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SOLVING THE NUISANCE-VALUE  
SETTLEMENT PROBLEM:  
MANDATORY SUMMARY JUDGMENT

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SOLVING THE NUISANCE-VALUE SETTLEMENT PROBLEM:  
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RANDY J. KOZEL & DAVID ROSENBERG

*The nuisance-value settlement problem arises whenever a litigant can profitably initiate a meritless claim or defense and offer to settle it for less than it would cost the opposing litigant to have a court dismiss the claim or defense on a standard motion for merits review like summary judgment. The opposing litigant confronted with such a nuisance-value claim or defense rationally would agree to settle for any amount up to the cost of litigating to have it dismissed. These settlement payoffs skew litigation outcomes away from socially appropriate levels, undermining the deterrence and compensation objectives of civil liability. Yet current procedural rules are inadequate to foreclose nuisance-value strategies.*

*Class action is commonly thought to exacerbate the nuisance-value settlement problem to the systematic disadvantage of defendants. This concern has contributed to the growing support among courts and commentators for subjecting class actions to precertification merits review (PCMR), generally understood as conditioning class certification on prior screening of class claims for some threshold level of merit.*

*This article proposes “mandatory summary judgment” (MSJ) as a solution to the problem of nuisance-value settlement in class actions and in civil litigation generally. Essentially, MSJ denies judicial enforceability to any settlement agreement entered into before the nuisance-value claim or defense has been submitted for merits review on a motion for summary judgment or other standard dispositive motion. Assessing the potential costs of the MSJ solution, we conclude that neither the opportunity for evading MSJ strictures nor the possibility of adding expenses to the settlement of non-nuisance-value litigation outweighs the benefits of MSJ. MSJ will be most cost-effective in the class action context, given the already existing general requirements of judicial review and approval of class action settlements, but MSJ should also prove beneficial in preempting nuisance-value strategies outside of class actions in the standard separate action context.*

*With the MSJ solution set out, the article moves finally to offering a more exhaustive analysis of the theoretical soundness and practical efficacy of MSJ in the class action context, where its marginal benefits are arguable the greatest. First, the article challenges the commonly held belief that class action certification exacerbates the nuisance-value settlement problem, attempting to displace the conventional understanding of complex litigation with a new conceptual framework based on the recharacterization of the class action as part of a continuum of litigation processes rather than an isolated litigation mechanism. Second, the article provides a comparative analysis of MSJ and PCMR as solutions to the nuisance-value problems that do exist in the class action context, concluding that MSJ presents the superior and more cost-effective option.*

*\*forthcoming in Virginia Law Review, 2004.*

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RANDY J. KOZEL<sup>±</sup>T & DAVID ROSENBERG<sup>±</sup>

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I. INTRODUCTION

Civil litigants often exploit the litigation process strategically for private gain at the expense of social welfare.<sup>1</sup> One of the most significant exploitative strategies entails asserting a claim or defense to obtain a “nuisance-value settlement.” To employ such a nuisance-value strategy, a litigant files a plainly meritless claim or defense in order to extract a payoff based on the cost the other party would need to incur to have the claim or defense dismissed under a standard dispositive motion.<sup>2</sup>

It might seem puzzling that a fully informed, rational litigant confronted by such an obvious litigation ploy would settle instead of seeking

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<sup>1</sup> In recent years, there has been a significant amount of useful commentary addressing the evils of so-called “frivolous” lawsuits and recommending ways to minimize the social impact of such suits. See, e.g., Lucian Bebchuk & Howard F. Chang, *An Analysis Of Fee Shifting Based On The Margin Of Victory: On Frivolous Suits, Meritorious Suits, And The Role Of Rule 11*, 25 J. LEGAL. STUD. 371 (1996); Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEG. STUD. 1 (1996); Lucian Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEG. STUD. 437 (1988); Robert G. Bone, *Modeling Frivolous Suits*, 145 U. PA. L. REV. 519 (1997); Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 U. CHI. L. REV. 163 (2000); Peter H. Huang, *Law-suit Abandonment Options in Possibly Frivolous Litigation Games* (Nov. 2003) ([http://ssrn.com/abstract/abstract\\_id=474681](http://ssrn.com/abstract/abstract_id=474681)); Scott A. Martin, *Keeping Courts Afloat in a Rising Sea of Litigation: An Objective Approach to Imposing Rule 38 Sanctions for Frivolous Appeals*, 100 MICH. L. REV. (2002); Jonathan T. Molot, *How U.S. Procedure Skews Tort Law Incentives*, 73 IND. L.J. 59 (1997); A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397 (1993); John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433 (1986); Charles M. Yablon, *The Good, the Bad, And The Frivolous Case: An Essay on Probability and Rule 11*, 44 UCLA L. REV. 65 (1996). Cf., e.g., Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 STAN. L. REV. 497 (1991); Michael J. Meurer, *Controlling Opportunistic and Anticompetitive Intellectual Property Litigation*, 44 B.C. L. REV. 509 (2003).

<sup>2</sup> Put differently, a nuisance-value payoff is one derived by a party threatening the adverse party with trial of a claim or defense that both parties know the court would dismiss on an adequately supported dispositive motion, like summary judgment.

dismissal on summary judgment, or that the proponent of the nuisance-value strategy would fail to anticipate the certainty of dismissal and refrain from initiating the lawsuit in the first place. Yet, however legally untenable the claim or defense, a nuisance-value strategy can be profitable when it costs less to initiate the claim or defense than it does to have it dismissed. That is, paying off the proponent of the meritless claim or defense rather than incurring the greater expense of litigating to have it dismissed may well be the opponent's rational (and expected) course of action.

In this article, we specifically define a "nuisance-value settlement" as a payoff extracted by a threat to litigate a meritless claim or defense that both parties know the court would readily dismiss as "untrialable" or otherwise legally untenable on an applicable dispositive motion for merits review, like a motion for summary judgment.<sup>3</sup> The civil justice system is rife with situations in which the difference in cost between filing and ousting meritless claims or defenses makes the nuisance-value strategy profitable.<sup>4</sup> The resulting settlements decrease social welfare by vexing and taxing the victimized party, encouraging the misallocation of legal resources, and diminishing public confidence in the civil liability system.<sup>5</sup> Further, the prospect of such settlements distort the *ex ante* incentives of potential litigants to take socially appropriate levels of precautions against risks. This distorting effect is likely to be pronounced in cases involving multiple similar claims arising from "mass production"<sup>6</sup> processes or goods — litigation that constitutes a large share of civil dockets across the country and that is well suited for class action treatment.<sup>7</sup>

In this article, we analyze the mechanics and magnitude of the nuisance-value settlement problem in class actions and in civil litigation generally. We go on to propose a comprehensive solution:

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<sup>3</sup> For the federal summary judgment rule, see FED. R. CIV. P. 56. "Summary judgment" is used throughout this article as a convenient, collective reference to all standard merits-review procedures invoked before, during, and after trial. See, e.g., FED. R. CIV. P. 12(b)(6) (motion to dismiss for failure to state a claim upon which relief may be granted); FED. R. CIV. P. 50 (judgment as a matter of law).

<sup>4</sup> See, e.g., Jonathan D. Glater, *California Says State Law Was Used as Extortion Tool*, N.Y. TIMES, April 5, 2003, at A8 (discussing a California law firm alleged to have filed lawsuits against "thousands of small businesses" to extract nuisance-value settlements); see also *Trevor Lawyers Voluntarily Resign*, Los Angeles Business (July 11, 2003), available at <http://www.bizjournals.com/losangeles/stories/2003/07/07/daily55.html>.

<sup>5</sup> See, e.g., John W. Wade, *On Frivolous Litigation: A Study of Tort Liability and Procedural Sanctions*, 14 HOFSTRA L. REV. 433, 433 (1986) ("The person against whom the groundless suit is brought is subjected to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprivation of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property.").

<sup>6</sup> By "mass production" claims, we refer to claims of harm to person or property resulting from systematic risk-taking by business or governmental organizations that affect more than one potential plaintiff (and oftentimes hundreds or thousands of plaintiffs). In these cases, the defendants are usually capable of predicting and internalizing the costs of expected civil liability, including the costs of potential nuisance-value payoffs.

<sup>7</sup> See David Rosenberg, *Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831 (2002).

mandatory summary judgment, or MSJ. Mandatory summary judgment overcomes the nuisance-value settlement problem by precluding judicial enforcement of any settlement agreement entered into before the relevant claim or defense has been submitted for merits review on summary judgment.<sup>8</sup> Essentially, mandating summary judgment as a condition precedent to entering into an enforceable settlement agreement eliminates the potential payoff from nuisance-value strategies, removing any motive to employ them.

It is commonly assumed by courts and commentators that class action litigation exacerbates the nuisance-value settlement problem — and, further, that it does so to the systematic disadvantage of defendants.<sup>9</sup> Indeed, concern about nuisance-value class settlement partly motivates growing support among courts and commentators for subjecting class actions to precertification merits review (PCMR), generally understood as an apparatus for conditioning class certification on prior screening of class claims for some threshold level of merit.<sup>10</sup> This article challenges conventional assumptions by providing a theoretical analysis that contests the significance of any overall contribution of class actions to the nuisance-value settlement problem. The article then steps back to demonstrate that, regardless whether class certification makes a material contribution to the nuisance-value problem, MSJ provides an effective solution that is superior to PCMR at both preventing nuisance-value payoffs and avoiding the burdening of triable class actions with undue litigation costs.

We begin in Part II by illustrating the mechanism of nuisance-value strategies in both the separate action and class action contexts. In Part III, we articulate and develop the MSJ proposal, testing the effectiveness of MSJ at discouraging nuisance-value suits and assessing the potential costs of applying MSJ in both contexts. We focus particularly on the possible extra burden that parties may bear under MSJ in attempting to settle “non-

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<sup>8</sup> “Merits review” contemplates the level of judicial scrutiny generally prescribed for summary judgment to test whether the asserted claims and defenses are minimally sufficient, or rather whether they should be dismissed outright for lack of a basis in law or for failure to present a triable (genuine and material) factual dispute. *Cf.* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2712 (1998) (“A motion for summary judgment lies only when there is no genuine issue of material fact; summary judgment is not a substitute for the trial of disputed fact issues. . . . Given this function, the district court examines the affidavits or other evidence introduced on a Rule 56 motion simply to determine whether a triable issue exists rather than for the purpose of resolving that issue.” (footnotes omitted)). Nuisance-value litigation is thus “meritless” in the sense that the claims and defenses are legally untenable as a matter of law or untriability. According to the policy of gatekeeping rules like summary judgment, those claims and defenses are deemed too speculative (specifically or on average) to warrant expending the social resources necessary for full-scale adjudication.

This article does not take up the broader question whether the existing merits-review process should be more stringent or less stringent. For a thoughtful treatment of this question and its various implications, *see* Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Litigation Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. REV. 982 (2003).

<sup>9</sup> *See* Part II.B. and Part IV., *infra*.

<sup>10</sup> *See infra* note --.

nuisance-value” cases — that is, cases that present triable claims and defenses and that could be efficiently settled without their submission for merits review on summary judgment. Part IV turns its focus to the specific theoretical considerations underlying nuisance-value strategies in class actions. We demonstrate that, contrary to popular belief, class actions do not create special, isolated nuisance-value settlement problems, but rather are properly understood as representing a point on a continuum of litigation that ranges from one-on-one separate actions to comprehensive class action. We also offer an explanation and critique of precertification merits review (PCMR), as well as a comparative analysis of the efficacy of PCMR versus MSJ at thwarting nuisance-value strategies. Finally, the conclusion distinguishes the nuisance-value problem from the “blackmail” settlement problem and the “negative expected value” settlement problem, and it gives brief consideration to two other potential solutions to the nuisance-value settlement problem as appropriately conceptualized.<sup>11</sup>

## II. NUISANCE-VALUE SETTLEMENT STRATEGY

Our aim in this Part is to articulate and analyze the conditions that foster nuisance-value strategies in the civil litigation of separate actions generally and in the specific context of class actions. We examine polar cases — a single, two-party separate action at one extreme and a formally certified class action at the other. Understanding the mechanics of the nuisance-value strategy provides insight not only into the magnitude of the problem (as well as the contribution to that magnitude that arises through class action certification), but also into the design and effectiveness of the MSJ solution.

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<sup>11</sup> This article deploys and extends the model of nuisance-value litigation and settlement developed in David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance-value*, 5 INT’L REV. OF LAW AND ECON. 3, 3 (1985). Confining “nuisance-value settlement” to claims and defenses that are untriable and would not survive summary judgment distinguishes our project from those seeking to explain why claims that have some (usually low) probability of success but that nonetheless are too costly to prosecute to trial — commonly referred to as “negative expected value” claims — can nonetheless extract a positive settlement payoff. See, e.g., *id.* (explaining such payoffs according to a model that depicts a positive settlement range when claims are less costly to file than to contest). Lucian Bebchuk has developed two other models that explain positive payoffs for negative expected value claims. See Lucian Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEG. STUD. 437, 437–38 (1988) (positing situations of asymmetric information in which a defendant confronting a series of suits including some fraction of negative value claims will, under certain circumstances, rationally settle them as if all were going to trial rather than bear greater cost of sorting the viable from unviable actions); Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEG. STUD. 1 (1996) (explaining that a defendant rationally would settle a known negative expected value claim given a multi-round litigation process when the plaintiff’s expected recovery exceeds the marginal cost of the trial “round” and the plaintiff thus can credibly threaten to invest and “sink” costs in the prior rounds of litigation as a means of committing to make the marginal investment in trial). Cf. Robert Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519, 523 (1997) (developing a model of suit in which defendants find it too costly to discover negative expected value claims and plaintiffs fail to undertake any merits investigation prior to suit).

### A. Nuisance-Value Strategies in the Separate Action Context

The viability of a nuisance-value strategy depends on the presence of two conditions: a sequential litigation process, and a cost differential favoring the party initiating the litigation sequence. By “sequential litigation process,” we mean a process which is initiated by one party and which thereby automatically subjects the other party to the burden of responding or enduring the cost of defaulting.<sup>12</sup> Sequential litigation is ubiquitous in the civil system, underlying many core litigation processes. During discovery, for example, one party can file a request for document production that, without need for anything more, acquires the legal force of threatened judicial sanctions for non-compliance and thus compels the other party to make a choice between two potentially costly alternatives: complying with the request on the one hand, or objecting and moving for a protective order on the other.<sup>13</sup> We focus our analysis on a particularly significant — and, indeed, perhaps the *most* significant at least in terms of its consequence for the litigating parties — stage of the litigation process: the initiation of a claim or defense that requires a response, on pain of default, either acknowledging triability and proceeding toward trial (for example, by submitting to discovery) or denying triability and seeking dismissal on presentation of a dispositive motion (for instance, by moving for summary judgment).

