optimal investment that is necessary to determine the aggregate expected value of the class recovery for comparison against the anticipated recovery from class counsel's deficient representation. Even if class members were able to measure the differential in expected aggregate recoveries, there is no reason to opt out. The attorney who can discover and demonstrate the shortfall can simply provide the court with the information, and in all probability reap the reward of being appointed new class counsel. Indeed, unless a competing class action were convened, in most cases freedom to prosecute claims in the standard market process would not increase class members' chances of becoming wealthier, especially if the court learned of the risk aversion problem and appointed new class counsel to correct it. Even assuming all class members opted out, the likely result would be fractional aggregation yielding lower net recover-

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40 See Rosenberg, 115 Harv L Rev at 888–89 (cited in note 6) (explaining that because class settlements reflect the weighted average of contingent variables, opt-out will generate "false positives" of class members exiting from a perfectly reasonable settlement as well as "false negatives" of class members induced by litigation costs to take a class settlement payout that is tainted by class counsel's self-dealing).
ies on average than would a class action prosecuted by marginally risk averse class counsel.

b) Cost. 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 disallowing opt-out classes, that is, restricting each dissident class member to opting out solely on an individual basis, 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 necessary information to class members. Plaintiffs should be supplied with the basis for making reasonably informed decisions on basic questions such as the existence of a kickback deal or excessive risk aversion, the relative benefits and risks of exiting the class versus remaining in and relying on objections, and, if the former route is chosen, the best counsel to prosecute the claim in the standard market process. The complexity of both the information and questions indicates that far more than summary notifications and standardized exchanges is needed. Given the meager (at best) utility of opt-out in policing class counsel, these costs would seem to be the decisive reasons for disallowing exit and instead employing the promise of court-awarded fees to spur collective investment by objectors in detecting and reporting deficient representation.

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. The priority of optimal deterrence implies general preclusion of opt-out because it rarely if ever achieves any benefit in preventing deficient representation to offset the loss of the deterrent value of civil liability. Indeed, these collective action costs would persist even were opt-out perfectly effective, for example, in deterring kickback deals, and therefore costless to enforce because no such deal would ever be made. The only solution to such collective action problems is for the court to charge opt-outs an appropriately prorated share of class counsel's fee related to investing in the development of the common questions. Other, administratively expensive monitoring and regulatory checks on opportunistic opt-out might also require
Rule 68-type offer-of-settlement restrictions. As such, opt-out is unlikely to maximize individual welfare by minimizing the sum of accident costs.

B. Bargaining Breakdown

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 holdouts, and in some cases to bargaining breakdowns and demand for trial on the non-common questions that determine relative, individual recovery.

However, 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. Yet, 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 anti-redistribution principle—broadly read 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

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" FRCP 68.


" See, for example, Adam Liptak, Judges Seek to Ban Secret Settlements in South Carolina, NY Times A1 (Sept 2, 2002) (reporting that in the past year, the federal district court resolved 3,821 civil cases by settlement and only thirty-five by trial to verdict).

" Of course, the possibility of free riding on the common questions work product precludes the direct equation of a class member's rejection of a litigation class settlement with a plaintiff's rejection of a separate claim settlement in the standard market process.
Nevertheless, opt-out is unnecessary to satisfy this trial demand. That demand can be fully met within the ambit of a Rule 23(b)(3) litigation class action.

Recall that opt-out entails unconditional exit from the class action to prosecute a claim on all questions—common and non-common—in the standard market process. 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 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.

Rule 23(b)(3) can accommodate this preference by affording dissatisfied class members the option to reject the individualized settlement offer and demand trial on the non-common questions against the aggregate fund established for deterrence purposes.

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The Rule provides for such “mini trials” in the absence of settlement. Under the Rule, a class member can intervene “as of right” and have personally chosen counsel conduct the trial.\textsuperscript{50} If an unusually high rate of bargaining breakdown and high demand for “mini trials” overburdens the court’s docket, Rule 23 provides a solution. The court can order class treatment only of the common questions,\textsuperscript{51} render judgment approving the aggregate class settlement of those questions and awarding related fees to class counsel, and also approving a class settlement schedule or process for individualizing class members’ recoveries. Class members who reject the individualized settlement “offer” can file claims against the settlement fund for “mini trials” of the non-common questions in any otherwise appropriate jurisdiction and venue, federal or state.

C. Note on Deontological Justification for Opt-Out

Typically declared in question-begging and foreclosing moralistic terms, the deontological justification for opt-out lacks intellectual coherence as applied to mass production risk cases.\textsuperscript{52} To

\textsuperscript{50} The following diagram depicts the class action with “mini trial” option:

(1) The defendant and the class members reach an aggregate class settlement agreement establishing a schedule or process for determining and distributing individualized damages to class members.
(2) Class member accepts individualized settlement offer or demands a “mini trial” on non-common questions.

\textsuperscript{51} See FRCP Rule 23(c)(4)(A).

