SOLVING THE NUISANCE-VALUE SETTLEMENT PROBLEM: MANDATORY SUMMARY JUDGMENT

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INTRODUCTION

CIVIL litigants often exploit the litigation process strategically for private gain at the expense of social welfare. One of the most troubling abuses concerns "frivolous" litigation, and particularly litigation aimed at obtaining a "nuisance-value settlement." To employ a nuisance-value strategy, a litigant asserts a plainly meritless claim or defense in order to extract a payoff based on the cost the other party would incur to have the claim or defense dismissed by the court under a standard dispositive motion, like summary judgment.[1]

[1] The problem of litigation aimed at obtaining a nuisance-value settlement has long concerned legal policy makers and analysts, though seemingly never more so than in recent years. This is evident from the substantial amount of current commentary propounding a variety of analytic explanations and empirical assessments of, along with possible solutions to, the problem. See, e.g., Janet Cooper Alexander, Do the Merits Matter? A Study of Settlements in Securities Class Actions, 43 Stan. L. Rev. 497 (1991); Lucian Arye 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 Arye Bebchuk, A New Theory Concerning the Credibility and Success of Threats to Sue, 25 J. Legal Stud. 1 (1996) [hereinafter Bebchuk, A New Theory]; Lucian Arye Bebchuk, Suing Solely to Extract a Settlement Offer, 17 J. Legal Stud. 437 (1988) [hereinafter Bebchuk, Suing Solely]; 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, Lawsuit Abandonment Options in Possibly Frivolous Litigation Games, 23 Rev. Litig. 47 (2004); 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. 1156 (2002); Michael J. Meurer, Controlling Opportunistic and Anti-Competitive Intellectual Property Litigation, 44 B.C. L. Rev. 509 (2003); Jonathan T. Molot, How U.S. Procedure Skews Tort Law In-

It might seem puzzling that a fully informed, rational litigant confronted by such an obvious ploy would settle instead of seeking dismissal on summary judgment, or that the proponent of the nuisance-value strategy would fail to anticipate the certainty of dismissal and refrain from going forward in the first place. Yet, however legally untenable the claim or defense may be, a nuisance-value strategy can be profitable when it costs less to initiate the claim or defense than it does to seek its dismissal. 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 "untriable" or otherwise legally untenable on an applicable dispositive motion for merits review, like a motion for summary judgment.[2] 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.[3] The result-

centives, 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). For a survey of the economic literature, see Eric Rasmusen, Nuisance Suits, *in* 2 The New Palgrave Dictionary of Economics and the Law 690 (Peter Newman ed., 1988).

[2] 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 before or after the close of jury trial).

[3] Cf., e.g., Laurino v. Syringa Gen. Hosp., 279 F.3d 750, 758 (9th Cir. 2002) (Kozinski, J., dissenting) ("By paying a $150 filing fee (and then sitting back), plaintiff launched a lawsuit that dragged on for over thirteen months and caused defendants to spend over $10,000, not including the time they spent on the rule 60(b) motion, the motion for reconsideration or this appeal.").

How big is the problem of nuisance-value litigation? Reported instances of abuse abound. See, e.g., Burlington Indus. v. Dayco Corp., 849 F.2d 1418, 1422 (Fed. Cir. 1988) (characterizing the frequent filing of groundless charges of inequitable conduct in patent cases as an "absolute plague"); Restatement (Second) of Contracts § 176 cmt. d (listing cases refusing enforcement of settlement agreements in frivolous suits on grounds of duress); Barry F. McNeil & Beth L. Fancsali, Mass Torts and Class Actions: Facing Increased Scrutiny, 167 F.R.D. 483 (1996)

ing 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.[4] Further, the prospect of such settlements distorts 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"[5] processes or goods—litigation

(asserting that defendants in the asbestos litigation are being pressured by high litigation costs to settle non-meritorious claims in both separate and class action contexts); Jonathan D. Glater, California Says State Law Was Used as Extortion Tool, N.Y. Times, Apr. 5, 2003, at A8 (discussing a California law firm alleged to have filed lawsuits against "thousands of small businesses" to extract nuisance-value settlements). This experience has prompted calls for stronger judicial and regulatory efforts to deal with the nuisance-value settlement problem. See, e.g., Warren E. Burger, Annual Report on the State of the Judiciary–1980, 66 A.B.A. J. 295, 296 (1980) (focusing attention of trial judges on problem of frivolous litigation). Notable recent responses include the 1983 and 1993 revisions of Federal Rule of Civil Procedure 11 and The Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1–78u-5 (2000).