The second determinant of the nuisance-value strategy’s success is that the party initiating the litigation sequence must be able to initiate at a cost lower than the opposing party’s cost of responding to the litigation by, for example, filing and presenting the case for summary judgment or ouster on some comparable dispositive motion. In the most basic case, if a plaintiff can file a suit at a cost cheaper than the cost to the defendant of defeating that suit (which in turn is cheaper than the cost of suffering default judgment), then there is the potential for a nuisance-value settlement. A profit-maximizing defendant rationally would settle for any amount up to the cost of defeating the plaintiff’s claim. This potential for settlement exists regardless of the triability of the claim.<sup>14</sup> Once the trial process has begun, opportunities for nuisance-value strategies continue to emerge on

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<sup>12</sup> We assume throughout the article that the cost of invoking summary judgment to defeat the claim or defense is less than the cost of defaulting on the claim or defense by, for example, conceding or simply not contesting a claim and thereby incurring default judgment, other sanctions, or the costs and risks of trial.

<sup>13</sup> See FED. R. CIV. P. 26 (on discovery generally); FED. R. CIV. P. 37 (on discovery sanctions). See also *Cunningham v. Hamilton County*, 119 S. Ct. 1915, 1917 (1999). The responding party also has the option of complying in part, or of objecting and putting the burden of initiating enforcement proceedings on the discovering party.

<sup>14</sup> Of course, there are some limitations, in the form of legal as well as reputational and other extralegal sanctions, on the type of claims and defenses that litigants can assert. See, e.g., FED. R. CIV. P. 11. The prospects for imposition and effectiveness of these sanctions are discussed in the Conclusion, *infra*.



both sides of the litigation.<sup>15</sup> For instance, a defendant might be able to allege a nuisance-value defense for a cost less than the plaintiff's cost of overcoming the defense on summary judgment. In such a scenario, the plaintiff will reduce its settlement demand by some amount up to the cost of overcoming the defense, regardless of the defense's merit (or lack thereof). In this way, the differential costs of the sequential litigation process can give rise to numerous possibilities for deploying, as well as deflecting,<sup>16</sup> nuisance-value strategies by both parties.

To illustrate, take the case of a products liability suit against a manufacturer. Assume that there is only one injured consumer, who claims to have suffered a total loss of \$100,000 and who could, at a cost of \$1000, file an "untriable" claim that would cost the defendant-manufacturer \$5000 to defeat on summary judgment. In such a situation, the defendant rationally would agree to a settlement demand by the plaintiff-customer for any amount up to \$5000, the amount it would cost the defendant to defeat the claim on summary judgment and end the sequential litigation process.<sup>17</sup> Thus, there is a range for settlement regardless of the triability of the plaintiff's claim, arising from the fact that the plaintiff can begin the litigation process for less than the cost to the defendant of stopping the process.

Similarly, the defendant may be able to employ its own nuisance-value strategies. Suppose that the defendant interposes an unprovable defense of lack of personal jurisdiction that would be denied if it were presented for judicial decision on a motion to dismiss. If it cost the defendant \$100 to raise the defense and the plaintiff \$500 to prepare and litigate sufficiently to have the defense dismissed,<sup>18</sup> the plaintiff would reduce its settlement demand by up to \$500.

### *B. Nuisance-Value Strategies in the Class Action Context*

The introduction of the class action device into the litigation process changes the dynamic of available nuisance-value strategies for plaintiffs in cases in which the differential of litigation costs between the parties in the

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<sup>15</sup> Settlement agreements reached prior to the filing of suit take into account the expected outcomes of the parties' available nuisance-value strategies; that is, the parties analyze prospectively their own and each other's available nuisance-value strategies and adjust the settlement value accordingly.

<sup>16</sup> This recognition becomes particularly important when analyzing the net contribution of class action certification to the nuisance-value settlement problem. See Part III, *infra*.

<sup>17</sup> The actual payoff amount also would reflect the parties' relative litigation costs and bargaining power, including motivation to further interests external to a particular litigation that might lead the parties to behave in ways that would be regarded as irrational for purposes of the given suit. These external interests might include relational and reputational concerns. For example, a manufacturer might want to establish a reputation for "hardball" litigation by adopting a policy of refusing settlement demands in order to deter other plaintiffs from filing nuisance-value suits. See Rosenberg & Shavell, *supra* note --. These long-term, generalized considerations are largely defused by the MSJ solution, though their specific mechanism is outside the scope of this analysis.

<sup>18</sup> This scenario assumes that the cost of ignoring the defense, suffering dismissal, and refiling the claim would exceed \$500.

absence of class action favors defendants.<sup>19</sup> The impetus for the ostensible exacerbation of the nuisance-value problem caused by class certification is related to the effect on the litigation cost differential that accompanies the class action certification decision. In particular, by aggregating multiple similar claims, class certification enables the plaintiffs to exploit litigation scale economies by avoiding duplicative costs and by increasing the productivity of investments in litigating common questions.

Optimally, the class of plaintiffs makes a once-and-for-all investment on the questions of fact and law common to all classed claims.<sup>20</sup> Class action scale economies, then, essentially lower the plaintiffs' costs of initiating the sequential litigation process. This lowering of costs has the effect of increasing the differential between the plaintiffs' costs of filing suit and the defendant's cost of ousting the suit on summary judgment. And the widened cost differential creates a larger range of available values for the parties to strike a nuisance-value settlement rather than proceeding with the litigation.

Continuing with our example, imagine that instead of just one plaintiff claiming harm, there are 100 consumers who make similar untriable claims of having suffered a \$100,000 loss from a product defect. Again assume that it would cost each plaintiff \$1000 to initiate suit separately, but now imagine that it would cost the defendant only \$500 to defeat each claim on some non-common question, such as contributory negligence. If each plaintiff had to proceed separately, none would file a nuisance-value claim. However, the nuisance-value strategy would become profitable if the plaintiffs, by aggregating their similar claims in a class action, could prepare and file a single class complaint for the price of filing one claim separately — that is, \$1000.<sup>21</sup> Assuming that the defendant's per-claim cost to invoke summary judgment remained unchanged in the class action,<sup>22</sup> there would be a nuisance-value class settlement range of up to \$50,000 (100 x \$500 per claim to oust the class action on summary judgment).

The certification of a plaintiff class, then, would improve the plaintiffs' bargaining position for purposes of extracting a nuisance-value settlement by reducing the plaintiffs' per-claim cost of proceeding and creating a wider range for nuisance-value settlement.<sup>23</sup>

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<sup>19</sup> The device may also alter the nuisance-value strategies available to defendants. This point is discussed in Part III, *infra*.

<sup>20</sup> The significance of this consideration is developed in Part II, *infra*.

<sup>21</sup> Of course, in practice the plaintiff class likely would not be able to file a class complaint for the same cost of any given individual complaint. Rather, some lesser degree of cost-spreading would occur. Complete cost-spreading is used for purposes of simplicity, but incomplete cost-spreading does not alter the theoretical analysis or conclusion.

<sup>22</sup> This assumption is discussed and relaxed in Part III, *infra*.

<sup>23</sup> It should be noted, however, that class certification does not preclude the defendant to a class action from exploiting litigation scale economies related to common defense issues, or from exploiting a favorable cost differential relating to non-common questions by filing a nuisance-value defense. For a more detailed examination of this issue, see Part III, *infra*.

### III. MANDATORY SUMMARY JUDGMENT

#### A. Mechanism and Effectiveness of MSJ

Nuisance-value settlement strategy seems, in principle, simple enough to prevent. All a party confronted with an untriable claim or defense needs to do is make a credible threat of investing sufficiently to ensure dismissal of the claim or defense on summary judgment. Such a credible threat would eliminate the possibility of a nuisance-value payoff and concomitantly deter initiation of the nuisance-value claim in the first place. However, as a practical matter, there is presently no formal means by which a party can credibly commit to seek summary judgment when the costs of ousting a nuisance-value claim or defense exceed the costs of initiating it. The nuisance-value strategy is viable so long as capitulation and payoff remain a rational, lower-cost alternative to summary judgment.

MSJ serves to provide the necessary precommitment device that renders a party's threat to invoke summary judgment indubitably credible. MSJ accomplishes this effect by precluding the parties from entering into an enforceable settlement agreement prior to filing a motion, together with requisite arguments, discovery results, and other supporting documentation, for merits review on summary judgment (or other standard dispositive motion).<sup>24</sup>

This section explains the operation and beneficial effects of MSJ in deterring parties from exploiting nuisance-value strategies. We begin with the class action context, which, due to the fact that class settlements generally require judicial approval,<sup>25</sup> allows us to present the most straightforward model of MSJ. Next, we examine a model adapted for civil litigation generally, which normally involves little or no judicial oversight of settlements (unless, of course, some dispute arises over performance of terms). Finally, we consider possible strategies litigants might employ to try to evade the MSJ safeguards.

#### 1. MSJ in the Class Action Context

In barring enforcement of any class settlement agreement entered into prior to the filing of a motion for summary judgment,<sup>26</sup> MSJ negates the defendant's motive to make, and, therefore, the plaintiffs' ability to extract,

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<sup>24</sup> In Part II.B.3, we propose and analyze an MSJ standard that does not require filing a motion for summary judgment, but rather includes the option of simply filing a waiver of summary judgment.

<sup>25</sup> See FED. R. CIV. P. 23(e) (requiring court approval of class action settlement agreements); cf. Richard Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 COLUM. L. REV. 149, 161 (2003) ("The voluntary dismissal of a conventional civil action pursuant to a settlement is just that – voluntary, not a matter on which the court must rule. By contrast, the law of class actions insists upon a judgment, not only to mark the conclusion of litigation after a full-scale trial but also to do so by way of a settlement.").

<sup>26</sup> Again, it should be noted that the proposal would function similarly if applied to any standard merits-review process. See *supra* note 1.

a nuisance-value payoff.<sup>27</sup> The model of MSJ is quite simple. Submission of the class claim for merits review on summary judgment is the only precondition to the parties' entering into an enforceable class settlement (or, more accurately, a *potentially* enforceable class settlement, given the further existing requirement of judicial approval for class action settlements).<sup>28</sup>

To illustrate the effect of MSJ, return to the above example of a plaintiff class bringing a nuisance-value products liability claim on behalf of 100 class members. Under the MSJ regime, the defendant no longer has the option of settling prior to the determination of summary judgment. If such a claim were asserted, MSJ would deprive the defendant of the ability to "buy out" of the case for a nuisance-value payoff, and thus would compel the defendant to incur the \$10,000 cost of ousting the class claim on summary judgment. At first glance, this result seems problematic, as the defendant's net payout would be equal to the maximum amount it would have paid to settle the plaintiffs' claims. In practice, however, the situation for the defendant is not so bleak. From the plaintiffs' ex ante perspective, there would be an inevitable prospect of the defendant winning summary judgment, reducing the expected value of the class action to a payout of \$0 after its expense of \$1000 to initiate the class claim. Thus, the plaintiffs would be discouraged from filing nuisance-value class claims in the first place, meaning that the defendant would never even be confronted with the nuisance-value class action. By providing the defendant with credibility for its threat to spend the \$10,000 to have the class claim ousted on summary judgment, MSJ removes the possibility of plaintiffs profiting from pursuing a nuisance-value strategy.

## 2. MSJ in the Separate Action Context

In contrast to class actions, disputes that give rise to separate actions customarily do not require judicial approval as a condition for entering into an enforceable settlement agreement.<sup>29</sup> Indeed, a large fraction of disputes that have the potential to become separate action lawsuits are settled before any kind of formal litigation is even initiated. Slightly adapted to reflect

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<sup>27</sup> For the sake of convenience, we focus our analysis on MSJ as applied to nuisance-value class claims. As noted above, however, defendants likewise can exploit nuisance-value strategies in asserting their defenses in class actions (as well as separate actions). MSJ is fully effective at thwarting such nuisance-value defense strategies.

<sup>28</sup> For purposes of simplicity, unless otherwise specified, the discussion is framed in terms of federal class actions certified pursuant to Rule 23 of the Federal Rules of Civil Procedure. However, our analysis and the MSJ proposal also apply to state class action rules. Additionally, because the proposed judicial refusal to enforce settlements that is at the core of the MSJ proposal derives its force from reliance upon existing dispositive motion standards, no efforts to craft new review standards for state and federal courts are made in this article.

<sup>29</sup> Factors explaining this difference between class actions and separate actions include habitual practice, the fact that separate action suits do not involve absentees, and the (on average) lower aggregate stakes of separate actions as compared to class actions. In addition, the sheer number of separate actions renders judicial review of every settlement agreement impracticable. However, judicial review is available ex post in those (presumably few) cases in which dispute over settlement performance arises.

this practice of pre-suit settlement without judicial oversight, MSJ offers an efficient solution to the problem of nuisance-value litigation and settlement of separate actions. To accommodate this separate action practice of pre-suit settlement, MSJ would allow enforcement of pre-suit agreements if no litigation had begun. However, once litigation commences, MSJ would operate just as it does in the class action context to preclude enforcement of any settlement agreement, pre-suit or otherwise, entered into by the parties before filing for merits review on summary judgment. Thus, as applied to separate actions, MSJ does not preclude the enforceability of out-of-court (pre-suit) settlement agreements, and it thereby avoids sacrificing the vast cost savings achieved by resolving disputes without resort to litigation.<sup>30</sup> MSJ does, however, remain a fully effective means of deterring nuisance-value suits. Because MSJ renders nuisance-value claims or defenses unprofitable, pre-suit nuisance value settlement demands can be costlessly and credibly rejected with a dismissive, “See you in court.”

To illustrate, take a simple example. Assume first that an individual potential plaintiff is considering filing a nuisance-value lawsuit for \$1000 against a potential defendant. Imagine that the suit would cost the plaintiff \$100 to file and the defendant \$500 to oust on summary judgment. In the absence of MSJ and ignoring long-term interests (such as establishing a reputation for resisting nuisance-value claims), the prospective defendant rationally would agree to make a pre-suit settlement payoff of up to \$500. Under the MSJ regime, however, this nuisance-value claim would be foreclosed in the separate action context exactly as it was in the class action context; that is, the defendant would be forced to move for summary judgment before it could enter into a binding settlement agreement. Foreseeing this course of events, the potential plaintiff would recognize that filing a nuisance-value suit under the MSJ regime carries no possibility of a positive payoff and thus would choose not to bring the claim. And the defendant, anticipating this no-cost result of making the potential plaintiff sue for a payoff, rationally would reject any pre-suit settlement demands.

