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THE CLASS ACTION AS TRUST

Sergio J. Campos*

Abstract: The class action is controversial because the class attorney can litigate or settle the claims of the class members without their consent. Many scholars have turned to corporate law to address the potentially disloyal behavior of the class attorney. These scholars have used analogies to corporate law to support (1) the use of opt-out rights and (2) restrictions on class conflicts to constrain class attorneys, and the law has generally mirrored both requirements. In practice, however, both of these requirements have undermined the efficacy of the class action and prevented the class action from being used in many appropriate settings.

This Article argues that a more useful model for the class action is the trust. Unlike the shareholders of a corporation, the beneficiaries of the trust typically cannot exercise control over the trustee. Moreover, unlike the corporation, trust law facilitates the creation of trusts with conflicts among the beneficiaries. These features of the trust mirror the most controversial features of the class action.

The Article shows that both of these features are necessary to address problems of scale found in both contexts. Unlike in the corporate context, both the trust and class action contexts lack a well-developed market for managerial control which would allow beneficiaries/class members with conflicting interests to cede control to a third party with better aligned interests. In the absence of such a market, retaining control among the divided beneficiaries/class members prevents them from investing in the res/claims at the right scale.

Accordingly, trust law shows that class action requirements such as opt-out rights and class cohesion are misguided. The article concludes by applying the trust model of the class action to such class action issues as the ascertainability of class members, settlement pressure on the defendants, and cy pres awards.

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INTRODUCTION

The class action is one of the most controversial procedures in civil litigation.¹ This is because the class action allows the class attorney to litigate and settle the claims of the class members without their consent.² Courts and scholars have expressed concern that the class attorney may enter into suboptimal settlements to the detriment of the class members³ or fail to treat the individual class members fairly.⁴

1. Ryan C. Williams, *Due Process, Class Action Opt Outs, and the Right Not to Sue*, 115 COLUM. L. REV. 599, 635 (2015) (“It is no secret that class actions are deeply controversial.”).

2. See *Eubank v. Pella Corp.*, 753 F.3d 718, 719 (7th Cir. 2014) (noting that the class action “is controversial and embattled” because “[t]he control of the class over its lawyers usually is attenuated, often to the point of nonexistence”); John C. Coffee, Jr., *Conflicts, Consent, and Allocation After Amchem Products—Or, Why Attorneys Still Need Consent to Give Away Their Clients’ Money*, 84 VA. L. REV. 1541, 1549–50 (1998); Martin H. Redish & Julie M. Karaba, *One Size Doesn’t Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (“Both courts and scholars have expressed concern about what they see as the pathologies of the modern class action, among which is the threat posed by the controversial procedure to the constitutionally protected interests of those passive claimants.”); cf. Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 313 (2011) (arguing against advance consent to settle a claim in aggregate settlements because “[w]hether to develop or use that claim at all is, of course, the individual’s choice”).

3. Bruce Hay & David Rosenberg, *“Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1390–91 (2000) (discussing sweetheart

Many scholars have looked to the law of corporations to address the potential for abuse by the class attorney. Some scholars have directly analogized the class action to a corporation or similar entity.⁵ Others have used the literature on agency costs in corporate law.⁶ Generally, these scholars have argued in favor of opt-out rights for class members in class actions involving damage claims. Analogizing the class members to the shareholders in a corporation, they have argued that opt-

settlements). This concern with class attorneys selling out the class has a long history. *See* Alleghany Corp. v. Kirby, 333 F.2d 327, 347 (2d Cir. 1964) (Friendly, J., dissenting) (noting that a class attorney may have an incentive to accept a suboptimal settlement, stating that “a juicy bird in the hand is worth more than the vision of a much larger one in the bush, attainable only after years of effort not currently compensated and possibly a mirage”).

4. Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 626 (1997) (rejecting class action settlement of asbestos claims because “the interests of those within the single class are not aligned”); *see also* Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649, 1684 (2008) (arguing that class actions should not be certified where there are conflicts which “give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims”).

5. David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 921 (1998) (presenting an “entity” theory of the class action which analogizes the class action to “congregations, trade unions, joint stock companies, corporations . . . municipalities and other governmental entities”); *see also* Samuel Issacharoff, *Class Actions and State Authority*, 44 LOY. U. CHI. L.J. 369, 385 (2012) [hereinafter Issacharoff, *State Authority*] (analogizing the class action to the Venetian *commenda*, “a rudimentary type of joint stock company, which formed only for the duration of a single trading mission” (quoting DARON ACEMOGLU & JAMES A. ROBINSON, WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY 152 (2012))). The class action has also been analogized to a sovereign state. *See* Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338 [hereinafter Issacharoff, *Governance*] (“[I]t is useful to think of the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state.”).

6. The scholar most associated with using the agency cost literature in the corporate law context to examine the class action is John Coffee, Jr., whose class action scholarship has been enormously influential. *See* John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 377 (2000) [hereinafter Coffee, *Accountability*] (noting that “the academic literature on complex litigation has not analyzed class actions in these agency cost terms”); John C. Coffee Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 883 (1987) [hereinafter Coffee, *Regulation*] (“It is no secret that substantial conflicts of interest between attorney and client can arise in class action litigation. In the language of economics, this is an ‘agency cost’ problem.”). Others have also analyzed the class action in agency cost terms, most notably Jonathan Macey and Geoffrey Miller, although Macey and Miller do not analogize the class action to the corporation. *See* Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 12 (1991) (citing Michael C. Jensen & William H. Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. FIN. ECON. 305 (1976)) (“The lawyer’s role as agent of the client can be analyzed from an economic perspective with modern tools of agency cost theory”). Indeed, this Article does not criticize the use of the agency cost literature per se, but the use of corporate analogies based on this literature.

out rights allow class members to assert some control over their claims, and thus provide a check against a potentially disloyal class attorney.⁷ They have also argued in favor of avoiding significant class conflicts to prevent unfair treatment of some class members over others.⁸ The law on class actions has generally mirrored the proposed reforms of these corporate law-influenced scholars, requiring opt-out rights for damage class actions⁹ and that such class actions can only be certified if the class is “sufficiently cohesive.”¹⁰

The turn to corporate law, particularly its literature on agency costs, has significantly influenced class action scholarship.¹¹ In fact, the

7. The scholar most associated with using corporate law to advocate for opt-out rights is John Coffee, Jr. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 308–09 (2010) [hereinafter Coffee, *Governance*] (analogizing opt-out rights to the selling of shares in the corporate context, arguing that they may be a “powerful tool in litigation governance”); JOHN C. COFFEE JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* 83 (2015) [hereinafter COFFEE, *ENTREPRENEURIAL LITIGATION*] (arguing that “increased opting out benefits all plaintiffs because it may constitute an effective accountability mechanism by which class members can discipline their counsel”); Coffee, *Accountability*, *supra* note 6, at 419 (arguing for “enhancing the right to exit” to check the loyalty of the class attorney); John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 COLUM. L. REV. 1343, 1447, 1465 (1995) [hereinafter Coffee, *Class Wars*] (stressing the importance of the right to opt out in mass tort cases).

8. Coffee, *Accountability*, *supra* note 6, at 435 (arguing that “a more rigorous definition of class cohesion should apply in the case of the mandatory class action where the class member is essentially being coerced into participation”); see also Issacharoff, *Governance*, *supra* note 5, at 385 (using a governance model to argue for a modified cohesion, noting that “[t]he key is that a supervising court must be assured at the threshold stage of the litigation that there are no structural allegiances of class counsel that would create incentives to favor one part of the class over another, or be biased against seeking the best possible return to a defined subset of claims”).

9. See FED. R. CIV. P. 23(b)(3), 23(c)(2)(B) (providing that for classes certified under 23(b)(3), “the court must direct to class members the best notice that is practicable under the circumstances”); Wal-Mart Stores, Inc. v. Dukes, 564 U.S. 338, 362 (2011) (concluding that “individualized monetary claims belong in Rule 23(b)(3)” because of the “procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and *the right to opt out*” (emphasis added)).

10. The insistence on class cohesions stems from the Supreme Court’s review of comprehensive class action settlements of asbestos claims in the 1990s. See *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (noting that the federal class action rule, Rule 23, tests “whether proposed classes are sufficiently cohesive to warrant adjudication by representation”). The requirement has been emphasized in recent cases. See, e.g., *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, ___ U.S. ___, 133 S. Ct. 1184, 1196–97 (2013) (noting that “the focus of the predominance inquiry under Rule 23(b)(3) is whether “a proposed class is ‘sufficiently cohesive to warrant adjudication by representation’” (citing *Amchem*, 521 U.S. at 623)); *Comcast Corp. v. Behrend*, ___ U.S. ___, 133 S. Ct. 1426, 1436 (2012) (same).

11. See Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 113 (2006) (noting that, due to the work of Coffee, as well as Macey and Miller, “in legal academia, the dominant story was agency costs”); William B. Rubenstein, *On What A “Private Attorney General” Is—And Why It Matters*, 57

American Law Institute's recent *Principles of the Law of Aggregate Litigation* uses the agency cost literature in the corporate context both to support opt-out rights in class actions involving damage claims and to recommend against the certification of such class actions when "structural conflicts" exist.¹²

However, these reforms have had disastrous results for class actions involving damage claims. Even supporters of opt-out rights have conceded that such rights can cause collective action problems, which undermine beneficial settlements.¹³ Moreover, the class cohesion requirement has made it difficult to certify even litigation involving small claims because in many cases, the claims lack "some glue holding" them together.¹⁴ This is ironic because the Supreme Court has stated that "[t]he policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights."¹⁵

In analyzing the agency costs that may arise between the class attorney and the class members, scholars have ignored the trust and its

VAND. L. REV. 2129, 2161–62 (2004) (noting that "in the past twenty years, scholars loosely associated with the law and economics movement—most centrally, Professor John Coffee—have sketched a competing portrayal of class counsel" as profit-driven and that "the problem presented by entrepreneurial lawyering can be understood in terms of agency costs").

12. PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.05 reporters' notes cmt. a (AM. LAW INST. 2010) [hereinafter ALI, PRINCIPLES] (noting that "[t]his Section addresses the problem of agency failure in aggregate proceedings by establishing adequate representation as a goal and by identifying tools that can be used to help ensure it," citing literature on the agency costs of corporate control); *id.* § 1.05(c)(7) & cmt. j (arguing that class members should have a right to opt out to allow "escape from unwanted representation"); *id.* § 2.07(a)(1) (stating that, to protect the rights of individual class members, a court should determine that "there are no structural conflicts of interest"); *id.* § 2.07 cmt. c (supporting restrictions on "structural conflicts" by stating that "[w]ithin corporations, for example, shareholders may sell their shares (an exit right), participate in corporate governance (a voice right), or leave the management of the corporation to various agents obliged to advance corporate interests rather than their own (a loyalty right). As elaborated in the Comments that follow, aggregate litigation by way of a class action calls for an analogous array of rights . . .").

13. See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 143–47 (2007) (noting that the inclusion of back-end opt outs in a global settlement of fen-phen claims resulted in an unraveling of the settlement); Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571, 622 (2012) (noting that opt-out rights for class actions with high variance claims result in "adverse selection" which may unravel the class).

14. *Wal-Mart Stores, Inc.*, 564 U.S. at 339 (vacating certification of class action of female employees with small claims asserted against Wal-Mart).

15. *Amchem*, 521 U.S. at 617 (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

unique features.¹⁶ In part this is because scholars have tended to lump together all organizational forms that separate ownership and control rights.¹⁷ Moreover, the scholars who have applied the corporate law literature on agency costs to the class action context are also corporate law scholars.¹⁸ Finally, the trust has only recently been subject to functional analysis by scholars.¹⁹

But in ignoring the trust, scholars have overlooked a more analogous organizational form to the class action. For example, although scholars and courts have bemoaned the lack of direct control the class members can exercise over the class attorney, a similar lack of direct control is a defining feature of the trust.²⁰ This lack of direct control distinguishes the trust from the corporation, which allows shareholders to choose corporate directors and officers.²¹ In addition, despite the prohibition on conflicts among class members, conflicts are pervasive in all class

16. Apart from my own work, the only exception is Martin Redish and Megan Kiernan, who have analogized the class action to a trust, but only for the limited purpose of preclusion. See Martin H. Redish & Megan B. Kiernan, *Avoiding Death by a Thousand Cuts: The Relitigation of Class Certification and the Realities of the Modern Class Action*, 99 IOWA L. REV. 1659, 1676–77 (2014) (discussing the “limited nature” of their model).

17. See, e.g., ALI, PRINCIPLES, *supra* note 12, § 1.05 reporters’ notes cmt. a (referring to “the economic literature on agency relationships” without distinguishing among different relationships).

18. For example, along with his work on class actions, John C. Coffee has written extensively on corporate law, including serving as a reporter for the American Law Institute’s *Principles of Corporate Governance*. See PRINCIPLES OF CORP. GOVERNANCE: ANALYSIS & RECOMMENDATIONS (AM. LAW INST., Tentative Draft No. 3, 1984). Jonathan Macey and Geoffrey Miller have also written extensively on corporate law. See, e.g., ROBERT W. HAMILTON, JONATHAN R. MACEY & DOUGLAS K. MOLL, *THE LAW OF BUSINESS ORGANIZATIONS: CASES, MATERIALS, AND PROBLEMS* (12th ed. 2014); GEOFFREY PARSONS MILLER, *THE LAW OF GOVERNANCE, RISK MANAGEMENT, AND COMPLIANCE* (2014).

19. See, e.g., Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. L. REV. 434 (1998); Daniel B. Kelly, *Toward Economic Analysis of the Uniform Probate Code*, 45 U. MICH. J.L. REFORM 855 (2012); John H. Langbein, *The Contractarian Basis of the Law of Trusts*, 105 YALE L.J. 625 (1995); Robert H. Sitkoff, *An Agency Costs Theory of Trust Law*, 89 CORNELL L. REV. 621 (2004).

20. Admittedly, the terms of the trust instrument may permit the beneficiaries to exercise direct control over the trustee. See RESTATEMENT (SECOND) OF AGENCY § 14B cmt. b (AM. LAW INST. 1958). However, as a default, beneficiaries cannot exercise control over the trustee, and “the trustee is not ordinarily subject to the control of the beneficiary.” WILLIAM T. ALLEN & REINIER KRAAKMAN, COMMENTARIES AND CASES ON THE LAW OF BUSINESS ORGANIZATION § 2.3.3, at 36 (2003).

21. RESTATEMENT (SECOND) OF AGENCY § 14C cmt. a (AM. LAW INST. 1958) (noting that the board of directors of a corporation is subject to the control of the shareholders “with regard to the appointment and removal of its members. Directors are elected by the stockholders, who can refuse to re-elect them at the end of their terms of office and, in certain circumstances, can remove them prior thereto.”).

actions,²² and unlike corporate law, trust law uniquely facilitates the creation and maintenance of trusts with beneficiaries who have conflicting interests.²³ These shared features of the class action and the trust provide a clue that the trust, rather than the corporation, may serve as a more useful model for the class action.

This Article looks to the trust as a guide for understanding and reforming the class action.²⁴ Admittedly, the trust and the class action differ in important ways. The trust comes into being by a private party, the settlor, while the class action is judicially created. Moreover, there is no analogue for the defendant in the trust context. Nevertheless, the trust is useful for designing the class action because the features they do share are necessary to address a problem commonly found in both contexts.

Although controversial, it is generally understood that the class action addresses a problem of scale. One “policy at the very core of the class action mechanism” is to enable litigation involving numerous small claims against a single defendant, where the individual claimants lack an incentive to bring their small claims at all.²⁵ The claimants would have an incentive to bring an action if they could share the costs of investments in common issues, thereby using economies of scale to make litigation worthwhile.²⁶ However, the claimants fail to do so

22. Jay Tidmarsh, *Rethinking Adequacy of Representation*, 87 TEX. L. REV. 1137, 1139 (2009) (noting that “the reasons that class actions are thought to be necessary invariably generate the very conflicts of interest, either among class members or between class members and class counsel, that the traditional view of adequate representation forbids”).

23. Sitkoff, *supra* note 19, at 650–51 (noting that, unlike corporate law and other forms of organizational law, “[t]rust law facilitates the creation of residual claimants with interests adverse to each other” and imposes a unique “duty of impartiality” on trustees to account for these interests); see also Frank H. Easterbrook & Daniel R. Fischel, *Voting in Corporate Law*, 26 J.L. & ECON. 395, 405 (1983) (“The preferences of one class of participants are likely to be similar if not identical [in corporations]. This is true of shareholders especially, for people buy and sell in the market so that the shareholders of a given firm at a given time are a reasonably homogeneous group with respect to their desires for the firm.”).

24. Here I build on my previous work analogizing the class action to a trust. See Sergio J. Campos, *Class Actions and Justiciability*, 66 FLA. L. REV. 553, 565–74 (2014) [hereinafter Campos, *Justiciability*]; Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1077–79 (2012) [hereinafter Campos, *Mass Torts*]; Sergio J. Campos, *Proof of Classwide Injury*, 37 BROOK. J. INT’L L. 751, 772, 775–77 (2012) [hereinafter Campos, *Proof*].

25. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997) (quoting *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)). This Article focuses on class actions for damages, which are typically certified under Federal Rule of Civil Procedure 23(b)(3). However, many of the arguments made here extend to other types of class actions as well, which this Article will discuss intermittently in the text.

26. Campos, *Mass Torts*, *supra* note 24, at 1074–76 (discussing the problem of asymmetric stakes, or scale, in small claims litigation). The scale problem was first introduced by David Rosenberg in his work on mass tort litigation. For a recent examination by Rosenberg of the

because of collective action problems.²⁷ Moreover, a third party cannot acquire the claims in a market and thereby acquire the requisite incentive to invest at the right scale.²⁸

The class action solves this problem by assigning control over the claims to a third party, the class attorney, who is incentivized to sue because her compensation is typically based on the class's recovery as a whole.²⁹ Thus, the class attorney, unlike the class members, takes control over the claims because she can invest in common issues at the right scale.

The trust addresses a functionally identical problem of scale in many typical settings.³⁰ Trusts are generally created to manage property, the res, for beneficiaries who lack the ability or motivation to dispose of the property on their own.³¹ Trusts are commonly used when, in the absence of the trust, conflicting interests would prevent beneficiaries from pursuing investment opportunities that increase the res as a whole. In a common example, one beneficiary may have an interest in the income of a res while another may have a remainder interest in the principal.³² In such trusts, the conflicting interests of the beneficiaries may prevent such persons, in the absence of the trust, from pursuing investment opportunities that would make them both better off but would make one worse off, such as by depleting the principal to increase income.³³

problem of scale in small claims and similar litigation, see David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 305–06 (2014) (arguing that class action treatment is preferable when the plaintiffs are numerous but their claims share common issues of law and fact).

27. Campos, *Mass Torts*, *supra* note 24, at 1074–76.

28. See *infra* section I.A.1 (discussing restrictions on the alienability of claims, such as champerty and maintenance).

29. See *infra* section I.B.3.

30. See *infra* section I.B.2.

31. RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. 2(b)(1) (AM. LAW INST. 2001) (noting that a “common motivation[]” for using a trust is “to provid[e] property management for those who cannot, ought not, or wish not to manage for themselves”).

32. AMY MORRIS HESS ET AL., *BOGERT’S TRUSTS AND TRUSTEES* § 816 (3d ed. 2013) (“Almost every trustee finds that the trust terms require him to pay or apply ‘income’ to or for a temporary beneficiary, and to distribute ‘principal’ to one or more beneficiaries prior to or upon termination of the trust”); see also Reid Kress Weisbord, *The Advisory Function of Law*, 90 TUL. L. REV. 129, 181 (2015) (discussing the “common example in which a trust provides income to the settlor’s surviving spouse for life, followed by income to the settlor’s children for their lives, followed by outright distribution of the remaining assets to the settlor’s grandchildren”); Sitkoff, *supra* note 19, at 650 (“The still classic example . . . is a trust for the lifetime income benefit of one party (B1) with the remainder principal benefit to another (B2)”).