\textsuperscript{52} The question begging starts with the very suggestion of “plaintiff autonomy,” presumably implying an individualistic conception of a claimant actually or at least potentially proceeding by separate action independently of any other present or future claimant. The condition of independence defines the essence of “autonomy”: that each plaintiff pursues his or her own interests through litigation without impairing (or appropriating) the interests of others. But the nature of mass production renders this conception implausible; the interests of everyone, ex post as well as ex ante, constitute a unity that can be pursued individually only at the expense of the whole and everyone comprising it. Thus, as I have shown, self-exclusion from the aggregate enables the mass production defendant to exploit asymmetric investment opportunities that would thwart deterrence objectives making
the extent that this justification does not operate merely as a proxy for assuring optimal deterrence, but rather asserts a "good" superior to or independent of individual welfare, it is a prescription for making everyone worse off. The following critique focuses on the "day-in-court" rubric, which Supreme Court rhetoric has recently given particular prominence to and which serves as a general catchall for related and similar concepts of "plaintiff autonomy" and "corrective justice."

It is said that there is a "deep rooted historic tradition that everyone should have his own day in court." Those who invoke that tradition merely assert its existence, even in the face of a large amount of evidence to the contrary, and usually ignore the need to give it content, practical or otherwise. Despite the imperative tone, no guarantee exists that a party to an accident will actually get to court, let alone to trial. Rather, in relying almost entirely on the market to allocate access, the principle tolerates, often in its name and generally in the operation of the tort sys-

everyone worse off ex ante, desires of all seeking maximum claim-related wealth ex post, and demand, ex ante and ex post, for the benefits—often life-sustaining—of mass production processes, products, and services. Of course, mandatory aggregation precludes the preference, however unreal and practically unrealizable, for going it alone. However, unless the market can supply those preferences without undermining the collective goods of deterrence and mass production, I regard subordination of "plaintiff autonomy" as necessary given its empirically demonstrable adverse effects on individual welfare. But the unity of mass production deprives the concept of "plaintiff autonomy" of any claim to intellectual coherence. Thus, it is the actual or anticipated filing of even one additional separate action that enables defendant to exploit asymmetric investment opportunities against the first claimant, litigation power the defendant would not have but for the second filing.

The actual or anticipated filing of each new separate action further increases the defendant's investment advantage against all other claimants who filed or will file separate actions or have already aggregated their claims. Similarly, opt-out by the first class member for a separate action confers the greatest marginal advantage on the defendant against the class as well as the exiting class member, and with each succeeding opt-out, defendant's litigation marginal power increases (though at a decreasing rate) over all plaintiffs. The "plaintiff autonomy" enterprise has more serious problems than intellectual incoherence; for, even assuming logical boundaries to insulate the interests from impairment or appropriation ex post, it must contrive an explanation for insisting that the law operate to harm the well being of everyone ex ante.

Diana Moses and I are preparing a paper questioning the prevailing normative and "individualistic" interpretation of Aristotle's conception of corrective justice. See, for example, Ernest J. Weinrib, The Idea of Private Law at 56–58 (Harvard 1995). On the basis of Moses's close analysis of the language, structure, and socio-historical context of Aristotle's Nicomachean Ethics, we find no substantial support for claims that an individualistic "right-duty" or "bi-polar" relationship between plaintiff and defendant is required by or essential to the concept of corrective justice. See Aristotle, 2 Nicomachean Ethics, in Jonathan Barnes, ed, 2 The Complete Works of Aristotle at 1781–97 (Princeton 1984).

tem, the exclusion of many if not most claims from court, because the parties cannot afford the high costs of litigation.\textsuperscript{55}

Indeed, plaintiffs treat civil litigation largely as economic theory would predict; namely, they seek to maximize claim-related wealth. The supposed preference of litigants to "tell their own story" over increasing their net recovery is belied by the fact that upwards of 98 percent of triable cases settle.\textsuperscript{56} Nor do we observe anyone exiting from market organized aggregates of mass production claims to proceed independently by separate action, let alone the large-scale or complete unraveling of these aggre-

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\textsuperscript{55} Rational choice theory, which predicts that individuals prefer ex ante to minimize the sum of accident costs, finds overwhelming empirical support in the tremendous annual expenditures on the legal system to prevent and replace accident loss. Of course, mass tort plaintiffs sometimes go to trial and in some cases go it alone. Their conduct is best explained, however, not by the desire for a "day in court," but by a more robust motive: sheer ex post wealth maximization. The plaintiff goes to trial because of failure to settle, or the plaintiff goes it alone to profit from free riding. Despite its moral pretensions, the "day-in-court" concept guarantees nothing that money cannot buy. Market forces determine access to the tort system, and the market provides telling information about individuals' willingness to pay for a day in court. Indeed, the high costs and risks of litigation exclude many potential tort claims and compel virtually all of the rest to settle. The increasingly prevalent pre-litigation agreements by potential plaintiffs to subrogate future claims to their insurers or to submit claims to arbitration provide further evidence of potential plaintiffs' willingness to forgo their "day in court."

\textsuperscript{56} Some opponents of mandatory class action also attribute supervening value to class action opt-out, suggesting that plaintiff autonomy is a good in itself. They 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 I have shown above, this way of thinking is a prescription for making everyone worse off. Giving independent weight to class action opt-out regardless of its effect in raising the sum of accident costs deprecates the individual's expected welfare as a matter of course.

