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The Malleability of Collective Litigation

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THE MALLEABILITY OF COLLECTIVE LITIGATION

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In Wal-Mart v. Dukes,[1] *Wal-Mart avoided class action because employment decisions were made by local supervisors. However, it was Wal-Mart who chose to delegate discretion; by doing so, it made class litigation less likely. Wal-Mart's choice of business administration, then, substantially reduces its expected liability. This is but one example of a broader, overlooked phenomenon. Mass defendants can control, before the occurrence of damages, the scope of future collective litigation. Collective litigation procedures are malleable, sensitive to the defendant's pre-damages choice of actions. This Article develops and substantiates this insight.*

This Article elaborates on two manifestations of this phenomenon. First, defendants can avoid class actions by "individualizing" the prospective class, injecting individual differences that preclude class treatment. Second, defendants can selectively contract with future victims, buying out the stronger, leaving only weak victims with a claimable right, and reducing the prospective class's capacity to litigate. Against this backdrop, this Article proposes an array of mechanisms to strengthen collective litigation procedures, including shifting the burden to defendants to justify the business action that prevented collective litigation, and taxing defendants for making the plaintiffs' case weaker.

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1 131 S. Ct. 2541 (2011).

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INTRODUCTION

During the 2011 term the Supreme Court ruled on the largest civil rights class action suit in U.S. history.[2] In "one of the most expan-

2 *Id.*

sive class actions ever,"[3] hundreds of thousands of women claimed that Wal-Mart—the world's largest private employer[4]—discriminated against them on pay and promotions in "literally millions of employment decisions."[5] However, the main issue before the Justices was not substantive, but procedural. Courts do not automatically authorize class litigation; they first have to certify a lawsuit as a class action. The *Wal-Mart* certification debate centered on the following question: whether these scores of women "have enough in common to join together in a single lawsuit."[6] As Wal-Mart conferred pay and promotion discretion on its local managers, the plaintiffs' claims might be too individualized to be pursued collectively. While Wal-Mart argued that plaintiffs "do not have enough in common to warrant class-action treatment," the plaintiffs, naturally, stressed the centralized, companywide policy behind pay and promotion decisions.[7] These are the rules of the game.

This Article moves beyond the *Wal-Mart* case, which was decided against the plaintiffs,[8] to examine the rules of the game more closely. As *Wal-Mart* illustrates, the level of individual vis-à-vis common questions is a crucial factor in the decision to authorize class litigation. However, courts and scholars have overlooked that this essential factor—the commonality of the class—is often under the defendant's control. Defendants can, so to speak, "individualize" the prospective class. Wal-Mart *chose* to delegate discretion to local supervisors; by doing so, it made class litigation less likely. When class treatment is denied, plaintiffs have to pursue the far less effective individual litigation. Wal-Mart's choice of business administration, then, substantially reduces its expected liability regardless of its actual fault. This is but one example of a broader, and largely undiscussed, phenomenon. In

3 *Id.* at 2547.

4 *See* Dukes v. Wal-Mart Stores, Inc., 603 F.3d 571, 629 (9th Cir. 2010).

5 *Wal-Mart*, 131 S. Ct. at 2552.

6 Adam Liptak, *Class Action at Wal-Mart has Justices in Conflict*, N.Y. TIMES, March 30, 2011, at B1; *see also* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 795 (2010) (mem.) (granting petition for certiorari and adding the question "[w]hether the class certification ordered . . . was consistent with Rule 23(a)"); *Wal-Mart*, 131 S. Ct. at 2550 ("The crux of this case is commonality. . . .").

7 Liptak, *supra* note 6, at B1. More precisely, the plaintiffs emphasized that Wal-Mart's uniform policy facilitated discriminatory practices. "[Wal-Mart's] refusal to cabin its managers' authority amounts to disparate treatment. . . ." *Wal-Mart*, 131 S. Ct. at 2548.

8 The Court asserted that "[b]ecause [plaintiffs] provide no convincing proof of a companywide discriminatory . . . policy, we have concluded that they have not established the existence of any common question." *Wal-Mart*, 131 S. Ct. at 2556–57.

virtue of their position, mass defendants can control, before any damages occur, the scope of prospective collective litigation.

The legal definition and structure of collective litigation procedures, therefore, are not exogenous, given facts of life; rather, they are manipulable and sensitive to the defendant's pre-damages choice of actions. I refer to this phenomenon as the *ex ante* malleability of collective litigation. This Article develops and substantiates this insight, and discusses its legal implications. In doing so, it elaborates on two ways in which mass defendants can frustrate, in advance, collective litigation. The first, a direct extension of the *Wal-Mart* example, stems from doctrinal gaps that enable defendants to avoid class actions; the second results from the capacity of prospective defendants to selectively contract with future victims.

The perspective taken in this Article is in contrast with existing views, which tend to take certification standards and, more broadly, the very existence of collective litigation, as independent of the defendant's behavior. More generally, this Article attempts to shift attention to what defendants can do to avoid litigation *ex ante*, before the occurrence of damages. Marc Galanter famously pointed to mass defendants' capacity to "come out ahead," using their post-damages litigation advantages.[9] This Article discusses how mass defendants can come out ahead *ex ante* as well, even before the occurrence of damages. In fact, although the literature has focused on the post-damages setting, taking pre-damages prophylactic measures to reduce the odds of successful litigation may well be more effective, from defendants' perspective, than resisting collective litigation after damages occur.[10]

The notion that firms conduct their businesses with an eye toward collective litigation does not mean that the desire to block litigation is the only motivation for their behavior. Wal-Mart—although in general notorious for its centralized decision making[11]—may well

9 Marc Galanter, *Why the 'Haves' Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 125 (1974).

10 As one defense attorney, advocating such a prophylactic approach, puts it, "[o]nce out there, it is nearly impossible to put the 'genie back in the bottle . . . .'" ROB HERRINGTON, VERDICT FOR THE DEFENSE 237 (2011).

11 *See, e.g.*, Pallavi Gogoi, *How to Fix Wal-Mart? Ask Its Managers*, BUS. WK., Aug. 21, 2007, *available at* http://www.businessweek.com/bwdaily/dnflash/content/aug2007/db20070820_358861.htm. Gogoi writes:

> Point-of-sale data are analyzed and crunched at the Arkansas headquarters, spitting out results for what's selling and what's not, what to restock and what to pull from store shelves. Workers' schedules are determined at the home office . . . . There's even a central 800 number that workers at the 3,500-plus stores must call when they need time off.

Id.

have had independent commercial reasons, other than preventing class actions, to decentralize pay and promotion decisions. Nevertheless, collective litigation considerations presumably factor into mass defendants' calculus. There is no reason to think that, anticipating liability, defendants do not attempt to avoid costly collective litigation, at least to some extent. Defense lawyers, for example, advise their clients to change their course of action to reduce the risk of collective litigation.[12] Contractual waivers of class litigation, which are inserted to standard-form contracts to reduce liability, proliferate after the Court authorized such waivers.[13] And after *Wal-Mart* the incentives for firms to decentralize are likewise larger.[14]

This *ex ante* perspective to collective litigation procedures, the focus of this Article, entails various legal implications. The capacity of defendants to manipulate, in advance, collective litigation procedures is socially undesirable. Collective litigation procedures (or the threat thereof) are aimed at flattening the litigation inequalities between mass defendants and individual plaintiffs, promoting deterrence and fairness; in their absence defendants can often pay less than the harm they inflicted on the group of plaintiffs. Defendants who frustrate collective litigation procedures create, in essence, litigatory damages—the plaintiffs' case is worth less, and sometimes much less, than it should be. In order to rectify this externality, this Article offers a menu of responses, ranging from attention to concrete attempts to avoid collective litigation, to a greater inclination to overcome individual differences among the would-be plaintiffs.

This Article proceeds as follows. Part I presents the conventional view regarding the role of collective litigation. Where one defendant faces individual plaintiffs, the defendant has inherent litigation advantages—it enjoys better economies of scale and can settle selectively

12 For concrete examples see *infra* notes 74, 77, 88, 93, 95, 100, and 112. Compare this to the capacity of injurers to target risky activity toward weaker communities, which are less likely to oppose it, and whose damages are valued lower. Richard L. Abel, *A Critique of Torts,* 37 UCLA L. REV. 785, 809–10 (1990). *See generally* Nancy Brooks & Rajiv Sethi, *The Distribution of Pollution: Community Characteristics and Exposure to Air Toxic*, 32 J. ENV'T ECON. & MGMT. 233 (1997) (collecting empirical evidence on the distribution of pollutants across race, class, and other characteristics).

13 *See* AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740 (2011); *infra* note 95 and accompanying text. These waivers seem to be an extreme, and more commonly discussed, example of pre-damages attempts to reduce liability; accordingly, they have also been harshly criticized. *See infra* note 96 and accompanying text.

14 *Cf.* Steven Greenhouse, *After the Wal-Mart Decision: Heavy Blow for Big Cases and Lawyers who Bring Them*, N.Y. TIMES, June 21, 2011, at B1 (noting that, after *Wal-Mart*, defendants should claim that they "delegate a lot of discretion to [their] branches" (quoting Professor Heidi Li Feldman)).

with plaintiffs. These litigation advantages mean that the defendant pays less than the harm it inflicted on the plaintiffs. Collective litigation is a procedural tool that largely overcomes these difficulties. This is the common perception, viewing collective procedures as a vehicle to effectively vindicate rights that are otherwise not worth pursuing.

Against this backdrop, this Article further shows that in many situations the defendant is in the position to control, before the occurrence of damages, the creation of successful collective litigation—i.e., the very procedures that are aimed at preventing the defendant from exploiting its litigation advantages. Part II discusses doctrine-based malleability—how defendants can manipulate the commonality requirements to avoid class certification. Courts—*Wal-Mart* is but one example—are hesitant to authorize class litigation where it raises too many individual questions. Defendants, however, can individualize the class, injecting factual differences among the prospective plaintiffs to avoid future certification. Decentralizing discretion is one way to do so. Other examples include inducing modifications in written contracts, creating artificial choice-of-law differences among future plaintiffs, and orally communicating with the would-be plaintiffs. The literature has given scant attention to the capacity of defendants to shield themselves from class litigation by manipulating certification standards.

The discussion on the malleability of the commonality requirements leads to a deeper form of malleability. Part III shows how, regardless of the law of class actions, mass tort defendants can affect the structure and formation of collective litigation. Briefly, mass defendants can identify and cherry-pick strong victims, who are going to be the moving force behind future litigation. Once the defendant locates the strong would-be plaintiffs, it is better off settling with them, as these settlements make the remaining collective of plaintiffs weaker—a "divide-and-conquer" strategy. While the literature has given attention to this problem in the context of selective settlements, it has overlooked that the defendant can take a similar approach before the occurrence of damages. Conceptually, there is no difference between settling with trailblazing plaintiffs and buying out strong would-be plaintiffs. Both adversely affect the remaining victims and reduce the defendant's overall liability. One example of pre-damages selective contracts is buying out the residents in the vicinity of a nuisance, as these neighbors are those who would have the greatest incentives to vigorously litigate against the defendant. Excluding them leaves the remaining victims worse off and reduces the defendant's overall liability. In a similar way, the defendant can detect strong would-be plaintiffs through standard-form contracts, encourag-

ing them to sign liability waivers. This Article, then, makes a novel link between liability waivers and collective litigation.

The normative implications follow. If defendants can avoid liability through pre-damages manipulations, one should look for ways to rectify this externality and improve existing collectivization procedures. A general, comprehensive solution is taxing defendants for the harm they created, i.e., for making the plaintiffs' case weaker. As this solution seems unlikely in practice, Part IV further delineates other directions. One set of responses is judicial case-by-case attention to *ex ante* malleability. In the context of class certification, courts can be more liberal toward certification where defendants attempted to circumvent certification standards. Courts can do so, for example, by shifting the burden to the defendant to justify its "individualizing" course of action. In the context of selective buy-outs, judges can be more suspicious toward liability waivers. When this perspective is taken, the results are contradictory to the existing law of disclaimers. While currently judges are more inclined to honor liability waivers between the defendant and sophisticated and informed consumers, the *ex ante* malleability approach is more suspicious exactly toward such agreements, as they are the most likely to harm remaining victims. A second set of responses involves broader, class-wide solutions. In the context of doctrine-based malleability, one direction may be a shift to class-wide determinations of liability, which obviate defendants' desire to bypass certification by individualizing the class. In the context of *ex ante* buy-outs, possible class-wide reactions might be prohibiting selective waivers, or assigning collective rights to a third party.

I. The Conventional Story and the Role of Collective Litigation

Where one defendant harms multiple plaintiffs, the defendant enjoys inherent litigation advantages over individual plaintiffs. This means that the value of the plaintiffs' claims is lower than it should be—victims are not fully compensated for their harms, and the defendant is not obliged to pay the full costs for its wrongdoing. Litigation inequalities between plaintiffs and defendants are, therefore, a social problem. Procedures of aggregate litigation are considered to be a tool to overcome these disparities. This Part presents this conventional story. It surveys the inherent adjudicative advantages mass defendants have, and how procedures of collective litigation can overcome these inequalities.

A. Mass Defendants' Inherent Litigation Advantages

This section discusses the litigation advantages defendants have when they face multiple plaintiffs, litigating them individually. The first is unequal economies of scale; the second is the ability to selectively settle with plaintiffs.

1. Unequal Economies of Scale

One fundamental advantage defendants have stems from the fact that compared to each individual plaintiff, mass injurers have more to gain (and lose) from litigating each case. The reason is that many questions that have to be litigated in different cases are correlated; hence, much of the work the defendant invests in litigating one case is valuable for other cases. Examples include investment in legal research, scientific survey, and expert witnesses. The defendant enjoys "economies of scale by investing once-and-for-all in the common questions and spreading the cost of that investment across all claims."[15] As the defendant has more at stake, it systematically invests more in litigating each case.[16] Hence, there is "a much greater chance that the defendant . . . will prevail on the common questions."[17] It is true that under certain circumstances defendants may prefer collectivization to litigating separately, in order to achieve "global peace."[18] This may happen where individual plaintiffs can extract more than the value of their claims.[19] However, normally the problem of unequal economies of scale creates a fundamental bias in

15 David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. ON LEGIS. 393, 397 (2000). An embedded assumption is that investment in litigation typically has diminishing marginal returns—the more one invests in litigation the greater the odds of winning, but the efficacy of this investment becomes lower. *Id.* at 398.

16 *Id.* at 398.

17 *Id.* at 401.

18 For an illustration of this tension see Jonathan D. Rockoff, *Merck Selects Lawyer as Its New CEO*, WALL ST. J., Dec. 1, 2010, at B3: "[Merck's new CEO is] the lawyer who masterminded the . . . company's strategy of defending the . . . drug Vioxx by fighting every case separately instead of as a joint action. Controversial at the time, that strategy is now seen as having minimized Merck's losses."

19 *Cf.* Lucian A. Bebchuk & Alon Klement, *Negative Expected-Value Suits* *2 (John M. Olin Center for Law, Economics, and Business, Discussion Paper No. 656, Dec. 2009), *available at* http://www.law.harvard.edu/programs/olin_center/papers/pdf/Bebchuk_656.pdf (explaining how plaintiffs in negative-expected-value suits can extract a positive settlement); *infra* notes 40–42 and accompanying text.

favor of mass injurers who litigate individually.[20] Indeed, mass defendants usually struggle to avoid class litigation.

The problem of uneven incentives to litigate is more severe under certain circumstances. These situations include mass injuries in which the correlation across cases is higher (more of the legal work is common), and where the class is more fragmented (individuals have smaller cases compared to the defendant). In fact, in some cases the result of this bias might be zero liability: individual harm that falls short of a certain threshold, possibly in the range of thousands of dollars, might well be too low to pursue individually.[21] In other cases, where individual claims are sufficiently large to pursue individually, unequal economies of scale reduce the ultimate value of the plaintiffs' claims, making the defendant's liability lower.

2. Selective Settlements—"Cherry-Picking" Plaintiffs

Another way in which mass defendants can avail themselves of their position is by striking selective, strategic settlements. Plaintiffs vary: some have better evidence, others suffer higher damages. Those with the better evidence and higher damages are more likely to initiate a lawsuit. Upon litigating, these "strong types"—whose cases have a higher monetary value—are likely to invest more effort in pursuing their claims. Plaintiffs with weak evidence and low damages, "weak types," are less likely to sue; and if they do, they are likely to put less effort into litigation. Defendants can use this variance to settle selectively—to use "divide-and-conquer" strategies.[22] In particular, defendants should find it worthwhile to settle first with the strongest plaintiffs, i.e., those with the greatest incentives to litigate.

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20 For a more comprehensive account of the divergent economies of scale in the individual versus mass injurer setting see Yeon-Koo Che & Kathryn E. Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer*, 164 J. INST. & THEORETICAL ECON. 4 (2008); David Rosenberg & Kathryn E. Spier, *On Structural Bias in the Litigation of Common Question Claims* *4–6, (Harvard Public Law Working Paper No. 11-28, October 14, 2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1950196.

21 A plausible hourly billing rate of a law firm is around $250. *See* Kathryn E. Spier, *Litigation*, *in* 1 HANDBOOK OF LAW AND ECONOMICS 259, 263–64 (A. Mitchell Polinsky & Steven Shavell eds., 2007). Assume, for illustration, that a claim requires at least twenty billing hours (*i.e.*, $5,000 investment), and that the expected probability to win given this investment is 33.3%. Under these assumptions, only damages beyond $15,000 are worth litigating.

22 *Cf.* NICCOLO MACHIAVELLI, THE ART OF WAR 180 (Book VI, 187) (Christopher Lynch ed. and trans., 2003) ("A captain ought with every art to contrive to divide the forces of his enemy . . . and, through this, [make him] weaker."); Che & Spier, *supra* note 20, at 19.

Because individual cases are correlated, each plaintiff that litigates individually affects the remaining ones.[23] Strong plaintiffs who litigate individually confer a benefit on subsequent plaintiffs; the stronger the plaintiff, the greater the value to the group. This benefit can be, for example, a favorable holding for the first plaintiff which has a precedential value for fellow plaintiffs.[24] In other examples the value the first plaintiffs create is their attorneys' work-product, which can be used by later plaintiffs.[25] In yet other cases, it is the mere presence of early claimants that enables others to "name and blame" the defendant.[26]

Be it through precedential value, legal work-product, or mere information regarding the tortfeasor's identity, plaintiffs affect each other. Settlements, compared to trials, reduce the value that litigants add to the remaining plaintiffs. Hence, the defendant is better off settling first with the strongest; these plaintiffs, in case trial occurs, are likely to confer on other plaintiffs the largest benefits. On the other hand, when weak, losing plaintiffs produce negative common value, the defendant might be better off taking them to trial.[27] In short, as

23 *See* Deborah R. Hensler & Mark A. Peterson, *Understanding Mass Personal Injury Litigation: A Socio-Legal Analysis*, 59 BROOK. L. REV. 961, 967 (1993) ("[T]he prospective value of many claims will rise or fall sharply with a large plaintiff award, a defense verdict or even a signal discovery event or evidentiary decision in a single case that is part of the mass of pending claims.").

