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AVOIDING DUPLICATIVE LITIGATION
OF SIMILAR CLAIMS: THE SUPERIORITY
OF CLASS ACTION vs. COLLATERAL ESTOPPEL
vs. STANDARD CLAIMS MARKET

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**Avoiding Duplicative Litigation of Similar Claims:
The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market**

David Rosenberg*

Abstract

This paper focuses on situations in which numerous plaintiffs have similar, but independent claims for substantial damages against the same defendant. These cases frequently result in the prosecution of multiple separate actions and the waste legal resources in duplicative litigation. All else being equal, the legal system could achieve substantial economy by avoiding litigation of “common questions” more-than-once, and instead adjudicating them once-and-for all. The paper describes the relative cost-effectiveness of three alternative means for avoiding duplicative litigation of civil actions for damages: class action, collateral estoppel and leaving the matter to the standard process for separate action driven by market forces. The class action design I consider aggregates all similar claims, regardless of whether they are pending or even accrued, on a mandatory basis, with an option for exit (opt-out) by class members. Regarding collateral, I propose and examine a “two-way” regime that expands the prevailing rules by extending the benefits or detriments of final judgment in the first case to preclude both defendant and non-party plaintiffs from relitigating common questions in subsequent cases. The third regime employs market forces to reduce duplicative litigation.

My central conclusions are that while, as an abstract matter, two-way collateral estoppel and class action have comparable capacity to avoid duplicative litigation, under currently governing rules and practice both alternatives entail high management costs. Courts are likely to incur more expense in managing class action. However, analysis indicates that two-way collateral estoppel fails to control duplicative litigation as effectively as class action; indeed collateral estoppel itself creates incentives for the parties to engage in unavoidable, duplicative litigation that offsets its administrative cost advantage. I also conclude that the separation process poses less of a problem of duplicative litigation than is commonly assumed. Indeed, some degree of duplicative litigation may be socially desirable. Moreover, my analysis suggests that the separate action process may prove the most cost-effective means of avoiding the residuary of inefficient duplicative litigation. Finally, I reject the general objection to two-way collateral estoppel that it systematically vests defendant’s with higher stakes than plaintiffs, and thus distorts the accuracy of adjudication, undermining the ability of civil liability to minimize the sum of sum of accident costs. Asymmetrical investment incentives favoring institutional (mass production) defendants against individual plaintiffs is the baseline of the civil system as established by the standard market process. Confronting a series of similar claims, the common defendant will exploit scale economies to invest at the optimal level that maximizes aggregate net benefit from litigating common questions. The investor in a single or even a large fraction of claims on the plaintiffs’ side lacks the scale economies and consequent investment incentives equivalent to defendant’s opportunities. This asymmetry in opportunity to exploit scale economies is eliminated by class action. Two-way collateral estoppel exacerbates the asymmetry in defendant’s favor—it does not create it—but that only strengthens the case for class action to equalize plaintiffs’ litigation power with that of defendant’s.

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I. Introduction

Situations in which numerous plaintiffs have similar, but independent claims for substantial damages against the same defendant frequently involve the prosecution of multiple separate actions that waste legal resources in duplicative litigation. Virtually all damage actions against business (and government)—including cases of mass tort, antitrust violation, securities and consumer fraud, corporate mismanagement, and employment discrimination—pose this problem of duplicative litigation, because the legally sanctionable activity usually consists of mass production decisions. These decisions systematically expose some population to risk of personal, property, and financial harm. Consequently, the resulting claims present a core set of common questions of fact and law determinative of aggregate liability and damages.¹ In the absence of coordinated and other collective action among the parties, and all else being equal, relitigation of common questions in separate, simultaneous or serial actions may be likely to occur.²

The parties' propensity in mass production cases to engage in duplicative litigation of common questions is considered a major cause of inefficiency in the civil system, particularly in mass tort cases arising from large-scale disasters and widely

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¹ See David Rosenberg, Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss (forthcoming 88 U. Va. L. Rev. 2002) (noting that because mass torts arise from the systematic risks of mass production processes and goods (products and services), the only questions of relevance to aggregate liability and damages and therefore to deterrence are common and indeed mostly statistical).

² The qualifier reflects the fact that redundant litigation is not necessarily wasteful. It may prove beneficial by increasing information and reducing risk. See David Rosenberg, *The Regulatory Advantage of Mass Tort Class Action*, in REGULATION BY LITIGATION, 244, 288-89 (W. Kip Viscusi ed., 2002) and *infra*, p. 24.

distributed products.³ Ongoing mass tort litigation provides a helpful example. Rollovers of Ford Explorers resulting from blowouts of their Firestone tires have caused an estimated 174 deaths and numerous other instances of serious personal injury and damage to property. Assuming those injured incur sufficiently high barriers to collective action (hindering “voluntary joinder” and other efforts at coordinated litigation), there is a likelihood of multiple, separate actions being prosecuted, simultaneously as well as sequentially, against the mass producers, Ford and Firestone. Indeed, as of 2001, approximately 180-280 such claims had been filed in federal and state courts around the country, with many more apparently waiting in the wings.⁴ Each claim presents a central, very costly (in time, money, and other legal resources) to litigate set of issues in common respecting the alleged design defect of relevant models of tires and SUVs, respectively and in combination. All else being equal, after the first case reaches final judgment, determining that the product was or was not defective, relitigation of the “defect” issues in any subsequent case is a sheer waste of legal resources. Thus the legal system could achieve substantial economy by avoiding litigation of “common questions” more-than-once, and instead adjudicating them once-and-for all.

This paper considers the relative cost-effectiveness of three alternative means for avoiding duplicative litigation of civil actions for damages: class action, collateral estoppel and leaving the matter to the standard process for separate actions driven largely by market forces.⁵ Although nothing in my analysis hinges on these characterizations, I regard class action and collateral estoppel basically as regulatory devices, and the separate action process as a market-oriented system that allocates legal resources by the general principles of supply and demand. Essentially, class action and collateral estoppel

³ The problem of duplicative litigation is considered particularly acute in large-scale mass tort cases such as the asbestos litigation. See *Amechem Prods., Inc. v. Windsor*, 521 U.S. 591, 598 (1997)(citing United States Judicial Conference Ad Hoc Committee on Asbestos Litigation that included among the “[t]he most objectionable aspects of asbestos litigation ... long delays are routine; trials are too long; the same issues are litigated over and over; transaction costs exceed the victims' recovery by nearly two to one; exhaustion of assets threatens and distorts the process; and future claimants may lose altogether.” Report of The Judicial Conference Ad Hoc Committee on Asbestos Litigation 2-3 (Mar. 1991). See also John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343, 1346-47 (1995) (“the vast majority of commentators agree that there is a crisis [in the mass tort system], one characterized by high costs and unjustified fees, threatening recurrent corporate bankruptcies, and requiring some form of radical remedy or another”); Roger H. Trangsrud, *Joinder Alternatives in Mass Tort Litigation*, 70 *Cornell L. Rev.* 779, 781-82 (1985); Note, *Class Certification in Mass Accident Cases Under Rule 23(B)(1)*, 96 *Harv. L. Rev.* 1143, 1143 (1983). But see John A. Siliciano, *Mass Torts and the Rhetoric of Crisis*, 80 *Cornell L. Rev.* 990, 998 (“The observation that mass tort claims increase congestion and delay, however, does not prove the existence of a problem, let alone one massive enough to require revamping or even discarding the tort system.”).

⁴ Associated Press, *Motions are Filed in Tire Case*, N.Y. TIMES, January 31, 2001, at Section C, 10. See also *In the Matter of Bridgestone/Firestone, Inc.*, 288 F.3d 1012 (7th Cir. 2002) (decertifying class action aggregating owners’ claims for diminished market value of Firestone tires).

⁵ For the most part, and solely for convenience, I focus on suits for monetary damages, because claims for “equitable” remedies are thought to pose less of danger of duplicative litigation. My analysis, however, is fully relevant to such claims, including suits for declaratory judgment as well as injunction.

more or less preempt the standard process in which the amount of litigation is determined by the “private” choices of litigants and lawyers.

Indeed, the principal utility attributed to class action is its capacity to avoid duplicative litigation.⁶ For example, if A sues Z on a claim that B, C, etc. also independently have against Z, then courts can class (aggregate) all similar claims, pending or not, for resolution in a single proceeding. Separate, simultaneous or subsequent actions by B, C, etc. are thus precluded (if necessary enjoined) and final judgment between A as class representative and Z binds all “absentee” class members as well as defendant Z, barring them from relitigating any common question in a subsequent phase of the class action or in a separate action. However, governing law and practice makes class action an expensive tool. It entails significant costs of judicial management,⁷ in particular to structure complex discovery and trial proceedings; delimit the scope of class-wide binding effect; determine the fee for class counsel; and monitor against potential conflicts of interest between class counsel and the class and among class members, and against related agency problems in class settlement.⁸ The possibility that

⁶ See, e.g., *Ortiz v. Fibreboard Corporation*, 527 U.S. 815, 860-67 (1999); *Amchem Products, Inc. v. Windsor*, 512 US 591, 598-632 (1997); *General Telephone Company of Southwest v. Falcon*, 457 U.S. 147, 155 (1982); *Hoffman-La Roche, Inc. v. Sperlberg*, 493 US 165, 172 (1989); *Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 39 (1986); Peter H. Schuck, *Mass Torts: An Institutional Evolutionist Perspective*, 80 Cornell L. Rev. 941, 958 (1995); John C. Coffee, *supra* note 3, at 1348-49; Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 820-1 (1992); Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 7 (1986).

⁷ Under current law, class actions also require that all class members be notified – at plaintiff’s expense -- of their inclusion in the pending class. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 172-80 (1974).

⁸ See John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation*, 54 U. Chi. L. Rev. 877, 882-83 (1987) (concluding that the high agency costs of class action litigation render it “more accurate to describe the plaintiff’s attorney as an independent entrepreneur than as an agent of the client”). See also, Coffee, *supra* note 10 (“No opening generalization about the modern class action is sounder than the assertion that it has long been a context in which opportunistic behavior has been common and high agency costs have prevailed. If not actually collusive, non-adversarial settlements have all too frequently advanced only the interests of plaintiffs’ attorneys, not those of the class members.”); Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs’ Attorney’s Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. Chi. L. Rev. 1, 6 (1991) (noting that in class actions, “the identified plaintiff operates almost always as a mere figurehead”); Susan P. Koniak, *Feasting While the Widows Weep: Georgine v. Amchem Products, Inc.*, 80 Cornell L. Rev. 1045 (1995); Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 Va. L. Rev. 1051 (1996). But see Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377 (2000) (“the risks of sweetheart ... settlements have been overstated”); Arthur R. Miller, *Of Frankenstein Monsters and Shining Knights: Myth, Reality, and the “Class Action Problem”*, 92 Harv. L. Rev. 664, 667 (1979) (“Stories about a few questionable occurrences have been repeated so often at professional meetings that they have created the impression that evils are commonplace in class action practice. The empirical evidence ... implies that in settled class actions ... the great bulk of the money received from the defendants actually is distributed to class members, in contrast to the widely held notion that the fund is either devoured by avaricious attorneys or consumed by administrative expenses.”). For a proposal to empower plaintiffs to monitor class counsel in the securities context, see Elliot J. Weiss & John S. Beckerman, *Let the Money do the Monitoring: How Institutional Investors can Reduce Agency Costs in Securities Class Actions*, 104 Yale L.J. 2053 (1995).

the cost of class action exceeds the benefit in avoided relitigation prompts the question whether there are “superior” alternatives.⁹

Collateral estoppel is the one regulatory device that could achieve global preclusive effects rivaling those of class action.¹⁰ Collateral estoppel embraces various rules that preclude litigating a claim (“claim preclusion”) or issue (“issue preclusion”) in any case subsequent to entry of final judgment in another case in which the same claim or issue had or could have been raised and determined.¹¹ Generally, collateral estoppel applies when the party adversely affected by the preclusive effect was a party (or in privity with a party) to the case in which final judgment was entered.¹² Thus, an

⁹ A finding that “class action is superior to other methods for the fair and efficient adjudication of the controversy” is required (though often made superficially) as a condition for federal courts to certify class action treatment under Rule 23(b)(3), F.R.Civ.P., the provision generally applicable to actions for damages. Trangsrud notes that the superiority requirement has been one of the major barriers to class certification. Trangsrud *supra* note 3, at 783-84. For a criticism of civil procedure and its scholars as “confined by a tunnel vision focused on the Federal Rules of Civil Procedure [who] have as a group been reluctant to engage explicitly in incentive-based reasoning,” see John C. Coffee, *supra* note 8, at 877. But see *Johnson v. General Motors Corporation*, 598 F.2d 432, 439 (5th Cir. 1979) (Fay, J., specially concurring) (“Class actions are unique creatures with enormous potential for good and evil. This valuable tool will only serve the ends of justice if Rule 23 of the Federal Rules of Civil Procedure is followed strictly.”).