Despite the general consensus that a problem exists, there is a paucity of empirical research substantiating its extent. Notably, the field of securities litigation has yielded studies of both class and separate actions. See, e.g., Roberta Romano, The Shareholder Suit: Litigation without Foundation?, 7 J.L. Econ. & Org. 55 (1991); Eric Helland, A Secondary Market Test of the Merits of Class Action Securities Litigation: Evidence from the Reputation of Corporate Directors, (Contracting and Organizations Research Institute, Working Paper No. 2004-05, 2004), at http://ssrn.com/abstract=517183 (on file with the Virginia Law Review Association). Separate action studies have also explored the realm of medical malpractice. See Paul C. Weiler et al., A Measure of Malpractice: Medical Injury, Malpractice Litigation, and Patient Compensation 42, 70 (1993) (finding that while relatively few actual cases of medical malpractice result in claims, over eighty percent of the claims filed are in fact meritless); Troyen A. Brennan et al., Relation Between Negligent Adverse Events and the Outcomes of Medical-Malpractice Litigation, 335 New Eng. J. Med. 1963, 1964, 1966 (1996) (reporting positive settlement payoffs in forty percent of the meritless cases filed).

[4] See, e.g., Wade, supra note 1, at 433 ("The person against whom the groundless suit is brought is subjected to serious harassment and inconvenience, pecuniary loss through necessary attorney's fees, deprival of time from his business or profession, and, in some cases, harm to reputation and even physical damage to person or property.").

[5] By "mass production" cases, we refer to civil liability actions against businesses, governments, or other institutions arising from their mass production processes, products, and services. Mass production methods entail exposing some population, often a large one, to systematic risks endangering person, property, economic, and other interests, and conditions affecting individual well-being. Thus, in mass production cases, the potential defendants are usually capable of shaping their risk-taking decisions in light of expected civil liability—including the expected costs of

that constitutes a large share of civil dockets across the country and that is well suited for class action treatment.[6]

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 model a solution adaptable to both contexts: 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.[7] 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 incentive to employ them.

Class action has come under increasing criticism by courts and commentators for exacerbating the nuisance-value settlement problem—and for doing so to the systematic disadvantage of de-

nuisance-value claims and taking into account the expected benefits of asserting their own nuisance-value defenses.

[6] See David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 Harv. L. Rev. 831, 833–34 (2002).

[7] "Merits review" contemplates the level of judicial scrutiny generally prescribed for summary judgment to test whether the asserted claims and defenses are legally tenable—that is, whether they should be dismissed for lack of some minimum basis in law or fact. For convenience, we use "triable" and "untriable" to distinguish between those claims and defenses that would and would not survive merits review on summary judgment or other standard dispositive motion. Cf. 10A Charles Alan Wright et al., Federal Practice and Procedure: Civil § 2712 (3d ed. 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 fact. 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 or to support imposing the consequences of final judgment.

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," "Liability Crisis," and Efficiency Clichés Eroding Our Day in Court and Jury Trial Commitments?, 78 N.Y.U. L. Rev. 982, 1062–71 (2003).

fendants. Indeed, concern about nuisance-value class settlement contributes to growing support for subjecting class actions to precertification merits review ("PCMR"), which is generally understood as an apparatus for conditioning class certification on prior screening of class claims for some threshold level of merit (or triability).[8] 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 of 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 I by illustrating the mechanism of nuisance-value strategies in both the separate action and class action contexts. In Part II, we articulate and develop the MSJ model, 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-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. In Part III, we turn to the specific theoretical considerations underlying nuisance-value strategies in class actions. Our analysis shows that, contrary to popular belief, class actions do not create special, systematic nuisance-value settlement problems. Rather, they are properly understood as representing a point on a continuum of litigation that ranges from one-on-one separate actions to comprehensive class actions. We also offer a critical analysis of PCMR as well as a comparison of the efficacy of PCMR (and of analog mechanisms in non-class action contexts for prelitigation or other ex ante merits screening) and MSJ at thwarting nuisance-value strategies. The Conclusion distinguishes the nuisance-value problem from both the "blackmail" and "negative expected value" settlement problems, and gives brief consideration to the potential

[8] See infra notes 69–73.

use of sanctions or fee-shifting to solve the nuisance-value settlement problem.[9]

I. 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 into not only the magnitude of the problem (as well as the contribution of class action to it), but also the design and effectiveness of the MSJ solution.