24 I use the term precedential value loosely to refer to any legal inference from one case to following cases, typically, issue-preclusion arguments that subsequent plaintiffs can assert against a defendant that lost a previous case. For this nonmutual offensive issue preclusion see, e.g., Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 175–77 (2003).

25 *See* David Rosenberg, *The Regulatory Advantage of Mass Torts Class Action*, *in* REGULATION THROUGH LITIGATION 244, 286–87, 95 (W. Kip Viscusi ed., 2002) ("Much of a lawyer's work product in litigation falls into the public domain and creates the incentive for other attorneys holding similar claims to free ride.").

26 *Cf.* Andrew F. Daughety & Jennifer F. Reinganum, *Hush Money*, 30 RAND J. ECON. 661, 664 (1999) (noting that some victims "attribute any illnesses they suffer to other causes," but other victims do "attribute at least some culpability to [the defendant]," and that a lawsuit filed by the latter increases the odds that the former would sue). *See generally* William L. F. Felstiner, et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming. . . .*, 15 LAW & SOC'Y REV. 631 (1981) (studying, sociologically, the transformation of grievances, from injuries to legal disputes).

27 *See* Yeon-Koo Che & Jong Goo Yi, *The Role of Precedents in Repeated Litigation*, 9 J.L. ECON. & ORG. 399, 401 (1993) (concluding that, in the context of varying precedential value, the defendant will attempt to settle with strong plaintiffs, and be more aggressive toward weak plaintiffs, taking them to trial more often).

Karl Llewellyn observed, defendants' lawyers use the "strategy of presenting cases in favorable series, settling the unfavorable cases."[28]

Settling first with strong plaintiffs puts the remainder in a worse position. In some cases, the elimination of one strong plaintiff can make litigation infeasible for the remaining, weak plaintiffs.[29] In other cases, litigation is still worth pursuing. However, the absence of the strongest makes the claims of the remaining plaintiffs less worthy, as now it is harder for them to achieve successful legal results. Hence, excluding the stronger from the pool of plaintiffs reduces the expected compensation that the remaining plaintiffs can get, and, as before, makes the defendant's liability smaller. The more important the strong plaintiffs are to the remaining ones, the defendant will find this divide-and-conquer strategy more useful.[30]

In addition to lower liability, another outcome of strategic settlements is transfer of wealth from weak to strong litigants.[31] Typically, strong plaintiffs can extract some of the gain the defendant makes from settling with them first.[32] In a sense, the defendant

28 Karl Llewellyn, *Some Realism About Realism—Responding to Dean Pound*, 44 HARV. L. REV. 1222, 1246 (1931).

29 For a concrete example, see *infra* notes 114–119 and accompanying text. As noted above, *supra* note 21, damages below a certain threshold are not worth litigating. Collective litigation tends to be complex; hence, even where the remaining plaintiffs can join forces, collective damages below several million dollars may be too low to pursue. As a suggested rule of thumb, "anything less than $5 million simply isn't worth the time and effort in filing a class action." HERRINGTON, *supra* note 10, at 176.

30 Strong plaintiffs are essential to the remaining ones when, for example, successful litigation requires large investment, the claims of the weak plaintiffs are particularly low in value, or the remaining group is not allowed to sue collectively.

31 Another possible outcome might be more settlements, due to the defendant's inclination to avoid early trials. *Cf.* Andrew F. Daughety & Jennifer F. Reinganum, *Informational Externalities in Settlements Bargaining: Confidentiality and Correlated Culpability*, 33 RAND J. ECON. 587, 588 (2002); Daughety & Reinganum, *supra* note 26. *But see* Che & Yi, *supra* note 27, at 401 (predicting, under certain circumstances, more trials).

32 To be clear, "strong" and "weak" refer to plaintiffs' capacity to litigate. They may, but not necessarily, correlate with socio-economic status. *Cf.* Janusz A. Ordover, *Products Liability in Markets with Heterogeneous Consumers,* 8 J. LEGAL STUD. 505, 517 (1979) (suggesting that low-income consumers suffer larger damages as the "propensity to suffer damages correlates negatively with income."); John Campbell et al., *The Regulation of Consumer Financial Products: An Introductory Essay with Four Case Studies* *11, (Harvard Kennedy School Working Paper, No. RWP10-40, September 1, 2010), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1649647 (discussing the correlations between socio-economic status and the tendency to pay overly high prices for financial products).

and the strong plaintiffs are better off at the expense of weaker claimants.[33]

Strategic settlements are an actual problem. Defendants do seek to settle as a means to resist potential mass torts and products liability suits.[34] Confidential settlements with first plaintiffs are a particularly effective tool to avoid the spillover of valuable information to subsequent litigants and reduce the odds of future successful lawsuits.[35]

33 Under a simplifying assumption of symmetric information, and in case of equal bargaining power, the defendant shares the gain with the strong plaintiff such that they are both equally better off. To the extent the defendant holds complete bargaining power it extracts all the gain. Divide-and-conquer strategies of this kind are not effective where the plaintiffs have 100% bargaining power, *i.e.*, the defendant is completely indifferent between settling and litigating. These basic results can be modified where the symmetric information assumption is dropped. Daughety and Reinganum provide a detailed and comprehensive account of information externalities between litigants, and their results are illustrative of this discussion. They investigate settings in which a single defendant settles sequentially with two plaintiffs, the defendant has private information the plaintiffs do not, and plaintiffs have 100% bargaining power. The first plaintiff is "stronger" in the sense of knowing who the defendant is; the second is "weaker," because he is uncertain as to whom to sue. By litigating, the first plaintiff reveals the defendant, and hence she confers a benefit on the second plaintiff. In a nutshell, Daughety and Reinganum find that the defendant would like to prevent dissemination of information from early, strong to later, weak plaintiffs. As the defendant desires to settle with the first litigants, both the defendant and early plaintiffs are better off at the expense of remaining plaintiffs. Daughety & Reinganum, *supra* note 31, at 596–601. However, the results are more ambiguous where the defendant's culpability is not correlated across plaintiffs. In that case, first plaintiffs can sometimes extract a high premium from the defendant, offsetting the defendant's gain from later plaintiffs. Daughety & Reinganum, *supra* note 26, at 674–71. As I discuss situations in which the defendant's culpability is typically correlated (or even similar) across plaintiffs, the general conclusion in the text holds: The defendant is better off settling strong cases.

34 *See* Jessup v. Luther, 277 F.3d 926, 928 (7th Cir. 2002). "Parties who settle a legal dispute . . . often do so . . . because they do not want the terms of the resolution to be made public. Defendants in particular are reluctant to disclose the terms of settlement lest those terms encourage others to sue." *Id.* Likewise, as arbitration is less transparent, it is often preferable to mass defendants. Judith Resnik, Comment, *Fairness in the Numbers: A Comment on* AT&T v. Concepcion, Wal-Mart v. Dukes, *and* Turner v. Rogers, 125 HARV. L. REV. 78, 108, 111, 123–24, 132 (2011).

35 *See, e.g.*, JAY TIDMARSH, MASS TORT SETTLEMENT CLASS ACTIONS 33–45 (1998) (discussing how Pfizer confidentially settled high-value claims and apparently reduced its liability for defective heart valves); Daughety & Reinganum, *supra* note 31, at 587–89; Scott A. Moss, *Illuminating Secrecy: A New Economic Analysis of Confidential Settlements*, 105 MICH. L. REV. 867, 869 (2007) (analyzing, among other things, the benefits defendants gain from confidential settlements, and noting that "[c]ourts regularly allow confidentiality provisions."); Robert C. Nissen, Note, *Open Court Records in Products Liability Litigation Under Texas Rule 76a*, 72 TEX. L. REV. 931, 932–33 (1994) ("In modern products liability cases, many defense attorneys routinely seek protective

Likewise, when litigation is underway, defendants can attempt to distinguish between strong and weak cases, preferring to settle the former and litigate the latter.[36] Similarly, strategic settlements can be used to push toward a favorable precedent, hence making repeat players "come out ahead."[37]

B. Defendants' Litigation Advantages as a Social Problem

Mass defendants, then, can use their better position vis-à-vis individual plaintiffs. They do so through unequal economies of scale and selective settlements. These litigation advantages reduce defendants' expected liability. The normative implications are clear. First, victims are not fully compensated for their damages. This, however, might not be a substantial problem to worry about. Many perceive compensating victims as a secondary goal of litigation.[38] Individual harms may be low in value, and, even where they are not, plaintiffs can often insure themselves against the vicissitudes of life. However, litigation does more than fulfill individual goals—it serves a social benefit by making the wrongdoers fully pay for the harm they inflicted.[39] Hence, regardless of inadequate compensation, flawed litigation is a social problem: defendants are not optimally deterred from taking a harmful course of action.

While there might be an over-deterrence argument—i.e., litigation makes defendants pay more than they should and hence ineffective litigation is a blessing—this claim does not seem to be true across

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orders to create a 'wall of silence.' . . . This has led to an explosion of sealed court records cases." (footnote omitted)).

36 *See* David Rosenberg, Comment, *Of End Games and Openings in Mass Torts Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 711 (1989) ("[D]efendants may attempt to expedite weaker claims and delay the stronger ones . . . to construct a string of . . . favorable verdicts.").

37 *See, e.g.*, Galanter, *supra* note 9, at 101 ("[Repeat players would] 'settle' cases where they expected unfavorable rule outcomes. Since they expect to litigate again, [they] can select to adjudicate . . . cases which they regard as most likely to produce favorable rules."). For some general empirical evidence of this practice see Catherine Albiston, *The Rule of Law and the Litigation Process: The Paradox of Losing by Winning*, 33 LAW & SOC'Y REV. 869, 887–906 (1999) (focusing her analysis on the Family and Medical Leave Act); Frank B. Cross, *Decisionmaking in the U.S. Circuit Courts of Appeals*, 91 CALIF. L. REV. 1457, 1490–97 (2003) (examining the main theoretical models of decision-making in the U.S. Circuit Courts of Appeals).

38 *See, e.g.*, Myriam Gilles & Gary B. Friedman, *Exploding the Class Action Agency Costs Myth: The Social Utility of Entrepreneurial Lawyers*, 155 U. PA. L. REV. 103, 131–39 (2006); David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Action for Future Loss*, 88 VA. L. REV. 1871, 1874 (2002).

39 *See* William B. Rubenstein, *On What A "Private Attorney General" Is—And Why It Matters*, 57 VAND. L. REV. 2129, 2140–42 (2004).

the board. Whether collective litigation creates over-deterrence is eventually an empirical question, which is presumably context-specific. To the extent the over-deterrence problem exists, its scope has contracted since the recent decisions heightening pleading standards.[40] Furthermore, where abusive litigation is a problem, courts should directly address it,[41] for example, by a more aggressive use of sanctions on frivolous suits.[42]

In principle, then, litigation inequalities are a social problem. One should look for ways to restore equality between defendants and plaintiffs. Misalignment between the legal standard and the defendant's actual liability "should ring a warning bell that the law is probably inefficient and should be modified."[43] This is all the more correct when litigation is the only effective means of deterring wrongdoing.[44]

C. The Solution: Collective Litigation

Collective litigation—in the form of class action, multidistrict litigation (consolidating pretrial proceedings and discovery), or informal aggregation by plaintiffs' lawyers—overcomes most of these pitfalls.[45]

In the context of unequal economies of scale, collectivization raises the stakes for the plaintiffs' side, making it as eager to collectively invest in the case as the defendant. Put differently, collectivization levels the litigation playing field. Class actions are a particularly

40 *See* Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) ("To survive a motion to dismiss . . . the pleaded factual content [should] allow[ ] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged."); Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007) (to survive dismissal a plaintiff must state "enough facts to state a claim to relief that is plausible on its face").

41 *Cf.* Bruce Hay & David Rosenberg, *"Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy*, 75 NOTRE DAME L. REV. 1377, 1379 (2000) ("[T]he risks of . . . blackmail settlements have been overstated, in that these problems can effectively be handled by courts through appropriate . . . safeguards, without resorting to the drastic remedy of eliminating or reducing the use of the damage class action. We can shed the risks of abusive class settlements without scuttling class actions and their considerable advantages.").

42 Technically, Rule 11(c) of the Federal Rules of Civil Procedure enables courts to levy sanctions on litigants and attorneys. FED. R. CIV. P. 11(c).

43 Ariel Porat, *Misalignments in Tort Law*, 121 YALE L.J. 82, 85 (2011).

44 For a brief discussion on the broader alternatives to litigation, namely, regulation and the market, see *infra* notes 202–210.

45 As Howard Erichson convincingly argues, "leveling the field in light of the asymmetric stakes" need not necessarily take the form of formal, compelled class actions. Sergio J. Campos & Howard M. Erichson, Debate, *The Future of Mass Torts*, 159 U. PA. L. REV. 231, 237 (2011), *available at* http://www.pennumbra.com/debates/pdfs/MassTorts.pdf.

effective collectivization tool.[46] "By aggregating hundreds, thousands, or even millions of claims, the class action can make small claims viable and empower claimants . . . ."[47]

In the context of selective settlements, collective litigation makes it harder, and less valuable, for defendants to cherry-pick strong plaintiffs to settle. Class actions can empower plaintiffs and hence remedy the problem of biased precedents, mitigating the "haves come out ahead" concerns.[48] Formal collectivization mechanisms can solve the difficulties that are created when strong plaintiffs individually contract with the defendant.[49] Likewise, plaintiffs' attorneys can informally aggregate and share information,[50] thereby mitigating attempts to pick strong plaintiffs and/or conceal settlements.

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46 Class actions are a more comprehensive collectivization mechanism than competing, more voluntary options. *See* David Rosenberg, Response, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 857–66 (2002) (arguing that voluntary aggregation results in greater transaction costs and free-riding among plaintiffs and their lawyers); *see also* HERRINGTON, *supra* note 10, at 34 ("[M]ass actions often are more difficult and more expensive to manage than class actions."); Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1079–81 (2012) (explaining why informal aggregation is inferior); Resnik, *supra* note 34, at 145 ("While multiple forms of aggregation exist, class actions have proved specially attractive vehicles for bringing cases to courts."); Genevieve G. York-Erwin, Note, *The Choice-of-Law Problem(s) in the Class Action Context*, 84 N.Y.U. L. REV. 1793, 1805–10 (2009) (discussing how in the absence of class certification, even where alternative collectivization means such as multidistrict litigation are available, plaintiffs receive lower compensation).

47 Charles Silver, *"We're Scared To Death": Class Certification and Blackmail*, 78 N.Y.U. L. REV. 1357, 1429 (2003); *see also* Amchem Prods. Inc. v. Windsor, 521 U.S. 591, 617 (1997) ("A class action solves [the problem that small recoveries do not provide incentives for individuals to bring actions] by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor." (quoting Mace v. Van Ru Credit Corp., 109 F.3d 338, 344 (7th Cir. 1997))).

48 Galanter, *supra* note 9, at 95, 150.

49 *See* Rosenberg, *supra* note 46, at 831–40 (suggesting mandatory collective litigation as a means, among other things, to avoid the problems created by opt-outs); *see also* John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. CHI. L. REV. 877, 918–30 (1987) (proposing mechanisms to avoid inefficient opt-outs); Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 NOTRE DAME L. REV. 1057, 1057–62 (2002) (delineating the boundaries of the right to opt out).

50 *See* Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 957 (2010) (explaining how information as to secret settlements percolates throughout the legal community); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–87 (2000) (noting that plaintiffs' lawyers informally coordinate and share information).

Collective litigation procedures in general, and class actions in particular, then, serve a social goal as they enable plaintiffs to vindicate their rights; in their absence, plaintiffs would recover much less, if anything. Consistent with this logic, a denial of class certification is often described as "the 'death knell' of the litigation."[51] Likewise, it is not surprising that defendants, by and large, fiercely resist the use of collective litigation,[52] even at the legislative level.[53]

Indeed, collective litigation mechanisms are widely considered to be a procedural vehicle to overcome the problems created by the litigation advantages that mass defendants enjoy. "Class actions are a conventional device for flattening [the adjudicative] inequities [between defendants and plaintiffs]."[54] Likewise, the American Law Institute asserts that "[a]ggregation is a means by which courts may promote justice under law more fully."[55] This conventional view implies that collective litigation mechanisms—enabling victims to overcome the advantages defendants have and vindicate their rights—

51 Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals Under Rule 23(f)*, 41 WM. & MARY L. REV 1531, 1553 (2000).

52 Under certain circumstances, collectivization may be better for defendants. *Cf. supra* notes 18, 40–42 and accompanying text.

53 *See, e.g.*, Richard A. Nagareda, *Bootstrapping in Choice of Law After the Class Action Fairness Act*, 74 UMKC L. REV. 661, 661 (2006) ("[D]efense-side interests [managed] to secure the enactment of the Class Action Fairness Act . . . ."); David Rosenberg, *The Dusting of America: A Story of Asbestos—Carnage, Cover-Up, and Litigation*, 99 HARV. L. REV. 1693, 1706 (1986) (suggesting that those interested in reforming the tort system represent broader interests); Silver, *supra* note 47, at 1429 ("One must therefore expect repeat class action defendants . . . to oppose the use of litigation classes and to enlist the help of tort reform groups and politicians when seeking to defeat them . . . ."); York-Erwin, *supra* note 46, at 1804 n.53 (referring to several commentators who "assert that [the Class Action Fairness Act of 2005]'s corporate backers hoped for exactly this result: Federal judges would . . . deny certification more often").

54 William B. Rubenstein, *A Transactional Model of Adjudication*, 89 GEO. L.J. 371, 433 (2001); *see also* Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924, 1927 (2006) ("[O]ne of the avowed purposes of [1966 amendments to the Federal Rules of Civil Procedure] was to enable the vindication through group litigation of claims under the substantive law that could or would not be brought on an individual basis."); Resnik, *supra* note 34, at 135 ("[F]or decades, the public and private sectors have endorsed forms of aggregation to address the fairness problems of intra-litigant equality, the disparate resources of opponents, and the equipage that a group can provide."). Of course, collective litigation has other goals, such as enhancing administrative efficiency. *See, e.g.*, Rubenstein, *supra*, at 434–35.