33. See *Dennis v. R.I. Hosp. Trust Nat’l Bank*, 744 F.2d 893, 897 (1st Cir. 1984) (concluding that a trustee breached fiduciary duty of impartiality to income and principal beneficiaries by failing to maintain buildings “to make larger income payments during the life of the trust,” noting that “[i]n a

Moreover, like in the class action, there is no well-developed market for the beneficiaries' shares that would allow a third party to acquire control over both shares to invest at the right scale.³⁴ Thus, trust law resolves this problem of scale by allowing the trustee to focus on the total returns of the res as a whole³⁵ and equitably distribute the gains,³⁶ making both beneficiaries better off.³⁷

Given their functional similarity with regard to the problem of scale, the trust can serve as a resource in designing and reforming the class action. Trust law has the further advantage of providing an existing and well-developed body of law which can be drawn upon in the class action context. Indeed, trust law utilizes many controversial features of class actions to solve the problem of scale, showing that these features are not

sense, the payments ate away the trust's capital"); Weisbord, *supra* note 32, at 181 (discussing this tension, noting that the income beneficiaries "would prefer the trust corpus to be invested in income-producing assets" while the principal beneficiaries "would prefer the trust corpus to be invested in equities of firms likely to realize long-term capital appreciation, such as growth stocks").

34. For example, spendthrift trusts, which prohibit a beneficiary from alienating his or her beneficial interest in the res, "and similar asset protection devices command huge amounts of capital in modern America." See Joshua Getzler, *Transplantation and Mutation in Anglo-American Trust Law*, 10 THEORETICAL INQUIRIES IN L. 355, 360 (2009). In fact, spendthrift trusts are the default form of trust in some states. See, e.g., DEL. CODE ANN. tit. 12, § 3536(a) (West 2016); N.Y. EST. POWERS & TRUSTS L. § 7-1.5 (McKinney 1967) (with respect to income only); see also JESSE DUKEMINIER, ROBERT H. SITKOFF, & JAMES LINDGREN, WILLS, TRUSTS, AND ESTATES 695 & n.18 (9th ed. 2013) (citing these two statutes as examples of laws which make trusts presumptively spendthrift). Given the proliferation of spendthrift trusts and other "doctrinal impediments designed to give effect to the settlor's dead-hand interests," it is no surprise that there is a "lack of a thick secondary market for trust residual claims." Robert H. Sitkoff, *Trust Law, Corporate Law, and Capital Market Efficiency*, 28 J. CORP. L. 565, 566 (2003).

35. See UNIF. PRUDENT INV'R ACT §§ 2-3 (1994) (permitting trustee to invest so as to focus on the total return on the trust property); RESTATEMENT (THIRD) OF TRUSTS: PRUDENT INV'R RULE § 227(a) (AM. LAW INST. 1992) (same).

36. UNIF. PRINCIPAL & INCOME ACT § 104(a) & cmt. (NAT'L CONFERENCE OF COMM'RS 1997) (providing that "[a] trustee may adjust between principal and income to the extent the trustee considers necessary if the trustee invests and manages trust assets as a prudent investor," and noting that "[t]he purpose of Section 104 is to enable a trustee to select investments based on the standards of a prudent investor without having to realize a particular portion of the portfolio's total return in the form of traditional trust accounting income such as interest and dividends"); see also RESTATEMENT (THIRD) OF TRUSTS § 111(b) (AM. LAW INST. 2012) (requiring a trustee to "make an equitable adjustment, except as preempted or precluded by statute, or as limited by the terms, objectives, or circumstances of the trust" if necessary to comply with duty of impartiality as to principal and income beneficiaries).

37. RESTATEMENT (THIRD) OF TRUSTS § 111 cmt. a (AM. LAW INST. 2012) (noting that "[i]t is normally advantageous to beneficiaries collectively and therefore prudent for the trustee to seek a total return that is optimal in light of the trust's purposes and circumstances," and thus, in a trust with both income and principal beneficiaries, "[t]he ideal way of reconciling . . . potentially conflicting responsibilities . . . is to invest for optimal total return and, if necessary, to adjust principal and income").

as unfamiliar, and therefore should not be as “extraordinary,” as courts and scholars frequently assume.³⁸

As I argue below, using the trust as a guide for class actions has two important payoffs. First, it shows that protecting class member control over the claims, such as through an opt-out right, is self-defeating. The fatal flaw of analogizing the class action to the corporation is that, unlike in the corporate context, there is no third-party market for the class members’ claims which would allow control rights to be acquired privately at the right scale. As a result, preserving the class members’ control over their claims only reintroduces the collective action problems that caused suboptimal investment in the claims in the first place.³⁹

Second, by looking to trust law, one sees that the insistence on class cohesion is not only unnecessary, but harmful. Conflicts among the beneficiaries are a common cause of the problem of scale both trusts and class actions address. Indeed the trust, unlike the corporation, accounts for conflicts among the beneficiaries for this reason. Accordingly, insisting on class cohesion would close off the class action to the very situations where it would most be useful, such as in mass tort litigation.⁴⁰ Moreover, the model shows that collective procedures such as bifurcation and damage scheduling are not only common in the trust context, but actually prevent the unfair treatment of beneficiaries.⁴¹ Thus, such procedures should be permitted in class actions.

The usefulness of the trust to class action law also extends beyond the relationship between the class attorney and the class members. Here I utilize trust law to address a broad range of class action issues, such as the ascertainability of class members,⁴² whether class actions impose undue settlement pressure on defendants,⁴³ and the availability of cy pres distribution to third parties.⁴⁴

Part I sets forth why the trust can be useful for understanding and reforming the class action. Part II uses the model to show that neither

38. Cf. Theodore Eisenberg & Stephen C. Yeazell, *The Ordinary and the Extraordinary in Institutional Litigation*, 93 HARV. L. REV. 465, 466 (1980) (arguing that then-recent institutional reform litigation was not “extraordinary” given “the willingness of past and contemporary courts to supervise complex institutions” in ordinary litigation).

39. See *infra* section II.A.1.

40. See *infra* section II.B.1.

41. See *infra* sections II.B.2 & II.B.3.

42. See *infra* section III.A.

43. See *infra* section III.B.

44. See *infra* section III.C.

opt-out rights nor class cohesion should be required to certify a class action. Part III concludes by extending the model to consider other controversial issues in class action law.

I. THE MODEL

A. *Background*

The trust model of the class action proposed in this article is based on an analogy between the relevant parties and property of the trust and of the class action. Specifically:

- the class members' claims are analogous to the res;
- the class members are analogous to the beneficiaries;
and
- the class action attorney can be understood as a trustee over the claims for the benefit of the class members.

Because the model is based on a correspondence between the relevant persons and property found in both the class action and trust contexts, it is useful to define generic terms for instances when I want to refer to both at the same time. Thus, I will use the term “managed property” to refer to both the res and the class members' claims; the term “recipients” to refer to both the beneficiaries of the trust and the class members; and the term “manager” to refer to both the trustee and the class attorney.⁴⁵

Because I am focusing on the rights and duties of the class attorneys with respect to the class members, I do not discuss the settlor in the core model, who admittedly plays an essential role in trust law,⁴⁶ but as noted earlier, does not have an exact analogue in the class action context.⁴⁷ Despite this difference between the class action and the trust, I argue below that the trust can still be a useful guide, or model, in examining the function of the class action.

45. See Hansmann & Mattei, *supra* note 19, at 439 (using the same terms “for the . . . characteristic parties” and property in trusts and trust-like relationships).

46. See Sitkoff, *supra* note 19, at 643 (“The settlor’s intent to create a trust is a prerequisite to trust formation.”). I respond to potential objections to the lack of a settlor analogue below. See *infra* section I.A.3.

47. Nevertheless, in discussing applications of the model, I do discuss the court as a type of “trust protector” that, like the settlor, can be understood as concerned with the enforcement of the terms of the trust. See *infra* section II.A.3. For that reason, I discuss the role of the settlor in the background section on trusts. See *infra* section I.A.2.

But before looking to trust law as a guide for the law of class actions, some basic background on class actions and trusts is necessary.

1. *Class Actions*

There are many types of class actions and similar aggregate procedures.⁴⁸ This article focuses on federal damages class actions governed under Federal Rule of Civil Procedure 23(b)(3). It does so because Rule 23(b)(3) class actions are the most controversial use of the class action, and thus most clearly demonstrate the controversial features of the class action.⁴⁹

In general, Rule 23 provides that “one or more members of a class may sue or be sued as representative parties on behalf of all class members” if certain requirements are met.⁵⁰ A party seeking class certification must first show that: (1) the class is “numerous”; (2) “there are questions of law or fact common to the class”; (3) the representative party is “typical” of the class; and (4) the representative party “will fairly and adequately protect the interests of the class.”⁵¹ These four prerequisites, commonly referred to as numerosity, commonality, typicality, and adequacy of representation, respectively, must be satisfied for certification of all proposed class actions. An additional “adequacy of representation” requirement applies to the attorney representing the class.⁵²

In addition to the above prerequisites, the party “must satisfy at least one of the three requirements listed in Rule 23(b).”⁵³ Rule 23(b)(3), the focus of this article, defines a residual category of permissible class actions that typically applies to litigation involving monetary remedies.⁵⁴

48. For a discussion of various aggregate procedures, see ALI, *PRINCIPLES*, *supra* note 12, § 1.02. Examples of these procedures include: (1) consolidated proceedings; (2) multidistrict litigation; and (3) bankruptcy proceedings. *See* 28 U.S.C. § 1407 (2012); FED. R. CIV. P. 42(a); FED. R. BANKR. 7001.

49. Campos, *Mass Torts*, *supra* note 24, at 1088 (taking a similar approach).

50. FED. R. CIV. P. 23(a).

51. *Id.* 23(a)(1)–(4).

52. *Id.* 23(g)(2) (“When one applicant seeks appointment as class counsel, the court may appoint that applicant only if the applicant is adequate under Rule 23(g)(1) and (4).”); *id.* 23(g)(4) (“Class counsel must fairly and adequately represent the interests of the class.”).

53. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 345 (2011); *see also* FED. R. CIV. P. 23(b)(1)–(3).

54. *See* Amendments to Rules of Civil Procedure Supplemental Rules for Certain Admiralty & Mar. Claims Rules of Criminal Procedure, 39 F.R.D. 69, 103 (1966) (discussing creation of Rule 23(b)(3) category); Benjamin Kaplan, *A Prefatory Note*, 10 B.C. INDUS. & COM. L. REV. 497, 497 (1969) (noting that the 1966 amendments that created Rule 23(b)(3) for damage class actions are the

Rule 23(b)(3) permits a class action only if it is shown that (1) common questions “predominate over any questions affecting only individual members” (the “predominance” requirement) and (2) the “class action is superior to other available methods” (the “superiority” requirement).⁵⁵

Rule 23(b)(3) class actions are typically certified for litigation involving claims that are too small to be brought individually. Indeed, the Rule 23(b)(3) category was created precisely to vindicate “the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”⁵⁶ However, Rule 23(b)(3) class actions are also certified for litigation involving large claims, such as in securities fraud and antitrust litigation.⁵⁷

Rule 23(b)(3) class actions are controversial primarily because, as in all class actions, the class attorney’s development and disposition of the claims are not subject to the direct selection or control of the class members. Upon certification of the class action by the judge, the class attorney, in effect, can seek a judgment that binds all of the class members without their consent. That is why the class action is considered a “recognized exception” to the “principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.”⁵⁸ Moreover, as evidenced by the common criticism that class attorneys

“most adventuresome of the new types”). Professor Kaplan was the reporter for the 1966 Amendments to the Rules of Civil Procedure, which included the amendments creating Rule 23(b)(3).

There are two other permissible categories of class actions, both of which involve situations where the remedy is, as a practical matter, indivisible with respect to the class. ALI, PRINCIPLES, *supra* note 12, § 2.04(b). Specifically, the first category, codified under Rule 23(b)(1)(A) and Rule 23(b)(2), permits class actions when separate actions “would create a risk of . . . incompatible standards of conduct for the party opposing the class,” such as when the plaintiffs seek “final injunctive relief or corresponding declaratory relief” which applies to “the class as a whole.” *See* FED. R. CIV. P. 23(b)(1)–(2); ALI, PRINCIPLES, *supra* note 12, § 2.04 & reporters’ notes cmt. a (noting that these two provisions are identical). The second category, codified under Rule 23(b)(1)(B), permits class actions when separate actions, “as a practical matter . . . would substantially impair or impede [the nonparties’] ability to protect their interests,” and has been primarily used in “limited fund” cases in which “claims [are] made by numerous persons against a fund insufficient to satisfy all claims.” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 834 (1999) (quoting Advisory Committee’s Notes on FED. R. CIV. P. 23). It should be noted that the problem of scale discussed here also arises in the first two categories, but this Article focuses on the third category for purposes of clarity.

55. FED. R. CIV. P. 23(b)(3).

56. Kaplan, *supra* note 54, at 497.

57. *See* Coffee, *Governance*, *supra* note 7, at 309–10, 317.

58. *Hansberry v. Lee*, 311 U.S. 32, 40–41 (1940) (citing *Pennoyer v. Neff*, 95 U.S. 714 (1877)).

enter into “sweetheart” settlements at the expense of the class members,⁵⁹ the class attorney also has the power to settle the claims without the class members’ consent.

The lack of control of the class members over the class attorney arises from two further features of the class action. First, although Rule 23 designates the “representative party” as the party who is permitted to obtain class certification, the class attorney is, in effect, the relevant party who initiates and controls the litigation.⁶⁰ Because percentage fees are the norm in Rule 23(b)(3) class actions, class attorneys typically have the largest stake in the potential recovery, and thus the most incentive to invest in the claims.⁶¹ Because of this, class attorneys also typically incur all of the costs in litigating the class action, as the other class members, including the class representative, typically have claims that are too small to justify significant investment.⁶² Accordingly, given her incentives, the class attorney is the one that makes investment decisions concerning the claims, including the decision to litigate or settle.

Second, Rule 23 permits the certification of a class that is subject to a binding judgment entered in the litigation without requiring class members to “opt in” or otherwise consent to inclusion in the class.⁶³ At best, in a Rule 23(b)(3) class action, a class member has an opportunity

59. Hay & Rosenberg, *supra* note 3, at 1390–91 (discussing sweetheart settlements).

60. FED. R. CIV. P. 23(a).

61. ALL, PRINCIPLES, *supra* note 12, § 3.13 cmt. b (noting that “most courts and commentators now believe that the percentage method is superior” to the lodestar method of determining class attorneys’ fees); Janet Cooper Alexander, *Contingent Fees and Class Actions*, 47 DEPAUL L. REV. 347, 349 (1998) (“Recently, there has been a trend in common fund cases away from the lodestar and toward a return to the percentage-of-the-recovery method of calculating fees.”). Admittedly, the class attorney may also be paid under a “lodestar” method, which compensates the attorney based upon the amount of time spent on the action. See Morris A. Ratner & William B. Rubenstein, *Profit for Costs*, 63 DEPAUL L. REV. 587, 594 (2014). Nevertheless, fees calculated under the lodestar method are not materially different from what would have been paid on a percentage basis. See Alexander, *supra*, at 350.

62. *Rand v. Monsanto Co.*, 926 F.2d 596, 599 (7th Cir. 1991) (rejecting the district court finding that the class representative was not adequate because he or she would not bear the total costs of the litigation, noting that “[t]he very feature that makes class treatment appropriate—small individual stakes and large aggregate ones—ensures that the representative will be unwilling to vouch for the entire costs”); Coffee, *Accountability*, *supra* note 6, at 412 (“Client financing of the action is highly unlikely because of the inherent collective action problem in class actions; that is, a class representative who expects to receive one percent (or less) of the recovery will not logically finance one hundred percent of the action’s costs.”).

63. See John Bronsteen & Owen Fiss, *The Class Action Rule*, 78 NOTRE DAME L. REV. 1419, 1449–50 (2003) (noting that Rule 23 does not require the parties to “opt in” to the class action, but arguing that such an “opt in” should be necessary for class action settlements).

to opt out of the class action,⁶⁴ or at least object to a proposed settlement.⁶⁵ Given that Rule 23(b)(3) class actions typically involve small claims, few class members either opt out or object and typically have no incentive to do either given the small amount at stake.⁶⁶ Accordingly, the lack of both opportunities and incentives for the class members to either exit the class or voice their concerns gives the class attorney free rein to develop the claims as she sees fit.

Nevertheless, the class attorney is restrained in how she can dispose of the property in two important ways. First, the law of champerty and maintenance generally prohibits all claim holders from either selling all or part of their claims to third parties (champerty) or otherwise “receiving improper aid from a stranger to the case (maintenance).”⁶⁷ Admittedly, there are exceptions, such as the subrogation of claims⁶⁸ and contingency fee arrangements,⁶⁹ which allow a partial interest in the claims to be alienated. Nevertheless, class attorneys typically cannot sell the claims, or a share of the claims, to any third party other than the

64. See FED. R. CIV. P. 23(c)(2)(B)(v) (requiring a class action certified under Rule 23(b)(3) to provide notice “that the court will exclude from the class any member who requests exclusion”).

65. *Id.* 23(e)(5) (“Any class member may object to the proposal if it requires court approval under this subdivision (e) . . .”).

66. See Theodore Eisenberg & Geoffrey Miller, *The Role of Opt-Outs and Objectors in Class Action Litigation: Theoretical and Empirical Issues*, 57 VAND. L. REV. 1529, 1563 (2004) (noting that, based on an empirical study, “the percentage of opt-outs and objectors are almost always small,” and that “[c]lass members appear to be behaving out of apathy or rational ignorance rather than making a considered choice not to opt out or object”).

67. Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61, 66 (2011) (discussing and criticizing the law of champerty and maintenance); see also *In re Primus*, 436 U.S. 412, 424 n.15 (1978) (“[M]aintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome; and barratry is a continuing practice of maintenance or champerty.”).

68. Kenneth S. Reinker & David Rosenberg, *Improving Medical Malpractice Law by Letting Health Care Insurers Take Charge*, 39 J.L. MED. & ETHICS 539, 539 (2011) (defining “insurance subrogation” and arguing that insurers should not be limited in what they can recoup).

69. Sebok, *supra* note 67, at 99–100 (noting that contingency agreements were “flatly illegal under the doctrines of maintenance and champerty,” but that “[c]ourts and legislatures quickly found an exception”). In addition, a number of jurisdictions have begun to experiment with third-party financing of claims, in effect relaxing champerty and maintenance restrictions. See Michele DeStefano, *Nonlawyers Influencing Lawyers: Too Many Cooks in the Kitchen or Stone Soup?*, 80 FORDHAM L. REV. 2791, 2816–18 (2012) (discussing “claim funding” by third parties in Australia and the United Kingdom and noting that it “is considered a fledgling industry in the United States”). Over time, greater relaxation of such restrictions may create the market for claims that currently does not exist. See Charles R. Korsmo & Minor Myers, *Aggregation by Acquisition: Replacing Class Actions with a Market for Legal Claims*, 101 IOWA L. REV. 1323, 1344 (2016) (noting that while the law has moved away from champerty and maintenance restrictions, “these doctrines continue to exist in many jurisdictions and pose a serious obstacle to any alienation of legal claims”).

defendant through a settlement. As a result, class attorneys rely predominantly on debt financing to fund their investments.⁷⁰

Second, even in a settlement, Rule 23 requires the class attorney to seek approval for any settlement of the class members' claims in a fairness hearing.⁷¹ In such a fairness hearing, the court examines whether the proposed settlement "is fair, reasonable, and adequate."⁷² Accordingly, any proposed sale of the claims to the defendant in a settlement is subject to the scrutiny and approval of the court.

2. *Trusts*

Like the class action, there are a wide variety of trust and trust-like arrangements.⁷³ For reasons discussed in more detail in the next section, this article focuses on expressive, or donative, trusts under United States law.⁷⁴

A donative trust is created when a *settlor* conveys the trust property, the *res*, to a *trustee* for the benefit of others, the *beneficiaries*.⁷⁵ Specifically, the settlor assigns dispositive control, otherwise known as legal title, over the *res* to the trustee, while the residual benefits of the *res*, often referred to as the equitable interest, redound to the beneficiaries.⁷⁶ The trust, like the corporation and other organizational forms, separates the control of property from the benefits produced by the property.⁷⁷

70. Samuel Issacharoff, *Litigation Funding and the Problem of Agency Cost in Representative Actions*, 63 DEPAUL L. REV. 561, 563 (2014) ("The prohibitions encompassed in the barratry-champerty-maintenance troika basically restrict the ability to raise money for legal ventures through equity financing."). Admittedly, attorneys can, and often do, receive some equity financing from other attorneys. See Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 389–90 (2014). Nevertheless, debt financing remains the dominant mode of financing. See Issacharoff, *supra*, at 563.

71. FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class may be settled, voluntarily dismissed, or compromised only with the court's approval.").

72. *Id.* 23(e)(2).

73. Campos, *Justiciability*, *supra* note 24, at 572 (discussing other "trust-like" arrangements).

74. See *infra* section I.A.3.

75. RESTATEMENT (THIRD) OF TRUSTS §§ 2–3 (AM. LAW INST. 2003) (defining a trust and the roles of the settlor, trustee, beneficiary and the "trust property"); RESTATEMENT (SECOND) OF TRUSTS §§ 2–3 (AM. LAW INST. 1958) (same).

76. See Hansmann & Mattei, *supra* note 19, at 440.

77. See Langbein, *supra* note 19, at 627 ("We treat the trustee as the new owner for the purpose of managing the property, while the trust deal strips the trustee of the benefits of ownership."); Joseph T. Walsh, *The Fiduciary Foundation of Corporate Law*, 27 J. CORP. L. 333, 333–35 (2002) ("In operation, the two entities, corporation and trust, were analogous in the separation of legal title from beneficial interest and in the separate, continued existence of the structure whether in trust or in corporate form."); cf. ALI, PRINCIPLES, *supra* note 12, § 1.05 reporters' notes cmt. a (citing

The trust, however, differs from the corporation in two important respects. First, and most importantly, the trustee is not, as a default, subject to the will of the beneficiaries, although the trustee nevertheless owes the beneficiaries a fiduciary duty to manage the res in their interest.⁷⁸ In contrast, in a corporation, “the shareholders can vote to elect or remove the corporation’s directors; they may also vote to amend the corporation’s bylaws, or to approve a significant transaction such as a merger.”⁷⁹ Second, the trustee must comply with the terms of the trust instrument. Indeed, the intent of the settlor in creating the trust, which is reflected in the trust instrument, has been understood as the “polestar” that “guide[s] all aspects of trust administration.”⁸⁰

Like the class action, there is not a well-developed market for the beneficiary’s shares in the trust property. Beneficial interests in trusts do not tend to attract buyers because trust law typically makes it difficult to deviate from “the settlor’s dead-hand interests” as reflected in the trust instrument.⁸¹ In fact, in spendthrift trusts, which are still the default in some states,⁸² the beneficiaries’ interest in the res cannot be sold at all.⁸³ The terms of the spendthrift trust are analogous to the champerty and maintenance restrictions on the class members’ claims.

literature on “agency relationships” in which the “ownership of assets and control of their disposition [are] separated,” including trusts).

78. See RESTATEMENT (SECOND) OF AGENCY § 14B cmt. a (AM. LAW INST. 1958) (noting that, unlike in the context of a corporation, a trustee “may or may not be subject to the beneficiary’s control”); ALLEN & KRAAKMAN, *supra* note 20, § 2.3.3, at 36 (noting that “the trustee is not ordinarily subject to the control of the beneficiary.”) Again, it should be noted that this is simply a default rule, and that a settlor may permit some beneficiary control in the trust instrument. See RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a(1) (AM. LAW INST. 2003) (“[M]any (but not all) of trust law consists of ‘default rules,’ as opposed to mandatory or restrictive rules, and is therefore subordinate to the terms (or ‘law’) of the trust.”). For now I will focus on the default rule, although I will explain later in the article why focusing on the default rules of trust law is appropriate for purposes of developing the model. See *infra* section I.A.3.

79. JAMES D. COX & THOMAS LEE HAZEN, TREATISE ON THE LAW OF CORPORATIONS, §§ 13:1, 22:13 (3d ed. 2010).

80. Lee-ford Tritt, *The Limitations of an Economic Agency Cost Theory of Trust Law*, 32 CARDOZO L. REV. 2579, 2640 (2011) (quoting *In re Sherman Trust*, 179 N.W. 109, 112 (Iowa 1920)).

81. Sitkoff, *supra* note 34, at 566.

82. DUKEMINIER, SITKOFF, & LINDGREN, *supra* note 34, at 695 (“In Delaware . . . all trusts are presumptively spendthrift, and in New York all trusts are presumptively spendthrift with respect to income.”) (citations omitted).

83. RESTATEMENT (SECOND) OF TRUSTS §§ 152–53 (AM. LAW INST. 1959) (defining “a spendthrift trust” as a trust which has a “valid restraint on the voluntary and involuntary transfer of the interest of the beneficiary”); RESTATEMENT (THIRD) OF TRUSTS § 58 (AM. LAW INST. 2003) (providing that such trusts are valid).

3. *Method*

The model developed in this article analogizes class actions to trusts. Analogizing the class action to other organizational forms is a common method of scholarship on the class action, if not legal reasoning in general.⁸⁴ Scholars have analogized class actions to corporations,⁸⁵ labor unions,⁸⁶ states,⁸⁷ and even the Venetian *commenda*.⁸⁸

This Article analogizes the class action to the trust, in part, to identify the inconsistent treatment of class actions as compared to trusts. Thus, this Article leverages the general acceptability of the trust to show that similar features found in the class action should not be considered either controversial or “extraordinary.”⁸⁹

Analogizing class actions to trusts has additional advantages. First, trusts, as creatures of equity, are primarily the product of judge-made law.⁹⁰ Consequently, the trust improves upon other analogous forms like

84. Scott Brewer, *Exemplary Reasoning: Semantics, Pragmatics, and the Rational Force of Legal Argument by Analogy*, 109 HARV. L. REV. 923, 926 (1996) (“[L]egal argument is often associated with its own distinct method, usually referred to as ‘reasoning (or argument) by analogy’; indeed, if metaphor is the dreamwork of language, then analogy is the brainstorm of jurists’-diction.”).

85. Coffee, *Accountability*, *supra* note 6, at 422 (“The potential for enhanced accountability in class actions can probably best be assessed by contrasting class action procedures with the comparable accountability mechanisms in corporate law. Strong analogies exist.”); Shapiro, *supra* note 5, at 921 (presenting an “entity” theory of the class action which analogizes the class action to “congregations, trade unions, joint stock companies, corporations . . . municipalities and other governmental entities”); Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1465–66 (1998) (noting that class actions “resemble corporations,” and using this analogy to examine attorney-client conflicts).

86. Shapiro, *supra* note 5, at 921; *see also* Coffee, *Regulation*, *supra* note 6, at 879 (in discussing the class action, noting that “it is useful to look beyond the immediate context of civil litigation to functionally analogous settings where similar problems arise, such as bankruptcy reorganizations and labor negotiations”); John C. Coffee, Jr., *Rethinking the Class Action: A Policy Primer on Reform*, 62 IND. L.J. 625, 627 (1987) (“To understand the tensions within the class [of a class action], it is useful to examine the experience in related contexts—such as collective bargaining negotiations and corporate re-organizations in bankruptcy—where claimants have also had to dispute among themselves over the distribution of a limited fund.”).

87. Issacharoff, *Governance*, *supra* note 5, at 338 (“[I]t is useful to think of the class action mechanism as fundamentally a centralizing device designed to accomplish some of the same functions as performed by the state.”).

88. Issacharoff, *State Authority*, *supra* note 5, at 385 (analogizing the class action to the Venetian *commenda*, “a rudimentary type of joint stock company, which formed only for the duration of a single trading mission” (quoting DARON ACEMOGLU & JAMES A. ROBINSON, *WHY NATIONS FAIL: THE ORIGINS OF POWER, PROSPERITY, AND POVERTY* 152 (2012))).

89. *Cf.* Eisenberg & Yeazell, *supra* note 38, at 466 (arguing that institutional reform litigation should not be seen as “extraordinary” given the “the willingness of past and contemporary courts to supervise complex institutions”).

90. I say “primarily” because trust law is also regulated by state statutes that are informed by uniform acts. *See* David M. English, *The Impact of Uniform Laws on the Teaching of Trusts and*

the *qui tam* action, which scholars have used to suggest that the class action can only be reformed (or even instituted) through legislation.⁹¹ Second, trusts are a quintessential form of private law, and thus avoid the concerns with “legitimacy” that arise when the class action is analogized to public law organizations like the state.⁹²

However, the primary goal of analogizing class actions to trusts is to use the trust as a guide in designing the class action. Indeed, those scholars who look to corporate law and its agency cost literature do so precisely for guidance in reforming the class action.⁹³ In using the trust as a design resource, this Article does not assume that trust law is perfect nor wade into the intricacies of trust law. Instead, it examines how basic features of the trust solve certain problems commonly found in both the class action and trust contexts. These basic features are then used to create a simple, functional model of the trust, which is then used as a reference for the class action.

Using a functional model of the trust as a guide in designing the class action is especially appropriate because the class action is primarily defined in functional terms. The modern class action, including the Rule 23(b)(3) category, was explicitly designed “on functional lines

Estates, 58 ST. LOUIS U. L.J. 689, 689 (2014) (noting that “close to thirty uniform acts relating to Trusts and Estates . . . have been approved”).

91. See MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* 23–56 (2009) (defining “faux” class actions as class actions which provide no compensation to the class members and only enrich the class attorney, and criticizing them because, unlike *qui tam* actions, they do not arise from legislation); cf. David Freeman Engstrom, *Private Enforcement’s Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 2003 & n.284 (2014) (noting that an “implicit assumption of Redish’s work” is a “tend[ency] to cast any lawmaking that occurs beyond legislative or administrative precincts as lacking a democratic pedigree”).

92. See Elizabeth Chamblee Burch, *Governing Securities Class Actions*, 80 U. CIN. L. REV. 299, 306 (2011) (analogizing the class action to “political governance” models like the state, and arguing that “the political governance model . . . adds a . . . critical dimension: the demand for legitimacy in the institutional arrangement”); Richard A. Nagareda, *Class Actions in the Administrative State: Kalven and Rosenfield Revisited*, 75 U. CHI. L. REV. 603, 625 (2008) (analogizing class actions to administrative agencies, and arguing that “the reason why the law of class actions must address that question [of class certification] as one of authority and legitimacy, whereas the administrative state need not, is this: the administrative state operates based on an ongoing delegation of authority that stems ultimately from the polity in the aggregate, whereas the delegation of authority effected by class certification is of a temporary, one-shot nature”).

93. See Coffee, *Accountability*, *supra* note 6, at 422 (“The potential for enhanced accountability in class actions can probably best be assessed by contrasting class action procedures with the comparable accountability mechanisms in corporate law. Strong analogies exist.”).

responsive to those recurrent life patterns which call for mass litigation through representative parties.”⁹⁴

As discussed in more detail below, the simple, functional model of the trust developed here is useful because the trust and the class action are both used to solve the same category of problems, what I call *problems of scale*.⁹⁵ Moreover, and as noted above, the trust and the class action already share certain relevant features, such as the inability of the recipients to control the manager directly. This similarity makes it easier to translate any suggested reform from one context to the other. Finally, the trust model comes with a well-developed body of law that courts and legislators can look to in reforming the class action. Accordingly, a trust model prevents one from reinventing the wheel in designing the class action.

Using the trust as a design resource poses some potential problems that are worth addressing. First, other trust-like arrangements may be more similar to the class action.⁹⁶ The term “trust” has been used to describe relationships such as that of the administrator of an intestate estate to the estate’s heirs,⁹⁷ and a guardian ad litem to a person who lacks capacity.⁹⁸

This Article focuses on expressive, or donative, trusts because the expressive trust has been the primary focus of recent developments in the functional analysis of trust law.⁹⁹ Accordingly, expressive trusts provide the clearest expression of the functional features of trust and trust-like arrangements. The trust is also one of the simplest forms of organization, and its simplicity both facilitates constructing a model, as

94. Kaplan, *supra* note 54, at 497 (discussing the 1966 amendments to the Federal Rules of Civil Procedure that produced the modern class action).

95. *See infra* section I.B.2.

96. Campos, *Justiciability*, *supra* note 24, at 571–72.

97. RESTATEMENT (SECOND) OF TRUSTS § 6 & cmt. a (AM. LAW INST. 1959) (providing that “[a]n executorship or an administratorship is not a trust,” but noting that both are fiduciaries, and that the main difference between the two is “the tribunals which enforced the duties”); *see also* Campos, *Justiciability*, *supra* note 24, at 572 & n.108.

98. 1 AUSTIN WAKEMAN SCOTT ET AL., SCOTT AND ASCHER ON TRUSTS § 2.3.3 (5th ed. 2006) (“A guardian of the property of one under an incapacity is certainly a trustee in the broad sense of the term, because a guardian is under a duty to deal with the property for the ward’s benefit.”); *see also* Campos, *Justiciability*, *supra* note 24, at 572 & n.109.

99. *See, e.g.*, Hansmann & Mattei, *supra* note 19 (taking a functional approach to trusts); Langbein, *supra* note 19 (arguing that function of trust is contractual); Sitkoff, *supra* note 19 (providing an agency cost model of the trust).

well as avoids any confusion that might result from looking to more complex forms.¹⁰⁰

It is worth noting that this Article further restricts its focus to the United States law on trusts, as English law tends to allow beneficiaries more control over the trustee, and is thus not as analogous to the class action as the U.S. trust.¹⁰¹ In fact, U.S. law on class actions, like U.S. law on trusts, provides the recipients much less control than its European counterparts. For example, in Europe, class actions typically are permitted only when the class members “opt in,” or consent, to participation in the action.¹⁰²

Second, much of trust law consists of default rules that can be customized by the settlor through the terms of the trust instrument.¹⁰³ Nevertheless, such default rules are still useful in developing a functional model of the trust. In general, the default rules of the trust are not penalty defaults,¹⁰⁴ but are meant to reflect the terms a settlor would generally prefer in setting up a trust.¹⁰⁵ Accordingly, the default rules can be understood as a guide to the function of the trust and the problems it addresses. Moreover, trust law also consists of mandatory

100. See Hansmann & Mattei, *supra* note 19, at 437 (“The private trust is among the simplest of the forms of enterprise organization provided for in the law and thus makes a particularly convenient focus for study.”).

101. See Sitkoff, *supra* note 19, at 662–63 (noting that “English law resolves significantly more of the settlor-beneficiary tension raised by questions of trust termination and modification in favor of the beneficiaries”); see also A.I. Ogus, *The Trust as Governance Structure*, 36 U. TORONTO L.J. 186, 202–03 (1986) (noting this difference).

102. See Coffee, *Governance*, *supra* note 6, at 330 (“With only a few exceptions, existing European class action procedures employ an opt-in rather than an opt-out procedure.”).

103. RESTATEMENT (THIRD) OF TRUSTS § 4 cmt. a(1) (AM. LAW INST. 2003) (“[M]any (but not all) of trust law consists of ‘default rules,’ as opposed to mandatory or restrictive rules, and is therefore subordinate to the terms (or ‘law’) of the trust.”).

104. Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 91 (1989) (defining “penalty defaults” as “purposefully set at what the parties would not want—in order to encourage the parties to reveal information to each other or to third parties (especially the courts)” (emphasis added)).

105. See Robert H. Sitkoff, *An Economic Theory of Fiduciary Law*, in PHILOSOPHICAL FOUNDATIONS OF FIDUCIARY LAW 197, 204 (Andrew S. Gold & Paul B. Miller eds., 2014) (noting that “[t]he requirement that a fiduciary act in the principal’s best interests . . . is informed by what the parties would have agreed if they had considered a given contingency”).

rules that cannot be changed.¹⁰⁶ These mandatory rules provide further guidance on the function of the trust.¹⁰⁷

Third, because trust law can be customized, the trust has been used in a variety of contexts.¹⁰⁸ The versatility of the trust is, in fact, a primary (if not the most important) benefit of the trust.¹⁰⁹ Accordingly, it is worth emphasizing that the functional model of the trust used here is not meant to provide an all-encompassing representation of the trust and its functions. Instead, the model developed here is based on the use of a trust to address a category of problems—problems of scale. Thus, the model of the trust used here is limited to this use and is not meant to go beyond it.

Finally, some features of the trust that comprise the trust model are not unique to the trust. For example, family firms and other closely held companies can also contain conflicting interests and also lack a market for corporate control.¹¹⁰ As an initial matter, the existence of these other corporate forms bolsters the argument that many controversial features of the class action should not be seen as controversial.

Nevertheless, I focus on trust law for two reasons. First, and as noted earlier, the trust has a general acceptability that is useful in supporting controversial features of the class action. Second, some of the features of the trust that are relevant to the model are, in fact, unique to trusts. This includes, for example, imposing an explicit duty on the trustee to treat the beneficiaries impartially, which is not present in other corporate forms.¹¹¹

106. John H. Langbein, *Mandatory Rules in the Law of Trusts*, 98 NW. U. L. REV. 1105, 1105 (2004) (“[T]he law of trusts consists overwhelmingly of default rules that the settlor who creates the trust may alter or negate. There are, however, some mandatory rules, which the settlor is forbidden to vary.”).

107. *See id.* at 1109 (noting that a class of mandatory rules are based on the presupposition that “that the settlor propounded the trust and its terms for the purpose of benefiting the beneficiaries”).

108. Hansmann & Mattei, *supra* note 19, at 466–69 (noting use of trusts in pension funds, mutual funds, and for asset securitization).

109. SCOTT ET AL., *supra* note 98, § 1.1, at 4 (noting that “[t]he purposes for which we can create trusts are as unlimited as our imagination”).

110. *See* Frank H. Easterbrook & Daniel R. Fischel, *Close Corporations and Agency Costs*, 38 STAN. L. REV. 271, 274 (1986) (“On the other hand, investors in closely held corporations lack a public market for claims. (We refer to claims as shares or equity, but the debt in close corporations also may be a residual claim.)”); *id.* at 275 (“[T]he lack of an active market in shares creates conflicts over dividend policy and other distributions.”). Conflicts can also arise in a number of commercial settings. *See* Steven L. Schwarcz, *Fiduciaries with Conflicting Obligations*, 94 MINN. L. REV. 1867 (2010) (discussing examples). I thank Holger Spamann for his comments on this point.

111. Sitkoff, *supra* note 19, at 652 (noting that the duty is “a salient distinguishing characteristic of trust law as organizational law”).

B. *The Class Action as Trust*

In this section I set forth the trust model of the class action, focusing on the following elements: (1) the claims are analogous to the res of a trust; (2) the class members are analogous to the beneficiaries of a trust; and (3) the class action attorney can be understood as a trustee over the claims of the class members.

1. *The Claims as the Res*

Like the res of the trust, the claims of the class members serve as the basis for the trust-like relationships created by the class action. A claim for damages, or a “chose in action,” is generally recognized as a form of property.¹¹² A claim for damages, like other “chose[s] in action” such as “debts” or “contractual rights,” is “an interest in property not immediately reducible to possession.”¹¹³ Such claims are reducible to possession once they have been adjudicated in the plaintiff’s favor and are “merge[d]” into a “judgment.”¹¹⁴ Claims for injunctive or similar relief are also generally considered property.¹¹⁵

Consistent with the functional perspective taken in this Article, here I focus on the functions performed by claims for relief. An understanding of the claim as property is consistent with this approach because holders of claims can exclude the world from litigating the claim.¹¹⁶ Such an in

112. *Richards v. Jefferson Cty.*, 517 U.S. 793, 804 (1996) (noting that a right to a lawsuit, or a “chose in action,” is “a protected property interest in its own right”); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (“[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs.”) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950)); see also *Campos, Mass Torts*, *supra* note 24, at 1092 (noting that the “claim for compensatory damages” is a property interest (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Logan v. Zimmerman*, 455 U.S. 422, 428 (1982)).

113. *Sprint Commc’ns Co. v. APCC Servs., Inc.*, 554 U.S. 269, 275 (2008) (citing 2 WILLIAM BLACKSTONE, COMMENTARIES *442).