The "autonomy" espoused by the proponents of class action opt-out reflects 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, the concept excludes every conflicting expression or understanding of individual autonomy from consideration. While hypothesizing that an individual may derive value from controlling litigation, proponents of plaintiff autonomy give no weight to the mast-tying choices an individual would have made ex ante to secure the most basic goods of mass tort liability—effective deterrence and insurance of accident risk—which safeguard real autonomy, indeed health and life, ex post.

"Autonomy" arguments of this kind follow the deeply rutted path of conventional judicial and scholarly "proceduralist" thinking on matters of civil liability that generally neglects the effects that rules structuring ex post litigation have on individuals' ex ante behavior and well-being. Scholars who invoke the typically vague and empirically unsubstantiated virtues of plaintiff autonomy surely benefit, as do adherents to the proceduralist mode in general, from ignoring ex ante consequences. Recognizing these consequences reveals the hard reality behind these scholars' metaphysical incantations: increased accident costs that make everyone worse off.}
gates that exit in any degree could trigger. Most significantly, mass production claims are not prosecuted as separate actions: all but free riders capitalizing on others’ work product are aggregated (albeit fractionally) for en masse representation. The inference fairly drawn from this evidence is 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.

Beyond lack of evidence of ex post demand for a “day in court,” the concept also lacks coherence to the extent it contemplates providing 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 existing ex ante between the prospective plaintiff and the defendant that 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 would thus accord the parties a full opportunity to present particularized proof of the terms and conditions of the individual 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 risk cases. Mass production precautions, like its processes and goods, secure welfare-enhancing scale economies and investment opportunities through cost-benefit projections and implemental designs that address the at-risk population in the aggregate, statistically and

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57 Unraveling—in principle, complete disintegration—of claim aggregates is implied by the fact that increasing aggregation of mass production claims increases marginal expected damages at a decreasing—but, still positive—rate and therefore decreasing aggregation decreases marginal expected damages at a diminishing rate. It should be noted that unraveling—assuming it occurred—would not necessarily signify a preference for a “day in court” as opposed to proceeding by aggregate means. The exit of succeeding claims would at base express nothing more than that the preceding or prospective exit of others has so far diminished the marginal benefits from aggregate litigation as to make it worthwhile to opt out for the marginal “autonomy” gain. For those in the aggregate, the prospect of its continuous unraveling leaves them with little (and ultimately nothing) left to lose by exiting. In other words, even if anyone ranked marginal plaintiff “autonomy” over marginal optimal deterrence, it is doubtful that anyone would exit for a separate action unless everyone else were forbidden to exercise the same freedom of choice.

indivisibly. These decisions cannot customize; that is, they cannot specifically reflect or affect the specific interests, preferences, and fortunes of any individual without destroying the welfare-enhancing benefits of mass production. Essentially, mass production liability based on "fault" (or negligence, that is, unreasonable risk taking), turns on a statistical, not an individualized, standard of optimal precautions, and, as noted below, in purportedly disaggregating it and particularizing the degree of wrong done to a given plaintiff, courts make everyone worse off ex ante. In deciding the proper or reasonable level of precautions, the prospective defendant (for simplicity I ignore the prospective plaintiff's contributions to precautions) necessarily aggregates all possible accident scenarios and all possible marginal investments in precautions. If appropriately motivated, the defendant will minimize the sum of accident costs: 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.\textsuperscript{59}

\textsuperscript{59} I presume 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.

\textsuperscript{60} This point, that mass-production decisions about precautions (like every other dimension of the undertaking) are probabilistically, 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
Of course, the conceptual incoherence of the day-in-court rhetoric does not prevent it from creating socially irresponsible results. The law can be designed and enforced to disregard the facts of life and welfare of individuals. (Civil liability driven by the supposed “compensation” objective generally exemplifies this perversity, paying out vast sums mostly in overhead to dispense unneeded, highly expensive and risky “insurance” that is funded by a regressive tax on the “beneficiaries.”) Thus it can ignore the statistical character of the “right-duty relationship” in accident risk from business activity, which reflects the central, calculated decision by the mass producer that fixes the parameters of the benefit-risk quotient of any process or good based on averages of all relevant demographic, legal, and other variables, including price. (A Ford is a Ford everywhere, and the core design decisions that set the benefit-risk quotient of a process or good and that organize all the factors and features of related production, marketing, and use are either reasonable or not reasonable, collectively and indivisibly, for everyone affected.) The law, too, can disregard the fact that the lives of everyone in the world depend on the benefits from the scale economies of mass production processes and goods. But there can be no denying that if the law actually mandated pursuit of the illusory goal of individualizing a “right-duty” relationship that is inherently unitary and aggregate, the system would make everyone worse off ex ante by forcing mass producers to forgo the benefits of mass production, in 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. When maximizing individual expected welfare is the priority of each person behind the veil of ignorance, no one would rationally prefer a legal system that mandated individually bargained, customized arrangements in lieu of the opportunity for scale-economy 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 the standardized means of mass production, to everyone’s detriment.