55 AM. LAW. INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 1.03 cmt. a. (2010).

are independent of the parties' behavior. Indeed, these procedures are often depicted as nothing more than tools that are plugged onto "class members' preexisting bundle of rights."[56] They are a vehicle, a form of delegation of legislative power, and thus are bound by substantive rights.[57]

This view, however, overlooks the fact that these collective litigation procedures—which are supposed to suppress litigation disparities—are plagued by inequalities that are similar to the ones they are aimed at eliminating. This Article demonstrates that defendants are often in the position to regulate, before the occurrence of damages, the scope of the procedural vehicle itself. The defendant, in essence, sets the scene: the odds and form of successful aggregation are typically under its domain. The procedural tool, then, is not independent of the parties' choice of action. This simple observation—that the current design of collective litigation is malleable, vulnerable to myriad forms of *ex ante* manipulations—has not been made in the literature. It is the subject of the following Parts. Part II discusses how defendants can affect, *ex ante*, the odds of certifying class litigation. I refer to this phenomenon as doctrine-based malleability. Part III shows how defendants can use the variance among future plaintiffs to frustrate, before the occurrence of damages, the formation of successful collective litigation.

II. Doctrine-Based Malleability—"Individualizing" the Class

A. The Crucial Class Certification Standards

1. Overview

As mentioned above, class actions are considered an effective tool to vindicate victims' rights. While class litigation overcomes the problems that are associated with the inherent litigation advantages mass defendants have, it has its own flaws. Most notably, class action is a formal collectivization mechanism that binds absent plaintiffs to an outcome of a legal process in which they did not participate. This is a salient exception to a "principle of general application in Anglo-

56 Nagareda, *supra* note 24, at 174.

57 *Id.* at 191–98. Class litigation "has no roving authority to alter unilaterally class members' preexisting bundle of rights . . . ." *Id.* at 181. This view relies, in part, on the Rules Enabling Act, which delegates the power to promulgate procedural rules to the Supreme Court, but only to the extent such rules do not "abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072(a)–(b); *see also* Am. Law Inst., *supra* note 55, § 1.03 cmt. a. ("[C]ourts are not . . . empowered to select substantive policies . . . [but they] are empowered to create and revise adjudicatory procedures [to further legislative policies] . . . .").

American jurisprudence."[58] Class actions, in short, harm the plaintiffs' due process rights. In order to respect victims' individual rights, legal systems define a minimum threshold to initiate class action. These are the certification requirements—the gatekeeper to the world of class litigation. Certification, then, embodies the balance between the need to achieve the advantages of collective litigation and the desire to respect individual rights.

Rule 23 of the Federal Rules of Civil Procedure delineates this balance. Among the basic prerequisites to certification, courts have to ensure that the class of victims is too large to voluntarily join into a collective;[59] that "there are questions of law or fact common to the class;"[60] and that the class is adequately represented.[61] These and additional requirements that Rule 23 sets are crucial. The stakes are high. In the absence of class certification, individual litigation is often impractical; and, as a matter of fact, once a class is certified the parties are likely to settle for sizeable amounts. No wonder, then, that Rule 23's standards are debated: defendants typically argue that plaintiffs fail to meet these requirements, and plaintiffs argue that certification is appropriate.

While Rule 23's requirements are a sensible apparatus to determine the borderline between class and individual litigation, these requirements are vulnerable to manipulation by the defendant. The task of this section is to substantiate this argument, focusing on the requirement that the questions raised by the plaintiffs are not too individual.

2. Individual versus Common Questions

Many of the inquiries that judges ought to take before certification center on whether there are "too many" individual questions. The aggregation of the plaintiffs' cases can raise common questions, which are similarly solved for all the members of the class (e.g., whether the harmful product was negligently designed); it can also raise individual questions that are resolved differently for each mem-

58 Hansberry v. Lee, 311 U.S. 32, 40 (1940) ("It is a 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.").

59 FED. R. CIV. P. 23(a)(1).

60 FED. R. CIV. P. 23(a)(2).

61 FED. R. CIV. P. 23(a)(4).

ber of the class (e.g., whether, and to what extent, each plaintiff negligently contributed to the damages).[62]

Courts, in principle, disfavor certifying a class in which there are too few common questions relative to individual ones—i.e., the class is not sufficiently "cohesive." The tension between individual and common questions appears in several contexts. First, Rule 23(a) demands, as a basic prerequisite to certification, that "there are questions of law or fact common to the class" and that the representative's claims are typical of the common ones.[63] Second, the most prevalent clash between individual and common inquiries is the predominance requirement. In order to certify a Rule 23(b)(3) class action, the court should find "that the questions of law or fact common to class members predominate over any questions affecting only individual members."[64] Finally, even where common questions predominate over individual ones, courts deny certification of class actions that are not "manageable" due to a high proportion of individual questions.[65]

The crucial role that individual differences play in class certification makes some sense. The more individual questions there are, the greater the effort the court will have to invest in adjudicating the class; and vice versa: more common questions mean a more easily resolved class action.[66] Similarly, more individual questions indicate that the court should be more cautious toward plaintiffs' procedural rights. "The presence of important noncommon issues . . . raises doubts about the administrative efficiency of combining claims into a class

62 As the Supreme Court has recently clarified: "[Common questions] must be . . . capable of class-wide resolution—which means that [their] determination . . . will resolve an issue that is central to the validity of each one of the claims in one stroke." Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2551 (2011).

63 See the commonality and typicality prerequisites, FED. R. CIV. P. 23(a)(2), (a)(3), respectively. These requirements overlap, to some extent. *See* Gen. Tel. Co. of Sw. v. Falcon, 457 U.S. 147, 157 n.13 (1982); 1 ALBA CONTE & HERBERT NEWBERG, NEWBERG ON CLASS ACTIONS § 3:13, at 317–24 (4th ed. 2002).

64 FED. R. CIV. P. 23(b)(3). For the partial similarity between the predominance requirement and Rule 23(a) prerequisites see RICHARD A. NAGAREDA, THE LAW OF CLASS ACTIONS AND OTHER AGGREGATE LITIGATION 74–75 (2009).

65 *See* FED. R. CIV. P. 23(b)(3)(D); NAGAREDA, *supra* note 64, at 155–56; *cf.* Klay v. Humana, Inc., 382 F.3d 1241, 1269 (11th Cir. 2004) ("[T]he more common issues predominate over individual issues, the more desirable a class action lawsuit will be as a vehicle for adjudicating the plaintiffs' claims.").

66 *See, e.g.*, Hanlon v. Chrysler Corp., 150 F.3d 1011, 1022 (9th Cir. 1998) ('"When common questions present a significant aspect of the case and they can be resolved for all members of the class in a single adjudication, there is clear justification for handling the dispute on a representative rather than on an individual basis.'" (quoting CHARLES ALAN WRIGHT, ARTHER R. MILLER, & MARY ANN KANE, 7A FEDERAL PRACTICE & PROCEDURE § 1778 (2d ed. 1986))).

action and about the infringement of plaintiffs' individual autonomy and due process rights."[67] In addition, for the reasons discussed above, more common questions aggravate the litigation advantages that mass defendants have. More common questions indicate a higher correlation across cases; collectivization is presumably more necessary the more correlated the cases.[68] On the other hand, one can question all these arguments. The existence of relatively more individual questions does not make collectivization futile. More commonality among claims makes class litigation more efficient, but collectivization of cases with at least some common questions is presumably more efficient than the baseline of litigating each case individually.[69] Likewise, as long as there are some common questions, mass defendants can have a substantial litigation advantage. The relevant question for policy makers to ask is the extent to which defendants are likely to be in a better position when litigating individually. While the degree of common questions is one factor that affects the importance of class litigation in equalizing the litigation playing field, it is by no means the only one. Collectivization is particularly important, for example, where the alternative is likely to be no litigation and zero deterrence (and compensation), as is common in low-value claims, regardless of the common/individual questions ratio. A greater portion of individual questions in the mix of common issues, then, does not eliminate the necessity of collectivization.

Certification standards reflect a balance between conflicting interests. The predominance requirement and the way courts have interpreted Rule 23 embody an essential aspect of this balance—class actions should not consist of "too many" individual questions vis-à-vis common questions. While there are pro and con arguments, this is a defensible position. However, under the conventional view this balance assumes for each class litigation a given, exogenous mixture of individual and common questions.[70] It is here that the predominance requirement becomes more tenuous. As I will describe below, the individual/common questions ratio is not predetermined; rather, in many cases it is the defendant's *ex ante* choice of action that dictates

67 Note, *Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action*, 117 HARV. L. REV. 2665, 2676 (2004).

68 *See supra* text accompanying notes 20–21.

69 *Cf.* Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541, 2556 (2011) ("We quite agree that for purposes of [the commonality requirement] [e]ven a single [common question] will do." (second and third alterations in original) (internal quotation marks omitted)).

70 *Cf.* Resnik, *supra* note 34, at 164 ("The task is to decide which persons or entities can be understood as sufficiently similar to proceed as a juridical set . . . .").

the level of individual questions—defendants can easily "individualize" the prospective class. From this perspective, it is far less obvious to decide whether to certify a class based on a criterion controlled by one of the parties.

B. Inducing Factual Differences—"Individualizing" the Class

Current doctrine, I argue, enables defendants to influence in advance the level of individual questions, and, as a result, whether courts would certify class litigation. Doctrine allows defendants to "individualize" the class. The way to do so for defendants is to choose, before the occurrence of damages, a course of action that induces factual differences. In many cases, as case law demonstrates, these factual differences frustrate class certification. The following paragraphs provide paradigmatic examples in which class certification is sensitive to the course of action the defendant had chosen.

1. Individualizing Written Contracts

A supplier can offer its customers a uniform contract. Alternatively, it can tweak the standard contract, injecting individual differences. Some courts find these differences destructive of class certification. Against this backdrop, one court denied certification of contract claims in a case where physicians alleged that the defendants—health maintenance organizations (HMOs)—breached contracts, systematically underpaying the doctors for medical services:

> The algorithms . . . [used by the defendants' computer programs] appear to be . . . varied and complicated . . . . *Instead of applying one specific universal rule to cheat all doctors* (e.g., automatically deducting $100 from everyone's claim), *the . . . programs are instead alleged to apply a variety of more individually tailored rules* . . . . Even if the plaintiffs were to prove that computer systems "sometimes" . . . [underpays the plaintiffs] this fact would do nothing to further any of the plaintiffs' individual breach of contract claims.[71]

Importantly, it seems that the individualized class in this example is in a similar need of collectivization as the hypothetical, non-individualized one, in which defendants would apply "one specific universal rule to cheat all doctors." The cases in the individualized class are a bit less correlated, but litigating them individually is likely to result in substantially lower, if not zero, overall liability. Hence, the policy justi-

71 Klay v. Humana, Inc., 382 F.3d 1241, 1265 (11th Cir. 2004) (emphasis added). While reversing certification based on breach of contract claims, the court did affirm certification on RICO claims. *See id.* at 1276.

fications for class litigation in the individualized scenario are (almost) equally important.

Many other examples of individualized contracts exist.[72] While individualizing the class may be a demanding task in certain circumstances, in many cases—as the HMOs example suggests—it simply requires programming slightly different contracts.[73] As one defense attorney advises:

> Remember, class actions thrive on similarity. . . . If you can make changes that introduce significant variability, you can limit your risk of class actions. So look for ways to modify the material terms of the contract . . . . Change the wording. Move paragraphs around. There is almost never just one way to say something. . . . [M]ix it up a little. If you do this correctly, you can limit class action liability . . . .[74]

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72 In another case the appellate court decertified franchisees' contractual action against a franchisor because the standard agreements were subject to individual modifications. Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 340 (4th Cir. 1998) ("[P]laintiffs simply cannot advance a single collective breach of contract action on the basis of multiple different contracts. As the district court itself recognized, [contracts] 'may vary from year to year and from franchisee to franchisee.'"). In yet another action by franchisees the court denied certification due to disparity in contractual provisions. Thompson v. T.F.I. Cos., Inc., 64 F.R.D. 140, 146–47 (N.D. Ill. 1974) ("[T]hreshold factual distinctions as minute as they may be may have a vital bearing on the applicability of a common legal provision and may very well inject an 'uncommonness' that fragments the class." (quoting Gaines v. Budget Rent-A-Car Corp., 1972 CCH Tr.Cas. ¶ 73,860, at 91,604 (N.D. Ill. 1972))); *cf.* Schachner v. Blue Cross & Blue Shield of Ohio, 77 F.3d 889 (6th Cir. 1996) (refusing to certify a contractual claim where a common term was ambiguous and hence presumably subject to individual negotiations). "[T]he court reasoned that, since the clause at issue was ambiguous, it would have to consider extrinsic evidence of negotiations between [the defendant] and its . . . [customers] to construe the meaning of the clause." *Id.* at 895; *see also* NAGAREDA, *supra* note 64, at 186.

73 In another illustrative case, for example, the court denied certification due to an alleged computer bug, which created random misrepresentations of the product on the defendant's website. *See* Sevidal v. Target Corp., 117 Cal. Rptr. 3d 66 (Ct. App. 2010).

74 HERRINGTON, *supra* note 10, at 113–14. Likewise, two defense attorneys advise their clients in the following words:

> It is critically important to do everything possible to segregate each case as an individual matter. The key is to avoid class certification, because it is much easier to divide and conquer than to deal with a large group en masse. Therefore, cookie-cutter . . . agreements are not advisable . . . they should be modified so that each contract is different.

Brian S. Arbetter & Andrew J. Boling, *Emerging Trends in Wage and Hour Cases and Defense, in* UNDERSTANDING FAIR LABOR STANDARDS ACT VIOLATIONS 125–26 (2010).

Defendants, then, can often introduce individual differences in a relatively easy manner. The certifiability of class actions that are justified on policy grounds is, at least in certain cases, completely under the defendant's control.

2. Creating Choice of Law Differences

A related opportunity to avoid, *ex ante*, class certification, is inserting choice of law differences. Divergence in applicable law means, in essence, differences among the plaintiffs, as there are more questions that are not completely common to all the members of the class.[75] Courts are indeed reluctant to certify a class where different state laws apply. "The existence of significantly differing state laws currently poses a virtually insuperable obstacle to certification of multistate, diversity class actions. . . . [C]ourts regard the potential management difficulties and diseconomies of this 'daunting enterprise' sufficient to tip the balance against class certification."[76] However, uniformity in applicable law is not an objective, pre-existing standard. Rather, it can be set, to some extent, by the defendant. Consider the following:

> Firms can create, pre-damages, differences in applicable law. One way to do so is using different types of standard-form contracts, each of which dictates a different law governing the transaction. Another way is stipulating that the applicable law is the law of the state where the consumer resides. The result is similar: after damages occur, courts will be reluctant to authorize a unified action due to the multiplicity of applicable law.[77]

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75 *See, e.g.*, AM. LAW INST., *supra* note 55, § 2.05 cmt. a.

76 Luke McCloud & David Rosenberg, *A Solution to the Choice of Law Problem of Differing State Laws in Class Actions: Average Law*, 79 GEO. WASH. L. REV. 374, 374–75 (2011) (quoting *In re* Zyprexa Prods. Liab. Litig., 253 F.R.D. 69, 201 (E.D.N.Y. 2008), *rev'd on other grounds sub nom.*; UFCW Local 1776 v. Eli Lilly & Co., 620 F.3d 121, 137 (2d Cir. 2010)); *see also* Castano v. Am. Tobacco Co., 84 F.3d 734, 741 (5th Cir. 1996) ("In a multi-state class action, variations in state law may swamp any common issues and defeat predominance."); Nagareda, *supra* note 53, at 671 (arguing that there is a "general hostility of courts toward nationwide product liability classes on choice-of-law grounds"); York-Erwin, *supra* note 46, at 1794 ("Choice of law has proven to be one of the most consistent obstacles to . . . class certification"). For notable examples of cases in which courts denied certification, see also *id.*, at 1802–03, 1814–15, 1824; Rory Ryan, Comment, *Uncertifiable?: The Current Status of Nationwide State-Law Class Actions*, 54 BAYLOR L. REV. 467, 470 n.5 (2002) (providing a case list of federal courts denying certification of nationwide state-law class actions on choice of law grounds).

77 *See, e.g.*, Wash. Mut. Bank, FA v. Superior Court, 15 P.3d 1071 (Cal. 2001) (decertifying a class due to choice-of-law provisions in nationwide mortgage agreements, which choose the governing law to be the law of the state where the property is

As before, these induced variations allow defendants to reduce the odds of prospective certification, at least in certain circumstances.[78]

3. Varying Oral Communication

Mass service providers often have a choice as to the method to convey the message to their customers. Oral representation is an individualized method of communication, which, compared with written representation, is more likely to escape prospective class certification. In one paradigmatic case, for instance, where patients who received an implant that was not approved by the Food and Drug Administration (FDA) brought a class action against the physician, the trial court denied certification of informed consent claims:

> Given the distinctly factual nature of the informed consent question, however, the court hesitates to find commonality on this issue . . . . The emotional state and injury of each proposed plaintiff, not to mention *possible variations in the conversations with [the Doctor], renders this area unsuitable for certification.*[79]

As this example shows, oral, individual communication has the same "individualizing" capacity as the contractual modifications in the previous examples. Both can prevent inference of sufficient commonality and hence block class certification.[80] In this example the individ-

located); *see also* Medina v. Am. Airlines, Inc., 2005 U.S. Dist. LEXIS 18916, at *1, *15–17 (S.D. Fla. July 5, 2005) (No.02-02133-CIV) (in an individual action, the supplier alleged that a standard-form provision allows it to elect, for each customer, that damages be determined by the law of the consumer's domicile); Linda Silberman, *The Role of Choice of Law in National Class Actions*, 156 U. PA. L. REV. 2001, 2016 (2008) ("[C]hoice of law clauses in consumer contracts [can be used strategically] as a means to block class litigation. . . . [A] choice of law clause that might ostensibly seem more favorable to the consumer—e.g., the law of the state where the consumer resides—presents the difficulty of the application of multiple laws in class actions."); *cf.* HERRINGTON, *supra* note 10, at 118–19 ("[I]ncluding a choice-of-law clause in consumer contracts . . . [is] a gift for plaintiffs' lawyers, as [it helps] remove a major hurdle to class certification.").

78 As federal courts are considered more stringent regarding multi-state class certification, the potential use of *ex ante* choice of law manipulations has become larger since the Class Action Fairness Act (CAFA) of 2005, which expanded federal jurisdiction to entertain multi-state class actions. *Cf.* York-Erwin, *supra* note 46, at 1804 n.53 (noting that "CAFA's corporate backers" intended to make certification of multi-state class actions harder).