¹⁰ I will adopt rather stylized conceptions of “class action” and “collateral estoppel,” abstracting from particular rules and practices. However, to avoid blurring these concepts, making one the functional equivalent of the other, I retain the basic features that distinguish them in conventional understanding.

¹¹ The classic rule applies final judgment in the first case to bar the same parties or their privies from filing a subsequent case raising common questions. That rule has been expanded to govern situations of “non-mutuality” in which the binding effect runs against or for a litigant in the subsequent case who was not a party or privy to one in the preceding case. Thus far the “non-mutuality” rule has been applied primarily in two situations. “Defensive collateral estoppel”: when Z sues A and loses, that final judgment precludes Z from raising common questions in subsequent suit against B. “Offensive collateral estoppel”: when A sues Z and wins, that final judgment precludes Z from raising common questions in defense of a subsequent similar suit by B.

¹² “Privity” has been interpreted to include situations in which the non-party interest was adequately if virtually represented by a party in the case that reached final judgment first. See, e.g., *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *id.* at 802 (previous litigation challenging constitutionality of county tax did not preclude other taxpayers from raising constitutional challenge); *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999) (prior action by unrelated taxpayer did not preclude nonparty plaintiff from challenging tax on foreign corporations). However, collateral estoppel has not been applied on that theory to extend the preclusive effect against relitigation of common questions by non-party plaintiffs after judgment for the common defendant on, or necessarily implicating, those questions. See, e.g. *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174-76 (5th Cir. 1987); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 196 (1992) (“Courts have hesitated to expand nonparty preclusion ... even though current nonparty preclusion rules are narrow and formalistic, and even though they tolerate extensive relitigation at substantial social cost.”). Cf. *C.A. Hardy v. Johns-Manville Sales Corp.*, 681 F.2d 334 (5th Cir. 1982) (no preclusion of non-party defendant in asbestos litigation). But see *Tyus v. Schoemehl*, 93 F.3d 449, 453 (8th Cir. 1996) (nonparty plaintiffs precluded from bringing Voting Rights Act challenge to electoral boundaries because claims were raised and decided by previous suit); *Cauefield v. Fidelity and Casualty Company of New York*, 378 F.2d 876, 878-79 (5th Cir. 1967) (nonparty plaintiffs precluded from suit in federal court after previous state court judgment for defendants on same evidence). For purposes of my analysis, however, nothing of substance turns on the state of actual practice.

extension beyond prevailing practice is required for collateral estoppel to operate as a worthwhile substitute for class action.¹³ Specifically, I consider a design for collateral estoppel that gives binding effect to the first final judgment between any plaintiff and the defendant, regardless who wins. That final judgment would preclude subsequent litigation of common questions that had or could have been raised and decided in the case in which judgment was entered. Thus, if plaintiff A sues defendant Z and wins a final judgment, that judgment would preclude defendant Z from raising common questions in defense against a subsequent claim by plaintiff B. Conversely, if defendant Z wins a final judgment against plaintiff A, that judgment collaterally estops plaintiff B from raising the common questions in a subsequent suit against defendant Z. Essentially, the rule would establish “two-way” collateral estoppel to enforce the final judgment in the first suit according to its outcome, precluding subsequent relitigation of common questions between the party defendant and any non-party (“absentee”) plaintiff.¹⁴

In view of the availability of this design, it is somewhat surprising that collateral estoppel rarely receives consideration as an alternative to class action.¹⁵ This lack of

¹³ Shapiro notes that the doctrine of collateral estoppel is “both unpopular and respected” but that the “recent trend to give [collateral estoppel] even broader application” has “tilt[ed] the balance further towards hostility on the part of litigants, commentators, and courts.” David L. Shapiro, *Civil Procedure: Preclusion in Civil Actions* 12 (2001).

¹⁴ Res judicata binds and precludes the party plaintiff from relitigating the claim as well as issues that had or could have been determined by final judgment.

¹⁵ Use of the “two way” rule to quell duplicative litigation has received only passing mention. See, e.g., Shapiro, *supra* note 13, at 92-97 (offering several reasons why the two-way rule “should be carefully guarded against expansion”); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigation*, 63 B.U. L. Rev. 383 (1983); Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 Duke L.J. 381 (2000); Robert G. Bone, *Rethinking the “Day in Court” Ideal and Nonparty Preclusion*, 67 N.Y.U.L. Rev. 193 (1992); Michael A. Berch, *A Proposal to Permit Collateral Estoppel of Nonparties Seeking Affirmative Relief*, 1979 Ariz. St. L.J. 511 (1979). More attention has been paid to a one-way version of the rule: the first separate action to reach final judgment in favor of the plaintiff operates to preclude the defendant from raising common questions in defense thereafter. A defendant win has no preclusive effect on subsequent litigation of common questions by non-party plaintiffs. For the most part, courts and commentators have simply dismissed this rule as “unfair” to defendants. Currie, B., *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281 (1957); *Parklane Hosiery Co. v. Shore*, 439 US 322, 327 n7 (1979). But see Shapiro, *supra* note 13, at 115 (2001) (“the virtues of NMIP [non-mutual issue preclusion] exceed the defects so long as the limitations are marked with sufficient clarity and uniformly applied by all tribunals within the jurisdiction”). See also generally Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 Rev. Litig. 391 (1993).

The principal contribution to the economic analysis of collateral estoppel is Posner, R., *Economic Analysis of Law*, 635-637 (5th ed. (1998)); Spurr, S., *An Economic Analysis of Collateral Estoppel*, 11 *Internat. Rev. of Law and Economics* 47 (1991); Spurr, S., *Palgrave: Collateral Estoppel*, *The New Palgrave Dictionary for Law and Economics*, 289-292; Hay, B., *Some Settlement Effects of Preclusion*, 1993 U. Ill. L. Rev. 21; Note, *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 Harv. L. Rev. 1940 (1992) Note, *Probabilistic Analysis of the Doctrine of Mutuality of Collateral Estoppel*, 76 Mich. L. Rev. 612 (1978) [hereinafter *Mutuality*]. My contribution is in providing a more comprehensive analysis not only of collateral estoppel, in particular two-way collateral

interest is particularly puzzling given that the only other general alternative to class action is the standard market process of separate actions.¹⁶ At least on the face of things, the standard process would seem to be the source of the problem of duplicative litigation, not its solution. Nevertheless, the third alternative I consider is to do nothing, that is, leave it to the market. We could simply rely on market forces that drive the standard process of separate actions. As I suggest at the outset, those forces induce voluntary joinder and other cooperative arrangements among plaintiffs that reduce duplicative effort. Given the costs and shortcomings of regulation, as currently structured,¹⁷ the market might turn out to be the most cost-effective alternative after all.¹⁸

My analysis assumes that the social objective for the type of civil litigation I consider is to minimize the sum of accident costs, specifically by pursuing cost-effective deterrence and compensation, including avoidance of inefficiency from duplicative litigation.¹⁹ Part II is predicated on the prospect that the separate action process will result in socially wasteful duplicative litigation, and considers the relative capacity of class action and two-way collateral estoppel to avoid it. I show that that, as an abstract matter, two-way collateral estoppel and class action have comparable capacity to avoid duplicative litigation. Part III examines the litigation dynamics of these two regulatory alternatives, focusing on the relative costs of management by courts and strategic behavior by the parties. I show that both alternatives entail high management costs, but, given current practice, courts are likely to incur more expense in managing class action. However, analysis indicates that two-way collateral estoppel fails to control duplicative litigation as effectively as class action; indeed, collateral estoppel creates incentives for the parties to engage in unavoidable, duplicative litigation that offsets its cost advantage. Part IV focuses on the separate action process and introduces the idea of an efficient level

estoppel, but also of its comparative advantage to class action and the market driven, separate action process in avoiding wastefully duplicative litigation.

¹⁶ To reduce duplicative litigation, the rules of many jurisdictions provide that if a substantial number of claims are pending, they may be directed to proceed on a “consolidated” basis for discovery and other pre-trial purposes. Usually, these rules do not entail consolidated trial, and none of the consolidated pre-trial work and decisions binds or applies to claims which were not pending in the particular jurisdiction or which are filed subsequent to the end of consolidated proceedings. Consolidation rules involve much of the cost of class action, and broadening those rules to make their scope equivalent to that of class action would probably raise the costs equivalently. Given their limited capacity, as presently designed, to reduce duplicative litigation, I do not regard consolidation rules as a basic alternative to class action. However, I will note their usefulness in augmenting market forces that inhibit duplicative litigation.

¹⁷ For far more efficient models of collective adjudication, in particular, mandatory-litigation class action, see David Rosenberg, *supra* note 1.

¹⁸ Analysis of the regulatory alternatives notes the influence of market forces and the interaction with the standard separate action process.

¹⁹ To simplify analysis, I focus on duplicate litigation of common questions of “fact” (e.g. is X substance carcinogenic?) or “fact-law” (e.g. did defendant act negligently?). The analysis holds for common questions of law, but their relitigation poses lower magnitude problems of duplicative litigation given the preclusive effects of such norms as *stare decisis*, precedent, equal protection, and rule of law.

of duplicative litigation. I consider the social advantage of relying on the market for separate actions to avoid inefficient duplicative litigation as compared with using class action and collateral estoppel. This comparison also examines certain modifications in the design of these alternatives, specifically consolidating pending claims to augment the market and use of multiple-trials to resolve a class action or to provide the basis for two-way collateral estoppel.