114. *Merger*, BLACK’S LAW DICTIONARY (9th ed. 2009) (defining a “merger” in civil procedure as “[t]he effect of a judgment for the plaintiff, which absorbs any claim that was the subject of the lawsuit into the judgment, so that the plaintiff’s rights are confined to enforcing the judgment”).

115. *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 424–25, 430–31 (1982) (concluding that “[t]he right to use the FEPA’s adjudicatory procedures” to seek, among other things, “reinstatement” to a job, is a “property interest,” and that property interests protected by the Due Process Clause “are varied and, as often as not, intangible, relating ‘to the whole domain of social and economic fact’”).

116. This right to exclude others from disposing of the claim manifests itself most prominently in the Article III context, where, as a prudential matter, there is a “general prohibition on a litigant’s raising another person’s legal rights.” See *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, ___ U.S. ___, 134 S. Ct. 1377, 1386 (2014) (citing *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004)).

rem right to exclude is typically considered a defining feature of property.¹¹⁷

Claims perform two important functions. The first function is to enforce what can be called a primary right or entitlement. This function is apparent in a claim for injunctive relief, in which a plaintiff asks the court to enforce the law by ordering the defendant to comply with it. Injunctive relief is generally considered to provide “property rule[]” protection because it allows the holder of the primary right to coercively stop individuals from taking the entitlement without the holder’s consent.¹¹⁸

Claims for damages also protect primary entitlements, but do so “indirectly, through the deterrent effect of damage actions that may be brought once harm occurs.”¹¹⁹ Claims for damages provide “liability rule” protection, in which a party may take that primary entitlement “if he is willing to pay [the] objectively determined value for it.”¹²⁰

Second, along with enforcing primary entitlements, claims also provide compensation for harm done. Claims for compensatory damages, where by definition the damages are calculated to offset the harm done to the plaintiff, clearly fall in this category. But injunctions can also provide compensation. For example, a “reparative injunction” directly compensates the plaintiff, not with money, but by ordering the defendant to engage in remedial measures.¹²¹ Moreover, insofar as

117. *E.g.*, Thomas W. Merrill, *Property and the Right to Exclude*, 77 NEB. L. REV. 730 (1998); *cf.* Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1792–93 (2004) (noting that “exclusion is likely to be the predominant element of the method used to define” property rights given that property rights are rights against “unspecified” persons in the world).

118. Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1115–16 (1972) (showing that a right to be free from a nuisance protected by a “property rule” permits the entitlement holder to “enjoin [the] nuisance”); Smith, *supra* note 117, at 1720 (noting that “property rules” utilize “injunctions . . . [to] make a nonconsensual taking of an entitlement less attractive than bargaining to a consensual price with the present owner”).

119. Steven Shavell, *Liability for Harm Versus Regulation of Safety*, 13 J. LEGAL STUD. 357, 357 (1984); *see also* Hughes v. Kore of Ind. Enter., Inc., 731 F.3d 672, 677 (7th Cir. 2013) (“A class action, like litigation in general, has a deterrent as well as a compensatory objective.”). Injunctions can also utilize claims for damages to deter noncompliance with the injunction. Smith, *supra* note 117, at 1720 (noting that “property rules” also utilize “supracompensatory damages” to prevent takings).

120. Calabresi & Melamed, *supra* note 118, at 1090–92. Accordingly, a “liability rule” effectively assigns a call option to take plaintiff’s primary entitlement, with the strike price valued at the damages caused by the taking. IAN AYRES, *OPTIONAL LAW: THE STRUCTURE OF LEGAL ENTITLEMENTS* 5 (2005).

121. OWEN M. FISS, *THE CIVIL RIGHTS INJUNCTION* 10 (1978) (discussing “reparative injunctions”).

compliance with an injunction is enforced through a contempt action, such a contempt action can mimic a claim for damages if the sanction sought is used to compensate the plaintiff for harm done.¹²²

Understanding both the claim's enforcement function and its compensation function is necessary to evaluate any disposition of the claim. Whether a claim should be settled, litigated, or abandoned will depend on how each option would affect both the enforcement and compensation the claim provides. Indeed, different uses of the claim may lead to a different mix of enforcement and compensation. In such cases, one must evaluate which mix is preferable.

Two things affect the optimality of various trade-offs between enforcement and compensation. First, many legal violations result in injuries that cannot be fully compensated through monetary damages, such as a deceased loved one or a lost limb. For such "nonpecuniary losses," no amount of money will buy back what was lost.¹²³ Given the possibility of nonpecuniary losses, improved enforcement is preferable to improved compensation because it is better to prevent such losses than to imperfectly compensate for them.¹²⁴ Second, even in the absence of nonpecuniary losses, adjudicating claims is costly, and under the American Rule, the parties bear their own litigation costs.¹²⁵ As a result, litigation costs diminish the compensation provided by a claim.

Finally, it is worth noting that claims, and civil liability in general, may not be necessary insofar as (1) the parties can contract ex ante concerning the legal violation, (2) market forces sufficiently induce potential defendants to comply with the law, or (3) the conduct is regulated by other means.¹²⁶ One party, for example, could assume the

122. *Id.* at 9 (noting that a contempt action for enforcement of an injunction "can properly be compared to the damage action or criminal prosecution"); cf. Campos, *Mass Torts*, *supra* note 24, at 1103 (noting that "[t]he correct analogue to the damage remedy . . . is not the injunction but the contempt action").

123. Campos, *Mass Torts*, *supra* note 24, at 1085 (discussing nonpecuniary losses).

124. See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 846 & n.32 (2002) (noting that, given nonpecuniary losses, "[b]y definition, the costs of preventing unreasonable risk are lower than the costs of compensating loss resulting from such risk").

125. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247 (1975) (defining the "American rule," stating that "[i]n the United States, the prevailing litigant is ordinarily not entitled to collect a reasonable attorneys' fee from the loser").

126. See A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1443-44 (2010) (noting that ex ante contracting and market pressure in products liability contexts may obviate the need for the use of tort liability); *id.* at 1450-51 (discussing "government regulation" as an alternative to liability); *id.* at 1486 (discussing contracting as an alternative to liability).

risk of injury that comes with a product in exchange for a lower price.¹²⁷ This Article assumes that, with a few exceptions, the use of civil liability, and thus the claims themselves, are both socially desirable and avoid the distortions that arise when liability is unnecessary.

2. *The Class Members as the Beneficiaries*

In using a simple model of the trust as a guide for understanding the class action, I analogize the class members to the beneficiaries. At first glance, the analogy is intuitive because class members and beneficiaries typically lack either the ability or motivation to dispose of the relevant property optimally. A “common motivation[.]” for creating a trust is “to provid[e] property management for those who cannot, ought not, or wish not to manage for themselves.”¹²⁸ Similarly, a common motivation for the use of class actions is to “vindicat[e] the rights of groups of people who individually would be without effective strength to bring their opponents into court at all.”¹²⁹

But the analogy is especially useful because the class members in a class action and the beneficiaries of trusts in commonly used contexts both share a more specific problem—a problem of scale. The problem of scale that both the class action and trust share has three features:

- (1) the recipients have a *divided interest* in the managed property;
- (2) the recipients cannot invest in, or otherwise dispose of, the managed property at the right *scale*; and
- (3) no well-developed or thick *market* exists for the interests of the recipients in the managed property.

This last feature is crucial, because it distinguishes both the class action and the trust from the corporation. In corporate contexts, third parties have access to thick markets to acquire divided shares in a corporation, such as through a tender offer,¹³⁰ to reap the benefits of

127. *Id.* at 1443.

128. RESTATEMENT (THIRD) OF TRUSTS § 27 cmt. 2(b)(1) (AM. LAW INST. 2003); *see also* Sitkoff, *supra* note 19, at 668 (“[T]he donative settlor’s motivation for interposing a trustee between the trust assets and the beneficiary, tax considerations aside, is often a lack of faith in the beneficiaries’ judgment.”).

129. *See* Kaplan, *supra* note 54, at 497.

130. *See* Lucian Arye Bebchuk, *Efficient and Inefficient Sales of Corporate Control*, 109 Q.J. ECON. 957, 957 (1994) (noting that, in the corporate context, “[t]ender offers or takeover bids are

investing in firm assets at the right scale. In contrast and as noted earlier, in both the class action and trust contexts, there exists no well-developed market for control over the relevant property.¹³¹

In the absence of such a well-developed market, divided control rights can lead to suboptimal investment. This is because each recipient has only a partial interest in the managed property, and thus each recipient lacks a private incentive to maximize optimally the entire managed property. More importantly, collective action problems can prevent recipients from acting together to invest at the appropriate scale. This, in a nutshell, is the problem of scale that the class members and the beneficiaries in many trusts share; it is no different from the “tragedy of commons” problems that typically arise when there is divided ownership of a common good.¹³²

The problem of scale is readily apparent in small claims litigation, the typical case certified under Rule 23(b)(3).¹³³ Suppose that a manufacturer designed and sold certain models of washing machines that all suffered from the same defect in their washer drums, and that the defect resulted in mold growth, noxious odors, and smelly clothes.¹³⁴ A large number of plaintiffs purchased the relevant models, and suffered from the noxious odors caused by the defect.¹³⁵ However, the damages suffered by each plaintiff are small, not “large enough to justify the expense of an individual suit.”¹³⁶ The injuries (exposure to bad smells, damage to clothing, costs of repairs or replacements) likely cost only in

used when the ownership of the target company is dispersed, with no shareholder holding a controlling interest”).

131. See Coffee, *Accountability*, *supra* note 6, at 376 (noting that “what is most distinctive about the class action is the absence” of “well-developed markets and voting mechanisms . . . to minimize these agency costs”); Sitkoff, *supra* note 19, at 654 (noting that “there is no well-developed market for beneficial interests in trusts”).

132. Specifically, such problems of scale arise when there are spillovers or externalities that the owners of property fail to account for absent partitioning of the property (to avoid such spillovers) or collective governance of the property (to capture such spillovers). See Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35, 35–50 (Kenneth Ayotte & Henry E. Smith eds., 2011) (showing that commons and anticommons problems that arise from divided ownership of a common good can be understood as problems of scale).

133. See *supra* section I.A.1.

134. This example is based on *Glazer v. Whirlpool Corp.*, 722 F.3d 838 (6th Cir. 2013) and *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796 (7th Cir. 2013). The facts, however, have been stylized for clarity.

135. *Butler*, 727 F.3d at 798 (“Roughly 200,000 of these Kenmore-brand machines are sold each year and there have been many thousands of complaints of bad odors by the machines’ owners.”).

136. *Id.*

the hundreds,¹³⁷ while the filing fee alone for a civil action in federal court is \$400.¹³⁸

In the absence of a class action, no individual plaintiff would file a lawsuit, because “only a lunatic or a fanatic” would sue for such a small amount.¹³⁹ Indeed, for each plaintiff, declining to sue is the rational action to take.

But the inaction of the plaintiffs leads to a self-defeating result because it allows the manufacturer to escape all liability for the defect.¹⁴⁰ By escaping liability, the manufacturer pays a much lower price (in fact, no price) for taking the entitlement of each plaintiff to be free from the defect. Indeed, the manufacturer, as well as others, will anticipate that it can avoid liability for defects that cause a small amount of damage to a large group of dispersed plaintiffs. Consequently, in the absence of market pressure or other regulation, manufacturers will produce and sell products with more defects.¹⁴¹

The plaintiffs could have avoided this result by sharing the costs associated with developing common issues of liability. For example, suppose that there is an expert who, for one million dollars, could testify that the defect shared by each of the models of washers was the sole cause of the mold growth. No individual plaintiff would pay for the expert; however if there are one million plaintiffs, then the cost for each plaintiff would only be one dollar. Accordingly, it would be rational for the class members to hire the expert and share the costs among themselves. In fact, had the plaintiffs agreed to share such costs, they could have used economies of scale to invest in common issues and, thus, threaten the imposition of liability on the defendant by litigating the claims.¹⁴²

137. *Id.* at 801 (noting that “[t]he present case” involves “tens of thousands of class members, each seeking damages of a few hundred dollars”).

138. See 28 U.S.C. § 1914(a) (2012) (filing fee of “\$350”); Judicial Conference Schedule of Fees, *District Court Miscellaneous Fee Schedule* ¶ 14, <http://www.uscourts.gov/services-forms/fees/district-court-miscellaneous-fee-schedule> [<https://perma.cc/77FM-8VE8>] (“Administrative fee for filing a civil action, suit, or proceeding in a district court, \$50.”).

139. *Carnegie v. Household Int’l, Inc.*, 376 F.3d 656, 661 (7th Cir. 2004) (discussing class treatment of small claims litigation).

140. See Macey & Miller, *supra* note 6, at 8 (“In the absence of a class action device, such injuries would often go unremedied because most individual plaintiffs would not themselves have a sufficient economic stake in the litigation to incur the litigation costs.”).

141. See Polinsky & Shavell, *supra* note 126, at 1453–55 (noting that “product liability may be efficacious” in reducing product risk if market forces and regulation reduces risk suboptimally).

142. See Campos, *Mass Torts*, *supra* note 24, at 1074–76 (discussing economies of scale in investing in common issues, using a similar example). For a formal model of these defects, see

The plaintiffs do not share costs in part because, in the absence of a class action, a plaintiff suing on her own behalf cannot seek reimbursement from a later plaintiff who relies upon her work on common issues.¹⁴³ Moreover, while there are no legal restrictions to the plaintiffs voluntarily aggregating to share costs on common issues, the plaintiffs would fail to aggregate because of the transaction costs involved in creating agreements and collecting funds among one another.¹⁴⁴ Accordingly, in the absence of a class action, the class members cannot invest in common issues at the right scale, and thus are disadvantaged relative to the defendant, who can invest at the appropriate scale.

This same problem of scale is also present in many situations where the trust is commonly used, particularly when conflicts among the beneficiaries prevent them from optimally¹⁴⁵ maximizing the total amount of the res. A common example in trust law, one that “[a]lmost every trustee finds,” arises when one beneficiary is assigned an interest in the income produced by the res while another is assigned an interest in the principal.¹⁴⁶ The income beneficiary generally prefers “income-producing” investments while the principal beneficiary generally prefers “long-term capital appreciation.”¹⁴⁷

Although in this situation there are only two beneficiaries, their divided interests in the res still would prevent them from investing at the right scale had they owned the res outright. Specifically, in the absence

Rosenberg & Spier, *supra* note 26 (arguing that class action treatment is preferable when the plaintiffs are numerous but whose claims share common issues of law and fact).

143. See David Betson & Jay Tidmarsh, *Optimal Class Size, Opt-Out Rights, and “Indivisible” Remedies*, 79 GEO. WASH. L. REV. 542, 548 n.25 (2011) (citing *Sprague v. Ticonic Nat’l Bank*, 307 U.S. 161, 170 (1939)) (“Although it is possible for a court to require parties who benefit from the creation of a common fund to share in the costs of creating that fund, the ‘common fund’ concept has never been extended so far as to require later plaintiffs who sue independently to reimburse earlier plaintiffs whose cases eased their own paths to recovery.”).

144. ROBERT G. BONE, *CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE* 263 (2003) (“It is true that class members could achieve these same benefits [of cost-sharing] by organizing voluntarily. However, the transaction costs of organizing a large group are simply too high.”); see also Campos, *Mass Torts*, *supra* note 24, at 1079–80 (noting the similar problem in mass tort litigation).

145. I say “optimally” because beneficiaries tend to be risk averse, and thus would prefer forgoing an investment that was too risky even if its expected value was positive. See Sitkoff, *supra* note 19, at 654 (“In the paradigmatic donative trust, the residual claimants are risk averse (imagine widows and orphans).”).

146. HESS ET AL., *supra* note 32, § 816 (“Almost every trustee finds that the trust terms require him to pay or apply ‘income’ to or for a temporary beneficiary, and to distribute ‘principal’ to one or more beneficiaries prior to or upon termination of the trust.”).

147. Weisbord, *supra* note 32, at 181.

of the trust, the persons designated as beneficiaries would forgo investments that would increase the res overall if that would involve either depleting the principal or reducing the income of the res. This is true even if the increase in the total res would more than offset any decrease in either income or principal. Here, like the small claims class members of a class action, it is “normally advantageous to beneficiaries collectively and therefore prudent for the trustee to seek a *total return* that is optimal in light of the trust’s purposes and circumstances.”¹⁴⁸

A similar problem of scale can also arise when there is only a single beneficiary, as when the beneficiary is young and improvident. In *Clitherall v. Ogilvie*,¹⁴⁹ for example, a beneficiary of land held in trust who recently turned twenty-one entered into a contract to sell the land for what was at most a third of its actual value.¹⁵⁰ The Chancery Court of South Carolina refused to order specific performance of the agreement.¹⁵¹ The court noted in particular that “[y]oung heirs even when of age, are under the care and protection of the court,” and that “[w]atching for an heir as soon as he comes of age, to get a bargain out of him, is a catching bargain and will be discountenanced by the court.”¹⁵² The permissibility of spendthrift trusts also reflect a concern for young and improvident beneficiaries, as spendthrift trusts are frequently used when “the [settlor] is concerned that the [beneficiary] is irresponsible and will too quickly encumber all of the [res].”¹⁵³

Young and improvident heirs, in particular, discount future outcomes too heavily relative to present outcomes. To use more colloquial terms, such beneficiaries lack “impulse-control”¹⁵⁴ or suffer from a “weakness of will.”¹⁵⁵ Typically such beneficiaries also lack the experience

148. See RESTATEMENT (THIRD) OF TRUSTS § 111 cmt. a (AM. LAW INST. 2012) (discussing income and principal beneficiaries) (emphasis added).

149. 1 S.C. Eq. (1 Des. Eq.) 250 (S.C. 1792).

150. *Id.* at 255; see also Arthur Allen Leff, *Unconscionability and the Code—The Emperor’s New Clause*, 115 U. PA. L. REV. 485, 532 & nn.186 & 190 (1967) (using the case as an example of an equity court being protective of “the young” and “the improvident”).

151. *Clitherall*, 1 S.C. Eq. (1 Des. Eq.) at 263 (holding that the court will “leave the complainant to his remedy at law to recover his damages for the non-performance of the agreement”).

152. *Id.* at 256–57.

153. Hansmann & Mattei, *supra* note 19, at 452.

154. See IAN AYRES, *CARROTS AND STICKS: UNLOCK THE POWER OF INCENTIVES TO GET THINGS DONE* 12–14 (2010) (discussing “impulse-control” and the “tendency to hyperbolically discount”).

155. See JON ELSTER, *ULYSSES AND THE SIRENS: STUDIES IN RATIONALITY AND IRRATIONALITY* 67 (1979) (noting that “there are no rational grounds for preferring the present over the future,” but that “there is the fact of weakness of will. We simply are not always able to follow our rational inclinations, and the time preferences may be seen as the formal expression of this inability.”).

necessary to make prudent decisions concerning the property to which they would hold title were the property their own.¹⁵⁶ In *Clitherall*, the young and improvident heir sold the property for far less than what it was worth because he lacked sufficient information about the potential uses of the land.¹⁵⁷ Taken together, the improvident beneficiary suffers from a myopia that focuses on her limited understanding of the present to the exclusion of the future. Indeed, “improvident” itself means “not providing or saving for the future.”¹⁵⁸

The lack of foresight of the improvident beneficiary can also be seen as a problem of scale. Her improvidence can be understood as arising from an intertemporal conflict between her present and future preferences—between her present self and her future selves. In other words, by focusing on her *present* self, she fails to account for *all* of her selves over time. Accordingly, the improvident beneficiary makes self-defeating decisions that not only harm her future selves, but also current self, as all of these selves are inextricably intertwined into one whole. This intertemporal conflict is not materially different from the interpersonal conflicts found in class actions and in trusts that lead to suboptimal investments at the wrong scale. Indeed, any intertemporal conflict can be characterized as an interpersonal conflict.¹⁵⁹

156. Alessandro Lizzeri & Marciano Siniscalchi, *Parental Guidance and Supervised Learning*, 123 Q.J. ECONOMICS 1161, 1162 (2008) (providing a model of parenting by exploring the “basic trade-off between sheltering the child from the consequences of his mistakes, and allowing him to learn from experience”).