79 Hum v. Dericks, 162 F.R.D. 628, 640 (D. Haw. 1995) (emphasis added).

80 For the similarity between written individual modifications and oral representations see Simon v. Merrill Lynch, Pierce, Fenner, & Smith, Inc., 482 F.2d 880, 882 (5th Cir. 1973) ("[C]ourts usually hold that an action based substantially . . . on oral rather than written misrepresentations cannot be maintained as a class action. Simi-

ualizing force of the oral consultations with the doctor was strong enough to overcome the uniform consent form, which did not disclose that the implant was not FDA approved.[81]

Similar examples, illustrating the individualizing role of oral communications, regularly appear where plaintiffs claim breach of orally-made (or orally-negotiated) contractual obligations[82] and in fraud cases.[83] As before, both the "individualized" and the "non-individual-

larly, if the writings contain material variations, emanate from several sources, or do not actually reach the [plaintiffs], they are no more valid a basis for a class action than dissimilar oral representations." (citations omitted)).

81 *Hum*, 162 F.R.D. at 640.

82 Particularly, oral communications can individualize an otherwise uniform contract. In one case, a motion to certify class litigation against insurers was denied due to different oral representations, notwithstanding evidence of standard practices and allegations that the oral representations were nothing more than reiterations of uniform promotional materials. *See* Liberty Mut. Ins. Co. v. Tribco Const. Co., 185 F.R.D. 533, 539 (N.D. Ill. 1999) ("[T]his court is not convinced that the alleged oral representations were the same to all the insureds in the putative class."); *see also* Frahm v. Equitable Life Assurance Soc'y of the U.S., 137 F.3d 955, 957 (7th Cir. 1998) ("[For some of the plaintiffs'] claims everything depends on what was said or sent to each agent personally, and different benefits advisers said or wrote different things to different agents. Individual rather than class litigation is the best way to resolve person-specific contentions . . . ."); Retired Chi. Police Ass'n v. City of Chicago, 7 F.3d 584, 597 (7th Cir. 1993) (declining certification because some contractual obligations were made orally to the group of plaintiffs: "[I]it is not known whether the communications were uniformly made . . . . Presumably each of the other three groups of [plaintiffs] had its own . . . seminars and pamphlets."); *In re* Indus. Diamonds Antitrust Litig., 167 F.R.D. 374, 384 (S.D.N.Y. 1996) ("[Price-fixing claims should not be certified where the defendant] sold thousands of distinct products for which [prices vary] . . . based on . . . negotiations with each purchaser.").

83 One court, for example, denied certification of customers' fraud allegations against a telephone company, asserting that the plaintiffs could not prove that the defendant "made the same core of misrepresentations to all, or most, members of the putative class." Stephenson v. Bell Atl. Corp., 177 F.R.D. 279, 293 (D.N.J. 1997). Another court refused to certify a class action based on fraud allegations against an insurer. *See* Parkhill v. Minn. Mut. Life Ins. Co., 188 F.R.D. 332, 342 (D. Minn. 1999) ("[P]olicies were sold in hundreds of thousands of individual meetings between independent agents and prospective clients. . . . [T]he information disclosed . . . to potential policyholders would depend on the client's needs and circumstances. . . . [The transactions involved] non-uniform oral representations at different times and places with different agents."). In another insurance fraud case, the court denied certification in the following words: "Where, as here, the information contained in the illustrations was shared with consumers, if at all, in the context of varying oral representations, presumption of reliance is inappropriate." *In re* Jackson Nat'l Life Ins. Co. Premium Litig., 183 F.R.D. 217, 222 (W.D. Mich. 1998). In yet another fraud case, the court denied certification due to "variations in facts [that] defeat the predominance factor . . . . Because there were several seminars in Houston and several in Memphis, problems ar[ose] when considering oral representations made at each of

ized" versions of the cases seem to justify class treatment—in the absence of class action, individual litigation is likely to extract far less compensation, if any, from the defendant.

4. Heterogeneous Plaintiffs and Products

The more diverse and heterogeneous the class, the less likely is certification. Similar to the previous examples, the range of damages and the plaintiffs' identity—both predict certification—are often under the defendant's control. Hence, as before, the class is *ex ante* malleable. Consider the following decision to deny certification of fraud allegations against gaming machine manufacturers, due to the inherent differences within the pool of customers:

> Gamblers do not share a common universe of knowledge and expectations . . . . Some players may be unconcerned with the odds of winning, instead engaging in casual gambling as entertainment or a social activity. Others may have played with absolutely no knowledge or information regarding the odds of winning . . . . Still others, in the spirit of taking a calculated risk, may have played fully aware of how the machines operate.[84]

Targeting a more diverse audience is therefore valuable for the prospective defendant, as it reduces the odds of class action if and when damages materialize.[85] Likewise, creating variability in damages

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the separate seminars." Marascalco v. Int'l Computerized Orthokeratology Soc'y, Inc., 181 F.R.D. 331, 340 (N.D. Miss. 1998); *see also* Martin v. Dahlberg, Inc., 156 F.R.D. 207, 215 (N.D. Cal. 1994) (a consumer fraud case in which individual salespersons made different representations, yielding "diversity of messages . . . and [hence potentially] differing reliance on varied information" which thwart class adjudication); Williams v. Balcor Pension Investors, 150 F.R.D. 109, 114 (N.D. Ill. 1993) ("[The proposed class representative was inadequate due to his reliance] on oral representations by his investment advisor [which made him] subject to a unique defense . . . .inapplicable to the remainder of the class."). For additional examples and discussion *see* CONTE & NEWBERG, *supra* note 63, § 3:15, at 335–67; Samuel Issacharoff, *The Vexing Problem of Reliance in Consumer Class Actions*, 74 TUL. L. REV. 1633, 1641 (2000); Shawn S. Ledingham, Jr., Note, *Aggregate Reliance and Overcharges: Removing Hurdles to Class Certification for Victims of Mass Fraud*, 85 N.Y.U. L. REV. 289, 307 (2010) ("[In mass fraud cases] a personal reliance requirement makes class certification nearly impossible due to the need for individual inquiries.").

84 Poulos v. Caesars World, Inc., 379 F.3d 654, 665–66 (9th Cir. 2004).

85 Other examples of too-heterogeneous classes exist. *See, e.g.*, McLaughlin v. Am. Tobacco Co., 522 F.3d 215, 226 (2d Cir. 2008) ("[I]ndividuals may have relied on defendants' misrepresentation to varying degrees in deciding to purchase [light cigarettes]; some may have relied completely, some in part, and some not at all. Thus, establishing . . . that defendants' misrepresentation caused an increase in [demand] would require individualized proof."); *In re* Methionine Antitrust Litig., 204 F.R.D. 161, 166 (N.D. Cal. 2001) (denying a motion to certify price-fixing claims as class

can block certification—as one court reasoned its decision to deny certification of antitrust claims, "the prices for some customers are going up while the prices of other customers are not ."[86] Similar logic makes the defendant better off when its activity potentially harms plaintiffs in different times and locations—the more dispersed the activity is, courts are generally more reluctant to certify.[87] A related reasoning applies to products heterogeneity. "[W]here the allegedly defective 'product' is actually a line of products that are similar, yet have distinguishable formulations, compositions, or configurations, courts refuse to certify on the grounds of factual variation."[88]

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members, indirect purchasers, differ) ("The [c]ourt cannot ignore the evidence that shows that some of the class members . . . may not have been injured by the antitrust conspiracy because the overcharge was not passed along or because the class member itself passed along the full amount of the overcharge to its customers."); Kaczmarek v. Int'l Bus. Machs. Corp., 186 F.R.D. 307, 312 (S.D.N.Y. 1999) ("Each computer user may have modified his or her computer hardware and software in ways that affect sound/video/modem capabilities and performance. Some of the named plaintiffs have reconfigured their hardware, overclocked their system, failed to upgrade and/or installed new operating systems and software drivers and applications.").

86 *In re* Hydrogen Peroxide Antitrust Litig., 552 F.3d 305, 314 n.12 (3d Cir. 2008) (quoting Am. Bar. Assoc. Section of Antitrust Law, Econometrics 210 (2005)).

87 The most famous example is probably Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 609 (1997) (rejecting certification of claims against asbestos products manufacturers, noting that "class members . . . were exposed to different asbestos-containing products, in different ways, over different periods, and for different amounts of time"); *see also* Broussard v. Meineke Disc. Muffler Shops, Inc., 155 F.3d 331, 342 (4th Cir. 1998) (certifying a class consisting of all the defendant's franchisees since 1986 creates difficulties; with respect to limitation claims, for instance, "[the appropriate analysis is] individualized inquiry into what each franchisee knew about [the defendant's] operation . . . and when he knew it").

88 Joel S. Feldman, *Class Certification Issues for Non-Federal Question Class Actions—Defense Perspective, in* Joel S. Feldman & Keith M. Fleischman, Pract. Law Inst., Non-Federal Question Class Actions: Prosecution & Defense Strategies 243 (2001); *see also* Herrington, *supra* note 10, at 177 ("[T]he more segmentation, the better . . . segmentation refers to creating material differences [for example] between . . . versions of product . . . ."). For relevant case law see, for example, Lyon v. Caterpillar, Inc., 194 F.R.D. 206, 221 (E.D. Pa. 2000) ("[T]he . . . engine is not a single product, but rather is made in several ratings (different models). The variations of the . . . engines necessitate a more individualized factual inquiry, a factor weighing against certification of this putative class."); Sanneman v. Chrysler Corp., 191 F.R.D. 441, 456 (E.D. Pa. 2000) (denying certification of claims that vehicle paint was defective, due to, among other things, "variations in paint applications and configurations"); *In re* Ford Motor Co. Vehicle Paint Litig., 182 F.R.D. 214, 220 (E.D. La. 1998) ("[Certification should be denied because t]his case does not involve a single failure event or a simple, fungible product. Rather, Ford's challenged course of conduct spanned at least seven years and involved different models of vehicles, made of different materials, painted a variety of colors at different plants, using different paint formulae. Further, Ford's paint processes changed over time."); *In re* Ford Motor Co. Bronco II

As in the previous examples, targeting diverse plaintiffs and disseminating heterogeneous products can individualize the class, making it uncertifiable; denying certification, in turn, allows the defendant to pay less than the harm it allegedly inflicted on the victims.

5. Decentralizing Action

Class action defendants are often hierarchical organizations. Their structures matter. Courts are less likely to certify class litigation where more discretion resides at the defendant's lower ranks, as individual differences are then more salient. Hence, by decentralizing decision making, an organization can avoid class litigation. Take the following example:

> Facing potential future liability, a retail giant chooses to delegate authority to local managers. To avoid class action based on discriminatory policies, for instance, local supervisors hold discretion regarding hiring and promotion.

The recently decided *Wal-Mart* case presents an essentially similar question.[89] As Wal-Mart's counsel concluded at the oral argument, "because the plaintiffs' claims in this case hinge on the delegation of discretion to individual managers throughout the country, they cannot meet the cohesion requirements."[90] Employment discrimination is but one example of molding class certification *ex ante* through decentralization.[91] In other areas, decentralized discretion leads to similar individualization of the class.[92] "[A] company could signifi-

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Prod. Liab. Litig., 177 F.R.D. 360, 372 (E.D. La. 1997) (refusing to accept common rollover defect argument, inter alia, as the car was "sold over seven years in varying configurations"); Harding v. Tambrands, Inc., 165 F.R.D. 623, 630 (D. Kan. 1996) ("[Certification of this class against tampon manufacturers denied because d]uring the [relevant] time frame . . . the defendants each marketed a number of different styles of tampons. [They] made various changes in fiber composition and absorbency . . . .").

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

90 Transcript of Oral Argument at 3, *id.* (2011) (No. 10-277), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-277.pdf.

91 *Cf.* Greenhouse, *supra* note 14 at B1 (noting that the *Wal-Mart* decision will make it tougher for plaintiffs to bring "nationwide class actions against a large company with many branches" because the plaintiffs "would have to offer strong evidence of a nationwide practice or policy").

92 *See, e.g.*, Parkhill v. Minn. Mut. Life Ins. Co., 188 F.R.D. 332, 342 (D. Minn. 1999) (refusing to certify fraud allegations against insurer because "defendant did not require a uniform sales presentation" and sales agents made "non-uniform oral representations"); Martin v. Dahlberg, Inc., 156 F.R.D. 207, 215 (N.D. Cal. 1994) (denying class adjudication as individual salespersons made different representations).

cantly limit its risk of class actions by introducing more autonomy in how sales and customer service personnel deal with consumers . . . ."[93] Again, policy justifications point in similar directions in both the decentralized and the centralized cases—in both, without class litigation the defendant's overall liability would fall short of the damages it inflicted on the plaintiffs.

* * *

This list of mechanisms, from injecting contractual differences to decentralizing discretion, is not exhaustive.[94] Some of the mechanisms may overlap with others. Nonetheless, these mechanisms do illustrate the very same point—*ex ante* choices of business organization can make prospective certification harder and hence reduce liability. As the aforementioned quotations from defense lawyers suggest, there is no reason to think that firms that face the risk of multi-million dollar class actions are oblivious to these considerations and to the opportunity to reduce prospective liability. While this Part focuses on the manipulability of the commonality requirements, the very same considerations motivate suppliers to draft the more commonly discussed mandatory arbitration clauses, which prohibit the use of class actions.[95] Indeed, in light of the straightforward effect of these

93 HERRINGTON, *supra* note 10, at 145; *see also id.* at 144–45 ("[The] proposal to free your company's customer service personnel from scripts and policies injects the potential for significant variability into each customer's experience. Countless class actions have been filed that are based on [uniform] guidelines followed by sales or customer service personnel."); Arbetter and & Boling, *supra* note 74, at 126 ("Broad policies . . . are also less desirable than specific directives.").

94 Another possible way to avoid certification is to transact with plaintiffs who would not be easily located *ex post*. *See, e.g.*, *In re* Fresh Del Monte Pineapples Antitrust Litig., 2008 WL 5661873, at *10 (S.D.N.Y. Feb. 20, 2008) (No. 1:04-md-1628 (RMB)) ("[Certification denied] no matter how easy it is to establish damages on a class level, if it is extremely difficult or almost impossible to distribute these sums to their rightful recipients, the class is unmanageable." (quoting City of Philadelphia v. Am. Oil Co., 53 F.R.D. 45, 72 (D.N.J. 1971))). For a criticism of this so-called "ascertainability" requirement, see Myriam Gilles, *Class Dismissed: Contemporary Judicial Hostility to Small-Claims Consumer Class Actions*, 59 DEPAUL L. REV. 305, 307 (2010).

95 As mandatory arbitration clauses mandate individual resolution, those who sign them have a meager threat of suing. As one defense attorney put it:

> [Mass defendants should require consumers] in the potential class to pursue individual claims in a separate arbitration. Since many (and perhaps most) of the putative class members may never do that . . . strict enforcement of an arbitration clause should enable the [defendant] to dramatically reduce its aggregate exposure.

Myriam Gilles, *Opting Out of Liability: The Forthcoming, Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 396 (2005) (quoting Edward Wood Dunham, *The*

mandatory arbitration class action waivers, the Court's decision that authorizes their use has been attacked by academics, legislators, and judges;[96] and it may lose some of its sweeping application as a result of this critical reaction. The lesson of this Article, however, is that a similar pre-litigation, collectivization-avoidance logic can proliferate in numerous domains without any visible response.

It is true that aggregation is sometimes in the interest of mass defendants.[97] It is also true that there are often independent business reasons to introduce individual differences.[98] Likewise, firms that do inject individual differences to reduce liability may simultaneously harm the efficient administration of their own businesses.[99] Nevertheless, these are qualifications to the general argument. The main message of this Part is that the level of individual differences, from defendants' perspective, is a choice variable—they are able to set it in order to achieve optimal outcomes. The strategic value of individual

Arbitration Clause as Class Action Shield, 16 FRANCHISE L.J. 141, 141 (1997)). For other examples see *id.* at 396–98. *See also* Theodore Eisenberg et al., *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts,* 41 U. MICH. J.L. REFORM 871, 895 (2008) (concluding that the "use of mandatory arbitration clauses may be based more on strategic advantage than on a belief that corporations are better serving their customers").

The Supreme Court recently upheld the validity of such clauses in a 5–4 decision in *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011). Technically, the Court rested its decision on grounds external to Rule 23—the Federal Arbitration Act was held to preempt state prohibitions on mandatory individual arbitration provisions. *Id.* at 1747. *Concepcion*, then, paves the way for a more pervasive use of class action waivers. *See, e.g.*, Nathan Koppel, *Will Federal Consumer Bureau Ride to the Rescue of Class Actions?*, WALL ST. J. LAW BLOG (April 29, 2011, 6:03 PM), http://blogs.wsj.com/law/2011/04/29/will-federal-consumer-bureau-ride-to-the-rescue-of-class-actions/?blog_id=14&post_id=39935 (paraphrasing a partner saying that upon the holding of *Concepcion* "he is advising clients to start crafting class-action waivers").

96 For academic criticism, see, for example, Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of* AT&T Mobility v Concepcion, 79 U. CHI. L. REV. 623 (2012). *See also* Jean R. Sternlight, *Tsunami:* AT&T Mobility LLC v. Concepcion *Impedes Access to Justice*, 90 OR. L. REV. 703 (2012). For a survey of legislative attempts to limit the reach of *Concepcion*, see Maureen A. Weston, *The Death of Class Arbitration After* Concepcion *?*, 60 U. KAN. L. REV. 767, 791–94 (2012) ("Congress is increasingly responding to calls for protection against mandatory arbitration in certain sectors."). For lower courts' attempts to distinguish *Concepcion* see, for example, *Post-*Concepcion*, Plaintiffs Chalk Up Few Victories, Look to Government for Relief,* Class Action Litig. Rep. (BNA) (13 Class) 525 (May 11, 2012).

97 *See, e.g.*, *supra* notes 18–20 and accompanying text.

98 *See, e.g.*, *supra* note 11 and accompanying text (discussing the context of Wal-Mart's decentralized discretion).

99 In the context of Wal-Mart, for example, decentralization blocked class litigation, but it also clashes with Wal-Mart's tradition of highly centralized decision making and closely monitored stores. *See supra* note 11 and accompanying text.

differences, along with other business considerations, factors into mass defendants' decision making.[100] Firms can choose, in each case, whether to "individualize" the prospective class or not. While sometimes firms are better off not changing their ordinary course of action, presumably there are many circumstances in which it is valuable for mass defendants to individualize the prospective class.[101] The unilateral capacity of mass defendants to manipulate collective litigation procedures, if they find it worthwhile, resurrects the one-sidedness that these procedures are aimed at rectifying.