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addition to wasting resources and undermining optimal deterrence and insurance.\footnote{26}
IV. RISK BASED CLASS SETTLEMENT WITH "BACK-END OPT-OUT"

This Part briefly analyzes the use of so-called "back-end opt-out" for class action settlements that resolve "future loss" or "exposure-only" (risk-based) claims. Essentially the "back-end opt-out" refers to a subset of the "class settlement opt-out." The following critique and conclusions apply fully to all versions of "class settlement opt-out," including the "second" opportunity adopted by the Judicial Conference.\(^3\)

The back-end opt-out affords class members who, at the time of class settlement, bear sanctionable risk but have not yet suffered serious actualized harm, the choice between accepting the class settlement terms for resolving their individual claims or opting out for the settlement terms offered in the standard market process. Like the second class settlement opt-out in general, the back-end opt-out for risk-based claims serves as a means for class members to capitalize on a favorable change in circumstances affecting claim values (for example, new scientific findings regarding the causal connection in question) and to check class counsel's temptation to provide deficient representation. I examine the back-end opt-out first as used in the context of a settlement-only class action, and next as part of the design for settling a litigation class action. My central conclusion is that the back-end opt-out serves no needed role in policing the adequacy of class counsel representation, frustrates the social objective to minimize the sum of accident costs by supplying needed optimal deterrence and insurance, and makes everyone worse off ex ante and ex post (excepting only the lawyers who profit from concocting and executing the plan).

A. Settlement-Only Class Action

In contrast to litigation class action, settlement-only class action does 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 by definition, and all claims return for trial through the standard market process of separate actions. Thus, in the settlement-only class action, the

50 percent chance of having 31.46 in welfare from net compensation of $990 plus a 50 percent chance of having thirty in welfare from net compensation of $900. (Indeed, even if ex ante the individual is risk neutral, he or she would rationally prefer the scheduled average.)\(^5\)

Report at 8 (cited in note 1).
threat of trial in a series of independently prosecuted, separate actions creates leverage for the plaintiffs and value to settlement for the defendant. 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 firm’s asymmetric scale advantages, thereby raising settlement values above those generated in the standard market process.

A number of settlement-only class actions have resolved risk-based claims by adding to the pre-certification opt-out (or “front-end opt-out”) an opportunity for class members to accept the class settlement or to opt out at the back-end, when and if they incur serious actualized harm.\(^6\)

Proponents of this model argue that because class members exercising back-end opt-out will have the benefit of a settlement offer in and driven by the standard claims market process, the opportunity for such exit will at the very least serve as a needed deterrent against deficient representation by class counsel. In addition, back-end opt-out would implement the anti-redistribution principle by enabling class members to maximize

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\(^6\) The following diagram depicts a settlement-only class action providing for both front-end and back-end opt-out:

(1) The defendant and the class members at risk of suffering serious tortious harm arrange a class settlement establishing a schedule of damage payments for specified serious harm if and as incurred by class members in the future.
(2) Before court approval of the class settlement, class members can choose either to remain in the class action or to exercise the “front-end opt-out” to prosecute claims in the standard market process.
(3) Those class members who remain in the class action and incur specified serious harm can choose either to accept the damage schedule payment under the class settlement or to exercise the “back-end opt-out” to prosecute claims in the standard market process.
claim-related wealth in the event of a favorable change in circumstances affecting claim values. On examination, back-end opt-out makes class members worse off. Before making those points, it is important to stress that claimants are best off settling in a litigation class action, and gain little or nothing from settling in settlement-only class action rather than in so-called “inventory” or “aggregate” settlements in the standard market process.

1. Lack of benefit from settlement-only class action.

The settlement-only class action offers no additional scale economy and investment opportunities for development of the merits of plaintiffs’ claims above the scale opportunities that standard market processes provide. This type of class action, as a general matter, merely reproduces the claim recovery values generated by fractionally aggregated representation. This limitation arises because settlement-only class actions are convened solely to effect classwide settlement. Failure to achieve such settlement—because the parties cannot reach agreement or because they fail to obtain judicial approval—automatically dissolves the class action and disaggregates the claims, relegating plaintiffs to voluntary joinder without affecting the value of their claims. Litigation class action is operationally, and therefore functionally, distinct from settlement-only class action because failure to achieve classwide settlement does not result in dissolution of the litigation. Instead, the case proceeds to trial based on classwide aggregation of all classable claims and with the benefit of the corresponding optimal investment. This key difference makes settlement-only class actions inferior to litigation class actions. Plaintiffs’ bargaining power in settlement-only class actions derives from whatever truncated scale economy 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 optimally to maximize aggregate benefit from the defendant’s mass tort liability. Any settlement in a settlement-only class action thus reflects claim values depressed not only by the plaintiffs’ suboptimal in-

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In other words, settlement-only class action requires the defendant’s consent, and no defendant would agree to a mode of settlement that increased its total costs above those it would otherwise bear in the standard market process.
vestment and other deficient scale incentives, but also by the defendant's superior litigation power. 66