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

[9] 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. L. & Econ. 3 (1985). Confining "nuisance-value settlement" to claims and defenses that are untriable distinguishes our project from those seeking to explain why claims that have some (usually, though not necessarily, 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. at 3 (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 Bebchuk, Suing Solely, supra note 1, at 437–38 (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 the greater cost of sorting the viable from unviable actions); Bebchuk, A New Theory, supra note 1, at 4 (explaining that a defendant rationally will 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 last, 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). For a similar "sunk cost" model, see David C. Croson & Robert H. Mnookin, Scaling the Stonewall: Retaining Lawyers to Bolster Credibility, 1 Harv. Negot. L. Rev. 65 (1996). Cf. Bone, supra note 1, at 523 (developing a model in which defendants find it too costly to detect frivolous claims through discovery and plaintiffs exploit this predicament by filing suit without prior reasonable investigation of the merits).

differential favoring the party initiating the litigation sequence. By "sequential litigation process," we mean a process that is initiated by one party and that thereby automatically subjects the other party to the burden of responding or enduring the cost of defaulting.[10] 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.[11] We focus our analysis on a particularly significant—and perhaps the *most* significant—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 example, 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 proceed at a cost lower than the opposing party's cost of responding by, for example, moving 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, 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.[12] Once the trial process has begun,

[10] We assume throughout this Article that the cost of invoking summary judgment to defeat the claim or defense is lower than the cost of defaulting on the claim or defense by, for example, simply not contesting a claim and thereby incurring default judgment, other sanctions, or the costs and risks of trial.

[11] See Fed. R. Civ. P. 26 (on discovery generally); Fed. R. Civ. P. 37 (on discovery sanctions). The responding party also has the option of complying in part, or of objecting and putting the burden of initiating enforcement proceedings on the party seeking discovery.

[12] Of course, there are some limitations, in the form of legal as well as reputational and other extralegal sanctions, on the nuisance-value claims and defenses that liti-

opportunities for nuisance-value strategies continue to emerge on both sides of the litigation.[13] 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 his or her settlement demand by some amount up to the cost of overcoming the defense, regardless of the defense's merit. In this way, the differential costs of the sequential litigation process can give rise to numerous possibilities for deploying, as well as deflecting,[14] 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.[15] Thus, there is a range for settlement regardless of the

gants can assert. The prospects for imposition and effectiveness of legal sanctions are discussed in the Conclusion.

[13] Anticipating plaintiff's nuisance-value strategy, the defendant may well agree to settle and make the payoff before suit is filed. Settlement agreements reached prior to the filing of a suit take into account the expected outcomes of litigation, including 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.

[14] This recognition becomes particularly important when analyzing the net contribution of class action certification to the nuisance-value settlement problem. See infra Part III.

[15] The incentive to press a nuisance-value claim or defense obviously depends on counsel's willingness to breach professional and other formal prohibitions as well as informal, yet strongly engrained personal inhibitions against employing abusive litigation tactics. Moreover, the actual payoff amount would reflect the parties' relative litigation costs and bargaining power.

Another significant factor affecting resort and submission to nuisance-value strategies involves 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 in product, financial, insurance, and litigation markets. 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

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 pressed to judicial decision on a motion to dismiss or strike. If it cost the defendant $100 to raise the defense and the plaintiff $500 to prepare and litigate sufficiently to have the defense dismissed,[16] the plaintiff rationally 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 absence of class action favors defen-

from filing nuisance-value suits. See Rosenberg & Shavell, supra note 9, at 10. Similarly, a plaintiff's lawyer might want to establish a reputation for relentlessly pressing uneconomical claims to trial to undermine defendants' hardball stances. While the specific mechanism and effects of such external reputational and relational interests lie outside the scope of this Article, we note the empirical significance of these interests in gauging a party's incentives to resist or press a nuisance-value strategy and in evaluating the relative overall cost-effectiveness of MSJ. The central point is that MSJ does not create or magnify these interests; they would exist and operate regardless of MSJ. Thus, MSJ does not affect a party's existing commitment to preempt nuisance-value strategies by waging "hardball" litigation. If, however, establishing and maintaining a reputation for waging uncompromising "hardball" litigation can prove costly, then one of the principal benefits of MSJ is that it relieves a party of this burden. MSJ provides a supplementary formal remedy that automatically preempts nuisance-value settlement strategies regardless of a party's capacity to engage in self-help.