Part V refers to the economic explanation for the conventional limitations on collateral estoppel, which posits that these constraints are designed to avoid systematically vesting one of side with higher stakes than the other. Creating asymmetrical stakes “unbalances” the parties’ relative litigation investments and thus distorts the accuracy of adjudication, undermining the ability of civil liability to minimize the sum of accident costs. I close by noting that this concern about asymmetric investment incentives has unrecognized general application to the separate action process as well as to all rules of collateral estoppel, conventionally limited or not. Asymmetrical investment incentives favoring institutional (mass production) defendants against individual plaintiffs are the baseline of the civil system. Confronting a series of similar claims, the common defendant will exploit scale economies to invest at the optimal level that maximizes aggregate net benefit from litigating common questions. The investor in a single or even a large fraction of claims on the plaintiffs’ side lacks the scale economies and consequent investment incentives equivalent to defendant’s opportunities. This asymmetry in opportunity to exploit scale economies is eliminated by class action. Two-way collateral estoppel exacerbates the asymmetry in defendant’s favor—it does not create it—which only strengthens the case for class action to equalize plaintiffs’ litigation power with that of defendant’s.²⁰

II. Comparable Preclusive Effect of Class Action and Collateral Estoppel

On their face, the stylized forms of class action and collateral estoppel both vest final judgment between the common defendant and a particular named-plaintiff with the breadth of binding effect on the defendant and non-party plaintiffs (“absentees”) to achieve virtually equivalent results in avoiding duplicative litigation.²¹ Both procedures, however, require substantial revision of conventional rules and practice to accomplish this result. The class action design I consider aggregates all similar claims, regardless of whether they are pending or even accrued, on a mandatory basis, without any option for

²⁰ See David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 860-61 (2002). The use of class action to correct the asymmetry in investment incentives favoring defendants was first developed in David Rosenberg, *The Causal Connection in Mass Exposure Cases: A “Public Law” Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

²¹ For present, I ignore the difference in preclusive effect under these regimes regarding simultaneous litigation of common questions in separate actions prior to entry of the estopping final judgment. Class action precludes such simultaneous duplicative litigation, while the two-way rule I consider does not, though it may suppress this wasted effort by encouraging free riding. See further discussion below. On the problem of competing applications for class action certification in different jurisdictions, see Report of U.S. Judicial Conference Committee on Practice and Procedure (Sept. 2002).

exit (opt-out) by class members.²² As noted above, the two-way regime of collateral estoppel expands the prevailing rules by extending the benefits or detriments of final judgment in the first case to preclude the defendant and non-party plaintiffs from relitigating common questions in subsequent cases.

Class Action. Mandatory claim aggregation by class action would avoid the inefficiency of duplicative litigation entirely. Discovery, pretrial motions, trial and appeal to final judgment on the common questions would occur only once. While the litigation might require additional phases to resolve non-common questions, such as damages and affirmative defenses such as contributory negligence, these, by definition, would not be duplicative. As for common questions, final judgment would be binding on both the defendants and class members (absentee or non-named plaintiffs), precluding them from ever relitigating those questions in any phase of the class action or in any separate action.

To illustrate the ability of class action to generate and exploit scale economies that avoid duplicative litigation, assume 100 personal injury claims, each seeking \$1

²² Under the prevailing rules, class action represents an incomplete solution to duplicative litigation, because class members can freely exclude themselves from the aggregated action to pursue separate actions. For proposals to limit opt-out rights, see, David Rosenberg, *The Causal Connection in Mass Exposure Cases: A 'Public Law' Vision of the Tort System*, 97 Harv. L. Rev. 849, 913 (1984); Note, *Class Certification in Mass Accident Cases Under Rule 23(b)(1)*, 96 Harv. L. Rev. 1143 (1983); Mark W. Friedman, Note, *Constrained Individualism in Group Litigation: Requiring Class Members to Make a Good Cause Showing Before Opting Out of a Federal Class Action*, 100 Yale L.J. 745 (1990); Note, Bruce H. Nielson, Note, *Was the 1966 Advisory Committee Right?: Suggested Revisions of Rule 23 to Allow More Frequent Use of Class Actions in Mass Tort Litigation*, 25 Harv. J. on Legis. 461 (1988) (proposing that Rule 23 be revised "to require judges to certify mandatory class actions in mass tort litigation when there is significant threat that plaintiffs who do not participate in a class action will be unable to recover damages in individual actions"). However, the Supreme Court's decision in *Phillips Petroleum v. Shutts*, 472 U.S. 797 (1985), in which the Court refused to require affirmative consent to be bound by the proposed class action in order for plaintiffs to be subject to the personal jurisdiction of the forum-state, took note of the fact that the plaintiffs in *Shutts* had the opportunity to opt-out of the class. Indeed, some commentators have argued that the Court's explicit mention of this factor "threatens the continued viability of...mandatory [class actions]." Arthur R. Miller & David Crump, *Jurisdiction and Choice of Law in Multistate Class Actions After Phillips Petroleum Co. v. Shutts*, 96 Yale L.J. 1, 7 (1986). Yet Shapiro notes that "it is not clear why or to what extent the 'right to opt out' is constitutionally required if class members are adequately notified and represented, if the availability of such a right may undermine not only the utility of the class action but the interests of the class as a whole in obtaining relief, and if the case is one in which even relief to those remaining in the class will inevitably affect those who have withdrawn from it" and distinguishes *Shutts* in several ways. Shapiro, *supra* note 13, at 89-90. Regardless, opt-out levels are relatively low in proportion to the number of potentially classable claims. See David Rosenberg, *Individual Justice and Collectivizing Risk-Based Claims in Mass-Exposure Cases*, 71 N.Y.U.L. Rev. 210, 222 (1996). Although low opt-out levels are usually attributed to class members not being adequately informed of their options, there is good reason to believe that the choice to remain in the class is well advised if not well informed. In reality, class action opt-out creates the incentive for large-scale corporately organized law firms, operating through a nation- or world-wide network of finders, to compete for market share of the classable claims, often aggregating them into "inventories" for wholesale disposition by large-scale settlement. These lawyers are then in a position to extract some of the surplus from class action, by threatening to pull large numbers of claims out of the class action, thereby reducing the fee for class counsel or even precluding class action altogether.

million damages against the defendant firm for an explosion at its plant that could reasonably have been avoided by investing \$99 million in new safety technology. Assume that litigation is socially desirable for deterrence and compensation purposes. Suppose that prosecution of each action separately will cost each of the parties \$100,000 to litigate the common questions of negligence and the courts will bear a corresponding cost to adjudicate those questions through final judgment. (For now, ignore the implicit scale economies from free-riding as well as the equally realistic possibility of voluntary coordination.) Assuming plaintiffs win every case, the system would have transferred \$100 million dollars from defendant to plaintiffs at a total cost (ignoring the expense for non-common questions) of \$30 million, with the courts spending \$1 for every \$10 of assessed damages. The parties respectively bear \$10 million in expense. Net recovery for each plaintiff is thus \$900,000, significantly short of replacing the loss. For the defendant, the total cost of liability is \$110 million.²³ If defendant wins, total costs remain the same, with the courts expending \$1 for every \$10 in avoided damages. Plaintiff attorneys and defendant each absorb \$10 million in litigation costs.

Compare the results under class action (ignoring for now its distinctive management costs, the determination of fees for class counsel and other effects of increased scale economies). By resolving the common questions relating to negligence once-and-for-all, the parties and court spend only \$300,000, one percent the cost of separate actions. The courts spend only 1/10th of a penny to adjudicate each \$1 of damages. If plaintiffs win, then each receives net recovery of \$997,000. Defendant's total liability is \$100.3 million.²⁴ If plaintiffs lose, then the court, plaintiff attorneys and defendant, respectively bear \$100,000 in costs. Measured by the value of putting the otherwise squandered resources to productive use, class action effects a vast gain in social welfare.

Collateral Estoppel. Here, in addition to considering the two-way model of collateral estoppel, I examine the one-way version that has more often been suggested by courts and commentators as an alternative to class action. I defer until later discussion of the effects that these rules have on the rate and terms of settlement.

Two-way Collateral Estoppel. Two-way collateral estoppel could achieve virtually the same cost-savings as class action, but without need for formal aggregation. The first case to reach final judgment—marked by the end of the period for review and appeal of a verdict—would foreclose subsequent litigation of the common questions of

²³ Ex ante, defendant expecting liability of \$110 million would have added incentive to take optimal care in the first place and avoid the tort sanction altogether. If, however, defendant is uncertain about what the court might regard as optimal care, the litigation cost-inflated level of liability may result in overdeterrence. See John Calfee and Richard Craswell, *Some Effects of Uncertainty on Compliance with Legal Standards*, 70 *Virginia L. Rev.* 965 (1984). Cf. Rosenberg, *supra* note 23, at 863-65.

²⁴ As I discuss below, because defendant litigates the defense interest in these claims as if they comprised a single claim, it fully exploits scale economies to avoid duplicative effort even without class action. Defendant wields this advantage in the separate action process, creating asymmetry in litigation power over plaintiffs, who but for class action, rarely, if ever, fully exploit scale economies.

negligence. Final judgment would bind all non-party plaintiffs as well as the defendant, precluding them from subsequently raising any issue to support or oppose liability or damages that was presented or that could have been presented in the case that went to final judgment. (Again, non-common questions might require resolution in the subsequent cases, but that litigation is not duplicative.)

One-way Collateral Estoppel. A version of collateral estoppel frequently mentioned to address duplicative litigation against a common defendant would preclude relitigation of common questions subsequent to entry of final judgment for plaintiff, but would not preclude non-party plaintiffs from trying again if judgment is for defendant.²⁵ Of course, because such a rule entails the possibility of more duplicative litigation, all else equal it is not superior to the two-way rule.

Moreover, one-way collateral estoppel has the potential to increase significantly the defendant's expected liability relative to the level it would reach in the separate action process. Assuming that socially desired liability, all else being equal, does not vary with the number of times a party litigates the same questions, one-way collateral estoppel could overdeter the defendant.²⁶ Take a simple case of two plaintiffs separately prosecuting similar claims for \$100 each against a common defendant, with each claim having an invariant 50% probability of success. Assuming that this probability represents or effects the socially desired level of liability, the defendant appropriately should expect to pay \$200 in the aggregate with a probability of 50%, that is, it should internalize aggregate expected liability of \$100. That is precisely the level of liability the defendant would bear, if the claims were prosecuted in the standard separate action process. And, indeed, it is precisely the level of expected liability under two-way collateral estoppel. In the absence of one-way collateral estoppel, these claims confront the defendant with aggregate expected liability of \$100 (= 50% x \$200).²⁷

But under one-way collateral estoppel, the defendant's faces higher aggregate expected liability than the socially desirable level. In the example, the defendant forecasts a greater than 50% chance of losing \$200. Ex ante, defendant has a 50% chance of losing \$200 in the first case plus a 50% chance of losing \$100 in the second case, with

²⁵ Trngsrud argues that offensive collateral estoppel "results in the resolution of common questions in a consistent and efficient manner." Trngsrud, *supra* note 3, at 785.

²⁶ Mutuality, *supra* note 15.

²⁷ Some might object along lines suggested by Posner that the two-way rule creates asymmetric stakes in the first case: defendant invests with an eye to avoiding aggregate liability, while plaintiff investment is limited by the value of the individual claim involved. The concern is that asymmetrical incentives to invest will distort outcomes, undermining the accuracy of decisions and the social objectives for civil liability of optimal deterrence and compensation. Of course, the impact on social welfare depends on whether the cost of distorted outcomes exceeds the cost of duplicative litigation. In any event, as I show in Part V, objections along these lines are mistaken, not because asymmetric stakes is not a problem under two-way collateral estoppel, but rather because the same problem arises in the standard market process. In other words, the solution to asymmetric investment incentives is not the standard market process; the solution is class action.