Contingent on the circumstances of each case, settlement-only class action may improve upon fractionally aggregated 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 "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. 67

2. Lack of benefit from back-end opt-out.

Obviously, opt-out destroys any deterrence benefit from the defendant being able to commit credibly to class settlement terms. 68 Diminished deterrence might be a necessary price to pay for needed protection against deficient representation by class counsel—in particular, against class counsel arranging a sweetheart class settlement—or for the opportunity to maximize claim-related wealth from favorable changes in circumstances affecting claim values. However, the price is not justified by either ration-

66 This distinction is apt to blur in mass production risk cases in which there is some probability that the court will certify a litigation class action, such as when claims involve "moderate stakes" that fall between the determinative high and low categories. In such cases, class settlement will reflect the class's additional bargaining power derived from the probability of litigation class certification, even though the proceedings are formally designated as a settlement-only class action. Accounting for cases with some probability of litigation class certification, however, would merely complicate the analysis but would not change its substance or conclusions.

67 Of course, class settlement of a litigation class action provides the same and, indeed, greater deterrence benefits.

68 Opt-out might have the offsetting benefit of enabling defendant to mitigate somewhat a "lemons" problem: low value claims successfully masquerading as high value claims.
Indeed, allowing back-end opt-out makes all class members worse off.

a) Preventing deficient representation. As in the litigation class action, the incentive to arrange a sweetheart deal in the settlement-only class action is effectively solved by structuring the fee award for class counsel on the attorney's opportunity cost of class settlement. Specifically, class counsel's share of the class settlement recovery should not exceed the attorney's share of the return from the claims that would have been resolved in the absence of the settlement-only class action, either by trial or by aggregate settlement in the standard market process. For example, suppose that class settlement would resolve one hundred future claims valued at $1000 each for a total class recovery value of $100,000. Assume that in the absence of class settlement, class counsel would have litigated to judgment or settlement twenty of these claims under a contingent-fee arrangement of 30 percent. Thus the attorney would have earned a return on these claims amounting to 6 percent (20/100 claims x 30 percent) of the total aggregate recovery value in the standard market process. Applying that 6 percent share as the measure of class counsel's fee provides class counsel with the appropriate inducement to maximize the class recovery value at $100,000. Class counsel has no incentive to arrange a sweetheart deal with the defendant or otherwise to shortchange class members. Doing so would reduce the class recovery value and consequently depress class counsel's fee below what the attorney could have received in the absence of class settlement.

b) Maximizing claim-related wealth. Back-end opt-out is not needed for class members to capitalize on a favorable change in circumstances affecting claim values. Exit would be needed only if the class settlement specified fixed terms that did not vary with changed circumstances. But, there is no reason why class settlement must adopt invariant terms, compelling class members to bear some extra cost to file opt-out claims simply for purposes of obtaining higher settlement recoveries in the standard market process. The class settlement can readily provide for variable payouts without the extra costs of filing an opt-out claim. Of course, such a variable-term class settlement would eliminate the

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69 As discussed above, court mandates for disclosure and denial of contract enforcement are superior to opt-out as means of preventing kickbacks. Moreover, opt-out entails costly monitoring and regulation to prevent "opportunistic" exercise by plaintiffs' attorneys, particularly free riders, seeking fees.
potential for class and other counsel (including defense lawyers) to generate unnecessary fees, and indeed, for many, fees for doing nothing of value or at all.

This is not to say, however, that class settlements should avoid fixed terms altogether. There are very good reasons why class settlement should adopt certain fixed terms, in particular, offering expected value of the contingent outcomes—favorable as well as unfavorable changes in circumstances affecting claim values. Assuming, as is very likely true, class members are risk averse, then, as shown in the discussion of optimal insurance theory below, those in need of civil liability insurance would prefer fixed to variable terms. Rather than chancing recovery of loss in a system of variable payments (in which the amount paid depends on the outcome of an uncertain event affecting future claim value), a risk averse class member would always prefer a straight fixed payment equal to the expected value of the variable payments. Even those who do not need insurance supplied by civil liability would eschew the gamble of variable terms in favor of cashing out their claims immediately—that is, receiving the expected value of a claim—and spending the money according to their personal preferences. Risk-averse individuals generally (and this includes defendants as well as plaintiffs) are better off having a potential gain or loss converted to its present expected value and paid in cash rather than taking any chances on a fateful outcome.70

Another version of the back-end opt-out would enhance the value of exit by trading the class claim for punitive damages for eliminating time-bar barriers to suit. This model makes class members even worse off, squandering their recoveries, paying excessive fees to lawyers, and undermining the reliability of opt-out as a means (however unneeded) for checking deficient representation by class counsel. The trade merely moves money in a circle: the defendant pays class members the aggregate expected value of punitive damages in class settlement; class members pay that amount back to the defendant for time-bar waivers; the defendant then pays the same amount back to class members in aggregate settlement in the standard market process. Over the course of these transactions, the parties bear cost—notably, lawyers’ fees—but reap no gain. In addition to extra cost, as noted above, this churning makes risk averse class members worse off if there is some probability of non-recovery from back-end opt-out.