The success of the foregoing mechanisms in individualizing the class stems from the doctrinal reluctance to certify classes that raise too many individual questions. Doctrine, as always, is far from being neat and well-settled. The rules are context-specific. While some courts are more skeptical of class litigation, others are willing to certify a class notwithstanding minor individual differences. However, even when courts do authorize a class, the exact boundary between "sufficiently cohesive" and "too individual" is hotly contested.[102] Plaintiffs argue that there is uniformity, defendants stress individual differences, and the court ultimately draws the "commonality line."[103] While this might be a reasonable judicial approach to apply law to facts, it is a less convincing one when the legal standard for adjudicat-

100 The following advice from a defense lawyer illustrates the competing considerations: "Many companies, with good reason, attempt to standardize their contracts across products and business units. This standardization creates a risk—the risk of a class action." HERRINGTON, *supra* note 10, at 112. "[I]ntroducing Strategic Variability to reduce the risk of consumer class-action lawsuits while at the same time maintaining consistency . . . are not mutually exclusive." *Id.* at 84.

101 While this Article focuses on the capacity of individualizing mechanisms to reduce defendants' liability and deterrence, additional efficiency loss stems from the effect of these tools on firms' behavior: where firms choose to inject variability in order to avoid certification, they conduct their business in a more individualized manner than they would have done otherwise. *Cf.* Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1337 (2006) (discussing the implications of lawbreakers' attempts to avoid getting caught, and noting that, "[f]rom a societal perspective, detection avoidance is deadweight loss").

102 *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011), provides a good example. As noted above, the case centers on the issue of commonality, given Wal-Mart's decentralized decision making. Prior to the Supreme Court decision in favor of Wal-Mart, there were four different decisions certifying the class, the last one on a 6–5 vote *en banc*. All five decisions extensively discuss the commonality requirement. For the district court opinion, see *Dukes v. Wal-Mart Stores, Inc.*, 222 F.R.D. 137 (N.D. Cal. 2004); for the two circuit court opinions, see *Dukes v. Wal-Mart, Inc.*, 474 F.3d 1214 (9th Cir. 2007), and *Dukes v. Wal-Mart, Inc.*, 509 F.3d 1168 (9th Cir. 2007); and for the *en banc* decision, see *Dukes v. Wal-Mart Stores, Inc.*, 603 F.3d 571 (9th Cir. 2010).

103 For the use of the term "commonality line" in this context, see *Wal-Mart*, 131 S. Ct. at 2562.

ing a class—sufficiently few individual questions—is controlled by one party. As the foregoing examples demonstrate, in many areas defendants have the capacity to manipulate, *ex ante*, the level of individual questions. From this perspective, the struggle to find the line between overly individualized and sufficiently uniform seems much less useful, given that the policy reasons behind class litigation apply to individualized and non-individualized classes in an almost similar force. Why should one commercial activity be exempt from effective enforcement while a similar activity is liable? Why should defendants avoid liability based on their choice of organizational structure?

The following Part demonstrates another manifestation of the same phenomenon—the malleability of collective litigation procedures.

III. SELECTIVE PRE-DAMAGES CONTRACTS

While the discussion thus far has centered on the capacity of defendants to take advantage of class action doctrine to avoid class certification, this Part takes this logic further and discusses a broader form of malleability—defendants' avoiding collective litigation through selective *ex ante* contracts.

While class action is the most effective collectivization mechanism, it is not the only one.[104] This section argues that the very formation of collective litigation is, in general, vulnerable to *ex ante* manipulations. In contrast to the previous Part, individualizing the prospective class, the phenomenon described in this Part is not based on doctrinal gaps; rather, it has deeper roots, which stem from the freedom of potential victims to contract with the would-be defendant. In fact, this is the pre-damages manifestation of strategic settlements, in which defendants can selectively buy out plaintiffs to reduce their overall liability. This phenomenon is explored below.

A. Ex Ante *Divide-and-Conquer*

As previously discussed, mass injurers can strike strategic selective settlements, after damages materialize, to eliminate strong claims. I argue that similar strategies can be used by mass injurers before the occurrence of damages. Conceptually, the two settings are similar. Basically, whatever defendants can do after damages materialize, they can also do when there is only a prospect of harm. While the strategies do not diverge conceptually, their practical implementation is different. In the post-damages setting it is strategic settlements; in the

104 *See supra* notes 45–46 and accompanying text.

pre-damages setting it is waivers of prospective liability. To demonstrate the blurry line between the two, consider the following illustrative example:

> A golf course is negligently operated and golf balls hit adjacent premises. There are two identifiable classes of victims: the first includes those who border the golf course, and the second consists of farther landowners. The second class suffers fewer damages, and the longer distance makes it harder to prove the golf course's liability. The golf course buys out the first class's rights to sue—either before, after, or during damages, through liability waivers or settlement agreements. The second class's members are less likely to initiate a lawsuit, and if they do, their odds of winning are lower. If the second class's damages are sufficiently low, it poses no credible threat of litigation.[105]

As this example illustrates, there is no substantive difference between post-damages strategic settlements and pre-damages selective waivers. Of course, the two settings are not identical. The post-damages victims are known—typically, they are the ones that initiate the legal proceedings; pre-damages, the defendant has to reach out to the would-be plaintiffs. Where settlements are agreed upon in the shadow of uncertainty regarding the results at trial, *ex ante* selective waivers implicate another layer of uncertainty—whether damages would occur or not.

These differences do not mean that pre-damages selective waivers are necessarily less effective, from the defendant's perspective, than post-damages strategic settlements. In fact, it is plausible to believe that, in some contexts, *ex ante* agreements are a better way to buy out strong plaintiffs. In the post-damages environment lawyers spring up, creating information networks that counter attempts to strategically and confidentially settle.[106] In contrast, before damages occur there are typically no agents who share information and negotiate on behalf of the group of victims. A related advantage of pre-damages liability waivers, from defendants' perspective, stems from their subtlety. Strategic settlements are a more blunt measure to buy out strong claimants, and they may streamline further political, judicial, and public reaction against the defendant. *Ex ante* exclusion, i.e., liability waivers, might be safer and more effective in this respect.[107] Another dif-

105 This example is inspired by *Sierra Screw Products v. Azusa Greens, Inc.*, 151 Cal. Rptr. 799 (Ct. App. 1979). In that case, the defendant, who created a similar nuisance, alleged that its contract with the neighboring plaintiff includes liability waivers.

106 *See, e.g.*, Campos & Erichson, *supra* note 45; Erichson, *supra* note 50.

107 *Cf.* David Gilo & Ariel Porat, *Viewing Unconscionability Through a Market Lens*, 52 Wm. & Mary L. Rev. 133, 151–52 (2010) (stating that suppliers may prefer "selectively

ference that can make liability waivers more effective than settlements is the tendency of post-damages victims to be driven by non-economic motives, such as feelings of vengeance and a desire to restore equity.[108] These non-economic motivations inhibit post-damages strategic settlements. As one commentator observes, "irrational litigation decisions help counteract the resulting [pro-defendant] bias and should be applauded."[109] Because these non-monetary incentives do not typically appear before the occurrence of damages, they can make pre-damages waivers easier to implement, from the defendant's perspective.[110] Finally, defendants may be better than plaintiffs at assessing the risk of an injury, making liability waivers more valuable for defendants.[111]

In short, by the time the defendant is facing a multi-million dollar lawsuit, counteraction might be too late or too costly.[112] Selective buyouts, then, can be a highly effective tool to thwart future collective litigation. This result conflicts with a prominent position in the literature, mostly articulated by Howard Erichson.[113] According to this view, class actions are not as important an aggregation tool as they are

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oppressive terms" as they attract less judicial and public attention than the traditional, directly oppressive terms).

108 *See* Russell Korobkin & Chris Guthrie, *Psychological Barriers to Litigation Settlement: An Experimental Approach*, 93 MICH. L. REV. 107, 142–47 (1994) (providing evidence for the proposition that plaintiffs are "equity-seek[ers]," interested in validating their claims in addition to maximizing monetary value).

109 Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 32 (2000).

110 Moreover, pre-damages waivers "may undermine consumers' motivation to insist upon their rights and seek compensation." Shmuel I. Becher, *Asymmetric Information in Consumer Contracts: The Challenge That Is Yet to be Met*, 45 AM. BUS. L.J. 723, 748 & n.111 (2008) (referring to the empirical evidence in Dennis P. Stolle & Andrew J. Slain, *Standard Form Contracts and Contract Schemas: A Preliminary Investigation of the Effects of Exculpatory Clauses on Consumers' Propensity to Sue*, 15 BEHAV. SCI. & L. 83 (1997)).

111 Particularly, consumers might underestimate some risks. *See, e.g.*, Russell Korobkin, *Bounded Rationality, Standard Form Contracts, and Unconscionability*, 70 U. CHI. L. REV. 1203, 1231–33 (2003). Likewise, to the extent that prospective plaintiffs are more risk-averse than prospective defendants, the additional uncertainty that is associated with selective waivers makes them cheaper for the defendants.

112 As one defense attorney—who advocates such a "preventive" approach—argues:

> [B]usiness leaders become very attentive . . . when they are facing a ten or hundred-million-dollar lawsuit. But by then it is too late. We don't wait until our engines seize up to change the oil in our cars . . . . Why then would we not take the same preventive attitude to our [clients]? . . . Once out there, it is nearly impossible to put the "genie back in the bottle . . . ."

HERRINGTON, *supra* note 10, at 11, 237.

113 *See supra* notes 45, 50.

considered to be; plaintiffs' lawyers often fulfill a similar aggregatory role, informally coordinating and sharing information across plaintiffs. However, this reliance on lawyers overlooks the *ex ante* perspective. Defendants have the capacity to exclude, pre-damages, some victims, hence avoiding the benefits created by post-damages lawyers. The following paragraphs further illustrate this phenomenon.

B. Examples

There are numerous ways in which defendants can implement selective contracts that affect the formation of prospective collective litigation. The gist is identifying the strongest would-be plaintiffs, who have the greatest influence on the prospective class. This section provides several paradigmatic examples.

1. Nuisances

Nuisances, and more generally environmental damages, suffer from severe enforcement problems. Damages are typically dispersed and most victims have no credible threat to sue.[114] In this state of affairs, a single, strong would-be plaintiff is highly attractive for the defendant. Buying-out this strong plaintiff makes the defendant (and the strong plaintiff) better off at the expense of weaker plaintiffs/victims. And as explained above, there are good reasons for the prospective defendant to prefer a pre-damages waiver to waiting for the strong plaintiff to initiate a lawsuit, settling thereafter.

As the golf course example demonstrates, the strong would-be plaintiffs—whom the defendant wants to exclude the most—can often be the neighbors of the harmful activity. Those who live near the nuisance have greater incentives to eliminate it; those who are far away are not likely to successfully array their legal weapons. The story of the Campo Band of Mission Indian reservation is illustrative.

In the early 1990s, San Diego looked for an out-of-town place to establish a new landfill. The reservation surroundings—a "scrub-covered ridge" amidst a "desolate patch of windswept high desert"[115]—seemed like an excellent location. Apart from the Indian tribe there

114 *See* ROBERT C. ELLICKSON & VICKI L. BEEN, LAND USE CONTROLS 624 (2d ed. 2000) ("Because large-number situations foster free-riding, it hardly would be surprising if none of the many nuisance victims had filed a lawsuit during the prescriptive period."); Steven Shavell, *The Optimal Structure of Law Enforcement*, 36 J.L. & ECON. 255, 279–80 (1993) ("[I]t may be that harm is dispersed, as is often true with pollution-caused losses, so that individual victims might not find bringing suit worthwhile.").

115 Robert Reinhold, *Indians and Neighbors Are at Odds Over Waste Dump on Reservation*, N.Y. TIMES, Jan. 8, 1990, at A1.

were very few inhabitants. The major would-be victim of the landfill, the tribe, agreed to have the nuisance in its terrain in exchange for an appropriate compensation. This, however, ran counter to the other inhabitants' interests. "For the 250 inhabitants of the reservation . . . the landfill means big money. . . . To their ranch and farm neighbors, though, it is a potential source of contamination . . . ."[116] Lacking the strongest potential plaintiff—the Indian tribe that was bought out by the landfill—the remaining would-be victims had much less ammunition to resist the nuisance. As they lived further away from the landfill, their prospective harm was likely to be smaller and their damages harder to prove; in essence, these prospective victims had a very weak credible threat of a lawsuit. Indeed, their attempts to stop the landfill failed. As local activists attest, "[i]n spite of all [our] efforts and successes, we could not stop the [project's approval;] . . . [we] did not have the financial resources to file suit. The County did file suit . . . . Their one young attorney . . . was outgunned by multiple well-heeled big shots, including an ex-US Attorney, representing the landfill proponents."[117]

While the landfill project ended due to other reasons,[118] this story illustrates *ex ante* divide-and-conquer contracts. The major prospective plaintiffs are bought out by the defendant. In the absence of the strongest would-be victims, the remaining—even when they are able to collectivize themselves—find it harder to vindicate their rights. In the Campo landfill case, it seems that the contract between the tribe and the landfill was an indispensable reason for the residents' inability to stop the creation of the nuisance. Moreover, this incident is not unique; rather, it is typical of other nuisances in which one (or several) known neighbor is the primary victim, while others—the majority of the victims—suffer only minor harms.[119]

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116 *Id.*

117 *The History of Campo Landfill*, BACKCOUNTRY AGAINST DUMPS, http://www.backcountryagainstdumps.org/history_of_landfill.html (last visited Nov. 21, 2012).

118 Mainly, the "contract approved in the early 1990s faltered after the garbage company . . . went bankrupt." Onell R. Soto, *Campo Tribe Giving Up on Landfill Project*, SAN DIEGO UNION-TRIB., June 3, 2010, at B1, *available at* http://www.signonsandiego.com/news/2010/jun/03/tribe-junking-dump-project.

119 For another pre-damages nuisance/buy-out example of this kind, see Abel, *supra* note 12, at 810 n.82. *Cf.*, Michelle Nijhuis, *How the Five-Gallon Plastic Bucket Came to the Aid of Grassroots Environmentalists*, GRIST, July 23, 2003, *available at* http://www.grist.org/article/the19 (highlighting the organized attempt to urge immediate neighbors to curb large-scale nuisances).

2. Products Liability: Disclaimers and Standard-Form Contracts

Products liability is another paradigmatic case to implement selective contracts. One defendant harms multiple consumers, who diverge on several characteristics. As the parties have pre-existing contractual relations—through standard-form contracts between the defendant and the consumers—the defendant can easily locate and exclude plaintiffs. Indeed, many common provisions in standard-form contracts can serve to exclude stronger plaintiffs. Technically, these provisions can be selective, optional disclaimers, which encourage the strong consumers to get a discount in exchange for waiving their rights to sue. As before, the key factor is identifying "strong" consumers/plaintiffs, whom the defendant desires to exclude.

a. Damages-Based Exclusion

One example of provisions that distinguish between strong and weak plaintiffs hinges on the different damages that consumers are likely to sustain. Those who are likely to suffer larger damages would probably have the highest incentives to initiate a future lawsuit. Hence, they are the stronger prospective plaintiffs. Take the following case:

> A dry cleaning chain sets a provision according to which it is responsible for damages only up to a certain low threshold. Simultaneously, high-value customers are encouraged to "opt-out" by buying, for a fair fee, insurance for damages greater than this low threshold. The firm, in essence, identifies and creates two classes of customers, those with higher and lower damages. The former pays a fair fee for insurance, perhaps even extracting a premium, and is better off though it has no claimable right of action. The latter group has small claims, which are not worth litigating. Overall liability is reduced and the dry cleaning chain is better off.

In the actual case that motivates this example the court decided to invalidate the contract, though not because of the fear of diluted post-damages enforcement.[120] There are other paradigmatic situations in which the defendant can easily distinguish between high- and low-damages consumers. The defendant can, for example, identify

120 The same example is given, for other reasons, in David Gilo & Ariel Porat, *The Hidden Roles of Boilerplate and Standard-Form Contracts: Strategic Imposition of Transaction Costs, Segmentation of Consumers, and Anticompetitive Effects,* 104 MICH. L. REV. 983, 1015 & n.74 (2006). The case is CA 1/79 Dry Cleaning Factories Keshet Ltd. v. Attorney General 34(3) PD 365 [1980] (Isr.). At the time of the *Keshet* decision, consumers could not bring class actions.

frequent users of the product—whose damages are likely to be larger—and offer them a discount in exchange for waiving their rights to sue. Such provisions leave only non-frequent users with a claimable right; these consumers are less likely to litigate successfully.[121]

While excluding high-damages consumers cuts the class's incentives to litigate, it might be justified on commercial grounds. Where there are two groups of consumers, with higher and lower expected damages, the supplier, who may lack prior knowledge regarding the consumers' type, can offer a menu of prices and warranties in an effort to sort the two groups. In particular, it is common to say that the supplier should offer expensive, full insurance to attract the high-damages consumers (who have a greater demand for insurance). Under this description, low-damages types are left with less-than-optimal insurance (as they are not willing to pay that much). Hence, the supplier can sort the two groups.[122] On the other hand, the strategy of enticing high damages consumers is not a trivial one. Firms often cap damages in order to, among other reasons, "get rid of high-cost consumers."[123]

Either way, the bottom line is similar: design of standard-form contracts often separates strong from weak consumers, leaving only the weak to litigate. This design makes post-damages adjudication more difficult—collective litigation is malleable to *ex ante* manipulations.

b. Evidence-Based Exclusion

High-damages consumers are not the only prospective plaintiffs whose incentives to litigate are stronger. Those who are likely to possess better evidence would presumably have easier cases, and in this sense they are stronger as well; hence the supplier/defendant is better off excluding them from the pool of potential plaintiffs. Consider the following hypothetical example:

> Sport Utility Vehicles (SUVs) are designed for both urban, paved-road and recreational, off-road driving. Damages that materialize during recreational driving are harder to prove, as they often result

121 *Cf.* Gilo & Porat, *supra* note 120, at 989–93 (providing examples of standard-form provisions which aim at identifying repeat consumers).

122 *See* PATRICK BOLTON & MATHIAS DEWATRIPONT, CONTRACT THEORY 56 (2005). For a discussion and several anecdotal examples of similar price/quality discrimination practices, such as options to terminate in franchise agreements and airlines' tariffs, see Albert Choi & George Triantis, *The Effect of Bargaining Power on Contract Design*, VA. L. REV. *24–28 (forthcoming), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2010083, *19–20.