### 3. Attempting to Evade MSJ

The credibility of the threat to have a nuisance-value claim or defense dismissed on summary judgment — credibility necessary for the effective functioning of MSJ — would be undermined if the parties had a realistic chance of successfully collaborating to circumvent the MSJ requirement of submitting the case in question for standard, dispositive merits review such as summary judgment.

Tactics to evade MSJ, however, would meet with little success. Take the example of a nuisance-value suit where the parties decide to enter into a pre-summary judgment agreement by which the defendant deliberately will understate — that is, “throw” — its case for summary judgment in return for a promise by the plaintiff to accept and sign a post-summary judgment settlement agreement based on the pre-summary judgment

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<sup>30</sup> See Kong-Pin Chen et al., *Sequential Versus Unitary Trials with Asymmetric Information*, 26 J. LEG. STUD. 239, 248 (1997).

terms.<sup>31</sup> The parties would have incentives to pursue such a strategy if the cost of throwing summary judgment did not exceed the potential profit from a nuisance-value settlement. For example, the parties could mutually benefit from an evasion strategy if it cost the plaintiff \$5000 to initiate a class action and the defendant had its choice of either ousting the claim for \$10,000 by fully presenting its case on summary judgment or throwing summary judgment by understating its case, say for a cost of \$2500. In the latter scenario, the defendant could throw summary judgment and then make a nuisance-value payoff of up to \$7500 without matching the amount it would be forced to expend to oust the claim on summary judgment. Under these circumstances, the defendant might prefer to throw summary judgment for \$2500 and then pay an amount up to \$7500, the difference between the cost of throwing and of fully litigating summary judgment, to settle the claim.

While it is questionable whether many class action defendants would actually throw summary judgment,<sup>32</sup> in any event attempting to evade MSJ is generally a doomed strategy. Because MSJ renders the pre-summary judgment agreement wholly unenforceable, each party confronts the uncertainties of voluntary compliance that will preclude resort to the evasive strategy. And voluntary compliance, of course, is vulnerable if either (or both) party's motive to defect is sufficiently strong. In the sequential litigation process, the motive to defect from a pre-summary judgment agreement derives from the relative costs to each party of pressing the claim or defense to the next stage of standard merits review. When contemplating whether to throw summary judgment, for instance, the defendant, like the plaintiff, remains aware of the prospect of ousting the claim at a later stage of merits review, such as directed verdict following the close of the plaintiff's prima facie case at trial.<sup>33</sup>

On the realistic assumption that the marginal costs to both parties of proceeding through the post-summary judgment round to directed verdict are higher than the marginal costs of proceeding from the pre-summary judgment stage to summary judgment,<sup>34</sup> one or both parties would have an

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<sup>31</sup> Whether such "throwing" would be successful, or rather would be detected and sanctioned by the judge, is questionable. It is realistic to assume that some parties would be able to deceive the court into thinking a "thrown" summary judgment motion was litigated fully. But even accepting undetected throwing as a viable option, our analysis shows that attempts to evade MSJ would be unsuccessful due to the incentives set up by the unenforceability of pre-summary judgment agreements.

<sup>32</sup> Regardless of a higher settlement demand, risk aversion would dissuade litigants confronted by nuisance-value claims from "throwing" summary judgment and exposing themselves to the uncertainties of trial. Similarly, it is reasonable to question whether many parties would forgo a viable, cost-effective opportunity to invoke summary judgment (or any other dispositive motion).

<sup>33</sup> See FED. R. CIV. P. 50(a).

<sup>34</sup> The relative costliness of post-summary judgment merits review is indeed realistic. Unlike motions for summary judgment, in which documents like affidavits often suffice, motions for directed verdict generally require the parties to produce and rely upon records of live testimony and presentation of other admissible evidence, elicited through both direct examination and cross-examination of witnesses. These requirements tend to increase the marginal costliness of proceeding to directed verdict. Moreover, the very fact that a given party would invoke summary judgment suggests that summary judgment is less costly than seeking relief on directed verdict. Thus, while called "mandatory summary

incentive to defect from the pre-summary judgment agreement's payoff specifications. Because the incentives to defect are constrained only by voluntary compliance — which it to say, hardly constrained at all<sup>35</sup> — the pre-summary judgment agreement remains essentially meaningless. Foreseeing this scenario, the parties would not rely on such a pre-summary judgment agreement, and attempts at evading MSJ through unenforceable agreements would be foreclosed.<sup>36</sup>

To illustrate, it is useful to analyze two related but distinct scenarios. In the first, the defendant faces higher marginal expenses to oust a claim in the post-summary judgment round of litigation (such as directed verdict) than it does in the summary judgment round of litigation. That is, it would be marginally costlier for the defendant to oust the claim on directed verdict than on summary judgment. Additionally, assume that even though the defendant bears higher expenses in the post-summary judgment round than in the summary judgment round, the plaintiff incurs an even greater cost to initiate the post-summary judgment round. Put differently, it costs the plaintiff more to press the claim through trial and to the directed verdict stage than it costs the defendant to oust the claim on directed verdict. This situation is quite realistic. Bearing the burden of proof, the plaintiff may well incur substantial expense in preparing and presenting a case that is not patently frivolous and therefore vulnerable to summary dismissal, perhaps on the court's own motion, or, more likely, on the defendant's motion but at little cost to the defendant. This type of scenario can be described as including a post-summary judgment cost differential that favors the defendant. In such a scenario, any pre-summary judgment agreement between the parties meant to specify a nuisance-value payoff and evade summary judgment is destined to fail because the party opposing the nuisance-value strategy, here the defendant, rationally would renounce any pre-summary judgment agreement, reject any demand for post-summary judgment settlement, and credibly threaten to take the case to trial and have the claim ousted on directed verdict.

Returning to the example set forth at the beginning of this subsection, assume that the parties reach an agreement to evade MSJ. The agreement

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judgment," the solution we propose does not compel a party to invoke summary judgment or any other specific standard merits-review option. The solution simply renders enforceability of a settlement agreement contingent on its being entered into subsequent to submission of the claim or defense for standard merits review. The party confronted by a nuisance-value strategy is free to elect whatever standard merits-review option suits its purposes, and that party rationally would choose the most efficient among the available options. In describing "mandatory summary judgment," we are assuming that summary judgment, rather than motion to dismiss or directed verdict, is the option that most parties would choose as the "best" option, defined as the option that is most cost-effective relative to the succeeding standard merits-review options to satisfy MSJ.

<sup>35</sup> Of course, to the extent that there are repeat players in civil actions, and to the extent that those repeat players see some net benefit in sticking with voluntary agreements even when such compliance is net costly within the scope of the given litigation, there will be some discipline on the ability of parties to breach legally unenforceable agreements.

<sup>36</sup> The results for nuisance-value claims apply fully to nuisance-value defenses (in both the class action and separate action contexts).

provides that the defendant will throw summary judgment for \$2500 and the parties will then settle for \$7000, making the defendant's total expense \$9500<sup>37</sup> and giving the plaintiff a total payoff of \$7000 on its initial investment of \$5000 to file the claim. Assume also that, after the summary judgment stage, it would cost the plaintiff an additional \$15,000 and the defendant an additional \$12,000 to prepare and present witnesses and evidence for trial,<sup>38</sup> with the inevitable result being that at the close of plaintiff's case the court would direct verdict in the defendant's favor. Under these circumstances, the defendant would defect from the pre-summary judgment arrangement. Initially, the defendant would throw summary judgment at a cost of \$2500, just as the parties had agreed. Having sunk this cost of \$2500, the defendant would recognize that the cost of \$12,000 to oust the claim on directed verdict is less than the \$15,000 cost to the plaintiff of attempting to press the claim forward. That is, the defendant would recognize that, after summary judgment, the range for a nuisance-value payoff to the plaintiff would be eviscerated. Understanding that the plaintiff would not invest \$15,000 for a chance to extract a payoff of up to \$12,000, the defendant would reject the plaintiff's request that it honor the unenforceable pre-MSJ agreement or accede to any settlement demand. Instead, the defendant would declare itself ready for trial. Foreseeing such an endgame, the plaintiff would not spend the \$5000 to file the nuisance-value suit in the first place.<sup>39</sup>

Compare the preceding case with our second scenario, in which the post-summary judgment cost differential favors the plaintiff. Under these circumstances, both parties would have incentive to defect from a pre-summary judgment agreement. Again assume that the parties enter the same pre-summary agreement to evade MSJ, and that it would cost the plaintiff \$15,000 to initiate the post-summary judgment round of litigation by presenting its case at trial. Now, however, suppose that it would cost the defendant \$20,000 to oust the claim on a motion for directed verdict. If the defendant were to comply with the pre-summary judgment agreement, it would incur a cost of \$2500 to throw summary judgment and attempt to pay the plaintiff off with a settlement of \$7000 for a total expense of \$9500, and a total payoff to the plaintiff of \$7000 on a \$5000 investment, for a net profit of \$2000. The plaintiff, however, would reject the defendant's attempt to make a payoff of \$7000 and instead defect from the unenforceable pre-summary judgment agreement. The reason is that the

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<sup>37</sup> This amount is \$500 less than the \$10,000 it would have cost the defendant to oust the claim on summary judgment.

<sup>38</sup> That is, the defendant's total cost of ousting the claim on summary judgment would be \$10,000, and its total cost of ousting the claim on directed verdict would be \$14,500.

<sup>39</sup> We offer our analysis of this scenario for completeness in demonstrating the ability of MSJ to thwart attempts at evasion. However, it should be noted that this scenario does not present a "true" nuisance-value claim, for the defendant enjoys a favorable cost differential at the post-summary judgment stage. In the absence of MSJ, a defendant in such a situation rationally would refuse to make a nuisance-value payoff, choosing to make its stand not at summary judgment but rather at the directed verdict stage of litigation.



plaintiff would realize that the defendant, by throwing summary judgment, had given away its chance to defeat the claim for a cost of \$10,000. Now, having passed on that option, the defendant would be put in a position of having to pay out \$20,000 — the incremental cost of ousting the claim on directed verdict — to defeat the claim, a situation that the plaintiff would exploit by demanding a nuisance-value payoff of up to \$20,000 in the post-summary judgment stage. If the defendant were to capitulate to such a settlement demand, it would end up incurring an aggregate cost of up to \$22,500, an amount far exceeding the \$10,000 it would have had to invest to oust the claim on summary judgment in the first place.<sup>40</sup> Foreseeing this result, the defendant would “preemptively” defect from its agreement with the plaintiff by investing \$10,000 to oust the class claim on summary judgment.<sup>41</sup> This response would be effectively identical to the result compelled by MSJ. Understanding this series of events, the plaintiff would see no possibility of profit from initiating a nuisance-value action.

Finally, for MSJ to retain its full effectiveness against an evasion strategy, the formal filing for summary judgment must be deemed complete, unconditional, and irrevocable. Otherwise, MSJ would be vulnerable to a modified evasion strategy because revocability (or the option to supplement a deficiently supported motion for summary judgment) would enable the parties to satisfy MSJ by throwing summary judgment for purposes of entering into an enforceable settlement agreement for a nuisance-value payoff. Although throwing summary judgment may, for example, expose the defendant to a settlement demand reflecting the higher cost of merits review on directed verdict in the post-summary judgment round, the defendant could effectively resist that demand by credibly threatening to revoke or supplement the summary judgment filing and reinstate the MSJ barrier. However, revocation or supplementation would confront the defendant with the cost of adequately litigating summary judgment. Preferring to pay less than the full price of summary judgment and being in the position to enter into an enforceable settlement agreement, the defendant rationally would capitulate to the initial nuisance-value demand for up to the cost of adequately litigating summary judgment.

Thus, in the example above of a nuisance-value claim, revocable filing of summary judgment (or the option to supplement an inadequately supported invocation of summary judgment) would undermine the credibility of the defendant’s threat to invoke summary judgment at a cost of \$10,000, because the plaintiff would know that the defendant had the option of “throwing” summary judgment to gain MSJ authorization for an enforce-

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<sup>40</sup> Because the threat to file a nuisance-value claim or defense is credible by virtue of the relevant cost differential alone, the proponent need not actually make the expenditures necessary to carry out the threat in order to extract a settlement payoff from the opponent up to the amount of securing merits review. Thus, in the example, the ability to make a credible threat to press the nuisance-value claim in the post-summary judgment round enables the plaintiff to demand payment of the ultimate settlement amount of up to \$20,000 before filing suit, thereby avoiding the necessity to spend the initial \$5000.

<sup>41</sup> To save on bargaining costs, the defendant rationally would reject any settlement offer and choose to file for summary judgment.

able settlement agreement. While the defendant's option to revoke or supplement the filing would overcome the plaintiff's demand for a payment of up to \$20,000 – the cost of ousting the claim on directed verdict – the defendant rationally would enter into an enforceable agreement to make a nuisance-value payoff of less than the \$10,000 cost entailed by revoking and replacing (or supplementing) the deficient filing and fully investing in the summary judgment case for ouster of the plaintiff's claim. Because the deficient filing could be used to satisfy MSJ and enable the parties to enter into an enforceable nuisance-value settlement in the post-summary judgment round, the plaintiff would have an incentive to file a nuisance-value claim. The plaintiff would reason that when the defendant was confronted with the choice either of revoking the deficient filing and paying \$10,000 to replace it with an adequately supported motion for summary judgment or sticking with the deficient filing and paying some amount less than \$10,000 in settlement, the defendant would choose the latter, less costly course of action. Irrevocability forecloses this game.

### *B. Costs of MSJ*

Rendering pre-summary judgment settlement agreements unenforceable may add some costs that must be set off against the benefits of discouraging nuisance-value settlements in assessing the desirability of the MSJ proposal. In particular, there may be added expense to settling potentially triable cases — cases in which none of the claims or defenses is motivated by a nuisance-value strategy — under MSJ as compared to the current litigation process. In this Section, we begin by considering the potential for additional costs stemming from the use of MSJ in the class action context. Then, we broaden our analysis to examine the costs that MSJ may add if deployed in the conventional separate action process. We conclude first that MSJ in theory would add no significant cost to settling non- nuisance-value class actions, based in significant part on the fact that the current standards for judicial approval of class settlements require at least the same, and oftentimes substantially greater, litigation expenditures than would be necessary to prepare a motion for summary judgment as required by MSJ.<sup>42</sup> Second, we conclude that MSJ will add some additional expense in the separate action context, but that this expense likely will be limited on average to the minimal costs of drafting and submitting the summary judgment motion and supporting documents, given that the parties' readiness to settle generally is proceeded by lawyers and their experts evaluating the case based on relatively extensive investigation, often including formal discovery. Finally, we assess the cost-saving option of basing MSJ on waivers of summary judgment.