50% probability of this case being brought (depending on the result of the first one). This sums to expected liability of \$125 (= 50% x \$200 + 50% (50% x \$100)).²⁸ A proposal has been made to modify the one-way rule, applying collateral estoppel only when the defendant loses the first case (or in some early round). But, as Spur suggested, such a rule raises defendant's stake in the first case and would induce it to make a socially excessive investment in winning a final judgment (including refusing an otherwise rational settlement).²⁹

Symmetrical Scale Economies. In previous papers I have demonstrated the generally unrecognized benefits of scale economies in litigation involving many plaintiffs, namely, in providing plaintiffs with the same opportunity that defendant possess to exploit scale economies.³⁰ Here I focus on the scale advantages in avoiding duplicative effort. The starting point, however, is the same for both scale-economy advantages: the common defendant exploits scale economies fully, and in particular minimizes duplicative effort by preparing its defense on common questions once-and-for-all. As such, defendant generally litigates from a substantial cost advantage over plaintiffs in the standard market process, except in the unlikely case that a single investor could invest in all similar claims as if they were one claim. Defendant's cost advantage at minimum skews settlement conditions, thus jeopardizing compensation and deterrence objectives.

Take the above example involving 100 claims for \$1 million each arising from an explosion at defendant's plant. Anticipating 100 similar claims, defendant exploits scale economies that at the limit would enable it to make a one-time investment of \$100,000 to prepare its defense on the common questions in all cases.³¹ In contrast, plaintiffs must spend \$100,000 per claim. Given this cost advantage, the defendant can devote resources to more productive litigation uses than can plaintiffs.³² The most general consequence of this asymmetry in litigation cost will manifest itself in settlement, though it will also distort judgment based on trial. If the parties agree on the expected judgment then, all else being equal, they will probably settle within the range demarcated by defendant's reservation point of expected judgment plus trial costs and plaintiff's reservation point of

²⁸ This analysis can be generalized to explain the utility of applying two-way (or mutual) collateral estoppel and res judicata to final judgment in the conventional, sporadic or ungeneralized case of between A versus B.

²⁹ See Spur, note 18. The modified one-way rule would also lead to other opportunistic moves and arrangements by the parties. See *infra*.

³⁰ See e.g., David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 *Harv. J. on Legis.* 393 (2000).

³¹ In reality, of course, repeated litigation would require additional investments, for example, to pay a premium or hire substitutes for experts called upon to testify in numerous trials.

³² Defendant can also allocate some of its "surplus" resources to what Posner calls "predatory" litigation, for example, making discovery demands simply to divert plaintiff's resources from more productive uses. See Posner, *supra* note 18.

expected judgment minus trial costs. In the example, if the expected judgment equals \$1 million, defendant's reservation point is that amount plus \$1000 (the per claim cost of preparing the defense on common questions), while plaintiff's equals that amount minus \$100,000. If the parties settle at the mean, then the defendant will pay \$949,500, which is less than the plaintiff's loss. More importantly, summed up in the aggregate, defendant's total liability is less than the socially desired level of liability for deterrence purposes.³³

In their idealized forms, both class action and two-way collateral estoppel correct this asymmetrical opportunity for scale economies to spread the cost of adjudicating the common questions.³⁴ Class action reduces the costs of preparing plaintiffs' side of the common questions to \$100,000 total, resulting in average settlement at \$1 million and aggregate liability at the appropriate level of \$100 million. Ex ante, if the firm anticipated class action, the accident probably never would have occurred, saving its dead weight costs and making everyone better off. Two-way collateral estoppel would produce similar results by avoiding duplicative litigation and reducing plaintiff's total costs of preparing the common questions to \$100,000.

Thus, the question, to which I next turn, is whether class action or two-way collateral estoppel provides the more cost-effective means of avoiding duplicative litigation.

III. Litigation Dynamics of Class Action and Collateral Estoppel

Though the preclusive effects of final judgment would seem "comparable" for class action and two-way collateral estoppel, determining their relative cost-effectiveness requires further consideration of their litigation dynamics—how they are likely to perform in actual operation. As indicated above, I examine two cost factors, court management and litigation. The distinction between the two is not analytically pure, but more or less captures the difference between costs that courts incur to structure the litigation environment under the alternative regimes, and costs that the parties as well as courts incur as a result of regime-specific incentives to litigate. It is also useful to divide these basic categories in turn between trial and settlement.

A. COSTS OF COURT MANAGEMENT

Management costs arise from tasks performed by courts to organize, oversee and otherwise effectuate the alternative rule regimes. For present purposes, I am disregarding

³³ Note that asymmetrical costs favoring defendant adversely affect deterrence when final judgment results from settlement but not from trial (ignoring predatory behavior). Settlement deducts the costs of litigation from the amount of harm defendant pays, whereas the trial verdict assesses liability equal to harm. The distributive advantage of settlement, however, makes it preferable to trial for plaintiffs, and even more so for defendant.

³⁴ All else equal, an individual ex ante rationally prefers a rule that corrects the asymmetry by affording plaintiffs the same opportunities to exploit scale economies as defendant has.

the effect of relative expenditures on the quality of litigation, adjudication, and related outcomes.

Trial. The costs of managing trial fall into four interrelated categories:

Structuring discovery and trial: Class action often confronts courts with difficult problems of structuring discovery and trial for numerous simultaneously prosecuted claims.³⁵ While some questions are common to all claims, others are common only to a subset of claims, distinguished by salient variations of fact, such as differences in tire or vehicle model in the above Firestone-Ford litigation, and of law, such as the use of a negligence standard in some states and strict liability in others.³⁶ These variations might require the court to address complications in scheduling and in confining the scope of discovery, to resolve similar issues in sequencing trial, including possibly trying the common questions presented in several phases, and to devise special verdicts and other methods to simplify the decisionmaking process for a jury.

Two-way collateral estoppel avoids these management costs. Compared to the structuring normally required to conduct a separate action, there is no cost to structure discovery and trial in the case that provides the final-judgment basis for preclusion, other than the cost inherent in the structuring normally required to conduct a separate action. However, as noted below, the courts will bear much of this burden in subsequent cases when determining the scope of binding effect to give to the final judgment, especially when the litigation involves a combination of sub-group-specific as well as generally applicable common questions.³⁷

Monitoring agency problems: Another pressing problem for courts in class action is assuring that class counsel adequately represents the class. The cause of inadequacy may result from any combination of factors including incompetence, risk-aversion, collusion with defendant (or some sub-group of class members), shirking, and divergent interests of subgroups within the class.³⁸ Proper setting of class counsel's fee (a major cost of its own) will substantially reduce the risk of inadequate representation.

³⁵ Miller notes that some class actions “obligate federal judges to undertake supervisory tasks requiring enormous expenditures of time and effort, converting their role from one of passive adjudicator of a dispute staged by opposing counsel to that of active systems manager.” Miller, *supra* note 8, at 667.

³⁶ Coffee notes that “tendency to ignore the variance within the class helps explain the tensions within the large class action and the behavior of those who resist class certification.” Coffee, *supra* note 8, at 879.

³⁷ See, e.g. Shapiro, *supra* note 13, at 17 (“how much do the parties and the system save if the question of preclusion is one so complex that it becomes time consuming and expensive to determine whether relitigation is indeed precluded, and if that determination is often made in favor of allowing relitigation to ensue?”).

³⁸ See, e.g., *Wetzel v. Liberty Mutual Insurance*, 508 F.2d 239, 247 (3rd Cir. 1975) (holding that former employee, not entitled to reinstatement, may still be adequate representative for class of current and former employees alleging employment discrimination); Brian Wolfman & Alan B. Morrison, *Representing the Unrepresented in Class Actions Seeking Monetary Relief*, 71 N.Y.U.L. Rev. 439 (1996); Deborah L. Rhode, *Class Conflicts in Class Actions*, 34 Stan. L. Rev. 1183 (1982).

Nevertheless, it is likely that courts can make a cost-effective contribution through some monitoring of the competence and preparation of class counsel to bear the risk and expense of trial.³⁹

Two-way collateral estoppel likely involves comparable overall costs to monitor agency problems. Collusion between defendant and plaintiff is a palpable and pervasive danger under collateral estoppel, and is especially vexing whenever final judgment precludes subsequent litigation of common questions by a non-party. Courts directly incur full monitoring costs under collateral estoppel, because they do not determine the fee for plaintiff's attorney in the first (or any) case. Courts in subsequent cases routinely evaluate (collaterally attack) the adequacy of representation in the first case as a condition for accepting the binding effect of its final judgment. Moreover, a finding of adequacy in the second case usually is not binding on a non-party in the third and subsequent cases, but even if it were, counsel who secured that finding would be subjected to an adequacy test in the third case, and so on in infinite regress. If plaintiff in the first case is not part of a group, then client oversight of the lawyer might relieve some of the judicial burden of monitoring. But, the problem of a first-round sellout is not solely a matter of dereliction by plaintiff's attorney. The plaintiff also has good reason to take a fall for the right price.

Delimiting the scope of preclusive effect: In contrast to two-way collateral estoppel, class action entails special costs to delimit its preclusive effect. Two-way collateral estoppel extends binding effect to a final judgment, and therefore precludes only attempts to relitigate common questions made subsequent to entry of that judgment. Class action precludes such attempts before as well as after entry of final judgment. Thus, depending on the developmental stage of litigation, the class action court will project, more or less accurately, the scope of the probable binding judgment in determining whether to permit or halt simultaneous litigation. False-negatives create duplicative litigation, while false-positives delay litigation of the improperly classed claims. These difficulties of pre-judgment, over- and under-inclusive class definition are substantially lessened when class counsel's fee is appropriately set, although the risk of collusion and similar agency problems may persist.

Post-judgment, two-way collateral estoppel is likely to experience greater need and cost than class action to determine the scope of preclusive effect. The class action court will delimit the scope of preclusion in the final judgment and, will generally decide disputes over scope arising in subsequent cases. Centralized administration and first-hand information should enable the class action court to reduce uncertainty about the scope of preclusion and deter strategic filings of duplicative litigation by class members to vex or extract nuisance-value settlements from the defendant (or class counsel). Similarly centralized and informed control is lacking in the regime of two-way collateral estoppel. Courts in subsequent cases must decide the preclusive scope of a preceding final judgment. The comparative advantage of class action is especially apparent in

³⁹ Hay & Rosenberg, *supra* note 8, at 1379. But see Coffee, *supra* note 3, at 1348 (“courts have little ability or incentive to resist the settlements that the parties in class action litigation reach”).

litigation involving both generally applicable and sub-group specific common questions.⁴⁰

Setting fee for plaintiffs' attorneys. The clearest cost advantage for two-way collateral estoppel is that courts do not need to determine the fee for plaintiffs' attorneys. Those fees are set contractually in the normal course of separate action representation. Class action usually affords no practical opportunity for class counsel to negotiate the fee with class members. Consequently, the class action court must set the fee, usually in the form of a contingent reward. This task entails substantial expense for the court to gather the relevant information, including the demands of representation in the particular type of litigation, class counsel's opportunity costs, and the recovery percentage or rate of reimbursement plus multiplier that will lead the lawyer to invest optimally to maximize probability of success at trial on the common questions.⁴¹

Settlement. Considering solely the relative costs of managing settlement, two-way collateral estoppel has the decisive advantage. Class action settlement is prone to agency problems, in particular the incentives for class counsel in collusion with defendant to profit personally at expense of the class by not holding out for maximum recovery. Setting the proper fee negates some of these incentives, but, as noted, this is a costly task.⁴² Moreover, the proper fee cannot fully guard against collusive side-payments, risk-aversion, incompetence and other case-specific agency problems. As a result, the court needs to assess whether the settlement terms in substance approximate

⁴⁰ Proper setting of class counsel's fee could obviate much of the need for class action courts to delimit the preclusive effect pre- and post-judgment. Given the proper reward, class counsel will, to the extent practicable and otherwise legally permissible, prosecute all available claims against the defendant, regardless of their relationship to the "accident" that gave rise to the class claim. Pre-judgment uncertainty about which claims class counsel plans to represent could be dealt with by requiring specification of the class and other claims the attorney seeks to prosecute. Prior to specification, the class action would have no preclusive effect over separate actions involving non-common questions. Likewise, the class action would have no preclusive effect over such separate actions filed after but not covered by the designation.