123 Gilo & Porat, *supra* note 107, at 173 n.95.

> from factors other than the manufacturer's fault. Limited-use warranty covers only the safer, urban use. Post-damages, the only plaintiffs with claimable rights are the off-road drivers, who have weaker cases (evidence-wise).

This example can be generalized to other limited-use warranties that cover only safer activities.[124] Similar to previous examples, weaker plaintiffs (in terms of evidence) find it harder to litigate and win post-damages. Who would want to take a case in which the plaintiffs knowingly engaged in high-risk activity? The formation of future successful collective litigation is therefore under the defendant's control. The result is, again, lower overall liability and transfer of wealth from weaker to stronger consumers. Commercial reasons may account for the differential treatment that safe-users receive. But again, whatever the reasons for these waivers are, the outcome is lower odds of successful litigation against the defendant, and hence reduced liability and deterrence.

Other common standard-form provisions fit this pattern of excluding strong consumers based on the likely strength of their evidence. Sellers, for example, often provide full insurance but limit the warranty period.[125] This move excludes from the pool of potential plaintiffs buyers whose damages accrue within a given time, leaving those who face late damages to litigate on their own. The latter group has a weaker claim, as it is typically harder to prove damages the more time passed. Hence, leaving only late-victims to litigate post-damages reduces suppliers' liability. The same logic applies to restricting coverage only to immediate buyers—third party victims are likely to have weaker cases. While limiting coverage in these examples can again be driven by various commercial reasons, the consequences are similar—by choosing a certain course of behavior pre-damages, the defendant dilutes post-damages enforcement.

c. Personal-Based Exclusion

Good evidence and sizeable damages make stronger plaintiffs/consumers, who are more likely to wage a successful lawsuit. Consumers' strength, in this sense, can manifest itself in other ways. Certain

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124 *Cf.* U.C.C. § 2-314(2)(c) (2010) (stating that the implied warranty of merchantability covers "fit for the ordinary purposes").

125 *See* Florencia Marotta-Wurgler, *What's in a Standard Form Contract? An Empirical Analysis of Software License Agreement*, 4 J. EMPIRICAL LEGAL STUD. 677, 697–99 (2007) (discussing findings on the practical prevalence of statute-of-limitations restrictions); *see also* Steven M. Haas, *Contracting Around Fraud Under Delaware Law*, 10 DEL. L. REV. 49, 56 (2008) ("[C]ontracts often contain . . . specific time periods for submitting indemnification claims, which act as contractual statutes of limitation . . . .").

consumers are simply more likely to effectively stand up for their rights. Common provisions in standard-form contracts can serve to exclude these stronger consumers:

> A widget supplier distributes coupons—drafted in English—which offer insurance (or discount) for waiving liability. Immigrants and other non-English speakers are not likely to discern these coupons. Hence, when damages materialize, this low-means group is left to litigate on its own. Expected liability is lower.[126]

In the same spirit, standard-form contracts often hide exemptions from harsh, draconian terms, such that only careful consumers are likely to find them.[127] These more-aware consumers, who are capable of finding hidden exemptions, are also the most likely to initiate a successful lawsuit in the future.[128] Likewise, firms that sell over the internet regularly ask buyers to check either "home-user" or "business" before being allowed to proceed, offering different contracts to each group.[129] Business buyers are presumably the more sophisticated consumers, whom the supplier/defendant desires to exclude from litigation the most. More generally, this description fits the theories that attribute to a small group of more aware customers—the so-called "shoppers"—the power to drive prices down in a competitive market.[130] These shoppers, the market's agenda-setters, are the very plaintiffs the defendants would like to "bribe" for waiving their claims. Their absence makes the remaining consumers/plaintiffs worse off.

While, as before, there might be commercial reasons to sort out business buyers, the justifications for hiding exemptions such that only sophisticated consumers can find them are less obvious. Regardless of the motive the results are again the same—the suppliers' pre-damages behavior reduces incentives to litigate post-damages, yielding lower liability.

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126 This hypothetical is inspired by the examples provided in Gilo & Porat, *supra* note 120, at 988–89.

127 *See* Gilo & Porat, *supra* note 107, at 147–49 (providing several actual examples of draconian terms with concomitant hidden exemptions).

128 Those who look for the hidden terms, as Gilo & Porat describe, are either consumers who value their time less; large, repeat buyers; or sophisticated customers. *Id.* at 151. These are the very same aware-consumers who are more likely to trigger a lawsuit.

129 *See* Marotta-Wurgler, *supra* note 125, at 710 & n.51.

130 *See, e.g.*, Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economic Analysis*, 127 U. PA. L. REV. 630, 649 (1979).

d. The Market Does Not Correct

Selective exculpatory provisions, then, are a prevalent phenomenon, especially in certain areas.[131] They result in the following: weak consumers/plaintiffs, with lower incentives to adjudicate, find it harder to litigate *ex post*; stronger consumers/plaintiffs gain at the expense of weaker ones; and the defendant's overall liability falls short of the damages it inflicted on the group of consumers.

As defendants can implement selective waivers through standard-form contracts, one may ask why the remaining, weak consumers cannot demand a better contract for putting them in a worse position. According to this logic, low-damages, weak-evidence, and non-sophisticated consumers should understand, upon reading the standard-form contract, that high damages, strong-evidence, and sophisticated consumers are excluded; and this understanding should push the demand of the weak consumers down. A similar question can be asked with regard to other *ex ante* manipulations of standard-form contracts—such as stipulating choice-of-law provisions—that put consumers in a worse position.[132] There are two general arguments against the proposition that consumers reduce their demand in these circumstances.

First, one may suspect that consumers are not aware of all the risks and properties of a given product. Whether due to consistent cognitive limitations[133] or high transaction costs of deciphering long and complex standard-form contracts,[134] consumers are usually not fully informed regarding products' risks.[135] This is a fortiori true with regard to the more subtle, second-order repercussions of provisions

131 Many cases of this kind would not end up in courts, as plaintiffs with valid claims are too weak to litigate. Interestingly, the dry cleaning standard-form contract was not challenged by customers, but by the Israeli attorney general in quasi-administrative proceedings. *See supra* note 120 and accompanying text.

132 *See supra* notes 75–78 and accompanying text.

133 *See, e.g.*, Korobkin, *supra* note 111, at 1227; Oren Bar-Gill, *The Behavioral Economics of Consumer Contracts*, 92 MINN. L. REV. 749, 757–58 (2008); Campbell et al., *supra* note 32, at *9–11.

134 *See, e.g.*, Campbell et al., *supra* note 32, at *8 ("[S]earch costs give retailers a degree of market power, allowing them to charge prices above marginal cost."). The more complex the subject-matter is, the more severe is the problem.

135 Better and simpler provision of information, induced by regulation and consumer organizations, can often mitigate, but not eliminate, the problem. *See, e.g.*, Oren Bar-Gill & Kevin Davis, *Empty Promises*, 84 S. CAL. L. REV. 1, 28–29 (2010) ("We are skeptical . . . about the efficacy of disclosure mandates . . . to avoid . . . welfare-reducing . . . contracts . . . ."); Xavier Gabaix & David Laibson, *Shrouded Attributes, Consumer Myopia, and Information Suppression in Competitive Markets*, 121 Q. J. ECON. 505, 530 (2006) ("[D]isclosure laws . . . have [been] met with only mixed success.").

that reduce the odds of future successful litigation.[136] In fact, even when consumers can easily be informed regarding price and quality,[137] it is much harder to draw their attention to the more complicated consequences of exculpatory provisions.[138] Take, for example, the revolutionary effect of information technologies. Scholars tend to praise the internet for allowing consumers an immediate and cheap way to compare products' prices and quality. As Richard Epstein convincingly argues, "the use of web-based information has increased transparency so greatly that it is hard to recall the tedium of obtaining information for routine business transactions before the web."[139] While free websites do provide valuable reviews with regard to salient attributes such as price and quality,[140] it is harder to compare less salient characteristics.[141] A quick surf on the web reveals that the

136 For example, note the distinction between "search qualities" (*e.g.*, readily observable price), "experience qualities" (*e.g.*, product's quality, learned by experience), and "credence qualities" (attributes that are not discoverable even through a long use of the product). *See* Becher, *supra* note 110, at 740 & n.68 (referring to Michael I. Meyerson, *The Efficient Consumer Form Contract: Law and Economics Meets the Real World*, 24 GA. L. REV. 583, 596–97 (1990)); s*ee also* Bar-Gill & Davis, *supra* note 135, at 25–26 (discussing more subtle exploitation of consumers, unilateral modifications of form contracts, which "cannot be mitigated by third-party intermediaries such as *Consumer Reports*"); Korobkin, *supra* note 111, at 1234 (distinguishing between "salient" and "non-salient" contract terms, and stating that, in contrast to salient terms, "non-salient attributes are subject to inefficiencies driven by the strategic behavior of sellers attempting to increase their profits . . . .").

137 For the general focus on regulating more salient terms, particularly price, see Mark R. Patterson, *Standardization of Standard-Form Contract: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 366–67 (2010), and Oren Bar-Gill & Oliver Board, *Product Use Information and the Limits of Voluntary Disclosure* 5–8 (NYU Univ. Sch. of Law, NYU Ctr. for Law, Econ. & Org., Law & Econ. Research Paper Series, Working Paper No. 10-50, 2011), *available at* http://ssrn.com/abstract=1701653.

138 Compare the so-called "financial literacy": while price can be easily grasped, evidence shows that many people simply do not have the means to cheaply comprehend more subtle attributes, such as financial repercussions. *See* Campbell et al., *supra* note 32, at *9–10. In the current context it is plausible to think that many people suffer from "legal illiteracy," leading them to disregard the consequences of exculpatory provisions.

139 Richard A. Epstein, *The Neoclassical Economics of Consumer Contracts*, 92 MINN. L. REV. 803, 814–15 (2008) (footnote omitted). On the other hand, the internet may also enable suppliers to better identify strong consumers, making *ex ante* divide-and-conquer easier. *Cf.* Shmuel I. Becher & Tal Z. Zarsky, *E-Contract Doctrine 2.0: Standard Form Contracting in the Age of Online User Participation*, 14 MICH. TELECOMM. & TECH. L. REV. 303, 348–49 (2008).

140 For such websites, see, for example, Epstein, *supra* note 139, at 809 n.36, 814 n.58.

141 More subtle price and quality features are not easily comparable either. *See, e.g.*, Gabaix & Laibson, *supra* note 135, at 512, 530 (describing an inability to compare

internet is a much less useful a tool for comparing the second-order, legal aspects of given products. Indeed, class action waivers—which seem to clearly frustrate consumers' welfare—proliferate, without any meaningful response on the part of consumers.[142]

A second set of arguments concerns the uncertain power of competition to rectify informational disparities. If consumers cannot become informed independently, the argument goes, competition among suppliers can bring processed, accessible information to their mind. However, markets are a dubious tool to inform consumers, even when one assumes that consumers are able to easily filter information regarding the legal qualities of standard-form contracts.[143] Not all markets are sufficiently competitive to inform consumers.[144] Furthermore, the expectation that competing firms would inform consumers is unconvincing due to the very point of this Part—using exculpatory provisions selectively. To the extent that competition can prevent traditional oppressive terms,[145] it is less likely to eliminate selectively oppressive terms in which one group of consumers gains at the expense of another. To begin with, it is highly difficult to inform the unaware consumers, who are the losers of selective buy-outs.[146] Moreover, the defendant's competitors have no strong incentives to inform the unknowing consumers even when educating them costs

hotels' add-on pricing schedules, and the difficulty to "compel banks to make financial service fees salient").

142 *See generally* Gilles, *supra* note 95 (discussing the increase of use of such waivers); *see also* Robin Sidel, *No Day in Court for Bank Clients*, WALL ST. J., Aug. 2, 2011, at C1, *available at* http://online.wsj.com/article/SB10001424053111904292504576482603037174400.html (describing how U.S. banks are adding contractual provisions requiring customer complaints to be resolved through individual arbitration); Resnik, *supra* note 34, at 122, 128 ("[M]ost of the 240 million mobile telephone subscribers in the United States have service agreements that expressly provide for arbitration and specify that the arbitration must proceed on an individual basis." (internal quotation marks omitted)).

143 As explained before, consumers are unlikely to easily process this information. *See supra* notes 133–142 and accompanying text.

144 *See* Campbell et al., *supra* note 32, at *7–11.

145 *Cf.* Florencia Marotta-Wurgler, *Competition and the Quality of Standard Form Contracts: The Case of Software License Agreements*, 5 J. EMPIRICAL LEGAL STUD. 447, 467–74 (2008) (finding no statistically significant correlation between competition and biased contracts).

146 *See supra* Part III.B.2.c. for the examples in which vigilant consumers are excluded to the detriment of unaware consumers. *Cf.* Gilo & Porat, *supra* note 107, at 175 (rival suppliers would find it difficult to educate consumers, as the "uninformed consumers are often those who are not willing to expend the transaction costs needed in order to read the fine print in their contracts."); Campbell et al., *supra* note 32, at *23–25 (arguing that the sophisticated are better off at the expense of non-educated consumers).

nothing. Should competitors do so, the uninformed may well stick to the same supplier, using the information competitors provided to require better terms.[147] As one commentator observes, "when a flaw is pervasive in the industry, each seller must choose between correcting the flaw and educating consumers, or just going with the flow. It is not at all clear that the . . . correction strategy will always prevail."[148]

Markets, therefore, do not generally correct for selective, pre-damages buy-outs. Markets may have, in principle, the capacity to inform consumers. But at this point they do not seem to do so with regard to the subtle, second-order legal attributes of standard-form contracts.[149]

The two manifestations of the malleability phenomenon this Article discusses—individualizing the prospective class and striking selective contracts—yield lower threats of litigation and therefore diminished deterrence. Hence, one should think of the appropriate implications.

IV. Normative Implications

A. *Litigatory Damages*

As previous sections demonstrated, collective litigation is vulnerable to the defendant's *ex ante* choice of action. Collective litigation is malleable because the doctrinal requirements for class certification are not independent of the defendant's behavior; and due to the structure of the class—weak plaintiffs often depend on strong ones to

147 For a formal exposition of this argument, see Gabaix & Laibson, *supra* note 135. In a nutshell, Gabaix and Laibson find an equilibrium in which no firm would compete for the uninformed consumers ("Debiasing a consumer is good for the consumer and bad for both firms . . . . Often nobody has an incentive to show [uninformed consumers] the error of their ways."). *Id.* at 509. The results hold even where costs of informing consumers are zero, and thus explain "why industries with nearly costless marginal information dissemination still shroud [exploiting terms]." *Id.* at 510. When informing consumers is not costless, and the market is less competitive, the results are stronger; the results are weaker when an independent third party educates consumers. *Id.* at 527. For a non-formal discussion, coupled with additional reasons for competitors not to inform the unaware consumers, see Gilo & Porat, *supra* note 107, at 167–74. *See also* Campbell et al., *supra* note 32, at *11 ("[I]t [is not] profitable for firms to educate naïve consumers, because educated consumers become sophisticated and then demand fewer high-cost financial services.").

148 Bar-Gill, *supra* note 133, at 751. Oppressive practices can persist in a given industry for several other reasons. *See* Becher, *supra* note 110, at 742–43 (surveying the argument that empirically, at least in certain industries, standard-form terms tend to be similar across competitors); Patterson, *supra* note 137 (discussing the phenomenon of standardizing standard-form contracts and its repercussions).

149 *See* the text accompanying *supra* note 142.

redeem their rights, and defendants can buy out strong plaintiffs. Since collective procedures are mechanisms that help plaintiffs to overcome litigation inequalities and successfully pursue their claims, ineffective procedures result in lower overall liability and compensation. As litigation serves public goals—most notably, deterring harmful behavior—the defendant's pre-damages behavior that this Article describes is a social problem.

Defendants' pre-damages actions that weaken future enforcement are, then, a type of externality, inflicted on the group of prospective plaintiffs. This is true regardless of the defendant's motive. Independent of its purpose, the defendant made the plaintiffs' future case worse by choosing an individualizing course of action or by employing selective pre-damages disclaimers. Similar to other externalizing activities, a general solution is imposing on defendants the price of their behavior. Such a price would compel defendants to internalize the consequences of their conduct, and to engage in the hazardous activity only up to the socially optimal point. In this context the defendant's harmful activity makes prospective litigation less effective; hence, the price on this externality can be referred to as litigatory damages.

While the idea of compensable litigatory damages may sound extreme at first, it is not dissimilar from conventional solutions to other types of externalizing behavior. A close analog is evidentiary damages—deliberately or not, a defendant that lost an important piece of evidence reduced the value of the plaintiff's case.[150] Making the plaintiffs' case worth less by taking a slightly different course of action is conceptually similar to spoliating evidence. In both, it makes sense to discourage the defendant from so doing.[151]

The price that should be imposed to rectify the defendant's tendency to overly engage in harmful activities is equal to the social costs of these activities. In the current context, the litigatory damages should match the savings that the defendant reaped from the business conduct that prevented effective collective litigation. These sums can be in principle assessed. To illustrate, it is the difference between what the plaintiffs in *Wal-Mart* would have gained through a hypothetical, "counterfactual" class action; and the amount the group of plaintiffs actually receives in the alternative avenue, given the inability to

150 *See* Ariel Porat & Alex Stein, *Liability for Uncertainty: Making Evidential Damage Actionable*, 18 CARDOZO L. REV. 1891, 1894–95 (1997).

151 The idea of compensable litigatory damages can be extended to deter other behaviors that affect optimal litigation—one example may be strategic forum-shopping.

certify class litigation. Levying these litigatory damages guarantees that the defendant will not use pre-damages manipulations unless they carry a sufficient commercial value, which exceeds their social harm (in terms of debilitated enforcement). Furthermore, the suggested calculation of litigatory damages reflects the fact that, in some cases, individual litigation is effective and hence collective litigation is a superfluous means to achieve deterrence—in these circumstances, the litigatory damages would be trivial.

This litigatory damages response is analytically sound. It restores optimal deterrence[152] and reduces the defendant's incentives to break the class to the socially optimal level. Furthermore, an independent assessment of litigatory damages achieves these goals without the need to directly adjudicate split, individualized classes.

While this approach can achieve in theory a first-best, comprehensive solution, it substantially deviates from existing practices.[153] The remainder of this Part therefore turns to two additional directions for potential response. These additional suggestions are imperfect, second-best solutions; some better fit some situations, and others work well under different circumstances. Nonetheless, they seem to be more easily implemented than imposing litigatory damages. The goal, then, is to provide a menu of nuanced responses that have the potential to improve upon existing procedures.

The first direction that will be discussed is a case-by-case approach, which stresses judicial discretion not to honor *ex ante* manipulations. The second direction calls for broader, class-wide solutions.