#### 1. Costliness of MSJ in the Class Action Context

Applying MSJ to class actions is not likely to increase the litigation cost of settling non- nuisance-value class claims. MSJ does not affect the

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<sup>42</sup> See *infra* text accompanying notes --.

normal pretrial processes, including those occurring prior to summary judgment. Nor does MSJ in any way impede efforts by the parties to expedite and minimize the expense of the pretrial phase of class litigation. Rather, MSJ only precludes the parties from entering into an enforceable settlement agreement prior to submission of a motion for summary judgment. The parties remain free to employ informal, voluntary means of disclosing information to avoid the delays and expense of formal discovery. They can readily modify the pleadings to accelerate summary judgment, or to submit the case for merits review on a motion to dismiss.<sup>43</sup> And they can reduce the expenses of summary judgment submissions through the use of stipulations, admissions, and other joint or coordinated filings.<sup>44</sup> Cooperative efforts like these can be used to preserve the parties' respective positions on the question of summary judgment while enhancing the efficiency of their attempts to settle the case by reducing the costs of strategic adversarial posturing and ploys, including measures like inundating the record with superfluous or misleading documents and arguments that serve only to burden and distract the opponent.<sup>45</sup>

There are two other features of class action practice that render the possibility of MSJ adding substantial cost virtually nil. First, parties often reach class settlement only after conducting extensive discovery, which in turn is followed by determinations of motions (and cross-motions) for summary judgment.<sup>46</sup>

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<sup>43</sup> See FED. R. CIV. P. 12(b)(6).

<sup>44</sup> Cooperatively crafted stipulations, in particular, offer a relatively inexpensive means by which the parties can advance their settlement objectives under an MSJ regime. Stipulations enable the parties to avoid the costs of strategic litigation while preserving and promoting their respective positions on summary judgment. The common acceptance of stipulation usage by courts reinforces the substantial benefits accruing from the distillation of contested, core litigation issues through the use of stipulated facts with respect to the tangential, non-contested issues. Thus, stipulations have proven efficient even when submitted in a fully adversarial mode under court order. Indeed, courts presiding over summary judgment motions commonly require the parties to stipulate their respective positions as to which of the alleged facts each considers contested and material. See, e.g., FEDERAL LITIGATION GUIDE, § 5.12. See generally 11 JAMES WM. MOORE ET AL., MOORE'S FEDERAL PRACTICE – CIVIL § 56.14[2][d] (2002) (discussing admissions and stipulations for purposes of summary judgment); FED. R. CIV. P. 36 (governing the use of requests for admissions). Cf. RULES OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA 15, 21 (recognizing the ability of adverse parties to stipulate agreed upon facts).

<sup>45</sup> Cf., e.g., *Crabtree v. Nat'l Steel Corp.*, 261 F.3d 715, 719 (7<sup>th</sup> Cir. 2001) (remarking upon "the flood of documents exchanged between the parties and the multitude of discovery dispute hearings held the month before the trial began").

<sup>46</sup> According to the available data, class claims are oftentimes expeditiously reviewed on summary judgment. For a look at a limited empirical sample of the handling of summary judgment in class actions, see Thomas E. Willging, Loral L. Hooper, & Robert J. Niemic, *An Empirical Analysis of Rule 23 to Address the Rulemaking Changes*, 71 N.Y.U. L. REV. 74, 111 (1996). Based on their sample of cases, the authors found that "the median time for rulings on motion to dismiss ranged from 2.6 months to 7.4 months," and that "three of the four courts had a median response time of less than four months." *Id.* On the point of summary judgments, the authors concluded, "The timings of rulings on summary judgment follow a similar pattern, but involve generally longer time spans than the rulings on motions to dismiss. The median time from the filing of the first motion for summary judgment to the first summary judgment ruling was less than four months in two courts and more than seven months in the other two courts." *Id.* Professor Miller notes the widespread federal practice of judges employing Federal Rule of Civil Procedure 16, providing case management authority, effectively to implement sum-

Second, and perhaps most importantly, the work required of the parties to make the record for MSJ is *already required* as part of the showing they must make in submitting the proposed class settlement for judicial scrutiny, approval, and enforcement.<sup>47</sup> The cost of drafting and submitting the motion for summary judgment is likely to be virtually subsumed in preparation and presentation of the class settlement for judicial evaluation of its “fair, adequate, and reasonable.”<sup>48</sup> Judicial scrutiny of proposed class settlements entails a merits-review process that is in principle — and frequently in practice — more demanding than summary judgment, both qualitatively and quantitatively, for courts and party-proponents.<sup>49</sup> Indeed, review of class settlement agreements necessarily goes beyond the summary judgment question whether the class claim presents legally material triable questions of fact to require participating counsel to assess the probable trial outcome, or even to derive expected judgment baselines for comparative valuation of class settlement terms.<sup>50</sup>

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mary judgment merits review *sua sponte*. See Arthur R. Miller, *The Pretrial Rush to Judgment: Are the “Litigation Explosion,” “Litigation Crisis,” and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?*, 78 N.Y.U. L. Rev. 982, 1006 (2003) (observing that pursuant to Rule 16 authority federal courts compel parties to clarify and substantiate legal and factual issues in actual dispute and, having thus set up the basis for summary resolution, exercise “the equivalent of partial summary judgment” in disposing of “frivolous” claims and defenses). Professor Miller concludes that “the interrelationship between the increasing use of case management and the pressures for efficient—and rapid—resolution of litigation promotes the employment of motions to dismiss and summary judgment practice.” *Id.*

<sup>47</sup> See FED. R. CIV. P. 23(e). For particularly significant Supreme Court opinions striking down settlement agreements as impermissible, see, e.g., *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 879 (1999); *Amchem Prod., Inc. v. Windsor*, 521 U.S. 591, 607 (1997).

<sup>48</sup> “Fair, reasonable, and adequate” is a common phrase for articulating the standard for judicial approval of class settlement agreements under Rule 23(e). See, e.g., *Ortiz*, 527 U.S. at 879; see also 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 1797.1 (1986). The amended Rule 23 includes this phrase. See FED. R. CIV. PROC. 23(e).

<sup>49</sup> See Geoffrey P. Miller, *Competing Bids in Class Action Settlements*, 31 HOFSTRA L. REV. 633, 635 (2003) (noting that, in assessing the adequacy of a class action settlement under Rule 23(e), “the trial judge’s difficulties go beyond appraising the settlement. That analysis is meaningless unless compared with what might have been obtained from continued litigation. Presumably, a court should approve a settlement only if the result is as good as what could have been secured if the case went to judgment (or if class counsel fought harder in settlement negotiations). The amount that could have been obtained depends on intangible factors such as the strength of the class claims at time of settlement, the willingness of the defendant to compromise, the attitudes of judge and jury, developments in parallel cases, possible changes in applicable law, and likely results of appeals.”).

For recent examples of federal courts conditioning approval of class settlements on showings of merit equaling or exceeding the requirements for a summary judgment determination, see, for example, *Reynolds v. Beneficial Nat. Bank*, 288 F.3d 277 (7th Cir. 2002) (striking down the district court’s approval of the settlement); *Thomas v. Albright*, 139 F.3d 227, 231 (D.C. Cir. 1998) (stating that the approving court’s “primary task is to evaluate the terms of the settlement in relation to the strength of the plaintiffs’ case”); *Pigford v. Glickman*, 185 F.R.D. 82, 103 (D.D.C. 1999) (citing *Thomas v. Albright* and approving the class settlement only after “compar[ing] the likely recovery that plaintiffs would have realized if they had gone to trial with the terms of the settlement”).

<sup>50</sup> See, e.g., *Reynolds*, 288 F.3d at 285 (noting, in finding that the district court judge erred in approving a class settlement, that the judge “could have insisted that the parties present evidence” to es-

## 2. Costliness of MSJ in the Separate Action Process

By contrast to the class action context, the application of MSJ in the conventional separate action context creates some appreciable potential of adding to the parties' cost and burden of settling non-nuisance-value claims. Some separate action settlements follow extensive discovery and motion practice, including summary judgment, though this likely is not the case with respect to clearly meritless claims that the opposing party simply wants to settle quickly and for as little expense as possible. Moreover, the parties to separate actions can hasten merits-review submission to the pleadings stage by converting the complaint to a motion for summary judgment.<sup>51</sup> And the parties can reduce settlement costs through the use of stipulations and other joint or coordinated preparation and presentation of the case for merits-review.<sup>52</sup> All of these factors serve to limit the costs that MSJ is likely to add to attempts to settle non-nuisance-value claims.

Nevertheless, separate action settlement differs significantly from class settlement in one key respect. Generally, separate action settlement does not entail the judicial review and approval process that governs class settlements.<sup>53</sup> Thus, application of MSJ to the separate action process has the potential to add expense to the settlement of non-nuisance-value cases. This expense makes it impossible to rule out the possibility of some marketable claims or defenses becoming unmarketable, and thus not being as-

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timate the value of the class through “[s]ome approximate range of percentages, reflecting the probability of obtaining each of [four] outcomes in a trial (more likely series of trials)”. For a similar account, see *Mirfasihi v. Fleet Mortg. Corp.*, 2004 WL 169824 (7th Cir. 2004) (“In *Reynolds* . . . we emphasized the district judge’s duty in a class action settlement situation to estimate the *litigation value of the claims of the class* and determine whether the settlement is a reasonable approximation of that value.”) (emphasis added).

We note that judicial review of proposed class settlements pursuant to Rule 23(e) would not obviate the need for MSJ. It is uncertain whether courts possess the authority to use 23(e) review to screen out nuisance-value settlements, or whether 23(e) simply requires federal courts to approve any settlement that profits the plaintiff class, even if that profit comes by way of a nuisance-value payoff. Additionally, it is doubtful that courts could effectively carry out their monitoring functions, especially in the face of party dissembling, by distinguishing nuisance-value payoffs from reasonable settlements of cases that simply happen to have a low probability of surviving summary judgment. Finally, efforts to police against nuisance-value settlements pursuant to 23(e) review authority would be vulnerable to the evasion strategy discussed above. To foreclose evasion, 23(e) review would require the implementation of something like MSJ’s precommitment device—a device requiring the parties to submit the case on summary judgment as a precondition to entering into an enforceable settlement agreement capable of surviving 23(e) review.

<sup>51</sup> See FED. R. CIV. P. 12(c).

<sup>52</sup> See *supra* note --.

<sup>53</sup> It is arguable whether (and to what extent) courts should review the “fairness, reasonableness, and adequacy” of separate action settlements, particularly so-called “inventory settlements” that resolve numerous cases. This question, however, falls outside the scope of the present study.

served, once the costs of MSJ are factored into calculations of the expected return on litigation.<sup>54</sup>

Ultimately, the social welfare effects of adding costs to the litigation of separate actions are, when offset by the potential benefits stemming from the adoption of MSJ, indeterminate. Whether applying MSJ in the separate action context produces net benefit depends on the magnitude of the nuisance-value settlement problem, an issue we address in Part III.B.

### 3. MSJ Based on Summary Judgment Waiver

In this subsection, we show that MSJ can operate effectively to discourage nuisance-value claims and defenses merely by requiring submission of a *waiver* of summary judgment rather than submission of a full motion for summary judgment. The waiver option would be especially useful in the separate action context to reduce potential costs of settling non- nuisance-value cases while retaining all the benefits of MSJ.<sup>55</sup>

The MSJ waiver proposal requires simply that the defendant or plaintiff file an irrevocable waiver of summary judgment before entering into a judicially enforceable settlement agreement. This option expedites the MSJ process while preserving the incentive structure that allows MSJ to deter nuisance-value suits. The same litigation dynamics and costs that negated the evasion strategy<sup>56</sup> prevent the parties from using summary judgment waiver to circumvent MSJ. Once a party waives summary judgment with the goal of entering into a previously negotiated settlement agreement, it gives up its ability to dispose of the other party's claim relatively inexpensively, as compared to subsequent rounds of litigation, on summary judgment. Thus, the defendant who was to waive summary judgment would face the same voluntary compliance problem discussed in Part III.B.1: once the defendant waived its most cost-effective means of disposing of the claim in hopes of entering into a previously negotiated (but unenforceable) settlement agreement, the plaintiff would defect from the agreement and demand an inflated settlement payoff increased to exploit the defendant's having relinquished its summary judgment option.

The plaintiffs' uncertainty as to whether the defendant's threat of proceeding to trial was credible could provoke costly negotiations with the possible result of bargaining holdout, deadlock, and breakdown. If this problem were found to impose substantial costs, it could be remedied easily through a slight modification of the irrevocable waiver option that would enable defendants in these situations to make their threats of proceeding to trial entirely credible. This modified waiver would retain the irrevocability

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<sup>54</sup> The social welfare effects of adding costs to the litigation of separate actions are, when offset by the potential benefits stemming from the adoption of MSJ, indeterminate. Ultimately, whether applying MSJ in the separate action context produces net benefit depends on the magnitude of the nuisance-value settlement problem, an issue we address in Part III.B., *infra*.

<sup>55</sup> To thwart attempts to evade MSJ, waiver, like invocation of summary judgment, must be deemed final, unconditional, and complete upon filing; once formally submitted, the waiver cannot be modified, supplemented, or revoked.

<sup>56</sup> See *supra* Part III.B.1.

of the summary judgment waiver, but would allow the defendant to cancel the waiver's MSJ effect. That is, the defendant could cancel the waiver's ability to provide authorization for the parties to enter into a legally enforceable settlement agreement. Cancellation would reinstate the MSJ bar against the parties entering into an enforceable class settlement agreement prior to submitting the class claim for standard, post-summary-judgment merits review – for example, by invoking or waiving directed verdict at trial. In nuisance-value cases, this cancellation option is immaterial; the defendant still would not waive summary judgment, for if it did so it would expose itself to a greater settlement demand. The cancellation option is operational in non-nuisance-value suits. In those suits, the option inhibits plaintiffs from raising their settlement demands after the defendant's waiver of summary judgment by enabling the defendant to check the plaintiffs' opportunistic settlement demand by making an entirely credible threat of proceeding to trial.