Even were opportunism controlled, back-end opt-out would still fail as a reliable market check. 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. The time-
B. Litigation Class Action

This Part analyzes litigation class action employing back-end opt-out. Having shown above that litigation class action with opt-bar waiver enhancement further distorts the reliability of back-end opt-out as a market check by increasing the rate of false positive exits. 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.

The enhanced back-end opt-out also fosters self-dealing by plaintiffs' attorneys, class counsel and non-class counsel. The potential for considerable gain exists for class counsel and other plaintiffs' attorneys, who have the prospect of reaping duplicative fees from class-settled punitive damages. First, plaintiffs' attorneys receive court-awarded fees based on the aggregate proceeds of that settlement. But plaintiffs' attorneys also receive a second set of fees under separate agreements with class members who file back-end opt-out claims; these fees are partly based on the increase in recovery related to the time-bar waiver settlement proceeds purchased. For example, suppose a back-end opt-out claim has an expected recovery value of one hundred dollars and the per-claim value of class-settled punitive damages is ten dollars. The defendant's time-bar waivers would then increase the expected value of those claims to $110. Class and other plaintiffs' attorneys would receive a double fee if the court awarded them some fraction of the ten dollars per claim from class-settled punitive damages and would also receive a percentage of the expected $110 recovery from back-end opt-out claims under contingent-fee agreements. This reward system further distorts the incentives of class and other plaintiffs' counsel; it causes them to favor the class settlement with enhanced opt-out over straight class settlement, to forgo front-end opt-out despite the inadequacy of a class settlement offer, and to exercise back-end opt-out despite its shortcomings.

To prevent these lawyers from charging duplicative fees, the court has two unattractive options: either eschew awarding fees based on the aggregate value of class-settled punitive damages or else preclude the attorneys from taking a commensurate percentage from recoveries on back-end opt-out claims. A similar danger of distorting lawyers' incentives arises regarding plaintiffs' attorneys who receive no court-awarded fee from the proceeds of class-settled punitive damages. In representing claims under the class settlement or on back-end opt-out, these attorneys gain by taking a contingent-fee share of class members' total recovery, effectively charging for value created by the waiver of time-bars, value which derives from the settlement proceeds and not from any additional investment by the lawyers. If we return to the example from the text, the lawyers apply their contingent-fee agreements to the $110 total recovery, even though their back-end opt-out representation plausibly contributes only one hundred dollars of additional value. To solve this problem, the court must prohibit the attorneys from taking a share of the incremental recovery value attributable to the time-bar waivers for which class members paid out of the proceeds of class-settled punitive damages. This solution, however, places particularly heavy monitoring burdens on courts not only to identify these attorneys, but also to audit fees in the majority of cases involving general, unallocated settlements.

To the extent that courts award fees based on the total value of the class settlement of compensatory as well as punitive damages, the problem of distorted incentives becomes general. Class and other plaintiffs' attorneys will be led by self-interest to favor this model over straight class settlement unless those awards are reduced to account for the potential contingent fees these lawyers anticipate receiving from back-end opt-out claims. As such, class settlement with back-end opt-out merely adds a layer of pure cost in judicial fee setting and monitoring.
CURRENT ISSUES IN CLASS ACTION LITIGATION

out is unnecessary to prevent class counsel dereliction and undermines deterrence, I shall devote this section to considering the effects of exit—any exit—on potential insurance value from collective adjudication. After briefly outlining the theory of optimal insurance, I apply it to the design of the process and terms for distributing a litigation class recovery. The main thrust of my argument is to demonstrate the perversity of the anti-redistribution principle.

1. Optimal civil liability insurance to cover reasonable risk.

Risk-averse individuals are concerned with not only the probability of accident, but also the magnitude of the potential economic loss relative to their wealth. Ex ante, the risk-averse individual 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.\(^1\)

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. Essentially, full insurance coverage equalizes the individual’s marginal utility from wealth between the accident and no-accident states and thus increases expected utility. The individual effectively employs insurance to transfer wealth from the no-accident state to the accident state up to the point at which an additional dollar of wealth yields the same marginal utility in either state. Beyond that point, the individual would follow the reverse course.

2. Optimal insurance theory applied to class recovery.

To achieve optimal insurance in litigation class actions, courts should distribute the aggregate class recovery—

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established at trial or in settlement—by averaging out claim-specific variables unrelated to severity of loss (or individual deterrence), thereby redistributing claim-generated wealth from less to more severely harmed class members. Ex ante, the risk-averse individual in need of civil liability insurance rationally prefers that the legal system awards damages according to severity of harm. Class members in need of civil liability insurance do not want compensation to reflect the strength of their respective legal claims, which depends on numerous variables uncorrelated with severity of loss, such as differences in proof of defendant's causal responsibility, governing law, and competence of counsel. Accommodating this preference entails redistribution of claim-related wealth. After establishing aggregate liability, courts would effectuate the insurance plan that risk averse individuals would, it is reasonable to presume, have established for themselves by contract with the defendant before the accident occurred, if not for bargaining and information costs or other market defects.