⁴¹ For a survey of various methods of fee-setting and their implications on plaintiff lawyer incentives, see William J. Lynk, *The Courts and the Plaintiff's Bar: Awarding the Attorney's Fee in Class-Action Litigation*, 23 *J. Legal Stud.* 185 (1994); William J. Lynk, *The Courts and the Market: An Economic Analysis of Contingent Fees in Class-Action Litigation*, 19 *J. Legal Stud.* 247 (1990). Coffee also notes that the lodestar formula, which compensates plaintiff's attorney for the time reasonably spent on the litigation and has become the dominant form of compensation, creates incentives for delay on the part of plaintiff's counsel. Coffee, *supra* note 8, at 887-88. But see, e.g., *In re "Agent Orange" Product Liability Litigation*, 818 F.2d 216, 222 (1987) (reversing trial judge's attorney fee scheme because it "completely distorted the lodestar approach to fee awards").

⁴² Bruce L. Hay, *Asymmetric Rewards: Why Class Actions (May) Settle for too Little*, 48 *Hastings L.J.* 479, 479 (1997); Mary Kay Kane, *Of Carrots and Sticks: Evaluating the Role of the Class Action Lawyer*, 66 *Tex. L. Rev.* 385, 391-92 (1987). Coffee hypothesizes that one explanation for the resistance of some plaintiff's attorneys to class actions, notwithstanding their ability to increase plaintiffs' bargaining power, is that compensation under the contingent fee system in individual actions will be greater than in a class action. Coffee, *supra* note 8, at 881. Indeed, Macey & Miller argue that "judicial review of ... fee requests ... is often haphazard, unreliable, and lacking in administrative standards." Macey & Miller, *supra* note 8, at 4.

the expected value of the class claim at trial.⁴³ Two-way collateral estoppel avoids these costs, simply because the amount of the final monetary judgment is based on trial.⁴⁴

B. COSTS OF LITIGATION

Now compare the relative costs of litigation under class action and two-way collateral estoppel as measured by the amount of residual duplicative litigation each regime is likely to generate.

Trial. Trial encompasses the entire range of the parties' (plaintiffs' attorneys and defendant's) effort in litigating a case—claim and defense—to final judgment. It is useful to focus on two salient, more or less discrete stages: (1) initiation and development, and (2) adjudication. Initiation and development includes effort by both parties, but primarily plaintiffs' attorneys to search for, investigate, and acquire claims (plaintiffs' attorneys buying a contingent interest; defendants buying the interest outright); plaintiffs' attorneys filing claims; and both parties engaging in research and discovery. The adjudication stage spans all proceedings and points of decision up to entry of final judgment, including dispositive pre-trial motions, presentation of evidence at trial, post-trial review (JNOV and other motions, appeal), and remand for retrial etc.

Initiation and development. Ideally, mandatory class action eliminates redundancy at this stage. There is neither need nor incentive for class counsel to conduct any such initiatory work, beyond investigating claims for information development purposes, and to file a few claims for the representational purpose of informing the court about the contours of the class action to facilitate delimiting its preclusive effect pre-judgment. Plaintiffs' attorneys vying for appointment as class counsel need not have filed any claims; they need only apply for the post.⁴⁵ Indeed, class action considerably reduces

⁴³ See *Reynolds v. Beneficial National Bank*, 288 F.3d 277 (7th Cir. 2002). Substantive review of the settlement is also required because class action poses a pronounced problem of nuisance-value (frivolous) settlement. See, e.g., *In Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297-1300 (7th Cir. 1995); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. Chi. L. Rev. 163 (2000); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. Pa. L. Rev. 519 (1997); Schuck, *supra* note 6, at 962. Indeed, assuming a sufficiently high risk of class action being prosecuted for nuisance-value settlement, courts might have to forgo (refuse to accept and enforce) class settlement prior to summary judgment. This measure would allow the possibility of the defendant “throwing” summary judgment, but it is doubtful that many would find settling to avoid the cost (plus greater chance) of trial cheaper than the cost of ousting the frivolous claim at summary judgment (or even earlier, on the motion to dismiss). Additional willingness to resist throwing summary judgment would be supplied by liability insurers, which have a long-run interest both in actually and fostering the reputation of not settling frivolous cases.

⁴⁴ Although it is possible to conceive of predicating two-way collateral estoppel on final judgment from settlement, there are good reasons for doubting the utility of such a regime. First, the danger of collusion between plaintiff and defendant in the first case would be quite high, necessitating judicial intervention to monitor, and indeed regulate the fee for the plaintiff attorney. Second, these costs might well exceed the benefit of attempting to oversee a pattern-setting settlement, because defendant always can create such a pattern for settlement and offer those terms on the market to settle the first and all subsequent claims.

⁴⁵ In reality, some cases may involve the filing of multiple, separate actions seeking class action certification. Multiple filings sometimes result from lack of information about the existence of a prior

initiatory work. Except in cases requiring preservation of perishable evidence relating to non-common questions, the need for initiatory work on the balance of class members' non-common claims arises only if and when class counsel succeeds on the merits of the common questions.⁴⁶

Two-way collateral estoppel is likely to engender far more duplicative initiatory work than class action. First, and foremost, plaintiff attorneys will compete from the start to acquire large claim inventories with the expectation of earning fees for litigating the non-common questions in the event the first case results in final judgment for plaintiff. Second, while similar, claims will vary in strength according not only to the non-common questions, but also to counsel's competence, tolerance for risk, and limited claim-holdings—stakes—that determine investment incentives. Thus, defendant is motivated to find and settle the stronger claims (possibly paying a premium) as part of a strategy of maneuvering weaker claims to the front of the queue for trial. This culling process will lead not only to a large number of claim filings, but also to substantial development effort in many of them prior to entry of final judgment in one of them. Third, uncertainty about which claim will first reach final judgment also generates duplicative initiatory work. In effect multiple “defensive” filings, discovery and other aspects of development may result from the recognition of pervasive incentives for free riding that leaves many lawyers uncertain about whether anyone else will file and prosecute a claim to final judgment.⁴⁷ Additional factors contributing to uncertainty are the relatively high information costs of tracking claim filings, compounded by defendant's strategy of settling strong claims. Fourth, defendant's strategy of settling stronger claims will hasten and increase not only filings of these claims for settlement, but also processing of weaker claims to trial.⁴⁸ Fifth, much duplication of effort will result from time-bars compelling claim filings, and default and other sanctions that enforce other more-or-less mechanical requirements relating to pleading, discovery and pre-trial preparation.

filing. But it also results from strategic behavior by the competing attorneys. Each may race to the courthouse to preempt the others. Often, the first court to take up the question of certifying a class action will enjoin or, on comity grounds, receive the benefit of stays or deference from the others. Similarly, lawyers competing for appointment as class counsel may file one or more claims both to signal expertise on the matter as well as to select judges for their leanings on the question of appointment. However, overall, relatively few such duplicative claims will be filed before a court certifies the class action and halts all duplicative litigation.

⁴⁶ Using “issue classing,” it is possible to litigate the common questions to partial final judgment, and thus avoid unnecessary effort to “join” the balance of class members before the basis for proceeding to non-common questions exists with certainty.

⁴⁷ Coffee notes that the fear of a preclusive judgment induces a “rush to judgment” amongst plaintiffs. Coffee, *supra* note 8, at 910. Two-way collateral estoppel increases free-riding incentives, as I note below. For a proposal to combat free-riding, albeit in the context of class action opt-out, by assessing a pro-rata share of discovery costs for those plaintiffs who opt out from the class, see *In re Agent Orange*, 611 F.Supp. 1396, 1417 (1985), discussed in Coffee, *supra* note 8, at 925.

⁴⁸ Geoffrey C. Hazard, Colin C. Tait, & William A. Fletcher, *Pleading and Procedure: State and Federal* 865 (1999).

As noted, defendant's strategy of maneuvering to increase the odds of a weak case being the first to trial, or at least, final judgment may significantly contribute to the incidence of duplicative litigation under two-way collateral estoppel. To the extent that strategy attempts to exploit weakness stemming from plaintiffs' counsel's incompetence or other inadequacies of plaintiffs' representation, it motivates other, more capable plaintiff attorneys to join forces with or buy out the less capable attorney. However, collective action problems, especially free-riding, and costs of coordination, including those of bargaining and monitoring will limit the effectiveness of this response.⁴⁹ Moreover, the effort of bolstering or replacing inadequate counsel is itself costly, especially as defendant repeatedly pushes another similarly weak claim to the forefront.

An effective way of addressing defendant's strategy when the weakness in a claim involves the merits of non-common questions is to eliminate the source of "weakness" through a simple redesign of two-way collateral estoppel modeled on the staged litigation approach in class action. Essentially, the court could enter partial final judgment on the common questions, creating the basis for preclusive effect against relitigation of those questions in subsequent cases. This modification of two-way collateral estoppel will increase the costs of structuring discovery and trial, but more than makes up the added expense by avoiding duplicative litigation.

Adjudication. Again, class action ideally eliminates redundancy. The dispositive motions to dismiss, to decide admissibility of expert opinion, and for summary judgment, trial, review etc. proceed under the control of a single lawyer and a single court to permanently resolve the common questions by final judgment. Two-way collateral estoppel is likely to result in far more duplicate litigation for many of the reasons outlined in the immediately preceding discussion.

It is important to recognize that two-way collateral estoppel does not inexorably result in a single trial, even putting aside collateral attacks on the adequacy of a prior final judgment. As suggested already, defendant has an incentive to delay settlement of some claims and intensely litigate others to minimize the risk of loss at trial. To some extent, the defendant might transform two-way collateral estoppel into a one-way version in its favor. For example, confronting trial on a claim that would satisfy requirement for preclusive effect, the defendant might contract pre-trial with plaintiff that in the event of a verdict for plaintiff, the parties would settle before entry of final judgment for the amount awarded with the possibility of payment of some premium.⁵⁰ If courts enforced such pre-trial, contingent settlement agreements, defendant would gain the preclusive benefit of a trial win, while averting the preclusive detriment of a trial loss.⁵¹

⁴⁹ For elaboration of these collective action problems and costs see Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, *supra* note 23; Paul D. Rheingold, Prospects for Managing Mass Torts in the State Courts, 31 Seton Hall L. Rev. 910 (2001).

⁵⁰ Similar arrangements involve plaintiff's agreement to cap the defendant's liability exposure at trial in return for defendant's agreement to pay plaintiff some minimum amount in damages regardless of a jury verdict for less.

⁵¹ This "privatized" conversion of two-way collateral estoppel into a one-way version affords defendant the inverse of the increased expected probability of winning that raised questions about the social

Class action provides a further advantage in avoiding duplicative litigation that makes it superior to two-way collateral estoppel. By aggregating all similar claims, class action enables courts to generalize or broaden the scope of common questions subject to final judgment. In contrast, two-way collateral estoppel often involves the same relevant evidence as that admitted in the class action, but because the case narrowly focuses on the given plaintiff's claim, the trier of fact may not decide or at least need not decide the general question to which the evidence pertains. Consequently, the evidence may be marshaled repeatedly in a number of cases before the general common question is necessarily posed and decided, if ever.⁵²

As an example, consider the "state-of-the-art" question that governs many design defect cases that involve a product, which is marketed and causes harm over a period of years. Recur to the Firestone-Ford litigation, suppose that the tires in question were sold between 1995-2000, and that under the governing "state-of-the-art" rule liability turns on when the defendant manufacturers knew or reasonably should have known of the blowout-rollover risk. If the first case that reaches final judgment involved a tire manufactured, say, in December 1999, the plaintiff could make a strong case on the foresight question by marshalling evidence of the cumulating warranty data from 1995-1999.