157. See *Clitherall*, 1 S.C. Eq. (1 Des. Eq.) at 254 (noting that the heir, in his answer, after the sale learned from an “intimate friend” that the land was “prime tide land” and thus “was worth three times as much as the price offered for it”).

158. *Improvident*, MERRIAM-WEBSTER DICTIONARY, <http://www.merriam-webster.com/dictionary/improvident> [<https://perma.cc/NTL4-9HFD>].

159. See ELSTER, *supra* note 155, at 71 (“The absolute priority of the present is somewhat like my absolute priority over all other persons: I am I—while they are all ‘out there.’”); Jon Elster, *Introduction* to THE MULTIPLE SELF 1, 2 (Jon Elster ed., 1986) (“The two main strategies for concept formation in th[e] field [of the multiple self] rely on, respectively, interpersonal and intertemporal phenomena to make sense of the notion of several selves.”); Stuart Albert, *Temporal Comparison Theory*, 84 PSYCHOL. REV. 485 (1977) (pointing out the similarity between temporal behavior and social behavior); Robert Nozick, *Interpersonal Utility Theory*, 2 SOC. CHOICE & WELFARE 161, 165 (1985) (“[A] proposal about interpersonal comparisons should, when applicable, be plausible as a proposal about intrapersonal intertemporal comparisons of utility. It should be plausible that it yields correct utility comparisons for the *same* person at different times (when it applies to yield any comparisons of that sort).” (emphasis in original)). One can also say that any “internalit[y]” within a person can be understood as an “externality” among different persons. See Hunt Allcott & Cass R. Sunstein, *Regulating Internalities*, 34 J. POL’Y ANALYSIS & MGMT. 698, 700 (2015) (“It is . . . useful to think of internalities as ‘externalities that individuals impose on themselves.’”).

Trusts can contain a combination of both externally divided beneficiaries like the principal and income beneficiaries described above, and internally divided beneficiaries like the improvident beneficiary, or one that is not yet born.¹⁶⁰ In such situations a trustee must contend with both interpersonal and intertemporal problems of scale. Nevertheless, all of these situations show that the trust copes with the same problem of scale that the class action is designed to address.

3. *The Class Attorney as the Trustee*

Under a trust model of the class action, the class attorney is understood as a trustee of the claims for the benefit of the class members. As with class members and beneficiaries, analogizing the class attorney to the trustee is useful because both the class attorney and the trustee solve the problem of scale in the same way.

First, both the trustee and the class attorney are assigned dispositive control over the claims for the benefit of the class members.¹⁶¹ In both contexts, assigning dispositive control to the manager is crucial because it prevents the recipients from exercising control over the managed property at the wrong scale.

Second, both the trustee and the class attorney are incentivized to dispose of the managed property at the right scale. In the class action context this is primarily accomplished through the attorney fee award.¹⁶² Specifically, the fee award aligns the class attorney's incentives with that of the class. Because the class attorney's fee is typically a portion of the aggregate net recovery of the class members,¹⁶³ the class attorney is incentivized (albeit imperfectly) to make investments in common issues that maximize the class members' recovery as a whole. In contrast, no one class member or group of class members takes into account the total,

160. See RESTATEMENT (SECOND) OF TRUSTS § 112 cmt. a (AM. LAW INST. 1959) (permitting a trust to include beneficiaries that are “capable of ascertainment from facts which although not existing at the time must necessarily be in existence at some time within the period of the rule against perpetuities”).

161. See *supra* sections I.B.2 & I.B.3.

162. Coffee, *Governance*, *supra* note 6, at 306 (“From a traditional legal perspective, the court-awarded attorney’s fee is the principal lever by which the law seeks to incentivize the agent to act in the class’s interest.”).

163. It is worth noting that a trustee may have a partial beneficial interest in the res, but not a complete beneficial interest. See 1 SCOTT ET AL., *supra* note 98, § 2.1.6 (noting that “it is possible for a trustee to hold an equitable interest in trust”); RESTATEMENT (THIRD) OF TRUSTS § 3 cmt. d (AM. LAW INST. 2003) (noting that “the trustee must hold property for the benefit of one or more persons, at least one of whom is not the sole trustee”).

aggregate recovery of the class as a whole, which leads to suboptimal investment in common issues given economies of scale.¹⁶⁴

Trust law similarly relies upon structural features like trustee compensation to solve the problem of scale. For example, like the class attorney, modern developments in trust law have increased the discretionary power of the trustee to allow her to make investments that maximize the total return on the res (subject, of course, to the terms of the trust instrument).¹⁶⁵ This increase in discretionary authority is often combined with the use of compensation methods that are based on a percentage of the res that align (albeit imperfectly) the interests of the trustee with the beneficiaries as a whole.¹⁶⁶ Such trust compensation is no different from the compensation typically received by class action attorneys, and is similarly used to allow the trustee to invest in the res at the right scale.

II. APPLICATION OF THE MODEL

The previous part set forth a trust model of the class action. This Part applies the model to assess two requirements of Rule 23(b)(3) class actions involving damage claims: (1) each class member must have a right to “opt out” of the class¹⁶⁷ and (2) the class must be cohesive.¹⁶⁸ The model demonstrates that neither requirement is necessary, and that, in fact, both are harmful to the operation of the class action. The trust

164. Campos, *Mass Torts*, *supra* note 24, at 1079–81; *see also* David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 415–16 (2000) (using a numerical example to show the superiority of the class action to a “joint venture” that only aggregates a partial number of plaintiffs).

165. *See* Stewart E. Sterk, *Rethinking Trust Reform, How Prudent is Modern Prudent Investor Doctrine?*, 95 CORNELL L. REV. 851, 884 (2010) (noting that recent developments in trust law based on modern portfolio theory, and “[t]he Restatement (Third), in particular, went out of its way to indicate that a trustee should have broad discretion in formulating investment strategy”).

166. RESTATEMENT (THIRD) OF TRUSTS § 38 & cmt. c (AM. LAW INST. 2003) (noting that “[a] trustee is entitled to reasonable compensation out of the trust estate for services as trustee,” and that some state statutes “provide that trustees’ fees are to be based on specified percentages of the principal or of the income and principal of the trust”); *see also* Sitkoff, *supra* note 105, at 199 (noting “incentive-based compensation” as one way of “ameliorating the agency problem”).

167. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 362 (2011) (concluding that “individualized monetary claims belong in Rule 23(b)(3)” because of the “procedural protections attending the (b)(3) class—predominance, superiority, mandatory notice, and *the right to opt out*” (emphasis added)).

168. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, ___ U.S. ___, 133 S. Ct. 1184, 1196–97 (2013) (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997) (noting that “the focus of the predominance inquiry under Rule 23(b)(3)” is whether “a proposed class is ‘sufficiently cohesive to warrant adjudication by representation’”)).

model also suggests potential solutions to ensure class attorney loyalty and to deal with class member conflicts. Indeed, unlike opt-out rights or cohesion requirements, these solutions are not self-defeating.

A. *Control*

1. *Opt-out Rights*

A trust model of the class action demonstrates that preserving each class member's control over the claim is self-defeating. This is due to a problem of scale that both the trust and the class action address—the recipients are divided in such a way that they cannot act together to dispose of the managed property at the right scale.¹⁶⁹ Because there is not a well-developed market for managerial control in either context, protecting the control of the recipients only perpetuates the problem of scale rather than solves it.¹⁷⁰

Accordingly, giving class members control over their claims by giving them the right to opt out of the class is not only unnecessary, but harmful to their interests. Admittedly, opt-out rights are not harmful in small claims litigation, where the class members do not have an incentive to opt out because they lack an incentive to file suit separately.¹⁷¹ But many class actions that are certified under Rule 23(b)(3), such as securities fraud and antitrust class actions, often have some class members who have large claims.¹⁷² It is in these settings that opt-out rights can be, and often are, harmful.

To understand how opt-out rights are harmful, it is helpful to examine the arguments in favor of opt outs that are based on analogies to corporate law. For example, John Coffee has analogized opt-out rights to the exit rights of shareholders in a corporation.¹⁷³ Specifically, Coffee has argued that opt-out rights “discipline[] class counsel by threatening them with reduced fees if they propose a settlement that is unattractive to their clients.”¹⁷⁴ Moreover, Coffee has argued that opt outs can be used to mimic “takeover bids” in the corporate context by allowing for third parties to propose competing class actions, with class members using the

169. See *supra* section I.B.2.

170. *Id.*

171. Macey & Miller, *supra* note 6, at 28 n.85.

172. Coffee, *Governance*, *supra* note 7, at 309–10, 317.

173. *Id.* at 308–09; see also COFFEE, *ENTREPRENEURIAL LITIGATION*, *supra* note 7, at 83.

174. Coffee, *Accountability*, *supra* note 6, at 421.

opt outs to “opt in” to the competing actions.¹⁷⁵ Coffee admits that “an exact analogy cannot be drawn between the class action and corporate governance contexts,” but nevertheless concludes that “the idea of a competitive bid has considerable relevance to the class action context.”¹⁷⁶

But opt-out rights are ineffective at disciplining the class attorney against disloyal behavior. As an initial matter, unlike in the corporate context, the exercise of the opt out right cannot cause the *removal* of the class attorney. In the corporate law context, there is a market for control that allows third parties to acquire control rights over directors and officers by acquiring the stock of the shareholders. Accordingly, when a shareholder exits by selling her shares, she also enables a third party to acquire control.¹⁷⁷ This ability to acquire control, in turn, deters the directors and officers from acting disloyal out of fear that a third party will acquire ownership and replace them.¹⁷⁸ In contrast, the opt out right does not remove the class attorney. It only allows for concurrent, separate action. Thus, the opt out right does not provide the same threat of removal as in the corporate law context.

In fact, opt-out rights are not only ineffective, but harmful due to an important difference between opt-out rights and corporate exit rights. A shareholder of a corporation who wishes to exit the corporation cannot liquidate her share in corporate assets.¹⁷⁹ Thus, when a shareholder exits by transferring her share, the corporate assets remain under common control. In contrast, the right to “opt out” permits a class member to take her claim away from the other claims under the common control of the class attorney and “bring her own suit.”¹⁸⁰ By reducing the assets under

175. *Id.* at 422–28; *see also* Coffee, *Governance*, *supra* note 7, at 309.

176. Coffee, *Accountability*, *supra* note 6, at 422.

177. For the classic account of the “market for corporate control,” see Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112–13 (1965) (“The lower the stock price, relative to what it could be with more efficient management, the more attractive the take-over becomes to those who believe that they can manage the company more efficiently.”).

178. Frank H. Easterbrook & Daniel R. Fischel, *The Proper Role of a Target’s Management in Responding to a Tender Offer*, 94 HARV. L. REV. 1161, 1196 (1981) (arguing that the market for corporate control, “particularly the tender offer market,” “provide[s] incentives to management to operate efficiently and keep share prices high.”); *see also id.* at 1198 (“A frequent consequence of a successful takeover attempt is the replacement of incumbent managers.”).

179. Henry Hansmann & Reinier Kraakman, *The Essential Role of Organizational Law*, 110 YALE L.J. 387, 394 (2000) (noting that a shareholder of a corporation can only seek liquidation “when at least a majority of the firm’s shareholders agree”); *see also* Coffee, *Governance*, *supra* note 7, at 309 (“In the corporate context, when a dissatisfied shareholder sells shares, the shareholder does not withdraw capital from the corporation.”).

180. Macey & Miller, *supra* note 6, at 28 n.85.

the control of the class attorney, the opt out has the consequence of “reducing . . . the attorney’s likely fee award.”¹⁸¹

Coffee has argued that this liquidation feature of the opt out right is likely to discipline the class attorney because liquidation is “more direct, immediate, and painful” than corporate exit rights.¹⁸² But the liquidation feature of the opt out right cannot provide that discipline because a class attorney cannot avoid the consequences of the opt out by acting loyally. This is because a class member who opts out of the class action can free ride off of the “collective work” of the loyal class attorney, “as it usually enters rather quickly into the public domain through court records and insider leaks.”¹⁸³ Accordingly, the class member would still have an incentive to opt out even if a class attorney was completely loyal to the interests of the class. Indeed, Coffee acknowledges that class members have significant reason to free ride off of the common benefit work of others in the class.¹⁸⁴

In fact, the liquidation feature of opt-out rights causes harm because it not only fails to discipline the class attorney against disloyal behavior, but *causes* disloyal behavior. This is because the potential to opt out to free ride off of prior investments induces class attorneys to accept suboptimal settlements. Again, by opting out, a class member extricates her claim from the others, and thus reduces the total claims on which the class attorney can base her percentage fee. With a reduced potential fee, the class attorney has less incentive to make investments in common issues, which, in turn, reduces the probability that the class members will prove those common issues and ultimately recover.¹⁸⁵ Given the reduced

181. Coffee, *Governance*, *supra* note 7, at 309.

182. *Id.*

183. See Rosenberg, *supra* note 164, at 425 (2000) (discussing mass tort litigation); *id.* at 393 n.1 (defining “mass torts” to include “contract, property, employment discrimination, antitrust, securities and consumer fraud, and any other common law or statutory cause of action arising from systematic business risk-taking and serving the social objectives of deterrence and compensation”).

184. Coffee, *Governance*, *supra* note 7, at 336 (noting that, despite empirical evidence showing that parties do become representative plaintiffs, “rational parties should be reluctant to serve as the representative plaintiff” because they can “remain free riders and undertake no role that could give rise” to the costs of litigation, including the potential for adverse fee-shifting).

185. David Rosenberg & Kathryn E. Spier, *Incentives to Invest in Litigation and the Superiority of the Class Action*, 6 J. LEG. ANALYSIS 305, 320–21 (2014) (noting that both a free-rider and a financing party with only a partial interest in the total recovery will not have “an incentive to spend more in developing work product than would be optimal to maximize his or her” own individual return); see also David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 829, 874–75 (2002) (noting that opt outs “diminish[] plaintiffs’ attorneys’ opportunities to exploit litigation scale economies, thereby diluting their investment incentives to develop claim recovery values in the standard market process. . . . Minimizing rather than maximizing exit opportunities and incentives from a settlement-only class action enables the

expected recovery, the class attorney will have an incentive to accept a lower settlement offer than would otherwise be accepted had there been no opt outs.¹⁸⁶ Accordingly, opt-out rights make it more likely that the class attorney will sell out the class members, not less.

The empirical evidence on opt outs supports the conclusion that opt outs lead to suboptimal settlements due to free-riding. For example, John Coffee notes in reviewing certain securities fraud class actions that “large numbers departed the class, but only following the announcement of the proposed class settlement,” which demonstrated that the opt outs “were not seeking to gain timing or other tactical advantages, which they would have needed to pursue at an earlier stage.”¹⁸⁷ Coffee concludes from the timing of the opt outs that the class members who opted out “were obviously dissatisfied with the proposed settlement,” but the timing also strongly suggests that the opt outs planned on free-riding off of the work of the class attorney.¹⁸⁸

Moreover, empirical evidence demonstrates that high-value claims are more likely to opt out, which supports the inference that opt outs tend to dramatically reduce the class attorney’s incentives to invest.¹⁸⁹ In some instances, such as in litigation involving the diet reduction drug Fen-Phen, opt outs can completely unravel the settlement.¹⁹⁰ This reduction in incentives is further supported by empirical evidence showing that

investing attorneys to capture greater return and commensurately increases value-creating investment by reducing competition from free-riders.”).

186. Campos, *Mass Torts*, *supra* note 24, at 1116.

187. Coffee, *Governance*, *supra* note 7, at 315–16.

188. *Id.* Coffee argues that opt out class members tend to do much better than non-opt-outs, in some cases recovering more than the proposed settlement. *Id.* at 313. However, this result does not undermine the conclusion that opt-out rights result in suboptimal settlements. In such situations the class attorneys anticipate the opt outs and thus reduce their efforts accordingly, resulting in the very suboptimal settlement that the opt outs want to abandon. Coffee himself admits this effect, noting that “[l]ogically, one should assume that, when seventy percent of the claims opt out, this was not a complete surprise to class counsel.” *Id.* at 318.

189. Eisenberg & Miller, *supra* note 66, at 1555 (noting that “[a]s th[e] recovery increases, so does the opt-out rate”); *see also* Campos, *Mass Torts*, *supra* note 24, at 1082 n.111 (same, citing Eisenberg & Miller, *supra* note 66); Coffee, *Governance*, *supra* note 7, at 318 (noting that, because of the fact that high value claims opt out of class actions, the class action becomes “the vehicle for compensating the residual and less sophisticated plaintiffs”).

190. *See* NAGAREDA, *supra* note 13, at 143–47 (discussing unraveling of fen-phen settlement); Coffee, *Governance*, *supra* note 7, at 318 (same, noting that “90,000 persons opt[ed] out”); Lahav, *supra* note 13, at 622 (noting that opt-out rights can result in “adverse selection” which may unravel the class); Rosenberg & Spier, *supra* note 26, at 355 (noting that “there could be sufficiently strong opt-out incentives as to completely unravel the class action”).

attorneys expend much less effort in separate actions as compared to their efforts in class actions.¹⁹¹

2. *Loyalty Through Fiduciary Duties*

A trust model of the class action does more than show that providing a right to opt out for each class member is self-defeating. It can also provide guidance on how to ensure the loyalty of the class attorney. But, before discussing this guidance, it is worth highlighting that, unlike for trusts, fiduciary regulation of the manager is unlikely to be effective for class actions.

As an initial matter, in both contexts the manager is regulated primarily through fiduciary duties, or “the threat of after-the-fact liability for failure to” act in “the best interests of the” beneficiaries.¹⁹² The source of the class attorney’s fiduciary duties is the Due Process Clause, which the Supreme Court has interpreted to require that class action procedures “fairly insure[] the protection of the interests of absent parties,” and that the class representative “in fact adequately represent[s]” the absent class members.¹⁹³ Although this duty of adequate representation applies to the class representative, herself a class member, Rule 23 takes into account the de facto trustee role of the class attorney by separately requiring the attorney “to fairly and adequately represent the interests of the class.”¹⁹⁴

The class attorney’s duty of “adequate representation” is simply a re-articulation of the trustee’s primary fiduciary duties of loyalty and care.¹⁹⁵ The trustee’s duty of loyalty protects against “conflicts of interest” by “requiring a fiduciary to act in the ‘best’ or even ‘sole’ interests of the principal.”¹⁹⁶ Similarly, in the class action context, courts have been especially vigilant in protecting class members from class attorneys who enter “sweetheart” settlements that benefit the attorneys at the class members’ expense.¹⁹⁷

191. Rosenberg & Spier, *supra* note 26, at 346 n.87 (discussing empirical evidence).

192. Sitkoff, *supra* note 105, at 201.

193. *Hansberry v. Lee*, 311 U.S. 32, 42–43 (1940).

194. FED. R. CIV. P. 23(g)(1)(B).

195. Sitkoff, *supra* note 105, at 201 (“The primary fiduciary duties are loyalty and care.”).

196. *Id.*

197. See Hay & Rosenberg, *supra* note 3, at 1390–91 (discussing sweetheart settlements); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 n.30 (1999) (rejecting a class action settlement because of the concern that “[i]n a strictly rational world, plaintiffs’ counsel would always press for the limit of what the defense would pay. But with an already enormous fee within counsel’s grasp, zeal for the client may relax sooner than it would in a case brought on behalf of one claimant.”); *Reynolds v.*

However, trust law and class action differ as to the viability of using fiduciary duties to regulate the actions of the manager. In trust law, “[t]he agency costs-checking mechanisms of the private trust depend on the existence of *relatively few residual claimants*.”¹⁹⁸ This is because “[t]he relatively smaller number of residual claimants and their relatively larger stakes lessens the impact of the collective action and free-rider dynamics.”¹⁹⁹ Consequently, the beneficiaries in a trust have sufficient incentive to monitor and bring breach of fiduciary suits against the trustee (at least in theory).

In contrast to the trust, the class action by definition contains numerous class members.²⁰⁰ In fact, and as noted above, the whole point of the class action is to prevent the collective action and free-rider problems that arise from the numerosity of the class members.²⁰¹ Accordingly, fiduciary regulation is unlikely to be successful in the class action context precisely for the same reasons why a class action is needed in the first place.