I emphasize that the justification for averaging includes cost and information burdens that preclude perfect tailoring of damage awards according to the precise value of a given class member's claim. Contrary to the assumptions of many courts and commentators, however, the ex ante individual welfare-maximizing warrant and scope for averaging is neither dependent upon nor limited by the information and administrative costs that lead parties to average out marginal differences in settlement. Even if damage awards could be tailored perfectly and costlessly to the litigation value of each class member's claim, the individual ex ante who is risk averse and in need of civil liability insurance rationally prefers averaging to accurate determination of all claim-specific variables unrelated to the severity of loss.

I use "averaging" here in the special sense of disregarding differences in litigation value among claims in order to redistribute claim-related wealth in a manner consistent with tort deterrence and insurance objectives.

See, for example, Michael J. Saks and Peter David Blanck, Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts, 44 Stan L Rev 815, 835-36 (1992) (emphasizing "accuracy" for its own sake).

See Rosenberg, 115 Harv L Rev at 855 (cited in note 6) (applying basic theory of optimal insurance, which predicts that individuals who attach diminishing marginal utility to money will seek, all else held constant, to minimize the variance in their wealth across the accident and no-accident states of the world). The use of insurance theory to allocate damages in mass torts and through class action damage schedules was developed in David Rosenberg, Individual Justice and Collectivizing Risk Based Claims in Mass-
insist that “fairness” requires customizing awards according to such variables is to impress upon individuals a system that makes everyone ex ante worse off.\textsuperscript{75}

Accident victims, for example, 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 loss. Similarly, risk-averse individuals would never want their accident compensation to depend on the outcome of such events that do not correspond to an individual's need for compensation. Thus, risk averse individuals would never choose a system in which the compensation for a given 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 plaintiff, 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 in a system of variable payments (in which the amount paid depends on the outcome of an uncertain event), an accident victim 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.

Averaging or redistribution thus applies fully to every factor—factual, legal, litigation, strategic, and otherwise—unrelated to severity of loss and individual deterrence.\textsuperscript{76} The implications of this principle are significant for distributions from an aggregate

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\textsuperscript{75} See Rosenberg, 115 Harv L Rev at 855 (cited in note 6).
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damage award in a class action judgment or settlement. It applies to all of the paradigmatic mass production risk 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 risk liability in the name of the anti-redistribution principle, "plaintiff autonomy," or other conceptions of self-determination that disregard effects on individual welfare, in particular on the well-being of those relying on tort liability to supply insurance.

To illustrate the averaging or redistribution principle with a stylized example drawn from a recent, major class action settlement of a mass exposure case, consider a class member confronting a future loss of $100,000. Suppose the causal connection between the loss and the defendant's product remains uncertain on the day of class settlement. Assume that, before the class member incurs the loss, science will resolve the question with an equal chance of finding that the probability of causation is 75 percent or 25 percent; either finding effects a commensurate change in the probability of success at trial. Suppose the class member is given the choice between two class settlements. The first is a binding straight class settlement that pays with certainty an amount equal to the expected value of the two outcomes: $50,000 (=50 percent x (75 percent x $100,000 + 25 percent x $100,000)). The second class settlement offers either a fixed amount or the option to exit at the back end to the standard separate action process after scientific findings are announced. Given that the defendant's total costs remain constant regardless of settlement structure, the class member will have the option of receiving $25,000 (the expected recovery in the event of pro-defendant scientific findings) from class settlement or opting out for $75,000 (the expected recovery in the event of pro-plaintiff scientific findings) from suit. (Class members could opt out for payment of $25,000 in

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77 See id.
78 See id at 856.
79 See <http://www.settlementdietdrugs.com/pdfs/AmendedSettlementAgrement.pdf> (visited Aug 26, 2003) (providing information on and administration of American Home Products Corporation settlement trust). See also In re Diet Drugs Products Liability Litigation, 2000 US Dist LEXIS 12275 (E D Pa); In re Diet Drugs Products Liability Litigation, 2001 WL 497313, *8 (E D Pa), affd, 275 F3d 34 (3d Cir 2001) (explaining the opportunities for Class members to decide whether to remain in the settlement or opt-out). I note that I worked as an expert consultant for a nonparty concerning this matter. I base the views expressed in this essay, however, entirely on public record information about that case as well as about other mass tort cases in which I have been involved.
the event of pro-defendant findings, but presumably that course would entail extra cost and effort for no gain.) Plainly, a risk-averse class member needing tort insurance prefers straight class settlement to the back-end opt-out version. Both schemes have the same expected value, but being risk averse, the class member decidedly prefers payment with greater certainty. 80

CONCLUSION

This Article shows that permitting any opt out from class actions—that is, complete exit from the class action to prosecute a claim on both common and non-common questions by separate action in the standard market process—imposes cost without benefit. To the extent that personal safety and security depend on civil liability to deter unreasonable risk-taking by mass producers, enabling opt-out undermines everyone's well-being. None of the stated instrumental rationales for allowing opt-out, in particular prevention of class counsel perfidy or, in service of the anti-redistribution principle, maximization of individual recoveries from settlement or trial, requires opt-out. Indeed, opt-out proves counterproductive to achieving these ends. While very costly to administer, opt-out not only fails to check defalcations by class counsel, it actually raises the potential for disloyal representation by non-class as well as class counsel. Opt-out also diminishes expected recoveries. For, at the same time it constrains class counsel from fully exploiting class action scale economy and investment opportunities to maximize the expected value of the class claim, opt-out magnifies the litigation power of mass producer-defendants over plaintiffs.