B. Judicial Discretion

1. Certifying Individualized Classes

This line of responses calls for judicial attention to attempts to circumvent, before damages, collective litigation. In the context of doctrine-based malleability, where defendants "individualize" the class in order to avoid certification, judges should ignore these attempts

152 *Cf.* Rosenberg, *supra* note 46, at 832 (suggesting mandatory class action as a means to achieve optimal deterrence).

153 A practical vehicle to materialize this solution, at least in certain circumstances, may be an appropriate award of punitive damages, which should be determined according to the monies the defendant saved. While this approach is consistent with common law and economics views, which see punitive damages as a remedy for weak enforcement, judges often hesitate to take this direction. *See, e.g.*, Steven Shavell, *On the Proper Magnitude of Punitive Damages*: Mathias v. Accor Economy Lodging, Inc., 120 HARV. L. REV. 1223, 1225 (2007).

and decide whether to authorize class action as if no *ex ante* manipulations took place. It may be difficult for judges to identify the cases in which defendants individualize the class to avoid litigation, as opposed to taking a legitimate business action. One mechanism that can help to better sort the two groups of cases is burden-shifting.[154] Defendants would be required to explain to the court the independent commercial value of their individualizing choice of action. Absent showing a legitimate business purpose for their conduct, defendants would be barred from arguing that the class is too individualized to certify.[155] To see how this method can eliminate at least some attempts to avoid collective litigation, consider the following example, based on an actual case:[156]

> A corporation decided to appropriate the rights of its members, offering them compensation for their taken shares. The public notice for this move was deficient. Indeed, not a single shareholder claimed compensation. Later on, the shareholders filed a class action. The corporation raised the statute of limitations defense. The plaintiffs responded with an equitable tolling claim—they could not reasonably discover their injury on time. The corporation then argued that the equitable tolling question is an individual issue, which frustrates class litigation because it requires individual inquiries (whether each plaintiff could not reasonably discover the injury). As the corporation lacks business reasons for the deficient notice that created the individual differences, it should be barred from raising these differences to avoid certification.

The goal of this proposed procedural modification is straightforward: individualizing behavior with no legitimate business reasons should not block class certification. In this example, it is the flawed drafting and publication of the notice which created the individual differences that later precluded class certification; this individualizing behavior, which seems to lack any legitimate business motive, should not bar class certification.[157]

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154 I am indebted to Shmulik Becher for encouraging me to develop this direction.

155 The burden-shifting tool is used in other contexts to winnow out litigants' strategic behavior. *Cf.* Thatcher v. Hanover Ins. Grp. Inc., 659 F.3d 1212, 1214 (8th Cir. 2011) (refusing to allow a litigation maneuver because the plaintiffs "set forth no adequate reason" for doing so).

156 The case, decided at the Israeli Supreme Court against the plaintiffs, is CA 6887/03 Reznik v. Nir Shitufi Agricultural Cooperative [2010].

157 The reader may wonder how courts should adjudicate such individualized classes. As will be elaborated below, see *infra* notes 180–191 and accompanying text, courts have several tools at their disposal to handle classes with relatively more individual differences. While these tools do deviate from mainstream practices, this is a

The proposed approach would not solve all cases. Wal-Mart, for example, would probably be able to meet this burden, showing that it had independent business reasons to decentralize discretion.[158] However, the burden shifting tool can work well in other circumstances. The individualized statute of limitations case is one example. Additional salient examples that are mentioned in this Article are the individualizing computer glitch,[159] the informed consent case in which the doctor allegedly disclosed important information orally, but failed to do so in the written consent form,[160] and provisions that allow the defendant to elect the applicable law.[161] Requiring defendants to explain their individualizing behavior in these types of cases would avoid strategic individualizing steps.[162]

2. Suspicion Toward Waivers and the Contemporary Law

In the context of selective pre-damages contracts, where mass defendants can buy-out strong plaintiffs, judges can similarly take a more suspicious approach toward liability waivers. By restricting the freedom of the strong would-be plaintiffs, the entire class of victims is better off.

As before, it seems that some types of waivers—perhaps liability waivers that are hidden in standard-form contracts[163]—are hard to explain on commercial grounds. These situations are more likely to reflect attempts to dilute liability through *ex ante* agreements; hence, courts should hesitate to honor such waivers. Likewise, some selective

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reasonable price to pay where the defendant has no legitimate reason to take an individualizing course of action.

158 *See supra* note 11 and accompanying text.

159 *See supra* note 73.

160 *See supra* note 79 and accompanying text.

161 *See supra* note 77. One can also think of extending the burden-shifting logic to mandatory individual arbitration provisions. In this case, the defendant would be required to explain the commercial justifications for these clauses. *Cf.* Szetela v. Discover Bank, 118 Cal. Rptr. 2d 862, 867 (Cal. App. 2002) (invalidating mandatory individual arbitration provision); *id.* ("[The] provision is clearly meant to prevent customers . . . from seeking redress for relatively small amounts of money . . . . [The defendant] has . . . sought to create for itself virtual immunity from class or representative actions despite their potential merit.").

162 While the current proposal shifts the burden to defendants to provide a legitimate business purpose, a milder version is asking defendants to show that the individualizing behavior is part of a reasonable business administration. In the computer glitch example, see *supra* note 73, for instance, the defendant may be able to show that the error was reasonable, though it was not motivated by a legitimate business purpose. *Cf.* Porat & Stein, *supra* note 150, at 1940–41 (noting the analytical preference for strict liability, as opposed to negligence, in analog situations).

163 *See supra* note 127 and accompanying text.

waivers are especially harmful, as they exclude prospective plaintiffs who are crucial to successful litigation. This might happen where there is one (or a few) salient strong class member,[164] or where the remaining group is exceedingly weak or unaware of its rights.[165] Alternatively, the matter may be too complicated for the remaining plaintiffs to pursue without the stronger, trailblazing class members.[166] Technically, judges can invalidate harmful liability waivers through the doctrine of unconscionability.[167] This direction, however, is not taken by current doctrine.

Contemporary law of disclaimers focuses solely on factors internal to the adjudication between the parties—complete information, equal bargaining power, and substantive fairness.[168] Similarly, mainstream law and economics scholarship encourages disclaimers, as they can more closely fit each consumer's individual preferences.[169] Practi-

164 The nuisance example—in which the strongest prospective plaintiff was the immediate neighbor of the defendant—demonstrates this situation. *See supra* notes 114–119 and accompanying text.

165 *Cf. supra* notes 124–130 and accompanying text.

166 This might be relevant where the subject matter is exceptionally complex, or where courts, for whatever reason, do not certify class actions. In this state of affairs, litigation becomes more difficult, stressing the advantages that the defendant has and the weak plaintiffs' dependence on strong ones.

167 *See* Discover Bank v. Superior Court, 113 P.3d 1100 (Cal. 2005) (invalidating mandatory arbitration/class-action waiver provisions on unconscionability grounds); *id.* at 1110 ("[Under certain circumstances, a] waiver becomes in practice the exemption of the [defendant] from responsibility for its [liability]." (internal quotation marks omitted)). But, see *supra* note 95 and accompanying text for the contradictory Supreme Court ruling on this specific point. Another blunt tool to cope with provisions that harm third parties is voiding them on public policy grounds. *See* Note, *A Law and Economics Look at Contracts Against Public Policy*, 119 HARV. L. REV. 1445, 1445–46 (2006) ("[N]egative externalities [are] the key factor that may justify voiding certain contracts on public policy grounds.").

168 *See, e.g.*, U.C.C. § 2–302 (2010). The Official Comment holds that the relevant inquiry as to unconscionability is "whether . . . the clauses involved are so one-sided as to be unconscionable." U.C.C. § 2–302, cmt. 1 (2010); *see also* RESTATEMENT (SECOND) OF CONTRACTS § 208 cmt. d (1981) ("[G]ross inequality of bargaining power, together with terms unreasonably favorable to the stronger party, may confirm indications that the transaction involved elements of deception or compulsion, or may show that the weaker party had no meaningful choice, no real alternative, or did not in fact assent . . . ."); Becher, *supra* note 110, at 725; Gilo & Porat, *supra* note 107, at 137 ("The question of whether to strike down . . . a clause is generally determined by courts according to a combination of three considerations . . . : first, the information gap between the supplier and his consumers . . . ; second, whether the supplier enjoys superior bargaining power; third, the degree of harshness, or onesidedness, of the clause."); Korobkin, *supra* note 111, at 1256.

169 *See*, for example, Alan Schwartz, *Proposals for Products Liability Reform: A Theoretical Synthesis*, 97 YALE L.J. 353, 358 (1988). *But see* Albert H. Choi & Kathryn E. Spier,

cally, however, information inequalities often distort the price that suppliers charge for liability disclaimers, generating unfair and undercompensatory contracts.[170] But when there is an express and fair waiver, there will be no conceptual reason not to enforce it, even if the defendant pursues a negligent act.[171] Aware of these practical difficulties, law and economics literature came up with creative solutions to the information problems that are associated with disclaiming liability.[172] And in the internet era information disparities have been waning.[173]

The limited view that focuses on internal characteristics tends to honor, then, waivers between manufacturers and the "commercial, . . . sophisticated and knowledgeable" buyer.[174] This Article calls for courts to take into account external factors, i.e., how the exclusion affects fellow consumers/plaintiffs. Substantive fairness, symmetric information, and bargaining inequalities are irrelevant to the external inquiry. In fact, when the *ex ante* perspective of this Article is taken, the traditional results can flip. Repeat players, commercial parties, and sophisticated and knowledgeable buyers seem more likely to have larger and better cases. Excluding them is the most harmful for the remaining, weak consumers/plaintiffs. When a disclaimer provision in a standard-form contract is inspected, then, judges should have in mind class members who are *not* governed by it, in addition to those

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Should Consumers Be Permitted to Waive Products Liability? Product Safety, Private Contracts, and Adverse Selection, *2 (Harv. L. & Econ. Discussion Paper, Paper No. 680, Va. L. & Econ. Research Paper, Paper No. 2010-11), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1680932 (arguing that, where consumers have private information regarding their probability of being harmed, liability waivers may lead to suboptimal safety); Ehud Guttel & Shmuel Leshem, *Buying the Right to Harm: The Economics of Buyouts* *10–28 (2011), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930729 (finding that buy-outs enable injurers to manipulate the cost-benefit standard and avoid liability).

170 *See* MARK A. GEISTFELD, PRINCIPLES OF PRODUCT LIABILITY 227–30 (2006); Mark Geistfeld, *Imperfect Information, The Pricing Mechanism, and Products Liability*, 88 COLUM. L. REV. 1057, 1066 (1988). For similar problems in the context of medical malpractice, see Jennifer Arlen, *Private Contractual Alternatives to Malpractice Liability*, *in* MEDICAL MALPRACTICE AND THE U.S. HEALTH CARE SYSTEM 245, 263–64 (William M. Sage & Rogan Kersh eds., 2006).

171 *See, e.g.*, GEISTFELD, *supra* note 170, at 227–30.

172 *See* Geistfeld, *supra* note 170, at 1063 (suggesting that each product would be double priced—with and without sellers' liability); Schwartz, *supra* note 169, at 407–08 (same).

173 *See supra* notes 139–140 and accompanying text.

174 Mark Geistfeld, *Products Liability*, *in* 3 ENCYCLOPEDIA OF LAW & ECONOMICS 347, 375 (Bouckaert & De Geest eds., 2000), *available at* http://encyclo.findlaw.com/tablebib.html (describing the law of disclaimers).

who end up in court and challenge it.[175] The crucial question judges should ask is the following: how would the class of plaintiffs fare if there were no liability waivers?

C. Class-Wide Solutions

While existing practices are deficient, as they let defendants avoid post-damages collectivization, a case-by-case inquiry is by no means a panacea. In the context of doctrine-based malleability, the desire to avoid certification can manifest itself in subtle ways. In that case, the task of distinguishing between legitimate and illegitimate business strategies seems daunting. While burden-shifting may resolve certain cases, defendants, as the *Wal-Mart* case demonstrates,[176] can often refer to a business purpose that justifies their individualizing course of action.[177] Similar problems arise in the context of selective buy-outs. Generally, waivers promote efficiency as they satisfy individual preferences. Identifying the harmful waivers might be too complicated a task for courts to accomplish. While there are cases in which liability waivers seem to lack any commercial reason, others do have independent business justifications. Likewise, although rules of thumb can aid in recognizing the buy-outs that substantially harm remaining plaintiffs,[178] it may be a formidable task to gauge the effects of waivers on third parties, not in court. In light of these difficulties, more radical, class-wide solutions may be appropriate. The following paragraphs suggest class-wide responses to the problems of individualizing behavior and selective contracts. While these class-wide solutions are more comprehensive than case-by-case proposals, they are also more oblivious to individual differences. Put differently, case-by-case solutions deviate from mainstream practices to a lesser extent, and only in the more extreme cases.[179] Systematically ignoring individual differences,

175 *Cf.* Patterson, *supra* note 137, at 336 (urging courts to look at the more global, anti-competitive aspects of standard-form contracts).

176 *See supra* note 158 and accompanying text.

177 For discussions in other settings regarding the need to show a legitimate business purpose and the difficulties of policing this requirement, compare *Weinberger v. UOP, Inc.*, 457 A.2d 701, 715 (Del. 1983) (holding that, in the context of freeze-out mergers, no "additional meaningful protection is afforded minority shareholders by the business purpose requirement"), with Coggins v. New Eng. Patriots Football Club, Inc., 492 N.E.2d 1112, 1118 (Mass. 1986) (finding the business purpose test to be a useful means under Massachusetts statutes for examining freeze-out mergers).

178 For a short summary of relevant rules of thumb, see *supra* notes 163–166 and accompanying text. In general, selective waivers that target a conspicuously strong group of plaintiffs, where the remaining ones are particularly weak, are the most problematic.

179 *See supra* note 157.

however, may be justified where the defendants' behavior weakens enforcement and case-by-case inquiries cannot help.

1. Individualizing Course of Action

As the foregoing discussion demonstrates, the defendant's choice of business administration, even if justified by some legitimate commercial concerns, looks like a problematic criterion to determine class certification. It is particularly troubling where the alternative—individual litigation—is a much less effective route for plaintiffs to vindicate their rights. To overcome this state of affairs and avoid complex case-by-case determinations, courts can turn to procedures that do not yield malleable classes, i.e., rules that do not let the choice of business strategy determine certification.

As previously discussed, the crux of the battle over certification is the desire to balance procedural rights against the advantages of collective litigation. Consistent manipulations of certification standards should shift the balance in the direction of more collective litigation (at the expense of procedural rights).

Indeed, if one is willing to sacrifice, at least partially, the notion of precise individual recovery,[180] doctrinal hurdles to certification become illusory, to a large extent. Courts can determine liability in the aggregate; when the common fund—the price the defendant should pay for its wrongdoing—is set up, it can be distributed to approximate individual entitlements. This procedure is by no means unknown to courts.[181] It ensures deterrence, as the defendant pays the full price—or approximately the full price[182]—of its actions. Like-

180 In reality, the principle of appropriate individual compensation is often compromised, as administrative constraints may well lead to "rough justice": actual individual compensation is not likely to equal the victim's damages. AM. LAW INST., *supra* note 55, § 1.04 cmt. f. Likewise, there are reasons to believe that people do not assign exceedingly high value to their procedural rights. LOUIS KAPLOW & STEVEN SHAVELL, FAIRNESS VERSUS WELFARE 248–75 (2002). See Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012), for the tension between individual rights and values of fairness and equality in this context.

181 *See, e.g.*, 3 CONTE & NEWBERG, *supra* note 63, at § 10:5 ("Courts have not required absolute precision as to damages and have allowed damages to be proven by reference to the class as a whole, rather than by reference to each individual class member."); *see also* Resnik, *supra* note 34, at 152–53.

182 Class-wide procedures often approximate the defendant's liability. While these approximations yield accurate amounts on average, they would make the defendant pay in specific cases sums that are unequal to its liability. There are nonetheless several reasons to keep using class-wide mechanisms. First, relative to defendants' wealth, deviations from actual liability are typically immaterial and do not implicate risk-aversion concerns—firms, by and large, care much more about expected liability

wise, this method also guarantees a roughly accurate individual compensation to the members of the class. As class-wide mechanisms to determine liability ignore individual differences, they obviate the too-individual hurdle to class certification. That the defendants can stifle the certification of future classes should shift courts in the direction of these class-wide procedures, individual differences notwithstanding.

There are many practical mechanisms to achieve class-wide outcomes. To overcome choice of law problems, for example, courts can roughly divide the class to sub-classes, or, even better,[183] employ some kind of average law.[184] Alternatively, judges can be more receptive to the claim that a single law governs the area.[185] To cope with overly individual classes courts can use rough sub-classes; more general mechanisms are bellwether trials or sampling to approximate liability in the aggregate.[186] Alternatively, courts can presume a common question or frame the relevant issues in a way that is common to the

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than the precise damages. Second, by investing more—*e.g.*, sampling more cases—courts can greatly improve the accuracy of class-wide determinations. Third, where deviations from the average are sufficiently sizeable to trigger firms' risk-aversion concerns, and the accuracy of class-wide procedures cannot be easily improved, courts can discount the overall liability by the risk that firms have to bear. Practically, this means awarding lower damages to account for firms' risk-aversion. Finally, and perhaps most importantly, imprecise procedures should be judged against the alternative. Without collective litigation systematic underpayment is the likely result; class-wide procedures yield, on average, unbiased liability.

183 Sub-classes make the collective action less worthy of pursuing, and hence reduce the price tortfeasors pay for their wrongdoing. *Cf. supra* note 46.

184 See *supra* note 76 for McCloud and Rosenberg's proposal. In the same spirit, an unsuccessful proposed amendment to the Class Action Fairness Act suggested that "the district court shall not deny class certification . . . on the ground that the law of more than 1 state will be applied." 151 CONG. REC. S1215 (daily ed. Feb. 9, 2005).

185 One option is finding a single state law that governs the action. *See, e.g.*, Ysbrand v. Daimler Chrysler Corp., 81 P.3d 618, 625 (Okla. 2003) (applying law of the defendant's principal place of business to nationwide class action). Another alternative is invoking, where possible, federal law. *See, e.g.*, Ledingham, *supra* note 83, at 291 (demonstrating that in the context of mass fraud, the Racketeer Influenced and Corrupt Organizations Act (RICO) "provides . . . a common federal standard under which a national class can unite").