Because class action aggregates all claims arising from tires sold in the relevant time-period 1995-2000, the cumulating warranty data is admitted as relevant. But it is admitted not to determine defendants' knowledge of the risk for a given tire sale at any point in time, but rather to resolve the general common question: the threshold point of knowledge or sufficient reason to know. Determination of that question resolves the state of the art question for all claims. If, for example, a jury answers a special verdict query specifying "March 1997," then all claims involving tires sold before that date would be determined in defendant's favor and dismissed, while adjudication of the unresolved balance of claims involving subsequent sales would continue.

desirability of the one-way version favoring plaintiffs. By agreement, defendant can play until it wins, while it may never face losing everything in the balance by preclusive effect. Assume two cases, each with a 50% probability of loss equally \$100. If the defendant wins the first case it avoids paying \$200; if it loses the first case it pays \$100 and proceeds to trial on the second case with a 50% probability of losing \$100. Thus instead of internalizing \$100 (= 50% x \$200), defendant's scheme exposes it to expected liability of \$75 (= 50% (-\$100) + 50% (50% x -\$100)). Note that defendant achieves these results without collusion or selecting a weak case or adversary. Although this regime would increase duplicative litigation, as I explain in Part IV, some level of relitigation may be efficient. Of course, courts might not enforce this agreement even though it is mutually beneficial to the parties in the first case and does leave the plaintiff in the second case worse off than he or she would be in the standard market process. To be sure, the arrangement does reduce defendant's overall liability exposure below the optimal level for deterrence purposes. But, this result, and the essential effect of the arrangement is comparable to allowing plaintiffs to opt-out of a litigation class action. See Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, *supra* note 23.

⁵² In this respect, two-way collateral estoppel closely approximates the results of the market approach in the separate action process.

Yet under collateral estoppel, an individual plaintiff, all else being equal, has little stake in establishing the threshold point of knowledge or reasonable discovery. Thus, a final judgment in a case involving a tire sold in April 1998, for example, might not preclude a subsequent case involving a tire sold in December 1998. Again, given that the import of the cumulating warranty data decreases with the age of the tire in question, a court might deny preclusive effect in a subsequent case involving a tire sold earlier in 1998. And so on. Determining the point of defendants' threshold knowledge or reason to know might require processing many cases before a court could or does reasonably decide the question and issue a universally binding final judgment.

Settlement. Class action generally results in a permanent settlement and usually in a single proceeding once-and-for-all. Common as well as non-common questions are resolved through bargaining between defendant and class counsel representing the class's overall interests and designated sub-class representatives pressing the interests of their respective sub-groups. Although the parties surely engage in strategic behavior, the relatively small number of players, easy access to information, and practical limits on customized and side deal making constrain bargaining costs. Aggregate stakes also often justify using judicial and professional auspices to facilitate negotiations. The result is a "global" agreement specifying the terms for terminating litigation class-wide.⁵³

Settlement under the regime of two-way collateral estoppel costs more than class action, because, in contrast to the latter, the former gives settlement of one case no preclusive effect against non-party plaintiffs litigating the previously settled common questions in a subsequent case. At the limit, settlement negotiations and agreements must be hammered out serially and separately between the defendant and particular plaintiff in each case.⁵⁴ As a result of these higher settlement costs, defendant may well forgo settlement that it would accept in class action (or the separate action process), and invest to win the common questions at trial and thus avoid the ensuing case-by-case costs of settlement. Moreover, strategic behavior is likely to increase settlement costs, some of which will result from duplicative work at the trial stage in lieu of settlement. As noted, defendant has an incentive to identify stronger claims not only for early settlement but also to delay or block their advancing toward trial.⁵⁵ Correspondingly, defendant may

⁵³ See, e.g., Miller & Crump, *supra* note 6, at 39.

⁵⁴ Of course, the market is likely to create ways of reducing if not eliminating duplicative settlement effort. For example, plaintiffs might voluntarily aggregate claims for settlement negotiations. Defendant might simply develop a market clearing settlement offer and institute it through a more or less formal clearinghouse system. Part IV discusses the market forces that motivate informal aggregation of litigation effort, including settlement.

⁵⁵ Because defendant might pay plaintiffs with stronger cases some premium to settle quickly or delay prosecution of their claims, some of the strategic costs may be offset, because plaintiffs' attorneys will have an incentive and probably more efficient means to undertake the work of culling out stronger claims. On the other hand, defendant's incentive to increase the odds of going to trial and winning final judgment on a weaker claim will lead to more collateral attacks in subsequent cases impugning the final judgment for inadequacy of representation, collusiveness, and other factors diminishing the representativeness of the previous claim..

vigorously litigate many weaker claims to increase the odds that one of them, rather than a stronger claim, will reach trial first. Of course, the defendant may not initially have sufficient information to distinguish the relative strength of claims, especially because plaintiffs seeking premium payment or at least early, less costly settlement for strong claims will attempt to conceal weaknesses.⁵⁶ These circumstances may lead the defendant to delay settlement offers pending verification of claim strength through discovery and other pre-trial work.

IV. Comparative Advantage of Separate Action Process

The received assumption is that the separate action process creates a major problem of inefficiency from duplicative litigation of similar claims. The following examines the reality of that assumption. I then compare the relative advantages of the separate action process, two-way collateral estoppel, and class action in avoiding wasteful duplication of effort. My central conclusions are that the separation process generates less duplicative litigation than is commonly assumed and often proves the most cost-effective solution.⁵⁷

A. Duplicative Litigation in the Separate Action Process

For many types of multi-claim litigation, the standard separate action process generally operates through a relatively competitive claims market in which a few corporately organized firms of lawyers compete to aggregate and “mass produce” large shares of claims against a common defendant.⁵⁸ Given this competitive claims market, with each firm seeking to maximize its investment return, it seems natural to ask whether and why there is any substantial inefficiency from duplicative litigation.⁵⁹ The following considers several related reasons to question the existence of such a problem, or at least,

⁵⁶ Following final judgment against it in the first case, defendant is likely to offer settlement of the balance of the claims according their relative strength. Because that offer will be made in separate actions, settlement of the remaining claims will likely cost more than it would in class action. The costs of settlement under two-way collateral estoppel are also likely to rise, because the possible premium for early settlement may induce a plaintiff’s attorney to signal a claim’s particular strength (including a demonstration of the attorney’s readiness for trial) through discovery and other pre-trial litigation.

⁵⁷ Cf. Bruce L. Hay, *Some Settlement Effects of Preclusion*, 1993 U. Ill. L. Rev. 21,22 (1993) (“finality [between two parties will] be ‘supplied’ privately if the courts themselves did not supply it”).

⁵⁸ Edward H. Cooper, *Aggregation and Settlement of Mass Torts*, 148 U. Pa. L. Rev. 1943, 1947 (2000) (“noting that many plaintiffs “come to be represented by a small number of specialized firms that represent enormous ‘inventories’ of clients”); Schuck, *supra* note 6, at 952 (“Despite the very large volume of mass tort claims, the number of lawyers who undertake long-term commitments to represent mass tort claimants and to litigate on their behalf is relatively small. Tort litigation has become remarkably specialized. The same elite group of plaintiffs’ lawyers turns up on the management committees of one mass tort litigation after another.”).

⁵⁹ Jack Weinstein, a Federal judge in New York, notes that “the huge consolidations required in mass torts ... have many of the characteristics of class actions.” Jack B. Weinstein, *Ethical Dilemmas in Mass Tort Litigation*, 88 Nw. U. L. Rev. 469, 480 (1994).

its presumed major proportions. Analysis is divided between market conditions and efficient duplicative litigation.

Market Conditions.

Defendant Offer of Global Settlement. Anticipating multiple similar claims, the defendant has an incentive to make an open market proposal of global settlement through a clearinghouse system on market clearing terms. This proposal should avoid the vast bulk of duplicative litigation.

Voluntary Coordination. Profit maximizing attorneys will necessarily seek returns from scale economies, and thus are motivated to aggregate claims and otherwise organize their efforts to avoid duplicative litigation.⁶⁰ Perhaps the most significant development in the field of multi-claim litigation has been the transformation of the claims market from one populated by numerous small firms that coordinate their efforts on an ad hoc basis, to one dominated by a relatively few large-scale law firms operating through nation- or world-wide networks of cooperating or franchise agents.⁶¹ This highly structured claims market increases the efficacy of defendant proposing global settlement.

Free-riding. Much of an attorney's work product in litigation falls into the public domain and creates the incentive for attorneys holding similar claims to free-ride. At the limit, if one claim is prosecuted to final judgment and the underlying work product is costless to copy and use in subsequent cases, then free-riding avoids virtually all duplicative litigation. Free riding would seem an even more profitable strategy in a claims market dominated by relatively few firms, in which notwithstanding the incentive for free riding one firm is likely to invest in litigation (albeit at a sub-optimal level) and that investment is easily tracked and likely to be worth copying by other firms.

Correlated Effects. Multiple similar claims have correlated value in the separate action process. The litigation of one claim supplies information about claim value as well as work product to lawyers holding other claims. The overall level of litigation will rise or fall accordingly. Eventually, the accumulated work and results will strongly influence the decision whether to settle and for how much.

Efficient Level of Duplicative Litigation. In fact, multi-claim litigation often results in repetitive trials before defendant proposes a global settlement. Given the potential savings from global settlement, one needs an explanation for why the parties ever go to trial, let alone repeatedly. The standard explanation for the occurrence of trial is that the parties' respective estimates of the expected judgment differed sufficiently to

⁶⁰ See Trangsrud, *supra* note 3, at 811.

⁶¹ Schuck, *supra* note 6, at 952 (noting that the "repeat player" phenomenon amongst mass tort lawyers produces a "high degree" of informal coordination). Schuck further notes that as a result of this coordination, plaintiff mass tort lawyers "have achieved a level of parity with their corporate opponents that was unimaginable as recently as twenty years ago." *Id.* at 956. See also Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 *Duke L.J.* 381, 383 (2000) (examining the phenomenon of "informal aggregation" in which counsel in claims that are technically independent act as though the suits were formally aggregated).

wipe out the potential for joint savings from settlement; in particular, plaintiff's estimate exceeded defendant's estimate by more than the joint savings from settlement. But why would the parties in multi-claim litigation conduct more than one trial before global settlement? There are two related explanations: accuracy and risk aversion.⁶²

Accuracy. Because of the magnitude of aggregate stakes for plaintiff attorneys and defendant, divergence in their estimates of the expected judgment will likely involve a sufficiently large sum to warrant effort in reducing the degree of uncertainty. Hence, they might find it worth their while to conduct multiple trials to derive a more accurate sense of the average or weighted average value of the claims, rather than rely on a single, possibly outlier basis for projecting these values.⁶³ It is plausible to understand much of the duplicative litigation in the separate action process as a system (sometimes organized by the parties quite explicitly) for resolving uncertainty respecting expected judgment by conducting and averaging out the results of a more or less statistically reliable sample of test claim trials.⁶⁴

Risk Aversion. Risk aversion magnifies the parties' preference both to reduce uncertainty and to achieve this through multiple trials rather than a single "coin toss." Obviously, the specific outcome of one trial poses a far greater likelihood of substantial variance from the "true" expected judgment, than the average outcome of many trials. In other words, a party's chance of losing every one of a series of trials is far less than the chance of losing a single trial. Being risk averse, the party rationally prefers paying for multiple trials, to the extent that the costs of risk-bearing exceed the costs of litigation.⁶⁵

⁶² The implicit assumption is that settlement approximating the value of claims at trial ("true" value) better serves the social objective, all else equal, than simply terminating litigation on any terms.