The difficulty of fiduciary regulation in the class action context further makes it unlikely that creditors can serve as third party monitors of the class attorney. Arguably the most important benefit of the trust is asset partitioning, which prevents the trustee from using the res for her own personal benefit, to the detriment of both the beneficiaries and third party creditors.²⁰² Trust law enforces this partitioning through the doctrine of “equitable tracing,” which allows a beneficiary to attach “an equitable lien on property transferred by the trustee to a third-party in breach of trust.”²⁰³ Equitable tracing, in effect, deputizes third parties to

Beneficial Nat'l Bank, 288 F.3d 277, 279 (7th Cir. 2002) (“The principal issue presented by these appeals is whether the district judge discharged the judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class. This problem, repeatedly remarked by judges and scholars, . . . requires district judges to exercise the highest degree of vigilance in scrutinizing proposed settlements of class actions.”).

198. Sitkoff, *supra* note 19, at 680 (emphasis added). Of course, some trusts may have many beneficiaries, which, as with the class action, would reduce the utility of fiduciary duties. I thank Steve Urice for pointing this out to me.

199. *Id.* at 679.

200. FED. R. CIV. P. 23(a)(1) (defining the numerosity requirement).

201. *See supra* section I.B.2.

202. Hansmann & Mattei, *supra* note 19, at 438; *see also id.* at 469 (calling this in rem feature “the principal contribution of trust law”); Henry Hansmann & Reinier Kraakman, *supra* note 179, at 416 (“This insulation of assets held in trust from the personal creditors of the trustee is the essential contribution of trust law.”).

203. Sitkoff, *supra* note 19, at 672 (citing RESTATEMENT (SECOND) OF TRUSTS §§ 283–95 (AM. LAW INST. 1959)).

monitor the trustee's management of the res for the benefit of the beneficiaries. It does so by penalizing a third party who contributes to a trustee's breach of her fiduciary duties.²⁰⁴ However, this deputizing effect of asset partitioning is unlikely to be effective in the class action context because the class members are unlikely to file suit for breaches of fiduciary duty. As a result, the class members are unlikely to use remedies like equitable tracing to induce a creditor to monitor the class attorney.

3. *Loyalty Through Incentives*

Despite this difference in the efficacy of fiduciary regulation, a trust model of the class action does suggest an additional method to ensure that the class attorney remains loyal to the class members. Specifically, a trust model of the class action provides guidance in developing a market for control of the class action. Again, there exists no well-developed market for control in either the trust or class action context. However, the trust model illuminates certain features of the class action that strongly suggest that a limited market for control would be both possible and beneficial.

In the trust context, the settlor can appoint a "trust protector" who has "one or more powers capable of affecting what the trustees are to do with the trust property."²⁰⁵ A trust protector is typically chosen "by the settlor to represent the settlor's interests in making specified trust decisions that the settlor will be unable to make," and thus can serve "[a]s the living embodiment of the dead settlor."²⁰⁶

In the class action context, the court similarly functions as a protector because federal courts view themselves as a "fiduciary for absentee claimants."²⁰⁷ "Fiduciary" is probably the wrong term because the class

204. See Langbein, *supra* note 19, at 647–48 (concluding that equitable tracing reflects "a judgment about how far to impinge on outsiders to the trust deal between settlor and trustee in order to vindicate the deal"); Hansmann & Mattei, *supra* note 19, at 464 (explaining that under equitable tracing, "the third party transferee is almost by definition a lower-cost monitor of the [trustee's] breach of duty than is the [beneficiary]"); Sitkoff, *supra* note 19, at 672–73 (quoting Langbein, and concluding that "the rule of equitable tracing appears to reflect the parties' presumed intent in light of the comparative advantage of the outsider to bear the agency costs associated with this particular potential breach by the trustee").

205. RESTATEMENT (THIRD) OF TRUSTS § 64 cmts. b–d (AM. LAW INST. 2007).

206. Stewart E. Sterk, *Trust Protectors, Agency Costs, and Fiduciary Duty*, 27 CARDOZO L. REV. 2761, 2763 (2006).

207. Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2127–28 (2000) ("In the context of aggregation, judges have long claimed for themselves another role, that of fiduciary for absentee claimants.").

attorney is clearly the fiduciary of the class members. Nevertheless, courts have self-consciously considered themselves “protector[s] of class interests”²⁰⁸ and often exercise similar administrative duties like removing the class attorney.²⁰⁹ This protector function is typically invoked when a class action settlement is proposed.²¹⁰ This is because all class action settlements require approval from the court after a fairness hearing.²¹¹ During such hearings, judges assume a “judicial duty to protect the members of a class in class action litigation from lawyers for the class who may, in derogation of their professional and fiduciary obligations, place their pecuniary self-interest ahead of that of the class.”²¹²

The class action can take advantage of the protector function of the court by using it to create a market for control. Specifically, during the fairness hearing for a class action settlement the court, as protector, can invite bids for control of the class action. In bidding, a third party (such as an insurer, a hedge fund, or a class member herself) would offer to buy the claims outright and to have the discretion either to negotiate a new settlement or litigate the claims directly. The proceeds could then be used to compensate the class members, and the original class attorney can receive a set percentage fee. The court, as protector, would oversee the entire bid process and monitor the bidders to avoid collusion. In fact, state courts have already experimented with permitting settlement “objectors” to make bids to purchase the claims outright for an amount greater than the settlement.²¹³

Creating such a market for control through an auction procedure has been proposed before.²¹⁴ The trust model is useful because it illuminates

208. *See In re “Agent Orange” Prod. Liab. Litig.*, 818 F.2d 216, 223 (2d Cir. 1987) (discussing this protector role in the context of “its role of assuring reasonableness in the awarding of fees in equitable fund cases”).

209. *See Eubank v. Pella Corp.*, 753 F.3d 718, 724, 729 (7th Cir. 2014) (concluding that class counsel “was unfit to represent the class” and ordering his removal as class counsel).

210. *Reynolds v. Beneficial Nat’l Bank*, 288 F.3d 277, 280 (7th Cir. 2002) (“[T]he district judge in the settlement phase of a class action suit [is] a fiduciary of the class, who is subject therefore to the high duty of care that the law requires of fiduciaries.”).

211. FED. R. CIV. P. 23(e) (discussing fairness hearings).

212. *Reynolds*, 288 F.3d at 279; *see also* 4 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 13.40 (5th ed. 2014) (discussing the fiduciary duty of the court in reviewing a class action settlement during a fairness hearing).

213. *See, e.g., Forsythe v. ESC Fund Mgmt. Co.*, No. 1091-VCL, 2012 WL 1655538, at *2 (Del. Ch. May 9, 2012) (approving a class action settlement as fair “unless the objectors make the equivalent of a topping bid”).

214. For a recent and much more comprehensive proposal to auction control at the settlement fairness hearing, *see* Jay Tidmarsh, *Auctioning Class Settlements*, 56 WM. & MARY L. REV. 227

the role of the court as a protector in making the market and ultimately conducting the sale. This is an advantage that is absent in the market for corporate control. In that market, the corporate managers can obstruct takeovers through a variety of methods.²¹⁵ In contrast, the court, as protector, decides to whom (and whether) to sell the claims, and in doing so can prevent the original class attorney from entrenching herself.

A trust model is further useful because it suggests a way to create a market for control without providing control rights to the class members, which again, they cannot exercise optimally.²¹⁶ Thus, the trust model allows the class action to take advantage of the best of both the trust and corporate worlds. The class action can still retain managerial control over the claims with the class attorney while enabling the court, as protector, to facilitate a market for control. In this way, the class attorney can provide the scale advantages of common ownership while the class members would retain the advantages of the market for control.

Indeed, unlike providing opt-out rights, which would result in suboptimal investment and free-riding, selling the claims in toto would have the advantage of “replacing a party whose interest is only in the profits flowing from the award of fees . . . with a party with a bona fide interest in maximizing the net return to the claim for a party.”²¹⁷ Moreover, the use of a protector and a common manager to sell control in the class action context avoids the problems of free-riding that can occur in the corporate context when tender offers for control are made for a company with a large number of dispersed shareholders.²¹⁸ It does

(2014). Macey and Miller have proposed an auction of the class members' claims upon the *filing* of the class action, which would have the advantage of disbursing funds immediately to the class members. Macey & Miller, *supra* note 6, at 105–08 (holding the auction during the fairness hearing has one advantage over auctioning the case at filing). But auctioning off control at the settlement fairness hearing reduces the information costs of the court because the proposed settlement would set the minimum bid, while a court holding an auction at filing would, in some cases, have to “state a minimum bid in order to prevent an excessively low sale price.” *Id.* at 107.

215. Guhan Subramanian, *Bargaining in the Shadow of Takeover Defenses*, 113 YALE L.J. 621, 33–35 (2003) (discussing and criticizing theory that management should threaten obstruction in bids because “management knows better”); Lucian Bebchuk, *The Case for Facilitating Competing Tender Offers*, 95 HARV. L. REV. 1028, 1029 (1982) (discussing and criticizing such obstruction).

216. This is one difference between my proposal and the comprehensive proposal for class settlement auctions provided by Jay Tidmarsh. Tidmarsh allows for opt-out rights, while I do not because of the harm they cause to class attorney loyalty. See Tidmarsh, *supra* note 214, at 264–65 (discussing the timing of opt outs).

217. Macey & Miller, *supra* note 6, at 110; see also Sitkoff, *supra* note 19, at 637 (making the same point in discussing trusts).

so by initially vesting collective control in the class attorney to invest and develop the claims, and then selling the claims in the aggregate with the settlement amount as the minimum bid.

Designing such a market for control at the settlement stage would require important design considerations to avoid the problems generally associated with auctions, such as collusive bidding.²¹⁹ However, the existence of the court as protector strongly suggests that these problems are not fatal, and thus “do not refute the desirability of experimenting with an auction approach.”²²⁰

One concern worth addressing is the risk that such a market for control would reduce the incentive of a class attorney to develop the claims in the first place “by threatening to deprive [her] of any benefit from [her] research into the case.”²²¹ This is also a significant concern for tender offers in the corporate law context.²²² However, the concern with reducing incentives to bring class actions is unlikely to surface in the market proposed here, because, in the settlement context, the class attorney would receive the same percentage fee she would have received from the settlement itself. Accordingly, the class attorney would be compensated for initial work and would maintain the same incentives to invest in common issues she would have had in the absence of such an auction procedure.

4. *Due Process*

The concern with protecting litigant autonomy, however, is ultimately not based on the utility of procedures like the opt out to police class attorneys. Instead, it is based on a more fundamental belief that as a

218. See Bebchuk, *supra* note 130, at 958 (citing Sanford J. Grossman & Oliver D. Hart, *Takeover Bids, the Free-Rider Problem, and the Theory of the Corporation*, 11 BELL J. ECON. 42 (1980)) (“The free-rider problem may prevent a takeover from taking place even if it would be efficient.”); Grossman & Hart, *supra*.

219. Macey & Miller, *supra* note 6, at 111.

220. *Id.* at 110 (concluding that the difficulties associated with an auction approach “are not insurmountable and do not refute the desirability of experimenting with an auction approach”).

221. See *id.* at 114 (noting that “[a]n auction approach could deter first movers by threatening to deprive them of any benefit from their research into the case”); John C. Coffee, *Understanding the Plaintiff’s Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 COLUM. L. REV. 669, 692 (1986) (arguing that in an auction procedure “[t]he entrepreneurially motivated attorney who suspects that a legal violation has occurred would have a reduced incentive to investigate further because, even if a violation is discovered, the attorney would still have to outbid others in order to profit from this effort”).

222. See Frank H. Easterbrook & Daniel R. Fischel, *Auctions and Sunk Costs in Tender Offers*, 35 STAN. L. REV. 1 (1982) (arguing that auctions chill first bidders and acquisitions more generally).

normative matter, class members *should* have control over their claims. Coffee himself is quite explicit about this when he states that his “normative position” is “to facilitate client autonomy” rather than “the ‘best interests’ of the class (however determined).”²²³

The Supreme Court has also suggested that the opt out right is valuable in itself as a matter of due process. This due process concern with opt-out rights arose prominently in *Ortiz v. Fibreboard Corp.*,²²⁴ where the Court vacated a global class action settlement of asbestos claims because, among other things, the class action was certified under Rule 23(b)(1)(B), which affords the class members no notice or opportunity to opt out.²²⁵ The Court concluded that the lack of opt-out rights was unfair because “objectors to the collectivism of a mandatory subdivision (b)(1)(B) action have *no inherent right to abstain.*”²²⁶

Indeed, the *Ortiz* Court suggested, without holding, that the failure of the class action to provide notice and opt-out rights to the class members raised serious due process concerns.²²⁷ The Court noted in particular that without notice and a right to opt out, “[t]he legal rights of absent class members . . . are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary.”²²⁸ Recently, the Court has strongly suggested that opt-out rights are required as a matter of due process in a variety of contexts, from class action decisions themselves²²⁹ to decisions involving the *Erie* doctrine²³⁰ and arbitration.²³¹

223. Coffee, *Accountability*, *supra* note 6, at 380.

224. 527 U.S. 815 (1999).

225. *Id.* at 844–45; *see also* FED. R. CIV. P. 23(c)(2)(A) (providing that for class actions certified under (b)(1) and (b)(2), the court “may direct appropriate notice to the class” but is not required to do so).

226. *Ortiz*, 527 U.S. at 846–47 (emphasis added).

227. *Id.* at 846–48.

228. *Id.* at 847–48.

229. *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 363 (2011) (questioning whether procedural due process permits a mandatory class action for claims seeking injunctive relief, noting as an aside that such class actions are permitted under Rule 23(b)(2), “rightly or wrongly”).

230. *Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, ___ U.S. ___, 130 S. Ct. 1431, 1443 (2010) (upholding Rule 23 class actions against *Erie* and Rules Enabling Act challenges so long as the class actions involve “willing” plaintiffs).

231. *AT&T Mobility LLC v. Concepción*, ___ U.S. ___, 131 S. Ct. 1740, 1751 (2011) (citing *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811–12 (1985)) (affirming the validity of class action waivers in arbitration agreements and noting that “[f]or a class-action money judgment to bind absentees in litigation . . . absent members must be afforded notice, an opportunity to be heard, and a right to opt out of the class”).

But the taking away of control should not violate due process because it is necessary to ensure that the plaintiffs' claims are, in fact, properly developed. In other words, due process does not require the protection of procedural rights like litigant autonomy when those procedural rights would actually harm the plaintiffs' entitlements rather than protect them.

I have addressed the due process issues surrounding litigant autonomy and the opt-out right in great detail in a previous article.²³² Here I want to briefly note that trust law is not only instructive, but has been instructive. In *Mullane v. Central Hanover Bank & Trust Co.*,²³³ the Court reviewed a New York state law which permitted small trusts to invest in "common fund trusts" for common administration.²³⁴ Under New York law, such common fund trusts were subject to periodic "accountings" which settled "all questions respecting the management of the common fund."²³⁵ Although the decrees permitted any claim against the administrator of the common-fund trust, those with a potential claim only received newspaper notice of the proceedings.²³⁶

Among other things, the Court concluded that newspaper notice was sufficient for individuals who could not be located or identified. This is because "[t]he expense of keeping" those with such interests "informed from day to day of substitutions . . . would impose a severe burden on the plan, and would likely dissipate its advantages."²³⁷ Accordingly, the Court had "no doubt that such impracticable and extended searches are not required in the name of due process."²³⁸

In essence, the *Mullane* Court concluded that due process does not require procedural rights like individualized notice when such rights would destroy the substantive rights that they were meant to protect. In other words, *Mullane*, a trust case, stands for the proposition that procedural rights are not required as a matter of due process when they are self-defeating. Consequently, rights like an opportunity to opt out are not required as a matter of due process in class actions because they would be similarly self-defeating for class members.

232. See Campos, *Mass Torts*, *supra* note 24.

233. 339 U.S. 306 (1950)

234. *Id.* at 307–09.

235. *Id.* at 311.

236. See *id.* at 309–10.

237. *Id.* at 318 (emphasis added).

238. *Id.*

B. *Conflicts*

1. *Class Cohesion*

Along with opt-out rights, the Supreme Court has also insisted on the class members being “cohesive” to ensure that “the use of the class action device” is not “unfair.”²³⁹ The Court first expressed its concern with class cohesion in *Amchem Products v. Windsor*,²⁴⁰ which involved a global settlement of “current and future asbestos-related claims” brought against a consortium of former asbestos manufacturers.²⁴¹ Among other things, the settlement “devis[ed] an administrative scheme for [the] disposition of asbestos claims not yet in litigation.”²⁴² Thus, the settlement not only covered those with present asbestos-related injuries, but those who had been exposed to asbestos but had yet to manifest any injury.²⁴³ The settlement was included with a motion to certify the class, and the district court approved both.²⁴⁴ The Third Circuit, however, vacated the class certification.²⁴⁵

The Supreme Court agreed with the Third Circuit. The Court concluded that the class certification was improper because, among other things, the plaintiffs failed to show that “the questions of law or fact common to class members predominate over any questions affecting only individual members,” as required under Rule 23(b)(3).²⁴⁶ According to the Court, the “predominance inquiry tests whether proposed classes are sufficiently *cohesive* to warrant adjudication by representation.”²⁴⁷ The Court found no predominance of common issues because the purported class members differed significantly as to a number of issues of law and fact, such as the products they were exposed

239. *Amgen, Inc. v. Conn. Ret. Plans & Trust Funds*, __ U.S. __, 133 S. Ct. 1184, 1196–97 (2013) (noting that “the focus of the predominance inquiry under Rule 23(b)(3)” is whether “a proposed class is ‘sufficiently cohesive to warrant adjudication by representation,’” (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 (1997)); *Comcast Corp. v. Behrend*, __ U.S. __, 133 S. Ct. 1426, 1436 (2012) (same)).

240. 521 U.S. 591 (1997).

241. *Id.* at 599–601.

242. *Id.* at 601.

243. *Id.* at 602–05 (describing the settlement).

244. *Id.* at 606.

245. *Id.* at 608.

246. *Id.* at 622; *see also* FED. R. CIV. P. 23(b)(3) (setting forth the predominance requirement).

247. *Id.* at 623 (citations omitted & emphasis added).

to, the timing of each exposure, and the diseases or other injuries each class member suffered.²⁴⁸

Along with failing to satisfy predominance, the proposed class action also failed to satisfy the “adequacy of representation” requirement under Rule 23(a)(4).²⁴⁹ The Court emphasized, in particular, that “for the currently injured, the critical goal is generous immediate payments. That goal tugs against the interest of exposure-only plaintiffs in ensuring an ample, inflation-protected fund for the future.”²⁵⁰ Scholars have also expressed a similar concern with those conflicts “that give rise to a significant potential for negotiation on behalf of an undifferentiated class to skew in some predictable way the design of class-settlement terms in favor of one or another subgroup for reasons unrelated to evaluation of the relevant claims.”²⁵¹

As with opt-out rights, the trust model of the class action shows that the class cohesion requirement is both unnecessary and harmful. As noted above, both the class action and the trust are used in situations where the recipients lack either the ability or the motivation to dispose of the managed property at the appropriate scale.²⁵² One primary cause for this inability to invest at the right scale is the existence of conflicting interests among the recipients. For example, income beneficiaries and principal beneficiaries can, and often do, conflict over investments that may increase the res as a whole but may decrease either the income or the principal.²⁵³ The conflict between the principal beneficiary and the income beneficiary—“the tension between capital appreciation and income production”—is not materially different from the conflict between the futures and presents in *Amchem*.²⁵⁴ Thus, unlike other forms of organizational law, “trust law *facilitates* the creation of residual claimants with interests adverse to each other”²⁵⁵ because it seeks to alleviate the suboptimal investment and management that arises from those conflicts.

248. *Id.* at 624 (quoting *Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 626 (3d Cir. 1996)) (“Class members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods.”).

249. *Id.* at 625.

250. *Id.* at 626.

251. Issacharoff & Nagareda, *supra* note 4, at 1684 (discussing *Amchem*, 521 U.S. 591); *see also* ALI, PRINCIPLES, *supra* note 12, § 2.07 reporters’ notes cmt. d, at 158 (highlighting “commentary conceptualizing adequate representation in class actions in terms of structural conflicts of interest”).