186 For bellwether trials and sampling, respectively, see Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 VAND. L. REV. 561, 563–66 (1993); Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576, 577 (2008). *Cf.* Adam M. Samaha, *Randomization in Adjudication*, 51 WM. & MARY. L. REV. 1, 30 (2009) ("[C]ourts seem unwilling to randomly sample from a plaintiff class to resolve similar issues for all plaintiffs . . . . [However] . . . courts are open to early scheduling of randomly selected bellwether trials with the expectation that similar cases will thereafter settle accordingly.").

entire class.[187] Perhaps the most simple, practical, and effective mechanism to find liability in the aggregate is letting the parties settle—odds are that a certified class would settle, regardless of individual differences that the defendant raised to oppose certification.[188] To achieve a roughly precise allocation of the common fund, one can use some form of compensation grids, as often happens in class action settlements.[189]

Courts have been employing these class-wide procedures.[190] One notable example of an area in which this approach is common is securities law. The area is federalized, hence choice-of-law difficulties are irrelevant. In addition, a judicially created legal presumption—the fraud-on-the-market doctrine—disregards the common-law requirement of individual reliance, obviating individual differences that inhibit class certification.[191]

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187 In *Wal-Mart*, for example, the plaintiffs attempted to attribute a policy of "excessive subjectivity" to the defendant—a question that is common to the entire class. *See, e.g.*, Wal-Mart Stores, Inc., v. Dukes, 131 S. Ct. 2541, 2548 (2011) ("[R]espondents claim that the discrimination to which they have been subjected is common to *all* Wal–Mart's female employees."); Transcript of Oral Argument at 10, Wal-Mart Stores, Inc. v. Dukes, 131 S. Ct. 2541 (2011) (No. 10-277), *available at* http://www.supremecourt.gov/oral_arguments/argument_transcripts/10-277.pdf; *see also* Watson v. Fort Worth Bank & Trust, 487 U.S. 977, 990–91 (1988) ("If an employer's undisciplined system of subjective decisionmaking has precisely the same effects as a system pervaded by impermissible intentional discrimination, it is difficult to see why Title VII's proscription against discriminatory actions should not apply.").

For another example, the fraud-on-the-market presumption, see *infra* note 191 and accompanying text. Of course, there are limitations on the ability to frame the relevant issues as common questions. *Cf.* Issacharoff, *supra* note 83, at 1648–52. Furthermore, the framing of the relevant issues as common questions should presumably alter the calculation of the damages.

188 Courts have a myriad of ways to encourage settlements. *See, e.g.*, PETER H. SCHUCK, AGENT ORANGE ON TRIAL 143–67 (1987) (describing how Judge Weinstein encouraged the parties to settle).

189 For compensation grids see, for example, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849, 917–19 (1984). Mechanical compensation schemes are very common in class settlements. *Cf.* the examples in TIDMARSH, *supra* note 35. In addition to compensation tables, one can think of more radical methods to distribute the common fund. One such method, which is useful where the individual stakes are low, is holding a lottery among the members of the class. *See* Shay Lavie, *Reverse Sampling: Holding Lotteries to Allocate the Proceeds of Small-Claims Class Actions*, 79 GEO. WASH. L. REV. 1065 (2011).

190 *See, e.g.*, *supra* note 181.

191 As Richard Nagareda explains:

> The fraud-on-the-market doctrine has considerable consequences for class certification. . . . When the fraud is embedded in the market price, in other words, all those who traded during the relevant period can be said to have relied upon the fraud—hence, the notion of fraud "on the market" as a

While the conventional view is to take certification standards as independent of the defendant's behavior, previous sections demonstrated that class certification cannot be determined, according to existing doctrine, based on a given, objective standard. Defendants can reduce the odds of certification by choosing a slightly different, but still harmful, business strategy. Because denying certification is often akin to a death knell to any individual litigation, reducing the likelihood of certification means substantially lower liability. This phenomenon weakens the power of litigation to deter wrongdoing, and hence, it is a social problem.

When a doctrine ceases to meet its purpose, it should be reconsidered. As this section explains, there are numerous mechanisms that overcome individual differences and obviate the problem of class actions' malleability. While these methods deviate from mainstream practices, the balance should tilt toward using them where defendants can individualize the class—i.e., where they can affect, *ex ante*, the cohesiveness of the class. Courts should be particularly more inclined to overcome challenges to certification where the alternative avenue for redress—individual litigation—yields substantially lower proceeds. A notable example is low-value claims, which are often not worth pursuing individually.

2. Selective Pre-Damages Contracts

A shift toward post-damages, class-wide collectivization mechanisms may solve doctrine-based malleability, but it cannot eliminate the deeper issue of pre-damages selective contracts—the defendant can buy out strong plaintiffs regardless of the flexibility of the standards for certification. To avoid pre-damages buy-outs, one needs more comprehensive modes of collectivization. The following are three directions for such procedures, which take into account the availability of *ex ante* agreements. Although these mechanisms deviate from current practices, they do point at the direction in which possible policy reforms can enter where selective pre-damages contracts pose a problem.

> whole. Like other presumptions in law, this presumption of reliance remains rebuttable, but its procedural consequence is well-nigh uniform. The fraud-on-the-market doctrine, in effect, sweeps away opposition to class certification when that opposition rests upon the concern that the reliance element presents individualized questions unsuitable for aggregate treatment.

Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. Rev. 97, 116 (2009).

First, one can think of a wholesale ban on liability waivers. While this might be a viable option in some areas, in others it is impractical or inefficient. To illustrate such a ban, consider securities litigation, an area in which the law prohibits, in principle, liability waivers.[192] This anti-waiver policy is usually explained by the desire to protect ignorant and weak investors.[193] The ban persists although the traditional reasons seem irrelevant to modern securities markets, in which information gaps and bargaining inequalities are considered less problematic.[194] In light of markets' efficacy, the sweeping anti-waiver policy is by no means self-evident.[195] In particular, the anti-waiver rule masks the variance among investors. Indeed, several law and economics scholars criticize the mandatory nature of federal securities regulation.[196] Can the *ex ante* perspective of this Article explain the puzzling prohibition on waivers? One can conceive of selective waivers in the securities context, which aim at excluding the strongest actors (e.g.,

192 The relevant provisions are § 14 of the Securities Act of 1933 and § 29(a) of the Securities Exchange Act of 1934. The latter, for instance, provides that: "Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or of any rule or regulation thereunder . . . shall be void." Securities Exchange Act of 1934, Pub. L. 43-291 § 29(a), 48 Stat. 881, 903 (1934); *see also* LARRY D. SODERQUIST & THERESA A. GABALDON, SECURITIES REGULATION 611–25 (5th ed. 2003).

193 *See* Arnold S. Jacobs, *Affirmative Defenses to Securities Exchange Act Rule 10b-5 Actions*, 61 CORNELL L. REV. 857, 886–93 (1976); Comment, *Section 29(a) of the Securities Exchange Act: A "Legislative Chaperon" for Rule 10b-5*, 63 NW. U. L. REV. 499, 499–500 (1968); *see also* Edwin D. Eshmoili, Note, *Big Boy Letters: Trading on Inside Information*, 94 CORNELL L. REV. 133, 144 (2008) (referring to several sources for the proposition that the purpose of the anti-waiver policy is to protect "those who cannot protect themselves" (internal quotation marks omitted)).

194 "Securities often are traded in fairly well-functioning markets, so that the premises of economic analysis are satisfied more easily . . ." Frank H. Easterbrook & Daniel R. Fischel, *Optimal Damages in Securities Cases*, 52 U. CHI. L. REV. 611, 613 (1985); *see also* Roberta Romano, *Empowering Investors: A Market Approach to Securities Regulation*, 107 YALE L. J. 2359, 2366 (1998) ("[I]nstitutional investors . . . comprise the majority of stock market investors and . . . determine market prices on which uninformed investors can rely.").

195 Nineteenth-century English courts honored contractual waivers in securities transactions, and American states' securities laws were not decisive on this point prior to the federalization of the area. *See* Comment, *supra* note 193, at 500–03.

196 *See, e.g.*, Douglas G. Baird & M. Todd Henderson, *Other People's Money*, 60 STAN. L. REV. 1309, 1133 (2008) ("A more sensible approach is one that . . . makes it easier for sophisticated professionals both to opt out of disclosure obligations and opt into them." (citing FRANK H. EASTERBROOK & DANIEL R. FISCHEL, THE ECONOMIC STRUCTURE OF CORPORATE LAW 269–70 (1991))); Romano, *supra* note 194, at 2367, 2368, 2378, 2396; Daniel Sullivan, Note, *Big Boys and Chinese Walls*, 75 U. CHI. L. REV. 533, 564 (2008).

institutional investors[197]). Is the anti-waiver policy appropriate, in light of the considerations raised in this Article, and given the current allegedly efficient markets?

These questions exceed the scope of this Article.[198] However, the discussion on securities law does demonstrate an alternative solution to the problem of selective liability waivers. Rather than a case-by-case inquiry as to the validity of each disclaimer, securities law features a wholesale prohibition. Such a rigid approach may be useful where enforcement is deeply flawed; however, it loses on efficiency, as it does not let individual class members express their divergent preferences.[199]

A second direction to account for *ex ante* buy-outs is aggregating the interests of all plaintiffs before the occurrence of damages. Practically, this means that a third party would represent the class's interests. The third party would not allow liability waivers that hurt the class, even if such agreements benefit some individual members. While this procedure is perhaps appropriate in certain enclaves,[200] it seems unrealistic in others.

A third possibility is creating sufficient incentives to litigate as if there were no pre-damages buy-outs. Courts can, for example, allow the attorney who represents the remaining plaintiffs to litigate as if

197 Institutional investors are the perfect candidates for strategic buy-outs. They have expertise and sophistication, as well as larger expected damages due to their sizeable holdings.

198 What might have been appropriate at the enactment of the anti-waiver policy in the 1930s might be unsuitable today. Particularly, the advent of effective class litigation improves the enforcement of class-wide obligations. *See* Nagareda, *supra* note 191, at 116 (discussing the presumption in favor of class treatment in the securities context). One should judge the anti-waiver policy against these changing circumstances.

199 *Cf.* Campbell et al., *supra* note 32, at *24–26 (discussing standard mortgages versus agreements that favor sophisticated consumers).

200 The literature has offered several versions of the idea of third-party, *ex ante* representation. *See generally* Bar-Gill & Davis, *supra* note 135 (proposing third party approval of unilateral modifications in standard-form contracts); Shmuel I. Becher, *A "Fair Contracts" Approval Mechanism: Reconciling Consumer Contracts and Conventional Contract Law*, 42 U. MICH. J.L. REFORM 747, 750 (2009) (suggesting a regime of third-party authorization of form-contracts); Kenneth S. Reinker & David Rosenberg, *Unlimited Subrogation: Improving Medical Malpractice Liability by Allowing Insurers to Take Charge*, 36 J. LEGAL STUD. 261 (2007) (arguing for assigning all future claims to insurers); Campbell et al., *supra* note 32, at *20 ("[In the context of negotiating retirement plans] employers . . . may mitigate adverse selection by pooling individuals . . . and they may alleviate problems that arise due to limited cognition or lack of financial literacy by acting as an agent on behalf of their employees."); *id.* at 18 (discussing third party validation of standard-form contracts).

there were no *ex ante* waivers. Under these conditions, the court would determine the overall liability. From this sum, the defendant would deduct the amount it paid for excluding individual plaintiffs. The gist is that the counsel's fee would be based on the total, pre-deduction liability and damages. This method should eliminate strategic motives to strike pre-damages waivers. While this approach does have difficulties, they are not insurmountable, at least under some circumstances.[201]

CONCLUDING REMARKS

The previous Parts have shown that collective litigation procedures are not objective mechanisms; rather, they are manipulable, vulnerable to the defendant's choice of action. Mass defendants can destroy, before the occurrence of damages and in a myriad of ways, the formation of successful collective litigation. Specifically, defendants can use doctrinal gaps to individualize the prospective class, making it uncertifiable; and can avail themselves of the variance among plaintiffs to selectively buy out the strongest ones, leaving the remaining plaintiffs in a weaker position.

Elaborating on this malleability phenomenon, the Article shifts attention to the pre-damages setting. It is common to say that collective litigation purports to remedy the deep, inherent inequality between mass defendants and plaintiffs, the well-known "haves come out ahead" problem. As Marc Galanter observed, "authorization of class action suits . . . [is one of] the most powerful fulcrum[s] for change."[202] While collective litigation rectifies the *ex post* "haves come out ahead" issue, it cannot account for its pre-damages aspects. As the Article shows, the "haves" can come out ahead *ex ante* as well. This makes existing collective litigation procedures not as effective as they are considered to be, allowing the defendants to pay less than the full price for the harm they inflicted on the group of plaintiffs. Hence, this malleability phenomenon is a social problem.[203] Accordingly, the Article offers a menu of responses to obviate attempts to frustrate effective litigation and to strengthen collective procedures.

In light of the malleability phenomenon one should also give more serious thought to alternatives and supplements to litigation. One such alternative is the market. In some circumstances, market

201 I thank David Rosenberg for raising this point.

202 Galanter, *supra* note 9, at 150; *see also id.* at 150–51 ("The intensity of the opposition to class action legislation . . . indicates the 'haves' own estimation of [its] relative strategic impact.").

203 *See supra* Part I.B.

forces can effectively deter mass-injurers from selling risky products—defendants are "motivated by market forces to enhance product safety because their sales may fall if their products harm consumers."[204] To the extent market forces discourage wrongdoing better than litigation does, litigation may become unnecessary. In that case, the ineffectiveness of current collective litigation procedures that this Article demonstrates further weakens the case for litigation as a means to achieve deterrence. Along the same lines, appropriate responses may be interventions that facilitate the workings of the market. In the context of the malleability phenomenon, such interventions should enable potential victims, for instance, to easily acquire information regarding the legal attributes of the product or the service.[205]

Whether the market actually disciplines mass injurers is an empirical question. Presumably, there are situations in which the market, with or without such interventions, cannot help. One example is nuisance-type cases, where the weak, worse-off victims have no contractual relations with the injurer.[206] When both markets and collective litigation fail to enforce legal standards, regulation is often invoked.[207] The capacity of public officials to engage in mass enforcement is lim-

204 A. Mitchell Polinsky & Steven Shavell, *The Uneasy Case for Product Liability*, 123 HARV. L. REV. 1437, 1438 (2010).

205 One suggestion is to encourage the creation of networks of information that provide, in an accessible manner, data regarding the legal attributes of the product or the service (*e.g.*, the odds of successful litigation against the prospective defendant and the existence of hidden selective waivers). *Cf.* Becher & Zarsky, *supra* note 139, at 360–63 (suggesting governmental platforms that would increase the information flow from consumers to the broader public). Another practical suggestion in a related context may be obligating suppliers to put a clear price on class litigation waivers—consumers would choose whether to agree to mandatory individual arbitration clauses for a price discount. Compare the proposals that each product would be double priced—with and without sellers' liability. *Supra* note 172.

206 *See supra* notes 114–119 and accompanying text. Another example is warranties that exclude non-buyers. *See supra* Part III.B.2.b.; *cf.* Polinsky & Shavell, *supra* note 204, at 1490–91 (distinguishing products liability, which involves actual customers, from liability to "strangers," the non-customers, and concluding that with regard to strangers "market forces do not operate to penalize firms for the harm that they generate").

207 *Cf.* the new wave of regulation of consumer financial products in the aftermath of the financial crisis (*e.g.*, Michael B. Mierzewski et al., *The Dodd-Frank Act Establishes the Bureau of Consumer Financial Protection as the Primary Regulator of Consumer Financial Products and Services*, 127 BANKING L. J. 722 (2010)); Alexandra D. Lahav, *Can Liz Warren Save Class Actions?*, MASS TORT LITIGATION BLOG (May 2, 2011), http://lawprofessors.typepad.com/mass_tort_litigation/2011/05/can-liz-warren-save-class-actions-.html.

ited.[208] However, regulators can help to do exactly what collective litigation is supposed to achieve—flatten the adjudicative inequities between mass defendants and plaintiffs. Regulators have the means and expertise to target areas in which enforcement is unsatisfactory, e.g., due to the *ex ante* malleability problem and the collapse of collective litigation. Within these areas, regulators are capable of generating factual and legal information on the defendant's malfeasance that litigants need the most. Private attorneys and market competitors can follow-up these materials, better disciplining mass wrongdoers.[209] This approach, augmenting private enforcement, is not new; it has been adopted in several areas, most notably securities and antitrust.[210]

The discussion on supplementing collective litigation procedures with market forces and regulation exceeds the scope of this Article. For now, the perspective illuminated in the Article suggests a different take on the current array of relevant doctrines. Examples include: levying on defendants the litigatory damages they inflicted on plaintiffs, case-by-case judicial attention, burden shifting to preclude defendants from raising arguments against certification, a more frequent use of mechanisms to determine liability in the aggregate, and broader modes of collectivization, which take into account the availability of pre-damages buy-outs. These mechanisms can improve, at least partially, collective litigation processes. While these suggestions

208 In addition to obvious financial constraints, regulators' decision making is often criticized for being captured by industry interests. *See, e.g.*, Rachel E. Barkow, *Insulating Agencies: Avoiding Capture Through Institutional Design*, 89 TEX. L. REV. 15, 21–24 (2010).

209 As Howard Erichson states:

> [A] government lawsuit or investigation may simply give lawyers or litigants the idea for the private suit, or spur to action those who had been considering such a suit, and may suggest ideas or language for the complaint. Government litigation may also generate documentary discovery or other information that private litigants use in their lawsuits. The government suit may result in a judgment with issue preclusive effect against the defendant in subsequent private litigation. Successful government litigation may facilitate private claims by altering public attitudes about the defendants' liability.

Howard M. Erichson, *Coattail Class Actions: Reflections on Microsoft, Tobacco, and the Mixing of Public and Private Lawyering in Mass Litigation*, 34 U.C. DAVIS L. REV. 1, 6 (2000).

210 It was said, for example, that "[t]hirty percent of the class actions settled in 2010 followed the settlement of an SEC action in the same case." William W. Bratton & Michael L. Wachter, *The Political Economy of Fraud on the Market*, 160 U. PA. L. REV. 69, 159 (2011). For a recent initiative to strengthen enforcement through private/public cooperation, see Ben Protess, *Facing Complaints, S.E.C. Opens Whistle-Blower Office*, N.Y. TIMES DEALBOOK (Aug. 12, 2011, 10:36 AM), http://dealbook.nytimes.com/2011/08/12/facing-complaints-s-e-c-opens-whistle-blower-office/?ref=business. *See also* Erichson, *supra* note 209, at 47.

do not resolve all problems, a better understanding of the difficulties can lead to a better use of the doctrine, and a broader discussion of the necessity and efficacy of collective litigation.