Waiver of summary judgment should eliminate the costs of applying MSJ with respect to a substantial fraction of non-nuisance-value claims and defenses. It would have manifest appeal in cases involving low probabilities of gaining summary disposition, including many cases presenting routine legal and factual disputes or seeking limited litigation objectives, such as tolling time-bars, compelling discovery, free-riding on other litigation, or goading an insurer to negotiate seriously. In mass production litigation, summary judgment determinations and trial verdicts in a relatively few test cases often establish the template of values for settling the balance of pending or subsequently filed claims that often proceed no further than the exchange of pleadings.<sup>57</sup>

Despite its systematic cost-effectiveness, however, some parties attempting to settle non-nuisance-value claims may resist the waiver option. Waiver of summary judgment might not appear attractive to all parties, even those most intent on settling a given case, due to adversarial perspectives on the merits. These differing assessments are not insurmountable, for even though the parties have markedly different estimates of the expected judgment, they are driven to common ground by the desire to avoid the costs of trial. But the resistance to trial combined with their adversarial stance towards one another and on the merits will nonetheless tend to inhibit many parties from waiving outright a well-grounded (if low-probability) chance at disposing of a claim or defense on summary judgment.

Additionally, some parties might be resistant to waiving summary judgment in non-nuisance-value cases based on a concern that tracks the mechanism of summary judgment waiver in deterring nuisance-value cases: the fear of being exposed to an inflated settlement demand after waiving the relatively inexpensive option of ousting the claim or defense on summary judgment. Nevertheless, irrevocable waiver is likely to remain a robust means of satisfying MSJ in non-nuisance-value cases, be-

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<sup>57</sup> See, e.g., David Rosenberg, *Of End Games and Openings in Mass Tort Cases: Lessons from a Special Master*, 69 B.U. L. REV. 695, 697 (1989).

cause the discounted settlement value for the prospect of ousting a non-nuisance-value claim or defense on summary judgment will not be substantial enough to warrant a party's upsetting settlement negotiations and provoking the opponent to press on toward trial with the sacrifice of the settlement surplus of avoided litigation cost and risk. Indeed, even assuming that a party would waive summary judgment only when the opportunistic strategy of raising the settlement demand to reflect the forgone value of summary judgment would yield no profit, MSJ waiver still would be viable in a substantial number of cases.<sup>58</sup>

#### IV. NUISANCE-VALUE CLASS SETTLEMENT: THE NATURE OF THE PROBLEM AND THE EFFECTIVENESS OF MSJ VERSUS PCMR AT SOLVING IT

Even though separate actions present numerous opportunities for nuisance-value strategies, courts and commentators seem most troubled by the

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<sup>58</sup> For example, suppose that a plaintiff sues for \$1000 with a probability of success at trial of 50%, and that the defendant could alternatively invoke summary judgment or directed verdict with a 30% chance of ousting the claim. Assume further that summary judgment costs \$100 and directed verdict \$200 to each party. While the plaintiff might attempt to capitalize on the defendant's waiver of summary judgment and demand the forgone net benefit of \$200 in addition to the expected judgment of \$500, this strategy is pointless. Even assuming that the defendant were to proceed in the face of the threat of opportunism and waive summary judgment, the defendant would offer no more than its total expected cost of \$550 ( $50\% \times \$1000 \times 70\% + \$200$ ). Given that the plaintiff would accept no less than \$150 ( $50\% \times \$1000 \times 70\% - \$200$ ), and assuming Nash bargaining power, the parties' settlement at the mean would equal \$350, the amount they would have settled upon in the absence of opportunism. If the cost differential for directed verdict significantly favored the defendant, the plaintiff would have lost from opportunism. If the differential had significantly favored the plaintiff, the defendant probably would not have waived summary judgment.

Yet, in practical terms, summary judgment waiver may require cost differentials that are not only favorable, but favorable by a substantial margin. The reason is that opportunistically inflated settlement demands would reflect the cumulative, not independent, value of the waived chance for merits review on summary judgment. The preceding analysis and example assessed the expected value of summary judgment waiver as independent of the other stages of litigation; waiver did not affect the overall expected payout, except for cost, because directed verdict represented an independent, alternative opportunity for merits review. However, this characterization neglects the cumulative benefit from having multiple opportunities for merits review. Thus, waiver of summary judgment, though conceding only one opportunity for merits review, actually increases the overall expected payout for the party by some value greater than the sacrificed net expected value of ousting the case on summary judgment.

For example, given a 30% chance of ousting the case on summary judgment and a 30% chance of directed verdict, the party is better off (putting litigation costs aside and assuming no adverse effect on the trial verdict) invoking both opportunities. Doing so increases the probability of ousting the claim from 30% to the cumulative probability of 51%. In the above example, opportunism clearly profits the defendant when the parties would incur equivalent litigation costs for post-waiver merits review on directed verdict. By waiving summary judgment, the defendant would have limited itself to the one merits review opportunity, and therefore, as above, the prospect of settling at the mean of \$350. However, by invoking summary judgment, the defendant would effectively lower the mean settlement value to \$245, derived as the mean of the sum of defendant's maximum offer of \$485 ( $50\% \times \$1000 \times 70\% + \$200 \times 70\% + \$100$ ) and the plaintiff's minimum demand of \$5 ( $50\% \times \$1000 \times 70\% + \$200 \times 70\% + \$100$ ). To motivate a summary judgment waiver in this example would require not only a considerable cost differential in the defendant's favor, but also an increasing probability of success over multiple merits-review processes favoring the plaintiff.



prospect of nuisance-value settlement of class actions.<sup>59</sup> The view that class action poses a special problem, however, generally is not based on any comparative (“relative to what?”) assessment of its mechanism and magnitude in the class and separate action contexts. Rather, it is merely assumed that certification vests class counsel with “the extraordinary power that derives from certification of a class alone” and thereby allows the counsel systematically and seriously to victimize class defendants even when the underlying claims are meritless.<sup>60</sup> This concern has prompted increasingly insistent calls for a special solution, and, in particular, for use of one or another version of precertification merits review (PCMR).<sup>61</sup> The aim of this Part is to assess whether the class action mechanism does, in fact, present a special, systematic problem of nuisance-value litigation and whether PCMR would provide a more cost-effective solution than MSJ.

We conclude that class action poses no special problem of nuisance-value settlement, but rather alleviates one: the systematic advantage of mass producer defendants over individual plaintiffs allowing the former to extract nuisance-value payoffs (that is, reduce the plaintiff’s expected settlement amount) in the separate action process. This is not to say that nuisance-value strategies are absent from class action. Rather, we demonstrate that some opportunities for nuisance-value strategies are available to both parties in class actions, just as such opportunities are available in any case arising from sporadic accidents or transactions in the separate action process. Thus, MSJ is desirable in both contexts to foreclose nuisance-value strategies by defendants and plaintiffs alike. Moreover, we show that within the class action context, MSJ provides a more cost-effective means of solving the nuisance-value settlement problem than PCMR does.

#### *A. Class Action Poses No Special, Systematic Nuisance-Value Problem; Indeed, It Alleviates One*

We begin by contradicting claims that class action systematically vests the class with dominant bargaining power to extract nuisance-value payoffs from defendants. In fact, as is shown below, class certification actually removes such a nuisance-value problem by divesting mass production *defendants* of systematic nuisance-value leverage against plaintiffs, leverage that stems from the defendant’s ability to treat groups of individual claims as part of a *de facto* class action, that exists in the separate action process. More generally, we show that systematic strategic edge in employing nuisance-value strategies correlates directly with litigation scale advantage.

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<sup>59</sup> See sources cited at *infra* note --.

<sup>60</sup> George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521, 521 (1997); see also *id.* at 522 (“We have recently observed settlements or proposed settlements of mass tort class actions at enormous sums of money where there appears to be no substantive basis for defendant liability.”).

<sup>61</sup> See, e.g., *id.*

Because complete (as opposed to partial) aggregation of claims into a formal class action tends to equalize the opportunity of individual plaintiffs and mass producer defendants to exploit litigation scale, the net effect of class certification as it pertains to nuisance-value strategies is to transform mass production cases of asymmetric litigation scale into the more symmetric confrontations that characterize conventional, sporadic separate actions. As such, in the absence of a systematic nuisance-value advantage favoring either plaintiffs or defendants in class actions, non-systematic circumstances will determine which party to a class action gains the strategic edge.

As it affects the availability of nuisance-value strategies, then, we suggest that class action is properly examined not as an isolated litigation process, but rather as part of a continuum of litigation contexts ranging from “true” separate individual actions to formally certified comprehensive class actions. Focusing first on the separate action segment of this continuum, we discuss three types of such lawsuits: claims arising from sporadic accidents and transactions; claims arising from a systematic risk generated by processes or goods of mass production but prosecuted independently from one another; and, claims arising from systematic mass production risks prosecuted through some degree of informal or formal claim aggregation short of total aggregation via formal class certification. The first two types of separate actions respectively exemplify the extremes of cases characterized by symmetrical and asymmetric litigation scale. The third type of separate action, exhibiting some degree of incomplete claim aggregation, falls between these two points on the continuum. Finally, we shift our analysis to focus on the effect of comprehensive claim aggregation through formal class certification in bringing the parties’ abilities to exploit nuisance-value strategies into relative symmetry by affording the parties roughly equivalent opportunities to exploit litigation scale economies.

### 1. “True” Separate Actions

It is useful to begin with a simple case involving a sporadic, unique, one-shot interaction between two individual litigants, such as an automobile accident, in which neither party has significant opportunities for an increased return resulting from litigation scale economies.<sup>62</sup> Such an action is “truly” separate, in that neither party (nor, it is assumed for analytic convenience, their respective lawyers and insurers) is involved in any litigation similar to the given case that might allow for cost-spreading and other advantages stemming from litigation scale economies. Recall the general framework of the individual litigation example from Part I, *supra*, and substitute the possibility of one driver in an automobile accident filing

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<sup>62</sup> In fact, even in “sporadic” automobile cases involving two individual drivers, the parties can exploit litigation scale derived from long-run (extra-case) opportunities to benefit from and spread investments in a particular claim that may give the strategic edge to one side or the other. In addition to the lawyers for both parties being “repeat players” with extra-claim work product as well as reputational interests, the defendant is typically “represented” by a liability insurer with enormous advantages from litigation scale. Because these factors are more or less constant features of all of the civil litigation contexts under study, we can disregard them for the sake of convenience in analyzing the distinctive aspects of relevance to our inquiry.

a nuisance-value suit against the other for \$10,000 in damages, which would cost the plaintiff \$1000 to initiate and the defendant \$5000 to defeat on summary judgment. In such a case, the defendant rationally would settle the claim for up to \$5000, notwithstanding the certainty that a court would grant summary judgment to dismiss the claim on an adequately prepared motion. Thus, the case would present the plaintiff with an opportunity to exploit a nuisance-value strategy in making a demand of up to \$5000. The defendant, though, may have nuisance-value opportunities of his or her own. Recall again the example from Part II of the defendant raising a spurious defense of lack of personal jurisdiction. If the defendant could initiate the defense for a sum less than the cost of the plaintiff to defeat it, then the plaintiff's settlement demand would fall by some amount short of the plaintiff's cost of defeating the nuisance-value defense on a motion for summary judgment (or motion to dismiss).

As illustrated by this simple example, both sides in sporadic actions generally will have one or more opportunities, arising simultaneously (during processes like discovery) or serially (during processes like the phased exchange of pleadings), to pursue nuisance-value strategies. Consequently, the parties often have numerous opportunities to seek nuisance-value payoffs that are to some degree offsetting. Given that neither party in such a truly separate action is likely to have advantages in litigation scale economies, determining which party ultimately will bear the net burden of the dueling nuisance-value strategies is impossible in any given case. Both sides may engage in nuisance-value strategies to more or less offsetting effect, with the edge determined by non-systematic, case-specific circumstances.<sup>63</sup>

## 2. Separate Actions in Mass Production Cases

A large portion of civil litigation involves cases comprising numerous similar claims generated by the systematic risk-taking of mass production enterprises (governmental as well as business). Cases of products liability, security or consumer fraud, and environmental contamination epitomize this breed of litigation. These actions are not "true" separate actions in the sense that similarities among the set of outstanding claims provide opportunities for a mass producer defendant to treat some portion of outstanding claims against it as related. That is, the salient feature of these actions for present purposes is that the defendant effectively and automatically "aggregates" its common defense interest in all similar claims arising from a given mass production transaction or event. The mass production defendant thus exploits litigation scale economies to spread its common defense investment over all potential claims and thereby reduces defense costs per claim. Essentially, mass production defendants litigate in the conventional separate action process as if the defense interests in all similar claims were aggregated by mandatory class action into a *de facto* class.

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<sup>63</sup> It is also possible that the ability of or potential cost inflicted by each party pursuing its nuisance-value opportunities against the other could serve as a form of mutual deterrence, or, though such a situation may be unlikely, as a basis for them to commit credibly to refraining from such behavior.

In this subsection, we examine the effect of defendants' *de facto* class action posture in two litigation contexts: first, in the case of plaintiffs proceeding independently, with each suing in a separate action; and, second, in the case of plaintiffs aggregating some fraction of their claims through formal or informal means short of comprehensive class certification.

*A. PLAINTIFFS PROCEED VIA SEPARATE ACTIONS.* — When plaintiffs proceed against a mass production defendant in independent separate actions, the defendant has the ability to exploit scale economies by spreading its common defense costs across the plaintiffs' claims and otherwise increasing investment productivity, while the plaintiffs enjoy no comparable opportunities. The defendant's unilateral scale advantages enable it not only to discourage any given plaintiff from resorting to a nuisance-value strategy, but also to employ nuisance-value strategies of its own against plaintiffs.

To illustrate this effect, we continue with our products liability claim example.<sup>64</sup> Assume now that the 100 injured consumers independently prosecute separate tort actions for \$100,000 each. As above, it costs each plaintiff \$1000 to prepare and file a complaint individually, and it costs the defendant \$5000 to defeat such a claim at summary judgment. If the defendant had to develop its case for summary judgment separately to oust successive claims, it would be prepared to settle each claim for up to \$5000, for a total potential nuisance-value payoff of \$500,000. If the defendant could spread its defense costs over common issues, however, it would be able to thwart the plaintiffs' nuisance-value claims. For example, if the \$5000 cost to the defendant of ousting a given claim were related to a common component of its defense, such as developing the scientific basis for expert testimony on a pivotal question of general causation common to all prospective claims, and if this evidence generated by the defendant would persuade a court to render summary judgment dismissing any individual plaintiff's claim, then the defendant could avoid making any nuisance-value payoff at all. The defendant would realize that its scale economies allowed it to invest \$5000 once and for all in preparing and deploying the common causation defense to obtain summary judgment dismissal of each and every claim. Confronted with the prospect of paying \$500,000 to settle the outstanding nuisance-value claims, the defendant would choose to invest the \$5000. By spreading its common defense costs across all actual and potential claims, the defendant would effectively lower its per-claim nuisance-value exposure from \$5000 to \$50.<sup>65</sup> Because this value of \$50 is less than the \$1000 cost to each plaintiff of preparing and filing a claim, there is no possibility for profit from a nuisance-value strategy by the plaintiffs. As such, no plaintiff would file such a claim in the first place.