252. *See supra* section I.B.2.

253. *See supra* section I.B.2.

254. Sitkoff, *supra* note 19, at 653.

255. *Id.* at 650 (emphasis added).

Accordingly, the insistence on class cohesion is harmful because it prevents the use of the class action in many settings where the class action is necessary to solve a problem of scale. For example, in mass tort litigation like the asbestos litigation at the heart of *Amchem*, conflicts among the class members are pervasive because of the heterogeneity of the injuries the class members suffer.²⁵⁶ As a result, in the aftermath of *Amchem* and its insistence on class cohesion, “the class action has fallen in disfavor as a means for resolving mass-tort claims.”²⁵⁷

But the trust model of the class action shows that these conflicts suggest just the opposite—that the class action should be especially favored in mass tort litigation. First, the *Amchem* Court fails to consider the far worse alternatives to using the class action in mass tort litigation.²⁵⁸ The alternative to a class action in cases like *Amchem* would be separate lawsuits, which would allow the present plaintiffs to exhaust all of the recoverable proceeds from the defendants before the future plaintiffs even have a chance to file suit.²⁵⁹ The *Amchem* Court hinted at this possibility. It noted that while the case did not involve a “limited fund,” “the terms of the settlement reflect essential allocation decisions designed to confine compensation and limit defendants’ liability.”²⁶⁰ Consequently, the *Amchem* Court expressed a real concern that the present plaintiffs would exhaust compensation to the detriment of the future plaintiffs. Moreover, the *Amchem* Court failed to note that, unlike the present plaintiffs, the class attorney would be motivated to enlarge the amount of recovery as a whole because her fee was based on the total net settlement amount.²⁶¹ Thus, the class attorney would act for the benefit of all the class members equally, not just the present plaintiffs.

More importantly, the class action is particularly necessary in mass tort litigation because mass tort plaintiffs suffer the same problem of

256. See Coffee, *Accountability*, *supra* note 6, at 385–86 (noting while discussing mass tort litigation that the conflicts are pervasive because “[w]henver the injuries suffered by class members are relatively heterogeneous, internal conflicts necessarily arise.”); Coffee, *Governance*, *supra* note 7, at 318 (noting that “in mass tort cases, the variation in claim value can be particularly great, based on the highly variable physical injuries suffered by the plaintiffs”).

257. ALI, PRINCIPLES, *supra* note 12, § 1.02, at 25.

258. This is ironic because Rule 23(b)(3) requires a court to determine whether “a class action is superior to other available methods for fairly and efficiently adjudicating the controversy.” FED. R. CIV. P. 23(b)(3).

259. Campos, *Mass Torts*, *supra* note 24, at 1115.

260. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 627 (1997).

261. The Court noted that the class attorneys would “receive attorneys’ fees in an amount to be approved by the District Court,” but did not specify how the fees would be calculated. *Id.* at 605.

scale that plagues small claims litigation, but with far worse consequences.²⁶² Like the small claims plaintiffs, mass tort plaintiffs are numerous and share common issues of liability that would benefit from the cost sharing and economies of scale provided by the class action.²⁶³

Admittedly, unlike small claims plaintiffs, and as exemplified by *Amchem*, mass tort plaintiffs vary significantly as to their individual net expected recoveries. Thus, some mass torts plaintiffs may have an individual incentive to bring suit, resulting in some investment in common issues.²⁶⁴ However, this high variance makes it *more likely* that the plaintiffs will resist aggregate treatment. This is because plaintiffs with high value claims have an incentive to avoid aggregation in order to free ride, thus causing plaintiffs with low value claims to have a much lower expected recovery or to not file at all.²⁶⁵

Second, the absence of a class action in the mass tort context leads to far worse results. As with small claims litigation, the result of the mass torts plaintiffs' resistance to aggregation is that the defendant will not have liability optimally imposed on them, leading them to take less care. In other words, like the small claims plaintiffs, the mass torts plaintiffs' resistance to aggregation leads to the very mass torts they suffered.²⁶⁶

However, mass torts plaintiffs suffer a much greater cost for this loss in deterrence than small claims plaintiffs. For plaintiffs in small claims

262. See Campos, *Mass Torts*, *supra* note 24, at 1081–85 (arguing that small claims plaintiffs and mass tort plaintiffs both suffer from the problem of asymmetric stakes).

263. See Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 966 (1993) (noting that “the commonality of issues and actors among individual mass tort claims” distinguishes mass torts from “automobile accident” and other “high volume” litigation).

264. See Campos, *Mass Torts*, *supra* note 24, at 1081–85. *But see* Rosenberg & Spier, *supra* note 26, at 344 (“Even if fixed-cost barriers were removed, virtually any claim that turned on variable cost investments—that is, all claims that present some litigable common question—would nonetheless stand a good chance of being rendered worthless.”).

265. Campos, *Mass Torts*, *supra* note 24, at 1082 (noting that in mass tort litigation, “there may be plaintiffs who are better off suing separately than joining the collective”); Coffee, *Governance*, *supra* note 7, at 318 (noting that due to opt outs, “the class action in the mass tort context became the repository for two categories of plaintiffs: (a) those whose claims either had evidentiary, factual, or legal problems that made it undesirable to proceed individually; and (b) future claimants who had not yet sustained injury”).

266. There is a paucity of empirical evidence of the effect of procedures like the class action on the deterrence of mass torts. However, the available evidence does show “persuasively . . . that tort law achieves something significant in encouraging safety,” albeit imperfectly. Gary T. Schwartz, *Reality in the Economic Analysis of Tort Law: Does Tort Law Really Deter?*, 42 UCLA L. REV. 377, 423 (1994) (discussing different sectors of tort liability). This evidence of the imperfect deterrence function of tort law is supportive of the view that one source of the imperfection is the restriction on the use of class actions. However, admittedly, more work must be done to study this effect and to rule out alternatives.

consumer or products cases, the nonpecuniary losses are either nonexistent (*e.g.*, the only loss is an easily replaceable washer), or very small (*e.g.*, the smell of the washer). In contrast, mass tort plaintiffs typically suffer from such nonpecuniary injuries as cancer or death, which no amount of damages can ever replace.²⁶⁷ Thus, the costs of failing to certify class actions in mass torts litigation make mass tort plaintiffs especially vulnerable.

Finally, it is worth noting that an increase in mass torts from a failure to aggregate is more likely than in small claims litigation. Unlike in small claims cases, where the plaintiffs are typically consumers of the defendants' products, the plaintiffs in mass tort cases rarely have an opportunity, apart from insurance subrogation, to aggregate *ex ante*.²⁶⁸ In addition, in many mass tort situations there are not sufficient alternative regulatory schemes to prevent the tort.²⁶⁹

2. *Issue Class Actions*

The trust model of the class action shows that the class cohesion requirement is harmful because it prevents the use of the class action in situations like mass tort litigation where, due to conflicts, the problem of scale is especially acute. But the trust model also provides guidance in resolving the problem of scale caused by class member conflicts.

As noted earlier, trust law permits conflicts among the beneficiaries, such as trusts where one beneficiary has an interest in the principal of the *res* while another has an interest in the income produced by the *res*.²⁷⁰ To deal with such situations, recent developments in trust law permit a trustee to focus on the total return on the *res*²⁷¹ while granting the trustee the power to "adjust between principal and income to the extent the trustee considers necessary."²⁷² Permitting such powers of

267. Campos, *Mass Torts*, *supra* note 24, at 1085.

268. See David Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims* (2000) (unpublished manuscript) (on file with the Harvard Law School Library).

269. See Campos, *Mass Torts*, *supra* note 24, at 1077 n.78 (noting insufficiency of alternatives); Rosenberg, *supra* note 185, at 896–97 (arguing in favor of mandatory class actions for mass torts because "[r]egulatory and market alternatives that collectivize mass tort cases on a less comprehensive and less compulsory basis fail to take full advantage of scale economies and possibilities for redistributing claim-generated wealth").

270. See *supra* section I.B.2.

271. See UNIF. PRUDENT INV'R ACT § 2(b) (1994) ("A trustee's investment and management decisions respecting individual assets must be evaluated not in isolation but in the context of the trust portfolio as a whole."); *id.* cmt. ("In the trust setting the term 'portfolio' embraces the entire trust estate.").

272. UNIF. PRINCIPAL & INCOME ACT § 104(a) (1997).

equitable adjustment are designed to “authorize[] the trustee to make adjustments between principal and income that may be necessary if the income component of a portfolio’s total return is too small or too large because of investment decisions made by the trustee.”²⁷³ Thus trust law allows a trustee to maximize the *total res*, and then equitably distribute the proceeds afterwards to satisfy each beneficiary’s *partial* share.

The class action can also separate total return investing in the claims from equitable distribution of the proceeds by utilizing issue class actions. Rule 23 allows for class actions “with respect to particular issues,” but only “[w]hen appropriate.”²⁷⁴ Despite this provision, some courts, most notably the Fifth Circuit, initially expressed disapproval of issue class actions because such class actions would “eviscerate the predominance requirement of rule 23(b)(3); the result would be automatic certification in every case where there is a common issue, a result that could not have been intended.”²⁷⁵

However, issue class actions have recently gained support from both courts and scholars. For example, the ALI’s *Principles of the Law of Aggregate Litigation* has endorsed the use of issue class actions so long as such a class action “materially advances the disposition of the litigation as a whole,”²⁷⁶ and some courts have acknowledged that “it [is] more efficient” for such common issues “to be resolved in a single proceeding than for [each issue] to be litigated separately in hundreds of different trials.”²⁷⁷ Moreover, some state courts have also permitted

273. *Id.* § 104 cmt.; see also RESTATEMENT (THIRD) OF TRUSTS § 111(b) (AM. LAW INST. 2012) (requiring trustee to “make an equitable adjustment” if necessary to comply with duty of impartiality as to principal and income beneficiaries).

274. FED. R. CIV. P. 23(c)(4). Alternatively, a court could certify a class action, but later decertify the class after all common issues are adjudicated. State courts, following federal practice, have experimented with this “decertification” procedure, which, in effect, creates an ex post issue class action. See *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1269 (Fla. 2006) (concluding that such decertification was not an abuse of discretion, citing federal cases).

275. *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 745 n.21 (5th Cir. 1996); see also ALI, PRINCIPLES, *supra* note 12, § 2.02 reporters’ notes cmt. a at 94 (noting that “[c]ourts are divided over the precise relationship between the predominance requirement of Rule 23(b)(3) and the authorization for issue classes in Rule 23(c)(4)”).

276. FED. JUDICIAL CTR., MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.24, at 273 (2004); see also *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 234 (2d Cir. 2008), *overruled on other grounds sub nom*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (concluding that an issue class action was not appropriate because it would not “materially advance the litigation”); ALI, PRINCIPLES, *supra* note 12, § 2.02(a)(1) (recommending that a court “should exercise discretion to authorize aggregate treatment of a common issue by way of a class action if the court determines that resolution of the common issue would materially advance the resolution of multiple [] claims by addressing the core of the dispute . . .”).

277. *Butler v. Sears, Roebuck & Co.*, 727 F.3d 796, 799 (7th Cir. 2013).

issue class actions as “[t]he pragmatic solution” in some situations, citing federal case law on Rule 23 issue class actions.²⁷⁸ In fact, the Fifth Circuit has since relaxed its position on issue class actions.²⁷⁹

Indeed, issue class actions have the added benefit of preventing the class attorney from influencing the distribution of damages. As noted earlier, the trustee has discretion to re-characterize the total return of the res to allow for an equitable distribution of proceeds to beneficiaries with conflicting interests.²⁸⁰ In addition, trust law imposes a duty on the trustee to treat the beneficiaries impartially.²⁸¹ This duty is a corollary to the facilitation of conflicts in trusts, and thus, like conflicts, the duty is “a salient distinguishing characteristic of trust law as organizational law.”²⁸² In fact, the duty of impartiality makes trust law a particularly apt analogy to class actions because a class attorney’s duty to adequately represent the class also includes a duty to treat the class members impartially.²⁸³

But enforcing such a duty of impartiality in the class action context (and, arguably, in many trust contexts) is difficult because the class

278. *Engle*, 945 So. 2d at 1269–70 (concluding that trial court did not abuse its discretion in certifying a class action trial on common issues of liability).

279. See *Mullen v. Treasure Chest Casino, LLC*, 186 F.3d 620, 628–29 (5th Cir. 1999) (permitting an issue class action, distinguishing *Castano*, 84 F.3d 734, because *Castano* presented a risk that a second jury would re-examine a previously decided common issue in violation of the Seventh Amendment’s Re-examination Clause); *Engle*, 945 So. 2d at 1270 (noting that the Fifth Circuit has relaxed its position on issue class actions, citing *Mullen*, 186 F.3d 620). Avoiding such Seventh Amendment issues would be relatively easy to accomplish, and thus would not pose any problem to the certification of the issue class actions discussed here. In essence, common issues of liability arise from the defendant’s ex ante behavior, while individual issues arise from the effect of that behavior on the plaintiffs ex post. See Elizabeth Chamblee Burch, *Constructing Issue Class Actions*, 101 VA. L. REV. 1855 (2015). Accordingly, common issues of fact can easily be separated from individual issues of fact because the issues arise from two different points in time. See Campos, *Mass Torts*, *supra* note 24, at 1073.

280. See UNIF. PRINCIPAL & INCOME ACT § 104 cmt. (1997) (noting that “the purpose of the power to adjust in Section 104(a) is to eliminate the need for a trustee who operates under the prudent investor rule to be concerned about the income component of the portfolio’s total return”).

281. RESTATEMENT (SECOND) OF TRUSTS § 183 (AM. LAW INST. 1959) (“When there are two or more beneficiaries of a trust, the trustee is under a duty to deal impartially with them.”).

282. Sitkoff, *supra* note 19, at 652; see also Steven L. Schwarcz, *Commercial Trusts as Business Organizations: An Invitation to Comparatists*, 13 DUKE J. COMP. & INT’L L. 321, 329–30 (2003) (noting that, unlike in other organizational forms, “trust law imposes a duty of impartiality”).

283. See *Dechert v. Cadle Co.*, 333 F.3d 801, 803 (7th Cir. 2003) (noting in a bankruptcy case that in “the usual class action” the class representative has a “fiduciary duty as class representative . . . to represent all members of the class equally”). Cf. Lahav, *supra* note 13, at 594 (noting that “[i]n the absence of other, competing goals (such as decentralized adjudicators or the right to a jury trial), it is a general principle of law that similar cases ought to reach similar outcomes,” although “[d]octrinally, the principle requiring equality of outcomes is weakly supported”).

attorney is indifferent to the distribution of any recovery. Again, the class attorney solves the problem of scale among the class members by having a fee that is tied to the aggregate recovery of the claims as a whole.²⁸⁴ Accordingly, the class attorney has an incentive to exploit economies of scale in investing in common issues.²⁸⁵ However, no such economies arise in issues that are unique to each individual class member because the issues lack any spillover benefits for other class members.²⁸⁶ Thus, the class attorney does not care how that recovery is later parceled out to each class member, or even if it goes to the class members at all.²⁸⁷

Consequently, the use of issue class actions has the benefit of ensuring impartiality because it would prevent distributional issues from being influenced by the indifference of the class attorney. Because an issue class action allows the class attorney to focus solely on the “total return” of the claims, which is the only thing she is incentivized to care about, distribution is safely kept away from the attorney. Moreover, the issue class action allows the class members to retain some control over their claims while avoiding the problems of scale that arise when common issues are present.²⁸⁸ Indeed, issue class actions would avoid the inaccuracies that would arise from recharacterizing proceeds. This is because “damages recovery [can] proceed[] strictly in accordance with accepted evidentiary standards” and thus limit recovery only to “specific losses suffered by class members.”²⁸⁹

284. See *supra* section I.B.3.

285. See *supra* section I.B.3.

286. Rosenberg & Spier, *supra* note 26, at 314 (noting that issues that are not common to the class lack “spillovers” and thus “plaintiffs cannot benefit from centralized investment decisions”).

287. See *In re Baby Prods. Antitrust Litig.*, 708 F.3d 163, 178 (3d Cir. 2013) (noting that “awarding attorneys’ fees based on the entire settlement amount rather than individual distributions creates a potential conflict of interest between absent class members and their counsel” because the class attorney is indifferent to how the amount is distributed while “[c]lass members are not indifferent to whether funds are distributed to them or to cy pres recipients”); *Int’l Precious Metals Corp. v. Waters*, 530 U.S. 1223, 1224 (2000) (O’Connor, J.) (denying cert. and criticizing class action settlement that awarded the class attorneys a percentage of the total settlement amount, but reverted some of the amount back to the defendant, noting that “[a]rrangements such as [these] . . . decouple class counsel’s financial incentives from those of the class”); Tidmarsh, *supra* note 22, at 1193 (noting that “a self-interested class counsel . . . is ultimately indifferent to the distribution of the remedy”).

288. See Campos, *Mass Torts*, *supra* note 24, at 1111 (“[A] plaintiff may still have her ‘day in court’ in the context of a bifurcated class action with a common-issue proceeding and individual-issue determinations.”).

289. 3 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 10:17, at 517 (4th ed. 2002). For an example of litigation with a common issue class action coupled with each class member bringing separate claims to prove individual issues, see *Engle v. Liggett Grp., Inc.*, 945 So.

3. *Scheduling and Sampling*

Although issue class actions allow a class attorney to avoid distributional issues, and thus remain impartial to the class members, such class actions may undermine impartiality in two circumstances. First, in situations where there is a limited (or near limited) fund like in *Amchem*, it may make sense for the Court to introduce a distribution procedure that prevents the exhaustion of the fund.²⁹⁰ Second, in situations where proving individual damages is costly, it may make sense to use a procedure of distribution that relaxes evidentiary requirements to allow more class members to recover.²⁹¹

Again, trust law, which also must contend with “the problem of balancing the interests of residual claimants of different classes,”²⁹² is instructive. As noted earlier, in dealing with income and principal beneficiaries, recent developments in trust law permit the trustee to make equitable adjustments, including the power to reclassify proceeds (e.g., classifying “income” as “principal”) to fairly distribute the proceeds.²⁹³ Trust law also permits the use of the “unitrust,” which “abolishes the distinction between income and principal” by directing “[t]he unitrust trustee [to] pay[] out not traditional income, which is determined formalistically, but a fixed percentage of the portfolio, which is measured periodically.”²⁹⁴ Like equitable adjustment, the unitrust improves fairness among the principal and income beneficiaries.²⁹⁵ But the unitrust further reduces the costs of distribution considerably by defining a mechanical formula for distributing the proceeds.²⁹⁶

2d 1246, 1256–58 (Fla. 2006) (describing a “three phase[]” trial plan with a common issue class action phase and a phase having “new juries . . . decid[ing] the individual liability and compensatory damages claims for each class member . . .”).

290. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597, 626 (1997); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 852 n.30 (1999).

291. *Cf. Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (requiring the ascertainability of the class members because otherwise “individualized fact-finding or mini-trials will be required to prove class membership”).

292. Sitkoff, *supra* note 19, at 652.

293. *See supra* section II.B.2.

294. Joel C. Dobris, *Why Five? The Strange, Magnetic, and Mesmerizing Affect of the Five Percent Unitrust and Spending Rate on Settlers, Their Advisors, and Retirees*, 40 REAL PROP. PROB. & TR. J. 39, 42 (2005) (citing James P. Garland, *The Problems With Unitrusts*, 1 J. PRIV. PORTFOLIO MGMT. 35 (1999)).

295. *Id.* at 47 (“Two statutory solutions currently apply when traditional allocation rules fail. One solution is to give the trustee the power to reallocate or adjust receipts. The other is the unitrust.”).

296. It should be noted that while a unitrust is typically the choice of the settlor, some states permit a trust lacking such terms to operate as a unitrust. *See, e.g.*, 12 DEL. CODE ANN. tit. 12, § 3527(b)(1) (West 2016) (providing for conversion of a trust to a unitrust).