While long-term external interests can fortify the credibility of a party's threat of summary judgment to oust a nuisance-value claim or defense, such interests can also have the opposite effect. Indeed, they can operate to undermine MSJ, despite its cost-effectiveness in class actions or any given type of separate action. Thus, we note that like any formal rule, MSJ might be circumvented by secretive side-deals, which, though legally prohibited and unenforceable, the parties nevertheless may have a long-term external interest in performing.

[16] This scenario assumes that the cost of ignoring the defense, suffering dismissal, and refiling the claim would exceed $500.

dants.[17] 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 to avoid duplicative costs and increase the productivity of their investments—reducing the cost and raising the quality of representation—in litigating common questions.

Optimally, the class of plaintiffs makes a once-and-for-all investment in common questions of fact and law. Class action scale economies, then, lower the plaintiffs' costs of initiating the sequential litigation process. This lowering of costs increases the differential between the plaintiffs' costs of filing suit and the defendant's cost of ousting the suit on summary judgment. The widened cost differential, in turn, creates a larger range of available values for the parties to strike a nuisance-value settlement.

Continuing with our example, imagine that instead of just one plaintiff claiming harm, there are 100 consumers who assert 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, 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 suit. The nuisance-value strategy would become profitable, however, 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.[18] Assuming that the defendant's per-claim cost to invoke summary judgment remained unchanged in a class action,[19] there would be a nuisance-value class settlement range of up to $50,000 (100 x $500 per claim to

[17] The device might also alter the nuisance-value strategies available to defendants. This point is discussed in Part III, infra. Our analysis applies fully to defendant class actions.

[18] Of course, in current 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 our analysis.

[19] This assumption is discussed and relaxed in Part II, infra.

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 wide range for nuisance-value settlement.[20]

II. 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. As a practical matter, however, 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.

Our MSJ model provides the necessary precommitment device to render indubitably credible a party's threat to invoke summary judgment. It accomplishes this 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).[21]

[20] 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.

[21] More specifically, the party would expressly designate on the filed motion that it was being submitted to satisfy MSJ requirements. It is, as noted above, solely within the party's discretion (bounded by the prevailing rules and practice in the jurisdiction) to decide whether and when to file such an MSJ-designated dispositive motion. Moreover, the party retains the usual degree of discretion over the use of dispositive

This Section explains the operation of MSJ and its benefits in deterring parties from employing nuisance-value strategies. We begin with the class action context, which, due to the fact that class settlements generally require judicial approval,[22] 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 settlement agreements (unless, of course, some dispute arises over performance of terms). Finally, we consider possible strategies litigants might employ to try to evade MSJ safeguards.

1. MSJ in the Class Action Context

By barring enforcement of any class settlement agreement entered into prior to the filing of a motion for summary judgment, MSJ negates the defendant's motive to make, and, therefore, the plaintiffs' ability to extract, a nuisance-value payoff.[23] 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

motions generally. To the extent otherwise permitted, the party is free to pursue his or her litigation objectives through multiple filings of dispositive motions, including summary judgment. These filings may be made not only prior to submission of the MSJ-designated motion, but also afterward, as filing the MSJ-designated dispositive motion merely authorizes but does not compel the parties to enter into a legally enforceable settlement agreement. In Section II.B.3, we propose and analyze a version of MSJ that does not require filing a motion for summary judgment, but rather includes the option of simply filing a waiver of summary judgment.

[22] See Fed. R. Civ. P. 23(e) (requiring court approval of class action settlement agreements); cf. Richard A. 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.").

[23] 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).

existing requirement of judicial approval for class action settlements).[24]

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 entering into a legally enforceable settlement agreement prior to submission of its MSJ-designated motion for 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 spending $10,000 to win 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 adopting a nuisance-value strategy.