⁶³ The real meaning of "plaintiff autonomy" is that plaintiffs are "free" to chosen either as the few "guinea pigs" that litigate test cases or as the others, the vast majority, who capitalize on value created by those cases and settle.

⁶⁴ See, e.g., *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995); Laurens Walker & John Monahan, *Sampling Damages*, 83 Iowa L. Rev. 545 (1998); Robert G. Bone, *Statistical Adjudication: Rights, Justice, and Utility in a World of Process Scarcity*, 46 Vand. L. Rev. 561, 563 (1993); Saks & Blanck, *supra* note 6, (arguing that "the procedural innovation of aggregation provides a quality of justice that surpasses what courts have, until now, been capable of in any kind of case"); Bone, *supra* note 12, at 243-44 (noting that relitigation increases decision certainty). For a proposal to "draw on a wider database of prior adjudications and settlements by different juries, courts, or parties," see Glen O. Robinson & Kenneth S. Abraham, *Collective Justice in Tort Law*, 78 Va. L. Rev. 1481, 1492 (1992).

⁶⁵ This discussion suggests that multiple trials in the separate action process, or more realistically, the separate aggregated action process could represent an efficient level of duplicative litigation. But, the parties have other incentives for conducting multiple trials that do not necessarily further the social objectives for civil liability. Defendant could be waging a war of attrition, and given the correlated effects of this type of litigation, could be signaling a "scorched earth" strategy or attempting to mislead marginal plaintiffs' attorneys about the strength of the case against it. Plaintiffs' attorneys with large aggregate holdings may conduct multiple trials rather than settle to further a strategy of seeking a nuisance value settlement by establishing the credibility of their threat of repeatedly going to trial with the possibility of verdict, and, in any event, generating publicity adverse to the defendant, regardless of the actual lack of merit to their claims.

B. Assessment of Alternatives

The foregoing analysis suggests that the separate action process represents a possible cost-effective alternative to both class action and two-collateral estoppel in avoiding inefficient duplicative litigation. Using the criteria for comparison applied from the start, I briefly consider the relative advantages of these alternatives together with certain modifications that would improve their comparative benefits.

Preclusive Effect. The separate action process generally provides no formal preclusive effect against relitigating common questions of fact (and fact-law). Nevertheless, as we have seen, market forces naturally motivate the parties to economize on their investment in litigation and reach global settlement with a minimum of extra effort. However, class action would seem even more efficient, given that mandatory aggregation coalesces all of the factors and interests that bear upon the choice between comprehensive trial or settlement, avoiding much of the real as well as strategic costs of competition for claims in the standard market process. Mandatory class action has the same cost advantage over two-way collateral estoppel, which as noted above, gives no preclusive effect to settlement beyond the immediate parties, and thus, for settlement purposes, operates just like the separate action process.

Litigation Dynamics. This discussion takes account of the reality that the claims market has transformed the process of separate individual actions into one of separate aggregated actions. Two-way collateral estoppel operates in this context, and thus benefits from the greater, but nonetheless incomplete opportunities for plaintiffs' attorneys to exploit scale economies. Moreover, discussion recognizes the possible efficiency in relitigating common questions.

Court Management. Unlike class action and two-way collateral estoppel, the separate aggregated action process entails no management costs to effectuate non-party preclusion. Most importantly, in contrast to class action, courts presiding over separation actions normally have no role in setting fees for plaintiffs attorneys. A competitive market in legal representation should motivate law firms to charge fees—based on their relative opportunity costs and market share of claims—far more efficiently.⁶⁶ These

⁶⁶ In assuming a competitive market, I am not disregarding its somewhat oligopolistic structure in the field of large-scale, multi-claim litigation. Because individual plaintiffs often are relatively uninformed and inexperienced consumers of legal services, there is the possibility that law firms would set prices above the competitive level. To be sure, there are plenty of lawyers, and many who have or could develop expertise to compete in this field. Costs of entry, however, are high, especially to establish the networks of finders and other agents that enable the firms to increase their respective market share in claims. Competition among large-scale firms of defense attorneys probably is far stronger, because of lower entry costs and consumer information and experience, given defendant firms' relatively small and stable number, accessibility, collective long-term as well as specific litigation interests. Yet, overcharging by plaintiffs' attorneys may, to some extent, make up for having only fractional market share and thus insufficient incentive to make the optimal investment that would maximize aggregate recovery from litigating the common questions. See also Schuck, *supra* note 6, at 952 (noting that the repeat-player phenomenon amongst mass tort litigators causes them "to devote much effort to building and maintaining their reputations and credibility").

significant cost advantages are somewhat offset by the lost benefit from judicial fee setting in controlling agency problems that will persist despite competition because of collective action, information and other impediments to plaintiffs' effectively monitoring and disciplining their attorneys' defalcations.⁶⁷

Litigation Costs: Trial. Compared to class action, the separate aggregated action process entails substantial claim initiation costs. The same is true for discovery and other pre-trial work at the adjudication stage. While two-way collateral estoppel does not improve performance of the aggregate separate action process at the initiation stage, it does reduce duplicate pre-trial effort. By breaking the tie between trial of common and non-common questions, such as damages, two-way collateral estoppel curtails the incentives parties have in the separate action process to make an extra investment on the common questions simply to influence the jury's treatment of the non-common questions. Moreover, two-way collateral estoppel reduces duplicative effort by encouraging attorneys for non-party plaintiffs to join or take over prosecution of the case likely to reach final judgment first, and thus deter defendant from strategically maneuvering to increase the odds of confronting a weak or weakly represented claim. Efficiency gains are also, if somewhat perversely, the result of collateral estoppel lowering the cost and uncertainty for attorneys representing non-party plaintiffs to benefit from the work product of the attorney for the party plaintiff, and thus increasing the expected value from free-riding. Use of compulsory, but partial (relative to class action) consolidation and joinder of claims for pre-trial work up will produce similar dual effects in reducing duplicative effort. Use of market forces or legal incentives to stimulate voluntary, but partial (again relative to class action) aggregation of claim representation at the pre-trial phase will reduce duplicative effort both through increased coordination of litigation and by increasing the "value" of free-riding.

As noted above, the separate action process offers the parties the opportunity to conduct multiple trials to help reach global settlement. Neither class action nor two-way collateral estoppel provides this option. But nothing inherent in the separate action process or the regulatory alternatives suggests any design constraints. Class action readily accommodates the option for multiple trials, either determined by the court based on expert assessment of the statistically reliable sample or by defendant and class counsel exercising much the same discretion as the parties would in the separate action process.⁶⁸ Class-wide liability and recovery of damages would be discounted according to the

⁶⁷ Cost barriers to plaintiffs' comparison shopping are exacerbated not only by rules of confidentiality that constrain public disclosure of material information bearing on relative claim valuations, but also by numerous legal and legally relevant fact variations that ultimately but, given the social objective of optimal deterrence and insurance, unnecessarily) determine the ultimate value of a given plaintiff's claim.

⁶⁸ For a proposal along these lines, see Hay & Rosenberg, *supra* note 8, at 1382. Thus the courts in [In re Rhone-Poulenc Rorer Inc.](#), 51 F.3d 1293 (7th Cir.1995) and [Bridgestone/Firestone](#), *supra* at 1020, incorrectly viewed class action and separate action as diametrically opposed modes of adjudication, essentially regulation versus the market. Mandatory aggregation and multiple class action trials are fully complementary rule designs that produce deterrence and insurance benefits in combination than would use of one or the other or use of both separately, each resolving some fraction of the claims.

probably of verdict for defendant revealed by the results of multiple trials. Of course, defendant and class counsel could effect global settlement to avoid the costs of extending the results by formal, comprehensive judgment.⁶⁹ The key difference between the two modalities, as discussed in the next section, is in the incentives of plaintiffs' attorneys to make the optimal investment that maximizes aggregate recovery from litigating the common questions. Class action necessarily provides those incentives, while the process of separate aggregated actions does not.

Two-way collateral estoppel could undergo similar modification. The weighted aggregate average of several trial results would provide the basis for applying preclusion against relitigation of common questions in subsequent cases, as well as for formulating global settlement. As noted, to some extent the defendant might convert the rule into a one-way version giving it the option to conduct multiple trials. Again, however, the problem of relative advantage mainly concerns the investment incentives for the party plaintiff attorneys. Those incentives would be no greater than in the separate aggregated action process, and thus inferior to those of class action counsel. Most likely, the investment incentives under two-way collateral estoppel will be even lower, because that regime increases the value of free riding.⁷⁰

Litigation Costs: Settlement. All three alternatives avoid duplicative litigation through global settlement. Class action provides the most cost-effective mode for effecting such settlement, because it alone gives formal preclusive effect to the terms of settlement of all claims at once. Global settlement in the separate action process requires repeated agreements, if not negotiations, entailing more cost than class action, even though (or indeed, because) the process involves significant large-scale aggregation. Because economies of scale in the separate action process depend entirely on voluntary organization,⁷¹ plaintiffs usually achieve only fractional returns from scale, given problems like free riding, high bargaining and monitoring costs, and difficulties with dividing surplus that stymie coordination. Without such scale economies, the separate aggregated action process could result in dozens or hundreds of the same motions, hearings, and discovery campaigns in different courts around the country, redundantly consuming legal resources for years before global settlement puts an end to it.

As noted above, two-way collateral estoppel also relies on the separate action process to effectuate global settlement. Indeed, the aggregated character of the separate action process may make global settlement even more costly than it was (or would be) under conditions of less aggregation. In seeking to avoid inefficient customization by proposing relatively standardized terms of settlement, defendant will offer an average return to a middle range of plaintiffs' attorneys. Many of these attorneys will have an incentive to make credible threats of rejecting the settlement and going to trial in order to

⁶⁹ Indeed, to save costs, the court could direct the parties to draw up a consent decree or submit counter-proposals for comprehensive judgment based on the multiple trial outcomes.

⁷⁰ For discussion of the asymmetrical investment problem, see *infra* Part V.

⁷¹ Shapiro, *supra* note 13, at 86 n.17.

exact some modification or side payment from defendant. If any plaintiffs' attorney were to win some additional concession from defendant, and the other attorneys learned about the change, then the entire settlement package could unravel. Although defendant thus has strong reason hold fast, it lacks the credibility of preclusive effect to deter attempts at strategic bargaining by plaintiff attorneys.⁷² This problem of the separate aggregated action process, along with others, explains the use of settlement-only class action.⁷³ That device provides preclusive effect for the defendant's global settlement offer based upon judicial approval of the settlement.⁷⁴ However, the settlement-only class action does not certify the claims for class action trial—all claims revert to the separate action process in the event the court rejects the proffer of global settlement. Consequently, such a class action merely reproduces the global settlement that reflects the fragmented investment incentives of plaintiffs' attorneys in the separate aggregated action process, rather than the unified investment incentives of class counsel with the prospect of a share of the total recovery on all claims after litigating their common questions.⁷⁵

V. Symmetry of Investment Incentive

The foregoing suggests that the separate aggregated action process may present far less of a problem of inefficient duplicative litigation than is commonly assumed. That analysis reaches no conclusive view as to whether relying on class action, two-way collateral estoppel or the standard claims market is the best available approach to avoid any residuary of inefficient redundancy. In this last section, I put aside the cost-benefit

⁷² One device commonly used to avoid being whipsawed by plaintiffs' attorneys is to include a "most favored nation" clause in settlements, which provides that any subsequent change increasing the value of relevant settlement terms must also inure to benefit of plaintiffs who settled earlier under less favorable terms.