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<sup>64</sup> See Part I.A., *supra*.

<sup>65</sup> Of course, this latter assumption is simplified for purposes of the example; in practice, at least some of the defense costs would not be common, meaning that the entire \$5000 could not be spread. Still, this consideration does not alter the conclusions stemming from the analysis.

While the defendant's systematic advantage in terms of litigation scale economies illustrated in the example above can sometimes be used to combat nuisance-value strategies by plaintiffs, it can also give the defendant opportunities to employ nuisance-value strategies of its own against individual plaintiffs. Indeed, the problem is a systematic one; defendants generally have litigation scale advantages they can exploit to profit from nuisance-value defenses while simultaneously foreclosing plaintiffs from seeking offsetting nuisance-value payoffs. In other words, mass producers' litigation scale economies in independently prosecuted separate actions enable them to employ the nuisance-value strategy as well as thwart it.<sup>66</sup>

In the preceding example, assume that it costs \$100,000 for the defendant to develop a seemingly plausible common defense to causation that would cost each of 100 plaintiffs \$10,000 to defeat by marshalling scientific expert testimony on summary judgment. Given its capacity to spread the costs of this spurious defense over all outstanding claims, the defendant would face a per-claim cost of only \$1000 to raise such a defense. Thus, the defendant would find it profitable to invest in developing the defense and raising it in every individual action brought against it. Under these circumstances, each plaintiff's settlement demand would fall by up to \$10,000, the common question cost to each plaintiff of overcoming the nuisance-value defense. Depending on the expected value of a given plaintiff's claim, the defendant's nuisance-value strategy might price the plaintiffs out of court altogether.

*B. PLAINTIFFS PROCEED VIA FRACTIONAL AGGREGATION.* — Particularly in the mass production context, few claims are prosecuted independently, at least when “free-riding” on the work product of others is taken into account.<sup>67</sup> Rather, even in the absence of a class action, attorneys compete to acquire shares of actual and potential claims, customarily using various formal and informal aggregation measures, ranging from cooperative arrangements to share expenses and information to claim inventories, joinder, consolidation, and partial class action.<sup>68</sup> Such fractional aggregation of claims enables plaintiffs to bring about a favorable change in the

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<sup>66</sup> Cf. David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't*, 37 HARV. J. LEG. 393 (2000).

<sup>67</sup> See Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1384 (2000) (noting that the defendant, being involved in all of the claims, will be able to spread across and reap the full return from its investment on the common questions in the claims by all of the plaintiffs, while on the plaintiffs' side, different plaintiffs are likely to be represented by different lawyers).

<sup>68</sup> Examples of common formal aggregation measures include joinder of parties and federal multi-district consolidation of claims. See, e.g., FED. R. CIV. P. 19 (compulsory joinder); FED. R. CIV. P. 20 (permissive joinder); see also Miller, *supra* note --, at 1002. Informal measures may include anything from structured training workshops for plaintiff's attorneys involved in similar cases to creating claim inventories to simply sharing mailing lists. See Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386-401 (2000). Additionally, aggregation measures need not relate solely to claims brought simultaneously; rather, aggregation can be serial, meaning that later claimants may enjoy cost reductions based on the initial work done by prior claimants in bringing about a form of sequential claim aggregation.

“litigation units ratio”: the ratio of independently prosecuted claims (“claim units”) to independently asserted defenses (“defense units”).<sup>69</sup> The litigation units ratio represents the defendant’s relative investment advantages that result from litigation scale economies. The greater the litigation units ratio — and, accordingly, the greater the number of claim units relative to each defense unit — the greater the defendant’s investment advantage on the relevant common question.

Fractional aggregation of plaintiffs’ claims (either formal or informal) reduces the number of claim units while leaving the number of defense units unchanged. Put differently, aggregation lowers the litigation units ratio. The result is a chipping away from the defendant’s systematic advantage in litigation scale economies by reducing the number of independent claims over which the defendant can spread its common defense costs, and by enhancing the ability of plaintiffs to reap the benefits of scale economies by spreading common costs across all of the claims making up a given claim unit.

Thus, fractional aggregation may ameliorate the systematic potential for defendants to employ nuisance-value strategies against plaintiffs. But the magnitude of this effect will depend on the reduction in the number of claim units relative to the number of defense units. As aggregation increases the number of claim units and thereby decreases the number of litigation units ratio, the mass producer defendant’s ability to employ nuisance-value strategies against the plaintiffs is reduced.<sup>70</sup>

A few numerical examples will help to explain this analysis. Returning to the example set out in subsection A above, suppose that 20 competing law firms each acquire 5% of the 100 outstanding claims and prosecute their respective claim-holdings independently of one another. That is, the 100 outstanding claims become, due to fractional aggregation, 20 claim units. Assume also that the cost imposed on the plaintiffs is sufficiently

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<sup>69</sup> “Litigation unit” refers to the number of mass production claims or defenses that are litigated independently, without any formal or informal means of benefiting from litigation scale economies and investments. For example, while a mass producer defendant develops its *common* defenses in mass production cases based on the economy and investment scale of a *de facto* class action resulting in only 1 “defense unit,” its relative lack of scale opportunities regarding *non-common* questions generates multiple non-common question “defense units.” With respect to plaintiffs, the number of “claim units” is a function of the degree of formal or informal collaborative effort (that is, “claim aggregation”) by plaintiffs’ attorneys, usually based on the development of the plaintiffs’ cases on common questions.

To illustrate, assume that a defendant’s actions gave rise to 100 outstanding claims, and that the defendant has one independently asserted defense that applies to the key common litigation question in each claim. Thus, the defendant has 1 “defense unit.” If there are 100 outstanding plaintiff claims with no aggregation — that is, where a different plaintiff’s attorney independently controls each claim — then there are 100 claim units. If fractional aggregation occurs such that one law firm gathers up 50 claims to litigate on a coordinated basis, whether in separate or joint actions, then the number of claim units is 51: the aggregate of 50 claims counts as one claim unit, and the 50 non-aggregated claims, each litigated independently of one another and of the 50-claim aggregate, count as 50 additional claim units for purposes of calculating the defendant’s relative advantage from litigation scale economies. Similarly, if each of 10 firms gathers up 10 claims to litigate in some aggregated fashion, we will be left with 10 claim units, each comprising a set of 10 claims, and the ratio of defendant’s advantage from litigation scale will be 10:1.

<sup>70</sup> The relative decrease in the number and dispersion of claims therefore serves as a useful proxy for litigation scale benefits from fractional aggregation.

common to allow any group of plaintiffs functioning as a claim unit to combat the defense for the same value, \$10,000, that it would cost any given plaintiff proceeding separately to overcome the defense. In this situation, the defendant would be able to extract a payoff of up to \$10,000 from each of the 20 claim units. Thus, the defendant's total payoff from employing such a strategy would be \$200,000, meaning that the defendant would invest the \$100,000 and raise its nuisance-value defense successfully.

Even as one plaintiffs' law firm begins to dominate the claim market, the defendant's nuisance-value strategy continues to be viable. For instance, suppose now that one firm has aggregated 50% of outstanding claims into its claim unit, with the balance of claims divided among the other 19 firms. In this case, the defendant could still extract a \$10,000 nuisance-value payoff from each unit, again giving it a positive return from its employment of a nuisance-value strategy. The key consideration is that, despite the increased concentration of *claims* into one larger claim unit, the number of *claim units* has remained the same. It is the decrease in the number of claim units, not the increase in the number of claims within a given claim unit, that erodes the defendant's scale advantage over the plaintiffs.<sup>71</sup> The nuisance-value strategy remains profitable even as one firm acquires a large fraction of claims and leaves only a small fraction of claims as separately prosecuted actions. A single firm acquiring even 85% of the outstanding claims would make little difference in the above analysis if the remaining 15 claims were litigated separately; the defendant would spread its costs across 16 claim units, leaving it with a positive return of up to \$160,000 from its expenditure of \$100,000.

This particular nuisance-value strategy becomes unprofitable in this example only once the number of claim units is reduced to 10 by some combination of fractional aggregation and independently prosecuted actions. Assuming, then, that 5 firms each acquired 20% of the outstanding claims, the defendant would only be able to extract a maximum payoff of \$50,000 from the 5 claim units. At this point, it would not be worthwhile for the defendant to invest \$100,000 to pursue its nuisance-value strategy.

Fractional claim aggregation also functions to alter nuisance-value strategy dynamics by providing plaintiffs with more opportunities to profit from *offensive* nuisance-value strategies. That is, while the above examples have shown how fractional aggregation can enhance the ability of plaintiffs to insulate themselves from defendants' nuisance-value strategies by weakening the defendant's position, such aggregation also improves the plaintiffs' position in employing their own nuisance-value strategies. To illustrate, suppose, as above, that it costs each plaintiff \$100,000 in common question costs to initiate a nuisance-value claim that the defendant would have to spend \$1 million in common question costs to oust at summary judgment (perhaps by preparing a common general causation defense). If each of the 100 outstanding claims proceeded as a separate ac-

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<sup>71</sup> Of course, a group of plaintiffs with a large number of claims in their claim unit is in better shape than a group with fewer claims. But this difference is based on the plaintiffs' scale economies, not the inability of the defendant to spread its expenditures.

tion, the defendant would invest the \$1 million to repulse all of the nuisance-value claims, spreading its common defense costs over 100 claim units for a per-claim-unit cost of \$10,000. No plaintiff would incur a cost of \$100,000 to receive a payoff of up to \$10,000, so the plaintiffs would not initiate these claims.

If, however, there were substantial aggregation of claims into a small number of claim units, the results would differ. Assuming that 5 law firms aggregated all the outstanding claims into 5 distinct claim units, the litigation units ratio would be reduced from 100:1 to 5:1, representing a decrease in the defendant's relative investment advantage. The defendant would now be able to spread its \$1 million cost of ousting the claims over only 5 claim units, leaving it to face a per-claim-unit cost of \$200,000. Since any given plaintiff claim unit could assert a claim for \$100,000 to extract a nuisance-value payoff of up to \$200,000, each of the 5 firms would assert claims against the defendant and successfully employ the nuisance-value strategy.

### 3. Comprehensive Class Actions

Certification of a comprehensive class action — a class action in which all outstanding and potential claims resulting from a mass production defendant's risk-taking are combined into one formal class action — magnifies the nuisance-value effects of fractional aggregation to reflect the plaintiffs' opportunities to exploit litigation scale in relatively equal measure to that of defendants. On the positive side, class certification eliminates the systematic litigation scale advantages that defendants wield over plaintiffs in separate actions with zero or incomplete aggregation. Eliminating the systematic advantage in scale economies removes the corresponding strategic nuisance-value advantage of defendants. On the negative side, class action provides additional opportunities for plaintiffs to extract nuisance-value payoffs. The net result is that class actions resemble "true" sporadic separate actions in which both sides can employ offsetting (to some degree) nuisance-value strategies with the strategic edge determined largely by non-systematic circumstances of particular mass production cases.<sup>72</sup>

Thus, when the class action is viewed as part of a continuum of litigation processes, the contribution of the class action to the nuisance-value settlement problem becomes indeterminate. On one hand, class certification increases plaintiffs' opportunities for profit from nuisance-value strategies relative to those available to plaintiffs prosecuting claims individually or in fractionally aggregated claim units. On the other hand, class action negates the strategic advantage systematically afforded to defendants in the separate action process.<sup>73</sup>

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<sup>72</sup> See *supra* Part III.A.1.

<sup>73</sup> By affording plaintiffs the same opportunities as defendants to extract offsetting payoffs, certification of a class action also reduces, and in some instances may eliminate, the expected payoff (and resulting social costs) of nuisance-value litigation relative to the results of mass production cases in the separate action process.



*B. MSJ is More Cost-Effective Than PCMR, Regardless of the Nature and Magnitude of the Nuisance-Value Class Settlement Problem*

Having articulated the nature of the nuisance-value settlement problem in class actions and the MSJ model design for solving it, we now compare MSJ with precertification merits review (PCMR) as potential solutions for cost-effectively addressing the nuisance-value class settlement problem. PCMR, which generally proposes conducting merits review of a class action in advance of deciding whether to certify the putative class, has been gaining support in recent years from commentators and courts alike.<sup>74</sup>

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<sup>74</sup> The U.S. Supreme Court appears to have concluded that Rule 23 precludes precertification merits review. See *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177 (1974) (“We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action.”). However, leading commentators have called and continue to call for the Rule’s reinterpretation or amendment to authorize PCMR. See, e.g., Geoffrey C. Hazard, Jr., *Class Certification Based on Merits of the Claims*, 69 TENN. L. REV. 1, 4 (2001) (“In positive terms, consideration should be given to procedures for determining the merits of the individual claims and the size of the class before a suit is certified as a class suit. The basic idea is to reverse the decision in *Eisen* and to provide for an initial judgment on the merits of class members in relations to the claims.” (footnote omitted)); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1251–52 (2002) (urging explicit rejection of the Supreme Court’s statement in *Eisen* that precertification review of the merits of a putative class action is improper); Priest, *supra* note --, at 572 (arguing for the possibility of a more narrow reading of *Eisen*).