In general, courts have been resistant to the type of recharacterization of shares in the managed property permitted by trust law.²⁹⁷ Such “fluid recovery” procedures raise the risk that uninjured persons will collect at the expense of those injured, or that some class members may receive a windfall.²⁹⁸ However, most of this resistance has arisen in appellate courts that have focused on preserving individual autonomy over the claim.²⁹⁹ District courts, on the other hand, which must address distributional issues head on, have been open to the recharacterization of claims for fairness and efficiency purposes.³⁰⁰ For example, courts have historically used bifurcation procedures in antitrust and securities fraud class actions, often assessing a “lump sum” award at the end of the first (liability) phase³⁰¹ and then using “mechanical formulae” to distribute damages at the second (damages) phase.³⁰² Such a bifurcated, mechanical procedure mirrors the fairness and efficiency advantages of the unitrust.

297. See *McLaughlin v. Am. Tobacco Co.*, 522 F.3d 215, 231 (2d Cir. 2008), *overruled on other grounds sub nom.*, *Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639 (2008) (“[F]luid recovery” has been forbidden in this circuit.”).

298. See 3 RUBENSTEIN, *supra* note 289, § 10:20, at 527 (discussing criticism against fluid recovery that “it would result in a windfall to nonmembers of the class”); Campos, *Proof*, *supra* note 24, at 788–96 (discussing this concern). It is worth noting that the term “fluid recovery” is sometimes used to refer to “the entire procedure of classwide calculation of damages and distribution of the aggregate amount of any unclaimed balance thereof to injured class members or to others under cy pres notions or other doctrines.” *Id.* § 10:17, at 517 n.7. However, “fluid recovery” procedures typically refer more narrowly to procedures in which “a court awards compensation to a group that approximates the original group that suffered harm. For example, if a taxicab operator overcharges its customers, a fluid recovery might involve a court ordering the operator to offer discounts to its customers *in the future*.” Joshua P. Davis, Eric L. Cramer & Caitlin V. May, *The Puzzle of Class Actions with Uninjured Members*, 82 GEO. WASH. L. REV. 858, 877 (2014) (citations omitted) (emphasis added).

299. See *supra* section II.A.4 (discussing due process objections to class actions with no opt-out rights).

300. See Lahav, *supra* note 13, at 575 (noting that concerns with preserving autonomy over a claim “dominates the Supreme Court’s jurisprudence, an equality principle is emerging at the district court level,” with district courts “using *informal* procedures to facilitate settlements of mass tort cases” (emphasis in original)).

301. See 6 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 18:54 (4th ed. 2002) (discussing the use of such bifurcation procedures in antitrust class actions, in which “a lump sum damage award” is assessed against the defendant after liability is established); 7 WILLIAM B. RUBENSTEIN ET AL., *NEWBERG ON CLASS ACTIONS* § 22:72 (4th ed. 2002) (noting that such procedures are used in securities class actions).

302. 6 RUBENSTEIN, *supra* note 301, § 18:53 (“Class proof of damages, either by an aggregate lump sum award to the class as a whole or by application of mechanical formulae or statistical methods to individual class members’ claims, has received approval in several antitrust cases”); 7 RUBENSTEIN, *supra* note 301, § 22:65 (“Determination of damages sustained by individual class members in securities class action suits is often a mechanical task involving the administration of a formula”).

Bifurcation and mechanical distribution procedures can be used to deal with the special concerns with fairness raised in *Amchem*. In *Amchem*, the Court expressed a concern that those presently injured would induce the class attorney to bias any class action settlement in their favor over the interests of the futures.³⁰³ Accordingly, an issue class action would allow class members with “present” claims to directly bias any proceeds in their favor, at the expense of class members who have “future” claims that have not yet accrued.

A court can avoid such biasing by relying upon objective methods of determining the damages for each class member. For example, a court can base damages on a schedule that closely resembles the schedules used to pay benefits in Medicare or in workers’ compensation schemes.³⁰⁴ The use of such damage scheduling would allow for the distribution of proceeds free from the influence of any party. Moreover, the schedule can be adjusted by the court to avoid the exhaustion of funds by earlier claimants.

Finally, unlike in the trust context, class actions can take advantage of the “numerosity” of the class members by using random sampling to determine claim values for class members.³⁰⁵ Random sampling can provide “outcome equality” because “[s]ampling and similar innovative procedures . . . extrapolat[e] results of sample trials to the rest of the plaintiff population,” free of any of the selection biases produced by a nonrandom sample.³⁰⁶ Moreover, sampling reduces costs by limiting the number of claims actually litigated. Such sampling can be, and has been, deployed in a bifurcation procedure.³⁰⁷ Although the Supreme Court has recently disapproved of such “Trial by Formula” procedures in class actions,³⁰⁸ the trust model suggests that they should be encouraged, not discouraged, by courts.

303. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 (1997) (noting the present’s preference for “generous immediate payments” as compared to the future’s preference for “an ample, inflation-protected fund for the future”).

304. See Campos, *Mass Torts*, *supra* note 24, at 1105–06 (discussing this possibility); David Rosenberg, *Of End Games and Openings in Mass Tort Litigation: Lessons from a Special Master*, 69 B.U. L. REV. 695, 695 (1989) (noting and praising use of damage scheduling in mass tort cases, “similar to those created by statute for workers’ compensation programs”).

305. FED. R. CIV. P. 23(a)(1) (requiring, for class certification purposes, that “the class is so numerous that joinder of all members is impracticable . . .”).

306. Lahav, *supra* note 13, at 578; see also D. James Greiner, *Causal Inference in Civil Rights Cases*, 122 HARV. L. REV. 533, 563 (2008) (noting that “[r]andom assignment assures that, in the absence of bad luck, units who receive one treatment are not systematically different from those who receive the other treatment.”).

307. See *Hilao v. Estate of Marcos*, 103 F.3d 767, 782–87 (9th Cir. 1996).

308. See *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 341 (2011).

III. EXTENSIONS OF THE MODEL

The previous Part used a trust model of the class action to criticize the insistence under current law on opt-out rights and class cohesion in class actions involving damage claims. This Part extends the model to address other controversial issues in class action law.

A. *Ascertainability*

Recently, some federal courts have required the *ascertainability* of class members in class actions certified under Rule 23(b)(3).³⁰⁹ In *Carrera v. Bayer Corp.*,³¹⁰ for example, the Third Circuit reviewed a consumer class action that asserted claims that the defendant fraudulently marketed diet pills.³¹¹ However, the named representatives could not ascertain the identity of every class member because the class members did not purchase the pills directly from the defendant, and class members were “unlikely to have documentary proof of purchase,” such as receipts.³¹²

The Third Circuit vacated the class action, concluding that the ascertainability of each class member was required because, among other things, “it eliminates serious administrative burdens that are incongruous with the efficiencies expected in a class action by insisting on easy identification of class members.”³¹³ Moreover, requiring ascertainability would protect the rights of both the plaintiffs and the defendants.³¹⁴ Although the Third Circuit has softened its stance on ascertainability somewhat,³¹⁵ the Supreme Court has recently decided two class action cases which raised, without deciding, similar issues of ascertainability, focusing on situations where the class may “contain[]

309. *Carrera v. Bayer Corp.*, 727 F.3d 300, 307 (3d Cir. 2013) (noting that “[a]scertainability mandates a rigorous approach at the outset because of the key roles it plays as part of a Rule 23(b)(3) class action lawsuit”). *But see* *Mullins v. Direct Digital, LLC*, 795 F.3d 654, 657–58 (7th Cir. 2015) (declining to follow *Bayer* and impose such a “heightened ascertainability requirement”).

310. 727 F.3d 300 (3d Cir. 2013).

311. *Id.* at 303–04.

312. *Id.* at 304.

313. *Id.* at 306 (quoting *Marcus v. BMW of N. Am., LLC*, 687 F.3d 583, 593 (3d Cir. 2012)).

314. *Id.*

315. *See* *Byrd v. Aaron’s Inc.*, 784 F.3d 154, 163 (3d Cir. 2015) (concluding that the ascertainability requirement “does not mean that a plaintiff must be able to identify all class members at class certification—instead, a plaintiff need only show that ‘class members can be identified’” (quoting *Carrera*, 727 F.3d at 308 n.2)). Indeed, the Third Circuit’s decision in *Byrd* brings the court’s ascertainability requirement closer to the ex post ascertainability requirement proposed here.

hundreds of members who were not injured and have no legal right to any damages.”³¹⁶

The trust model of the class action demonstrates that such an ascertainability requirement is harmful. The trust model of the class action shows that the class action and the trust are commonly used when the recipients cannot invest in the managed property at the right scale. In the class action context, this problem of scale is caused in large part by the fact that the class members must incur significant transaction costs in acting collectively to exploit economies of scale. One such transaction cost is the search costs associated with identifying who the other class members are, as is especially true in small claims litigation. Thus, requiring the ascertainability of the class members at the outset would foreclose the use of the class action in many appropriate settings.

Here trust law is particularly instructive. Trust law also requires “a beneficiary who is definitely ascertainable,” but “[i]t is not necessary . . . that the beneficiary should be known at the time of the creation of the trust.”³¹⁷ Instead, the beneficiary only needs to be “ascertainable within the period of the rule against perpetuities.”³¹⁸ One reason is that the settlor may want to protect future interests who, because of their lack of existence, cannot possibly dispose of the res for their own benefit. Nevertheless, trust law does require some ex post ascertainability so that the beneficiary does receive the benefits of trust

316. See John Elwood, *Relist Watch*, SCOTUSBLOG (June 5, 2015, 10:32 AM), <http://www.scotusblog.com/2015/06/relist-watch-65/> [<https://perma.cc/2ZJM-85QK>] (explaining that *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036 (2016), granted certiorari on issue of “[w]hether a class action may be certified or maintained under Rule 23(b)(3), or a collective action certified or maintained under the Fair Labor Standards Act, when the class contains hundreds of members who were not injured and have no legal right to any damages”); John Elwood, *Relist Watch*, SCOTUSBLOG (May 1, 2015, 12:19 PM), <http://www.scotusblog.com/2015/05/relist-watch-61/> [<https://perma.cc/CJ9C-Q9YJ>] (explaining that *Spokeo, Inc. v. Robins*, ___ U.S. ___, 135 S. Ct. 1892 (2015), granted certiorari on issue of “[w]hether Congress may confer Article III standing upon a plaintiff who suffers no concrete harm, and who therefore could not otherwise invoke the jurisdiction of a federal court, by authorizing a private right of action based on a bare violation of a federal statute”).

The Supreme Court recently decided both decisions without discussing the ascertainability requirement. See *Spokeo, Inc. v. Robins*, ___ U.S. ___, 136 S. Ct. 1540 (2015); *Tyson Foods, Inc. v. Bouaphakeo*, ___ U.S. ___, 136 S. Ct. 1036 (2015). However, in *Tyson*, the Court did suggest that the members need not be ascertained *prior to* distribution of any award recovered at trial, which would be consistent with the proposal here. See *Tyson*, 136 S. Ct. at 1050 (affirming certification of class action but remanding on issue of whether there exists a method to identify injured class members).

317. See RESTATEMENT (SECOND) OF TRUSTS § 112 & cmt. a (AM. LAW INST. 1959).

318. *Id.* § 112; see also Hansmann & Mattei, *supra* note 19, at 464 (“Subject to the rule against perpetuities, the common law permits the beneficial interest in a trust to shift among individuals over time, and these shifts may be conditional upon a wide variety of contingencies.”).

management.³¹⁹ Accordingly, such a relaxed ex post ascertainability requirement allows the settlor to protect the interests of a particularly vulnerable class of individuals.³²⁰

The same ex post ascertainability requirement can easily be transported into the class action through the use of bifurcation procedures. Using such a procedure would permit the class attorney to develop the claims for the inchoate class, allowing the class members to reap the benefit of collective investment without incurring the costs of searching for the individual class members. In fact, the small claims plaintiff is particularly analogous to a future interest insofar as neither would do *any* investment in the absence of collective management by a manager.

Moreover, like the relaxed ex post ascertainability requirement in trust law, some form of ascertainability of the class members would be required ex post after liability has been established to allow the class members to individually benefit from the class action. Allowing ex post ascertainability would also allow the class attorney to avoid the costs of identification in establishing liability and could push some of the costs to the class members themselves. Moreover, and in response to the Supreme Court's recent concerns, ex post ascertainability would prevent uninjured parties from recovering. Finally, ex post ascertainability would not be as urgent in the class action context because, unlike in the trust context, the class members would have already received the ex ante benefit of the deterrence provided by the claims. The beneficiaries' interests in the res do not have an analogous ex ante component.

B. *Settlement Pressure*

Federal courts have also expressed concern that the class action places undue pressure on the defendant to settle, allowing “plaintiffs to extort large settlements from defendants for meritless claims.”³²¹ This concern with “blackmail settlements” is not new³²² and has been used to justify restrictions on the use of class actions. For example, courts concerned

319. See RESTATEMENT (THIRD) OF TRUSTS § 44 (AM. LAW INST. 2001) (requiring a “definite beneficiary”); RESTATEMENT (SECOND) OF TRUSTS § 112 (AM. LAW INST. 1959) (same).

320. Cf. HESS ET AL., *supra* note 32, § 168 (noting that “[t]rusts for those of limited capacities are especially useful and desirable because of their inability to act for themselves,” citing, among others, minors)

321. *Halliburton Co. v. Erica P. John Fund, Inc.*, ___ U.S. ___, 134 S. Ct. 2398, 2413 (2014).

322. See, e.g., HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973) (discussing “blackmail settlements” in class actions); see also Hay & Rosenberg, *supra* note 3, at 1378 & n.3 (citing Judge Friendly and discussing literature on blackmail settlements).

with blackmail settlements have concluded that a “rigorous analysis” of each of the class requirements is required, including a review of the merits to the extent that they overlap with other class certification requirements.³²³

Admittedly, there is no analogue to the defendant in the trust. However, the trust model strongly suggests that concern with settlement pressure is misplaced because the settlement pressure created by the class action is a feature, not a bug. As the model shows, the class action is used to alleviate a problem of scale suffered by the class members. Because the interests of the class members are divided, they cannot invest in common issues at the appropriate scale. In contrast, the defendant owns the entire liability associated with any common issue, and thus does not suffer from a problem of scale. Accordingly, the concern with settlement pressure does not unfairly treat the interests of the defendant. Instead, it ensures fairness by leveling the playing field.³²⁴ Indeed, empirical evidence shows that so-called “blackmail settlements” rarely, if ever, occur.³²⁵

C. *Cy Pres Distribution*

The trust model is also instructive in addressing cy pres awards in class actions. Cy pres awards themselves are derived from the law of charitable trusts³²⁶ and permit a court to “direct the application of the property . . . to [a] charitable purpose” within the intention of the settlor if “it is or becomes impossible . . . to carry out” the particular charitable

323. See *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 8, 17, 28 (1st Cir. 2008) (concluding that a review of the plaintiff’s “novel and complex” theory of injury was necessary to avoid “a doubtful class certification” that puts undue pressure on the defendants to settle); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 38 n.9 (2d Cir. 2006) (permitting court to review merits when it overlapped with the predominance requirement, noting that such evidence does not prejudice the defendant because “[e]very class action defendant wants its evidence disputing Rule 23 requirements considered in order to try to fend off the enormous settlement pressure often arising from certification”); David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1955 (2008) (“Courts tempted to deny class certification to guard against settlement pressure in anemic cases have to determine that the case is indeed anemic and not one that merits a settlement.”).

324. Campos, *Proof*, *supra* note 24, at 777–85.

325. See Charles Silver, “*We’re Scared to Death*”: *Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1359 (2003) (noting that “[e]mpirical researchers . . . dispute the blackmail claim”).

326. See *In re Pharm. Indus. Average Wholesale Price Litig.*, 588 F.3d 24, 33 (1st Cir. 2009) (using cy pres doctrine to justify the use of a fluid recovery procedure); 4 RUBENSTEIN, *supra* note 212, § 11:20 (noting that the “disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit, has been approved under the equitable power of courts in various cases under the analogous cy pres doctrine”).

purpose the settlor intended.³²⁷ Indeed, the invocation of the cy pres doctrine in the class action context strongly suggests that a number of courts already implicitly use a trust model of the class action.

In the class action context, cy pres awards are typically used when a portion of any recovery goes unclaimed or class members cannot be identified.³²⁸ Cy pres issues tend to arise in small claims litigation, where in many such cases, “the amount of damages that each class member can expect to recover is probably too small even to warrant the bother, slight as it may be, of submitting a proof of claim in the class action proceeding.”³²⁹ Cy pres awards typically go to a charity.³³⁰

Ironically, a trust model of the class action suggests that cy pres awards to a private third party like a charity may, in many circumstances, be inappropriate in the class action context because of the harmful effects they may have on deterrence and compensation.³³¹ Under the trust model, the class action solves a problem of scale by assigning control over the claims and incentivizing the class attorney to maximize the total return on those claims. Accordingly, cy pres distribution may be harmful to the extent that it disrupts this solution. For example, class counsel may have a relationship with the receiving charity and thus use her efforts to shift funds to the charity rather than to the class members.³³² Deterrence may be maintained but the compensation of the class members would be diminished.

Cy pres awards can also have harmful effects on the other parties involved in the class action. For example, the court’s relationship to a receiving charity may cause an undue amount of proceeds to go to the charity or result in bias against the defendant to increase the amount recoverable for the charity.³³³ In addition, the defendant’s relationship to the receiving charity may result in benefits to the defendant, such as

327. RESTATEMENT (THIRD) OF TRUSTS § 67 (AM. LAW INST. 2003); *see also* RESTATEMENT (SECOND) OF TRUSTS § 399 (AM. LAW INST. 1959).

328. *See* 4 RUBENSTEIN, *supra* note 212, § 11:20 (noting that the “disposition of funds that have not been individually distributed, by distributing them for the next best use which is for indirect class benefit, has been approved under the equitable power of courts in various cases under the analogous cy pres doctrine”); *In re Average Wholesale Price Litig.*, 588 F.3d at 33 (using cy pres doctrine to justify the use of a fluid recovery procedure).

329. *Hughes v. Kore of Ind. Enter., Inc.*, 731 F.3d 672, 675 (7th Cir. 2013).

330. Rhonda Wasserman, *Cy Pres in Class Action Settlements*, 88 S. CAL. L. REV. 97, 111–14 (2014).

331. I thank Martha Minow for clarifying my thoughts on this issue.

332. Wasserman, *supra* note 330, at 122–24.

333. *Id.* at 124–25 (2014) (discussing risk of “the appearance of [] impropriety”).

reputational benefits, that dull the deterrence provided by the litigation.³³⁴

Accordingly, the trust model suggests that, in considering cy pres awards, courts should choose a third party for distribution that inherently has no relationship with the parties. For example, the court could assign unclaimed funds to future plaintiffs in the form of price reductions, or to the state or United States Treasury through escheat procedures.³³⁵

CONCLUSION

Throughout this Article I have analogized the class action to the trust, using trust law as a guide in addressing a number of issues in the law of class actions. In the course of making the analogy, I identified a problem—the problem of scale—that justifies the use of the class action and the trust and explains why they are used despite the potential for agency costs. The scale benefits of the separation of ownership and control has been a central focus of the law of class actions,³³⁶ while trust scholarship has not given this benefit much consideration. This suggests that the class action can provide its own lessons for the trust.

334. *Id.* at 120–21; *see also* *Marek v. Lane*, ___ U.S. ___, 134 S. Ct. 8, 9 (2013) (noting in a statement respecting the denial of certiorari that “Facebook thus insulated itself from all class claims arising from the Beacon episode by paying plaintiffs’ counsel and the named plaintiffs some \$3 million and spending \$6.5 million to set up a foundation in which it would play a major role”).

335. 3 RUBENSTEIN, *supra* note 289, § 10:17, at 515–16; Wasserman, *supra* note 323, at 105–14 (discussing “alternatives” to cy pres distribution); *see also* 28 U.S.C. §§ 2041 et seq. (2012) (permitting escheat of funds to the U.S. Treasury).

336. ALI, *PRINCIPLES*, *supra* note 12, § 1.02 cmt. a (“The literature on aggregate proceedings is enormous. Much of it . . . focus[es] on matters like economies of scale and opportunistic behavior that are common to all [such proceedings].”).