⁷³ See, e.g., *In re General Motors*, 55 F.3d 768, 778 (3rd Cir. 1995) (holding that Rule 23 permits the certification of settlement-only classes so long as they meet all the other requirements of the Rule).

⁷⁴ As such, the exercise of the opt-out prerogative could serve as a signal of above-average claim value.

⁷⁵ E.g., *Amchem Products, Inc. v. Windsor*, 521 US 591, 621 (1997); *Coffee*, supra note 3, at 1453. But see *Trangsrud*, supra note 1, at 835 ("Although the common question class action is generally not desirable for trying mass tort cases involving substantial claims, its use as a pretrial joinder device to facilitate group settlements is both proper and desirable."). Other reasons for using settlement-only class actions include preventing attorneys representing later claims from free-riding on investments made by attorneys representing earlier claims, and thus preserving the basis for their optimizing investment within the constraints of the separate action process. In addition, the settlement-only class action makes it possible for defendant to offer global settlement terms that have a "public good" character, perhaps doing something symbolic that all in the class would prefer, but because all plaintiffs automatically enjoy the benefit, none has any reason to pay for it. Depending on the rate and nature of opt-out, settlement-only class action may reduce a defendant's costs of bearing the risk of long-term liability exposure, especially regarding multiple punitive damage awards. Of course, global settlement of a class action can charge class members for such a good, but also that term as well as all others reflect the incentive to make the optimal investment that maximizes the aggregate recovery from all claims in litigating their common questions. See also *James A Henderson, Jr., Settlement Class Actions and the Limits of Adjudication*, 80 *Cornell L. Rev.* 1014, 1014 (1995) (arguing that "[s]ettlement class actions are inherently unlawful because they clearly ... exceed the legitimate limits of adjudication.").

questions examined thus far to consider the relative utility of these alternatives on another dimension. I focus on a point indicated throughout: the effect of these alternative regimes on the relative incentives of the parties to invest in litigating the common questions.

This point is captured by the concept of scale economies in litigating similar claims against a common defendant. As noted, it is generally understood that as aggregation increases, wasted duplication of effort decreases, thereby reducing per-claim cost in absolute terms. At the limit, both actual universal aggregation by class action or virtual universal aggregation through two-way collateral estoppel wring out all of this inefficiency.

Nonetheless, the conventional understanding of scale economies in multi-claim litigation generally ignores that allocating return from scale affects a party's incentive to invest in litigation. Basically, as actual aggregation increases the investor's aggregate expected reward, the party gains greater return from making greater investments in variable litigation-related factors that exploit scale economies. That return comes from either lower average per-claim cost or higher average per claim productivity. Thus, aggregating claims might, for instance, make worthwhile a higher investment that reduces per-claim costs by investing in computerized equipment to replace less efficient manual handling of voluminous discovery material. Alternatively, aggregation might warrant a considerably broader discovery campaign, the higher cost of which would be more than offset by higher expected recovery at trial. In other words, the more a party is motivated to exploit scale economies, the more that party will invest in litigating the common questions. If each additional unit of investment yields a corresponding increase in probability of success, but at a diminishing rate, the party will optimize returns from scale, given the level of aggregation. All else being equal, if the party could litigate all claims as if they comprised a single claim—or equivalently, if all claims were actually aggregated for collective prosecution—then the party would make the optimal investment (from the perspective of plaintiffs as a group) that maximizes the aggregate and consequently individual value from litigating the common questions.⁷⁶

This optimal investment benefit represents the most important social advantage of class action, as I discuss more fully in my companion paper. For now, I apply the relationship between scale economies and investment incentives to analyze the choice between class action, two-way collateral estoppel and the market to address the residuary of inefficient duplicative litigation of the type under study. I start with the apparently prevailing objection that using collateral estoppel for this purpose is socially undesirable, because it operates in the predicate first case to skew investment incentives and hence the resulting outcome in defendant's favor. Briefly, I show that this objection is misplaced,

⁷⁶ But see Coffee, *supra* note 8, at 883 (noting that plaintiffs' attorneys work for a contingent, percentage of recovery fee, and thus "[c]lass actions necessarily involve asymmetric stakes [;defendants are prepared to expend greater resources on the prosecution of the action than are plaintiffs' attorneys, because defendants have more to gain or lose]"); Bone, *supra* note 12, at 253-54 (arguing that due to the diminishing marginal utility of investment in litigation, the "error effects of asymmetry are likely to be relatively small in those cases where the disadvantaged party has a substantial amount at stake in any event").

because the major cause of asymmetry in investment incentive is defendant’s natural asymmetric advantage in aggregation that exists regardless of whether the claims are prosecuted under the two-way regime or in the separate aggregated action process.⁷⁷ The principal constraints on investment stem from collective action problems and costs that prevent the claims market from achieving universal actual aggregation on plaintiffs’ side. Among the available alternatives, only regulatory intervention through class action can produce this result.

In practice, collateral estoppel generally applies against a party with the long-term interest—in the type of case considered here, the common defendant as opposed to the non-party plaintiff. This limitation is explained as necessary to prevent collateral estoppel from skewing the parties’ stakes in the first case and then enforcing the skewed outcome across all similar cases. Posner suggested that courts thus reject “non-mutual defensive collateral estoppel” in cases under study here, because the rule operates to raise defendant’s stakes relative to plaintiff’s in the first case, inducing defendant to make an overwhelming investment against plaintiff to win preclusive effect against subsequent claims by the non-party plaintiffs. Under this rule, winning final judgment on the common questions means defendant avoids not only paying damages to the party plaintiff, but to all potential plaintiffs. In an adversarial system, as Spurr concludes, this skewing of investment incentive would distort the accuracy of judgments and resulting effects on behavior from threatened civil liability, jeopardizing the social deterrence and insurance objectives for the litigation.

Take a simple example of a common defendant facing two similar, separately prosecuted claims each seeking \$1000 damages. Suppose that both defendant and plaintiff could respectively invest in hiring experts whose testimony would affect the probability of success as follows:

	Cost of Investment	Probability of Success for Plaintiff if		
		Plaintiff Alone	Defendant Alone	Both
Expert #1	\$250	90%	15%	65%
Expert #2	\$900	90%	15%	75%
Expert #3	\$912	90%	14.5%	76%

The supposition of the standard view is that in the separate action process, without collateral estoppel to extend the preclusive effect of final judgment for defendant, each party in the succeeding cases predicts that the other will invest \$250 for Expert #1, with the result that plaintiff has a 65% probability of success in each case. It is assumed that neither would find it worthwhile under any circumstances to invest in Expert #2, because

⁷⁷ Cf. Bone, *supra* note 12, at 253 (dismissing the argument that two-way preclusion creates asymmetries in investment incentives, noting that defendant has higher stakes in one-way preclusion, that stare decisis can raise the stakes for the first action amongst repeat players, and that repeat player has incentive to invest more at first to deter additional filings and enhance settlement leverage).

neither gains enough from making the investment alone or together to offset increased cost. The same reasoning excludes the possibility of either party hiring Expert #3. Based on this set of assumptions, the introduction of non-mutual defensive collateral estoppel seems to double the stakes for defendant in the first case, while leaving plaintiff's stake unchanged. As a result, the defendant might find it worthwhile to invest in Expert #2, because a win avoids \$2000 in damages and it predicts that plaintiff will not match the investment.⁷⁸ Thus, defendant reduces aggregate expected liability from \$2000 with a probability of 65% or \$1300 to \$2000 with a probability of 15% or \$300. Expert #3 still remains unattractive to defendant, because the marginal investment of \$12 yields marginal expected benefit in avoided liability of \$10.

This investment asymmetry that favors defendant is real, but collateral estoppel has nothing to do with it. Even without collateral estoppel, the defendant in the above example would rationally invest to deploy Expert #2 in the first case and second as well. Given the similarity of claims, and all else being held constant, the investment efficiently maximizes returns from scale economies.⁷⁹

But, now assume that in addition to common questions there are non-common questions that involve some cost, say \$500. Putting aside the possible interdependence of juror views on the two types of questions, the added cost for non-common questions is irrelevant to plaintiff's incentive to invest on the common questions. However, as Spurr showed, the possibility of avoiding liability for \$1000 plus variable cost of \$500 in the second case could induce a further marginal investment from defendant to win the first case. In the example, the defendant would spend the additional \$12 because it reduces the aggregate expected liability just over that amount. Again, plaintiff has no interest in the second case, so has no added incentive to match defendant's investment. Depending on the costs, defendant might forgo settling the first case unless plaintiff offered a premium of at least \$500. This added motive for asymmetrical investment by defendant is absent from the separate aggregated action process, at least as a formal matter.

Two-way collateral estoppel does not alter the analysis or conclusions. Ignoring the costs for non-common questions in subsequent cases, the parties' relative investment incentive depends on the relative degree to which they internalize returns from exploiting scale economies, which in turn depends on their relative aggregate interest in the outcome of the common questions in multi-claim litigation. Because defendant's stake in the outcome of the litigation consists of its defense on the common questions, and that

⁷⁸ Plaintiff might hire Expert #1 if defendant hires Expert #2. Refining the example, suppose that making this investment if defendant hires Expert #2 gives plaintiff a 30% probability of success. Predicting that move by plaintiff, defendant would nonetheless hire Expert #2, because the expected return of \$1400 (=70% x \$2000) still makes the increased marginal investment worthwhile. I thank Guy Halfteck for pointing out this nice permutation.

⁷⁹ Of course, common question evidence of this type entails some duplicative costs, for example, repetitive preparation and appearance of the witness in two different cases and courts. Moreover, as noted, duplicative litigation may enable a party to achieve collective gains from increased information, skill, and experience. For convenience, I hold these factors constant.

defense interest is unitary across all claims, it naturally and automatically “aggregates” all claims from the defense side.⁸⁰ In contrast, hindered by collective action problems and costs, exacerbated by the added value of free riding from the two-way rule, aggregation on the plaintiffs’ side rarely if ever approaches universal actual aggregation. Given partial aggregation on plaintiffs’ side, defendant’s total aggregate interest in avoiding the costs of litigating non-common questions in subsequent cases will also motivate an added asymmetrical unit of investment to win the first case. Generally, plaintiffs’ aggregate interest will not vary substantially under two-way collateral estoppel from what it would be were the case in question tried to final judgment in the separate aggregated action process. The degree and consequence of resulting asymmetry in investment incentive will depend on the number and dispersion of claims and on other litigation-specific factors. But, there will be few if any situations in which defendant cannot exploit scale economies more efficiently and more fully than plaintiff and thus make the optimal investment that maximizes aggregate value from litigating the common questions.

Class action equalizes opportunity for both sides to exploit scale economies efficiently and fully. Note that class action avoids not only the collective action problems and costs barriers to achieving universal actual aggregation. Class action also solves the problem of asymmetrical stakes in the the aggregate outcome of litigation that skews of the adjudication of non-common as well as common questions.⁸¹

⁸⁰ Defendant’s position is much like that of a natural monopoly.

⁸¹ Remarkably, despite decades of heated debate over the utility of the class action, its effects in optimizing plaintiffs’ investment incentives and correcting the investment asymmetry favoring defendant are generally unrecognized by courts and commentators. For an exception, see *In re Simon II Litigation*, No. 00-CV-5332 (E.D.N.Y Oct. 15, 2002).