Several federal appellate courts have effectively established a degree of precertification merits review as part of the certification process, including merits evaluation in the course of determining the adequacy of class representation, predominance of common over non-common questions, and manageability and superiority of classwide trial. See e.g., *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298–99 (7th Cir. 1995) (ordering decertification of a class action based in part on the court’s estimation of the low probability of success for the class claim as derived from the fact that the defendants had achieved trial victories in twelve of thirteen individual lawsuits before the attempted class certification, “demonstrat[ing] great likelihood that the plaintiffs’ claims, despite their human appeal, lack legal merit”). Additionally, it should be noted that a practical analog of PCMR exists in the form of precertification determinations of motions to dismiss and motions for summary judgment. Attitudes toward the propriety of such precertification litigation and the strictness of such determinations vary widely by court. See *Empirical Analysis of Class Actions*, *supra* note --, at 106 (“Federal courts of appeals have taken divergent views on whether a ruling on a motion to dismiss or motion for summary judgment may precede a ruling on class certification. Some courts have interpreted the Supreme Court’s ruling in *Eisen v. Jacquelin* to mandate that certification decisions be made before determinations of motions on the merits. The reasoning of such courts is that Rule 23(c)(1) requires that a class action seeking damages be certified before a determination on the merits in order to prevent one-way intervention or opting out by class members who would know the outcome of the ruling on the merits. Other courts have approved precertification rulings on the merits, reasoning that a party filing a pretrial motion to dismiss or motion for summary judgment may explicitly or implicitly waive the protection against one-way intervention or opting out.” (footnotes omitted)). See also Priest, *supra* note --, at 554 (explaining recent examples of “judicial hostility to class certification” in terms of judges’ “concern that the outcomes that follow class certification will depart from the substantive objectives of the law”).

The Civil Rules Advisory Committee continues to face an undercurrent of support for PCMR. The Committee’s most recent amendments to Rule 23 require courts to make the certification decision “at an early practicable time,” as compared to the “as soon as practicable” requirement for certification in the current Rule. See FED. R. CIV. PROC. 23(c)(1)(A); cf. REPORT OF THE CIVIL RULES ADVISORY COMMITTEE, May 2002, at 96. In offering some aid in interpreting this proposed revision, the Committee rejects the appropriateness of formal PCMR, stating that “an evaluation of the probable outcome

While PCMR responds to a perception that the nuisance-value settlement problem afflicting class actions is especially serious and systematically victimizes defendants — an erroneous view in our judgment — the following shows that regardless of the nature and magnitude of the problem, MSJ is the superior solution.<sup>75</sup> It is fully effective and far more efficient than PCMR as a means of preventing nuisance-value class claims.

### 1. Benefits of PCMR Relative to MSJ

PCMR advances merits review of the class claim from a postcertification stage like summary judgment under MSJ to the stage of litigation preceding a decision on class certification. We consider two possible benefits of advancing merits review to an earlier point in time than postcertification MSJ. First, hastening merits review to preempt nuisance-value class claims might more effectively deter plaintiffs from employing the nuisance-value strategy. Second, PCMR might also prove superior to MSJ in facilitating efficient settlement of non- nuisance-value class actions because merits review prior to class certification could occur while still allowing efficient settlement of triable class claims without submitting motions for summary judgment. As the following analysis demonstrates, however, PCMR provides advantages that are minimal at best, and that are offset by prohibitive costs.

Preliminarily, we note and correct a basic defect in current PCMR proposals: the lack of an MSJ-type precommitment device to mandate PCMR and bar pre-PCMR class settlement agreements. In particular, to deter nuisance-value class settlements adequately, PCMR (like MSJ) must employ the precommitment device of making submission for PCMR a precondition for enforcing a class settlement agreement by barring enforcement of any pre-PCMR settlement agreements. Otherwise, parties confronting the prospect of PCMR of a putative class claim would consider and possibly resort to nuisance-value settlement strategies in much the same way they do currently, with the pre-PCMR timing of the payoff agreements repre-

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on the merits is not properly part of the certification decision.” REPORT OF THE CIVIL RULES ADVISORY COMMITTEE at 98. Still, the Committee instructs, “[D]iscovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense it is appropriate to conduct controlled discovery into the ‘merits,’ limited to those aspects relevant to making the certification decision on an informed basis.” *Id.* Thus, while rejecting (at least for now) formal PCMR, the Committee explicitly remained concerned about the potential for abuse that accompanies the certification decision, inviting courts to analyze the merits of putative class actions insofar as those merits relate to certification itself.

<sup>75</sup> Precertification merits review has also been rationalized on the contention that given the high rate of class settlement, the class certification decision represents a court’s “last word” on the merits of the class claim. See *Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 674, 676–77 (7th Cir. 2001). There is at least some empirical evidence of the frequency of postcertification merits review in class actions that challenges the validity of such concerns. See *Empirical Analysis of Rule 23*, *supra* note --, at 104 (compiling evidence from four federal district courts contradicting the assumption that class action proceeds directly from certification of a class to settlement without judicial examination of the merits of claims). The “last word” justification also disregards the opportunity for merits review provided by the requirement for judicial evaluation of the “fairness, adequacy, and reasonableness” of the class settlement.

senting the only difference. Such thwarting would be expected whenever the plaintiffs could initiate the putative class claim for less than it would cost the defendant to oust the claim on PCMR. To have a significant deterrent effect, then, PCMR would require judicial refusal to enforce pre-PCMR settlement agreements. In essence, effective PCMR requires the core of MSJ, though the converse is not true. The following analysis of PCMR's benefits in deterring nuisance-value class claims and facilitating non-nuisance-value class settlements therefore assumes a design incorporating an MSJ-type precommitment device.

*A. PCMR'S DETERRENCE BENEFIT.* — The mere fact that PCMR, even including an appropriate precommitment feature, would advance merits review from a postcertification stage (such as, at least in most cases, class-wide summary judgment) to a precertification stage does not enhance deterrence of nuisance-value class claims relative to an MSJ regime. Assuming that both mechanisms would effectively identify and reject nuisance-value class claims if they were asserted — that is, assuming that PCMR could appropriately screen class claims for triability — the precommitment feature of either device would provide credibility for a defendant's threat to oust the claim at the first merits review opportunity. As such, the prospect of inevitable ouster with no positive payoff would discourage the filing of nuisance-value class claims regardless of whether this ouster was to occur precertification or postcertification. Where unavoidable merits review invariably and inescapably foredooms the class claim, timing of review is irrelevant.

Of course, if the PCMR mechanism in question were to adopt a standard of merits-review more stringent, meaning more trial-preclusive, than the test of "triability" customarily applied in determinations of summary judgment, then PCMR would deter more class claims than MSJ (though not more class claims brought to extract a nuisance-value settlement).<sup>76</sup> The problem, though, is that this effect might not be desirable. To justify heightening the prevailing merits threshold for class claims, and thereby rendering summary judgment irrelevant in class actions, PCMR proponents must justify screening out not only nuisance-value class claims, but also many other class claims that are allowed to proceed to trial under our current litigation system. Such a justification has yet to be offered. However, even if a rationale for toughening the merits test for class claims were forthcoming, it would not support adopting PCMR. Given the irrelevance of the mere timing of merits review to deterrent effect, it would be simpler and just as effective to raise the triability bar for class claims (assuming the desirability of doing so) by amending the conventional standard for summary judgment.

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<sup>76</sup> For one proposal of such a review standard, see Bone & Evans, *supra* note --, at 1279–80 (calling for a "likelihood of success" standard that is "similar to the one judges now use for evaluating preliminary injunction motions, but perhaps not quite as stringent"). As we demonstrate, setting the PCMR threshold below "triability" would be counterproductive; not only would this version of PCMR fail to screen out some fraction of nuisance-value class claims, but it would also make the resulting nuisance-value class settlements more costly for defendants.

Our analysis of mere triability and more trial-preclusive tests for PCMR has held constant everything other than the standard of PCMR review. It should be noted, though, timing of merits review affects the parties' relative ability to exploit litigation scale economies and investment opportunities in developing their respective cases on the merits of the class claim. Generally, as elaborated below, merits review prior to class certification curtails such opportunities for plaintiffs but not defendants, thereby undercutting the effectiveness of the plaintiffs' attorney in preparing and presenting the merits of the class claim and, on average, distorting outcomes in favor of defendants. Thus, regardless of the merits test employed, using PCMR runs a considerable risk of overkill, precluding more class claims than is strategically required to achieve the social objectives of civil liability. MSJ, operating postcertification, does not suffer from the same defect because class certification eliminates this asymmetric condition and gives both parties a full opportunity to exploit litigation scale. For PCMR to operate as the functional equivalent of MSJ, PCMR effectively would require convening a class action for pretrial merits review.

*B. PCMR'S SETTLEMENT BENEFIT.* — The preceding analysis indicates that PCMR, whether applying the current triability standard or a more trial-preclusive test, has no comparative advantage over MSJ in deterring the initiation of the targeted category of class claims (though, as explained below, PCMR incurs distinct overkill costs). Here, we consider a version of PCMR that would operate on a lower trial-preclusive standard than mere triability, such as one that excluded class claims determined “frivolous” or an “abuse of process.”<sup>77</sup> While PCMR operating on such a lower trial-preclusive standard would deter nuisance-value class claims less completely than MSJ, it may yield an offsetting advantage of allowing triable class claims to settle without incurring the cost and delay of first formally invoking (or even waiving) summary judgment. On its face, then, this design would provide PCMR with the only possible advantage over MSJ. That advantage, however, is minimal at best, given the possibilities for expediting and streamlining the process for invoking (or waiving) summary judgment under an MSJ regime, and the necessity of bearing equivalent or greater costs in any event for obtaining judicial approval of the class settlement as “fair, adequate, and reasonable.”<sup>78</sup> Moreover, lowering the merit threshold below triability would admit some nuisance-value class claims, defined as claims which summary judgment testing for triability would otherwise exclude under the current summary judgment standard. Thus, whether PCMR produces a net benefit in allowing class settlements of both triable and nuisance-value class settlements prior to summary judgment is ultimately unclear. As the next subsection shows, numerous other significant costs of PCMR operating on a less stringent standard than summary judgment would far outweigh any gain stemming from its adop-

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<sup>77</sup> This version of PCMR might enforce the standards for sanctionable pleadings established by FED. R. CIV. P. 11.

<sup>78</sup> See Part III.C., *supra*.

tion and render it inferior to MSJ as a solution to the nuisance-value class settlement problem.

## 2. Comparative Cost Assessment of MSJ versus PCMR

MSJ is superior on several basic dimensions to PCMR in terms of the costs of each proposal. First, MSJ does not entail formulating and administering a new merits review process or a new test, if the desired scope of trial preclusion is less (or, assuming some justification, more) stringent than mere triability. Moreover, regardless of the review standard employed, PCMR is not a viable replacement for standard merits-review processes; class claims that were to survive PCMR would likely be subjected to summary judgment review, resulting in an additional layer of cost for both parties and for the court to screen the triability of class claims. This added expense would not be limited to regimes operating with review standards that were less stringent than summary judgment, standards which would require supplemental merits-review processes to screen out the nuisance-value class claims that survived PCMR. Rather, the additional expense would also be present even in regimes employing tests equivalent to or more stringent than summary judgment, as there would be a set of cases in which the full-scale discovery that occurs postcertification would uncover new information requiring another round of merits review.

Second, MSJ more effectively screens out nuisance-value class claims compared to a PCMR regime employing a test that is less stringent than summary judgment. Such a PCMR test would, as noted above, fail to dispose of some nuisance-value class claims and thus allow for the continued possibility of nuisance-value class settlements. Because of the added PCMR burdens for courts and parties, the undetected nuisance-value class claims would result in even more costly nuisance-value class settlements than presently occur without MSJ.

Third, regardless of the strictness of the employed review standard, PCMR would erroneously bar some otherwise meritorious class actions because of investment asymmetries generally favoring defendants.<sup>79</sup> This condition stems from the inherent misalignment of PCMR with the functional benefits sought through the availability of the class action vehicle for asserting and recovering upon meritorious claims. A critical function of classing claims is the effect on the incentives of plaintiffs' counsel. When representing a certified class of plaintiffs, plaintiffs' counsel has enhanced incentives to invest in pursuing the litigation as compared with the incentives derived from representing some fraction of claimants, due to the higher aggregate expected return<sup>80</sup> and the increased returns on investment yielded from litigation economies of scale. But at the precertification litigation stages, this incentive effect is not optimal in many cases, for two

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<sup>79</sup> See *supra* note --.

<sup>80</sup> Indeed, this consideration provides much of the basis for the availability of class action litigation in the first place. See, e.g., *Mace v. Van Ru Credit Corp.*, 109 F.3d 338, 344 (7<sup>th</sup> Cir. 1997) ("The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights.").

major reasons. First, there is still (potentially great) uncertainty as to whether the class will be certified under the standard criteria evaluating the relative utility of class action and alternative means of adjudication. This uncertainty will prevent plaintiffs' counsel from investing optimally in developing the merits for PCMR to the same extent that the defendant, with knowledge that a *de facto* class of outstanding claims exists regardless of the certification of the class action, will invest.<sup>81</sup> It is only after the point of certification that plaintiffs' counsel has the full incentive to treat the classed claims as such, and thus to invest appropriately in developing these claims. By contrast, the defendant's confronting the total number of outstanding claims regardless of class certification will accordingly exploit scale economy and investment opportunities more fully than plaintiffs' counsel can.<sup>82</sup> Additionally, any given attorney attempting to certify a class must proceed in light of the fact that even if a class is certified, there is no guarantee that the attorney will be appointed class counsel and thus be able to gain the benefits of class certification going forward after certification. As with the possibility of being denied certification, the presence of uncertainty as to class representation functions as a discount factor, serving to decrease the attorney's incentive to invest in developing the merits at the PCMR stage.<sup>83</sup> Thus, PCMR threatens to preserve the defendant's edge in investing to combat a number of common outstanding claims relative to plaintiffs' counsel's investment incentives, forgoing the deterrence and compensation benefits that result from increasing the parity of litigants' investment incentives through invocation of the class action mechanism.<sup>84</sup>

Finally, the preclusive ramifications of MSJ versus PCMR greatly favor MSJ as an appropriate solution to the nuisance-value class action problem. The application of PCMR rather than MSJ to similar nuisance-value class actions brought simultaneously or serially threatens to increase the prob-

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<sup>81</sup> See *id.* at 400–01.

<sup>82</sup> Of course, this possibility that the class will not be certified serves to hinder plaintiffs' counsel's investment incentives in all putative class actions, as counsel must discount the expected value of the claims, and thus the optimal plaintiff-side investment, by the probability of certification being denied. Still, this systematic devaluation, when viewed in opposition to the defendant's ability to invest in combating the outstanding claims by treating them as a *de facto* class, provides all the more reason for resisting procedures like PCMR that serve to push a greater segment of class action litigation to a point in time preceding the court's certification decision. *Cf. id.*

<sup>83</sup> Note that one component of the newly amended Rule 23 might, in theory, serve to alleviate part of this problem. Section (g) of Rule 23 alters the appointment of class counsel by instructing judges to take into account factors including "the work counsel has done in identifying or investigation potential claims in the action." See FED. R. CIV. P. 23(g). Whether this criterion for appointment of counsel will prove to be of significant benefit in practice if implemented is an open question.