Mandatory class action is not inconsistent with effectuation of the anti-redistribution principle—assuming for the sake of argument we should want to perpetuate this prescription for socially pathological and profligate expenditure of legal resources. Decoupling class action into two discrete (separate fee-award) stages—the first determining aggregate liability and damages and the second individualizing recoveries—would eliminate any need for opt-out to serve the anti-redistribution principle. Decoupling thus readily solves the problem of promoting the law enforcement goal of optimal deterrence while adhering to the apparent default rule precluding redistribution of claim-related

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80 For further critical analysis of a class settlement model exemplified by the phen-fen class settlement, see Rosenberg, 115 Harv L Rev at 856–57 (cited in note 6).
wealth relative to the baseline of projected separate action recoveries by enabling class members (and their hand-picked lawyers) to seek and keep all the money they can individually extract from their respective claims. Combined with simple restructuring of the formula for setting class counsel's fee, decoupling deterrence from distribution functions would assure that class counsel's incentives are both aligned with class interests and trained on maximizing returns from class action scale economy and investment opportunities, thereby promoting optimal deterrence as well as anti-redistribution ends.

The proposed two-stage model of a decoupled class action provides the platform for further enhancing individual welfare by replacing the anti-redistribution principle with a mandate to promote the goal of optimal accident insurance. Thus instead of being distributed according to the baseline measure of claim recovery values—a pure wealth transfer that imposes costs but does not correlate with individual welfare gains—second stage payouts would be determined strictly according to optimal insurance theory. Relative severity of economic loss—with major loss receiving disproportionate priority—would govern allotments; distributions would take no account of any other claim-specific variable (except as it might relate to motivating individual precautions against accident, for example through application of rules like contributory negligence). Pursuing this insurance objective largely eliminates the costly individualization that substantially depletes the compensatory value of civil liability recoveries. Significantly, even if the costs of individualizing severity of loss (and individual deterrence-related variables) for insurance purposes reduces or even precludes recovery by some fraction of class members (surely much smaller than in the more costly and risky separate action process), decoupling fully achieves deterrence goals (appropriately adjusted to offset the insurance shortfall) to make everyone better off.

In the light of this analysis, the U.S. Judicial Conference endorsement of a “second opt-out opportunity” for class action settlements is worse than pointless: it is socially irresponsible. “Proceduralist” thinking is largely the inspiration for this misbegotten policy. This mode of thought is characterized by metaphysical postulates such as “fairness,” “plaintiff autonomy,” and so-called “process values,” the nature and consequences of which are never defined or critically examined, and are so intellectually incoherent as to be beyond rational analysis. Moreover, it abjures—often
with disdain—consideration of "substantive" policy. Notably, decades-long proceduralist debate over mass tort class action rarely, and then only superficially in passing, has referred to the effects of choices among procedural schemes on tort law goals of deterrence and insurance.

The deontological and semantical formalism of proceduralist thinking essentially rejects the functionalist, scientific approach I have attempted to apply in this article. Functionalist analysis translates "legal questions" into questions of social problems, needs, and policy. Functionalist analysis evaluates (as well as defines and classifies) regimes and rules of law solely in terms of their operational effects on the individual and institutional behavior and interests relevant to achieving specified (but always contestable) social objectives.

For the sake of social welfare, the proceduralist reign must end. It (and its analogs in the "substantive" fields such as torts, property, contracts, and constitutional law) has brought the civil liability system to the point of chaos and crisis.\(^8\) That system consumes vast social resources (upwards of two hundred billion dollars annually for tort litigation alone) to render decisions of social policy well beyond the capacity and resources of the decision-makers—judges, juries, and academic as well as practicing lawyers. Thus, society cannot continue to rely on this wholly inexpert and tremendously expensive system for effective regulation of the safety of mass production processes and goods. Meeting this social need (assuming an essential role for civil liability) will require a fundamental, functionalist transformation of the system, beginning with the law schools.

\(^8\) This is not a claim that proceduralist thought represents a uniquely flawed and destructive mode of legal analysis. Much if not most of what passes as legal analysis, in all fields and at all levels—education, scholarship, and practice of lawyers and judges—suffers from the same defects. Nor is this a claim that proceduralist and other legal dogmas completely lack social utility; religion, mysticism, and mythmaking, broadly conceived, generate norms, beliefs, and practices that can exert socially beneficial influence on peoples' behavior. However, the social resources devoted to legal mythologizing seem quite excessive: contriving, propagating, indoctrinating, and enforcing them is not brain surgery, at least not in the literal sense. Moreover, experience suggests that we should avoid as far as practicable governing by religious autocracy.