Still, the criterion is also likely to add delay and expense to the process of competing for appointment as class counsel, thereby exacerbating the discounting that prospective plaintiffs' attorneys have to do in determining how much to invest in developing class claims before certification and appointment.

<sup>84</sup> *Cf. Rosenberg, supra* note --, at 400–12.

ability of a nuisance-value class action surviving PCMR and then extracting a nuisance-value payout. This effect emerges because PCMR operates *before* certification, meaning that it dismisses claims before any class ever comes into existence. Thus, the ousting of a putative class action on PCMR presumably would not bind members of the “non-class,” other than the named class representatives, to the PCMR judgment.<sup>85</sup> In contrast to MSJ, which operates postcertification and binds all class members to the ruling dismissing the class claim as untriable, PCMR does not bind absentee class members to bar any of them from repetitively filing and seeking to satisfy PCMR in subsequent class actions until one finally succeeds in achieving certification.<sup>86</sup> In failing to preclude multiple class action applications to satisfy its test, PCMR increases not merely costs for parties and courts, but also the likelihood of a false positive error of certifying class action treatment for a nuisance-value claim.<sup>87</sup>

To illustrate this effect, assume that a nuisance-value class action, which by definition could not survive a determination of summary judgment, has a 10% chance of surviving the more lenient PCMR. Assume also that the nuisance-value claims by the plaintiff class total \$1000 in provable damages. If PCMR were applied and the class action’s inability to survive PCMR disposed of the class action with finality — that is, precluded further attempts to certify the class and assert the claims in question — then 90% of the nuisance-value class claims would be detected and excluded, exposing defendants to nuisance-value payoff demands with a 10% probability and translating into an expected cost of \$100 from assertion of the nuisance-value claims. This effect itself is problematic with respect to the goals of the tort system, and argues strongly for preferring MSJ. But the problem does not end there. The possibility of repeated attempts to satisfy the PCMR test puts the defendant in a much worse position even though most nuisance-value class claims are detected and excluded. If in the above example the defendant faces the possibility of two independent attempts at passing the PCMR test, then its *ex ante* cumulative expected loss is not \$100, but rather \$190, derived as the sum of a 90% chance of

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<sup>85</sup> *But cf. In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 2003 WL 21418413 (7<sup>th</sup> Cir. (Ind.)) (concluding, rather remarkably, that a previous denial of class certification was binding on all members of the non-class).

<sup>86</sup> To elaborate, the current regime of class action procedure includes incomplete consolidation of outstanding claims and an undeveloped doctrine of collateral estoppel with respect to judicial denials of class certification. When these considerations are viewed in light of a PCMR standard that is more lenient than summary judgment, the result is that PCMR demonstrates an inability to dispose of class actions with finality the way that the MSJ regime does. This problem is distinct from the more general problem of repeated applications for class certification. *See, e.g., id.*

<sup>87</sup> There is an interesting question whether results in a given PCMR proceeding would have preclusive effect in future PCMR proceedings. Even if such preclusive effect were available, it seems unlikely that the benefits of this effect would compensate for the costs arising from PCMR’s inability to preclude future lawsuits. Additionally, given the amended Rule 23’s spirit of allowing opt-out opportunity after opt-out opportunity, *see* FED. R. CIV. PROC. 23(e)(3) (“In an action previously certified as a class action under Rule 23(b)(3), the court may refuse to approve a settlement unless it afford a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so.”), we wonder whether opt-out would be allowed even during the PCMR stage.

avoiding class certification on the first application of PCMR and a 10% chance of erroneous class certification on the second application.<sup>88</sup> This compounding effect results from the phenomenon of repeated, independent PCMR determinations.<sup>89</sup> If the defendant faces additional applications, its expected loss will continue to rise,<sup>90</sup> approaching \$1000 when the number of repeated applications or the probability of error is sufficiently high. The adverse social welfare consequences resulting from such a scenario include detrimental effects on defendant incentives to take precautions<sup>91</sup> as well as encouraged filings of nuisance-value class actions.<sup>92</sup>

## V. CONCLUSION

The foregoing analysis of the nuisance-value settlement problem and the contribution of class action to that problem has demonstrated the function, benefits, and costs of MSJ. MSJ, we have argued, provides the most comprehensive and cost-effective merits review mechanism for foreclosing nuisance-value payoffs. Our analysis also provides direction for future research regarding variations in litigation process structure and costs, and in parties' relative bargaining power, that may affect the utility of applying MSJ in various different types of litigation. In these concluding remarks, we briefly address the limits of MSJ and our inquiry.

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<sup>88</sup> Thus, the defendant's expected loss becomes the sum of two values: first, the expected loss from the possibility of the class surviving the first round of PCMR, or  $10\% \times \$1000 = \$100$ ; and, second, the expected loss from the class failing the first round of PCMR but surviving the second round, or  $90\% \times 10\% \times \$1000 = \$90$ . The total expected loss for the defendant, then, becomes \$190.

<sup>89</sup> Interestingly, this prospect suggests that it might be better if PCMR did not bar pre-PCMR settlement agreements, because the parties would split the "surplus" of \$90, somewhat mitigating the overdeterrence effect on the defendant.

<sup>90</sup> Apart from doctrines of preclusion, there is some disagreement among the federal appellate courts as to whether statutes of limitations may provide some restriction on the ability of a given set of plaintiffs to undertake repeated attempts at convening a class action. Compare *McKowan Lowe & Co. v. Jasmine, Ltd.*, 295 F.3d 380 (3d. Cir. 2002) (holding that an attempt at class certification tolls the relevant statute of limitations with respect to subsequent claims at class certifications upon denial of the initial attempt), with *Griffin v. Singletary*, 17 F.3d 356 (11th Cir. 1994) (holding that there is no such tolling of the statute of limitations for subsequent class certification applications).

<sup>91</sup> This analysis can be generalized to explain the utility of applying two-way (that is, mutual) issue preclusion and claim preclusion to final judgment in the conventional case involving two individual litigants. For development of this point, see David Rosenberg, *Avoiding Duplicative Litigation Between Many Plaintiffs and a Common Defendant: The Superiority of Class Action Versus Collateral Estoppel Versus Nothing* (2001) (on file with the Harvard Law School Library).

<sup>92</sup> Compared to MSJ, PCMR is defective in two further respects. First, it fixes the point of merits review regardless of its cost-effectiveness for the defendant, a flaw that will lead the parties to adopt the evasion strategy in some cases when the defendant's cost of ousting the class claim on post-PCMR merits review is less than the cost of using PCMR to achieve that result. Second, PCMR does not address the real but often overlooked problem of nuisance-value defenses.



### A. MSJ Preempts Only Legally Untenable Litigation

In preempting the strategy of seeking settlement payoffs for “untrialable” claims or defenses, MSJ necessarily will have only partial effect in preventing “blackmail” class settlements, and, beyond the cost of complying with its requirements, it will have no significant effect on the initiation and settlement of “negative expected value” claims.

As commonly defined, the “blackmail” class settlement “problem”<sup>93</sup> stems from the defendant’s aversion to the risk of gambling a large sum on the outcome of a single, classwide trial.<sup>94</sup> The blackmail problem thus does not depend on the underlying claim’s triability. With respect to nuisance-value claims, conditioning the enforceability of class settlement agreements on prior submission of the claim for merits review of triability, whether under MSJ or PCMR, will prevent the blackmail effect from increasing the social costs of nuisance-value settlements. However, because merits review mechanisms are designed to exclude only untrialable class claims or defenses, neither MSJ nor PCMR will exert any preclusive or salutary constraint against the blackmail effect distorting class settlements of triable class claims and defenses.<sup>95</sup> A comprehensive solution to the blackmail class settlement “problem” should be sought elsewhere.<sup>96</sup>

Similarly, because MSJ only preempts strategies designed to extract payoffs through assertion of “untrialable” claims and defenses, it will not significantly affect the settlement of “negative expected value” claims.<sup>97</sup> By definition, “negative expected value” claims have some probability of being found “trialable” on summary judgment and succeeding at trial, though for one reason or another they are uneconomical to assert and prosecute through trial. Despite their apparent lack of profitability, such suits may sometimes be used to extract settlement payoffs.<sup>98</sup> Whether this

<sup>93</sup> We do not address the question whether such a problem does, in fact, exist. For a recent analysis of the blackmail settlement issue, see Charles Silver, *We’re Scared to Death: Does Class Certification Subject Defendants to Blackmail?*, N.Y.U. L. REV. (forthcoming 2003).

<sup>94</sup> See HENRY J. FRIENDLY, *FEDERAL JURISDICTION: A GENERAL VIEW* 120 (1973). For a critique of the claim that defendants are systematically victimized by class action “blackmail,” see Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1403 (2000) (pointing out that the defendant is not alone in gambling everything on the outcome of a single, classwide trial and that class counsel faces the same single “coin flip,” and that the blackmail effect distorts settlements of separate action litigation as well as settlements of class actions, and similar to their nuisance-value advantage, mass producer defendants generally have the advantage in extracting “blackmail” payoffs in settling separate actions arising from mass production risks.).

<sup>95</sup> The timing – pre- or postcertification – of merits review has no relevance to the “blackmail” effect.

<sup>96</sup> In previous work, one of us has argued that the complete solution for blackmail class settlements is to provide the parties with the option for multiple trials within the context of the class action. See Hay & Rosenberg, *supra* note --, at 1403. Note also that many of the proposals for various forms of PCMR purport to alleviate the blackmail settlement problem. See sources cited at *supra* note --.

<sup>97</sup> See Lucian Bebchuk, *Suing Solely To Extract a Settlement Offer*, 17 J. LEG. STUD. 437 (1988).

<sup>98</sup> See David Rosenberg & Steven Shavell, *A Model in Which Suits Are Brought for Their Nuisance-value*, 5 INT’L REV. OF LAW AND ECON. 3, 3 (1985); Lucian Bebchuk, *Suing Solely To Extract a Set-*

phenomenon is desirable or undesirable is an open question; the important consideration for present purposes is that MSJ does not extend to foreclose assertion of such triable claims.

### *B. Sanctions and Fee-Shifting*

Aside from MSJ and PCMR, there are other potential solutions to the nuisance-value settlement problem that do not bar enforcement of settlement agreements as a means of precommitting the party to seek merits review. Two such alternatives are worth mentioning here: sanctions and fee-shifting.

First, legal sanctions<sup>99</sup> might be used to deter nuisance-value strategies.<sup>100</sup> Courts could penalize parties employing nuisance-value strategies by imposing such sanctions as those provided by Rule 11 or Rule 37 of the Federal Rules of Civil Procedure,<sup>101</sup> or through judicial contempt powers.<sup>102</sup> However, such targeted sanctions generally would require courts to determine whether a party has deliberately asserted an untriable claim or defense to extract a nuisance-value settlement or rather has merely pressed a position unsuccessfully, but well within the bounds of zeal and due diligence. The notoriously high cost, potential for abuse, and risk of error of such judicial determinations are entirely avoided by the precommitment design of MSJ.

A second alternative solution to MSJ is fee-shifting,<sup>103</sup> which refers to rules imposing some part of a prevailing party's litigation costs, including attorney's fees, on the losing party.<sup>104</sup> Applying such fee-shifting rules in

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*tlement Offer*, 17 J. LEG. STUD. 437, 437–38 (1988); Lucian Bebchuk, *A New Theory Concerning the Credibility and Success of Threats to Sue*, 25 J. LEG. STUD. 1 (1996); Robert Bone, *Modeling Frivolous Suits*, 145 U. PENN. L. REV. 519, 523 (1997). These studies view negative expected value suits solely in terms of triable yet uneconomical claims. Consistent with our analysis of nuisance-value settlements, we note that negative expected value cases also involve the potential for triable yet uneconomical defenses, and the potentially offsetting effects of those defenses for purposes of litigation and settlement.

<sup>99</sup> Informal, extralegal sanctions, such as potential adverse reputational effects of employing nuisance-value strategies, are largely beyond the control of courts and are thus not focused on here. For a treatment of the issue and its effects, see Jason Scott Johnston & Joel Waldfogel, *Does Repeat Play Elicit Cooperation? Evidence from Federal Civil Litigation*, 31 J. LEG. STUD. 39 (2002).

<sup>100</sup> See Wade, *supra* note --, at 495. See also A. Mitchell Polinsky & Daniel L. Rubinfeld, *Sanctioning Frivolous Suits: An Economic Analysis*, 82 GEO. L.J. 397 (1993).

<sup>101</sup> See FED. R. CIV. P. 11, 37.

<sup>102</sup> See, e.g., 18 U.S.C. § 401 (2003).

<sup>103</sup> See Wade, *supra* note --, at 491. See also Lucian Bebchuk & Howard F. Chang, *An Analysis of Fee-shifting Based on the Margin of Victory: On Frivolous Suits, Meritorious Suits, and the Role of Rule 11*, 25 J. LEG. STUD. 371 (1996). Cf. Michael J. Meurer, *Controlling Opportunistic and Anticompetitive Intellectual Property Litigation*, 44 B.C. L. REV. 509 (2003).

<sup>104</sup> See, e.g., 35 U.S.C. § 285 (fee-shifting provision for patent infringement claims); 42 U.S.C. § 2000e-5(k) (fee-shifting provision for Title VII claims).

the pretrial settlement context, though, is exceedingly problematic. As a solution to the problem of nuisance-value litigation, fee-shifting presumably would tax the losing party on a summary judgment or other standard dispositive motion, motivating the prospective winner to reject settlement and file the motion instead.<sup>105</sup> Unless the fee-shift rule were confined to nuisance-value claims or defenses, however, it would significantly alter the parties' litigation incentives regarding the filing of non-nuisance-value claims and defenses as well as the filing for summary judgment to test triability. The utility of such a broad-ranging reform is not obvious and no empirical studies exist to evaluate the matter.<sup>106</sup> It is possible, of course, to design a targeted fee-shift rule that taxes the loser only when summary judgment issues with a judicial finding that the untriable claim or defense involved was filed to extract a nuisance-value settlement. But even if substantial risk of error could be eliminated (a very doubtful result), such a targeted fee-shift rule would entail high litigation costs and create potential for abuse. MSJ presents no such problems.

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<sup>105</sup> Some settlement payoff might be extracted if determining reasonable fees to shift is itself a costly and error-prone process.

<sup>106</sup> Theoretical analysis suggests that the social desirability of fee-shifting is largely indeterminate. Cf. STEVEN SHAVELL, *Basic Theory of Litigation*, FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW (forthcoming 2004).