2. MSJ in the Separate Action Context

Unlike class actions, disputes litigated in the separate action context customarily do not require judicial approval as a prerequisite for entering into an enforceable settlement agreement.[25] Indeed, a

[24] Our discussion is framed in terms of federal class actions certified pursuant to Rule 23 of the Federal Rules of Civil Procedure.

[25] Factors explaining this difference between class actions and separate actions include habitual practice, the fact that separate action suits usually 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. Judicial review is available ex post,

large number of disputes that have the potential to become separate action lawsuits are settled before any kind of formal litigation is initiated. Slightly adapted to reflect 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 pre-suit settlement, MSJ would allow enforcement of pre-suit agreements if no litigation had begun. Once litigation commences, however, 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.[26] Yet MSJ remains a fully effective means of deterring nuisance-value suits. Because MSJ automatically applies to bar enforcement of a settlement agreement if and when suit is commenced, the opponent of a pre-suit demand for a nuisance-value payoff can costlessly and credibly reject it 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 in damages 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

however, in those cases in which dispute over settlement performance arises or more generally when courts refuse to enforce agreements settling frivolous litigation on grounds of duress. See John Dawson, Duress Through Civil Litigation, 45 Mich. L. Rev. 571, 579 (1947).

[26] See Kong-Pin Chen et al., Sequential Versus Unitary Trials with Asymmetric Information, 26 J. Legal Stud. 239, 248 (1997) (discussing cost savings of pre-suit settlements).

was in the class action context; that is, the defendant would be forced to move for summary judgment before it could enter into a legally 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.[27]

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 circumventing the MSJ requirement of submitting the case in question for merits review.

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 pursuant to 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 terms.[28] The parties may well

[27] This result follows even if the potential plaintiff could credibly demonstrate having pre-committed $100 to pay for filing the nuisance-value claim. For example, he or she might hire a lawyer on an irrevocable $100 retainer with instructions to file the claim upon telephone authorization by the client. As such, the potential plaintiff would have "sunk" the cost of nuisance-value litigation and created a no-cost mechanism for initiating suit to set up a demand for a pre-suit payoff. Nevertheless, the potential defendant could treat the demand for a payoff as based on an empty threat to sue, for the simple reason that filing suit triggers the MSJ bar against entering into an enforceable settlement agreement. In other words, filing suit may force the defendant to pay for obtaining summary judgment, but the strategy will not profit the plaintiff; indeed, post-filing burden and expense over and above those costs already sunk makes the gambit a losing proposition. Therefore, in the absence of some extra-suit motivation, such as maliciously harming the defendant or establishing a reputation for pressing doomed claims, MSJ would deter potential plaintiffs from adopting such a "sunk cost" strategy.

[28] Whether "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, attempts to

have incentives to pursue such a strategy—so long, of course, as the costs of throwing do not exceed the potential profit to the parties from reaching 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. If the defendant were to choose the latter option, it 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 or separate action litigants would actually throw summary judgment,[29] 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 evasion 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 (that is, judgment as a matter of law) following the close of the plaintiff's prima facie case at trial.[30]

evade MSJ would be unsuccessful due to the incentives set up by the unenforceability of pre-summary judgment agreements.

[29] 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).

[30] See Fed. R. Civ. P. 50(a).

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,[31] one or both parties would have incentive to defect from the pre-summary judgment agreement. Because the incentives to defect are constrained only by voluntary compliance—which is to say, hardly constrained at all—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 to evade MSJ through unenforceable agreements would be foreclosed.

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

[31] 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 judgment," the solution we propose does not dictate when, or even whether, a party should 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 MSJ-designated 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.

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 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 Section, assume that the parties reach an agreement to evade MSJ. The agreement 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[32] and giving the plaintiff a total payoff of $7000 on its initial investment of $5000 to file the claim (for a net gain of $2000). 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,[33] with the inevitable result being that at the close of the plaintiff's case the court would direct a 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 was less than

[32] This amount is $500 less than the $10,000 it would have cost the defendant to oust the claim on summary judgment.

[33] 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, including the cost of throwing summary judgment, would be $14,500.

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 was 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.[34]

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 an incentive to defect from a pre-summary judgment agreement. Again assume that the parties enter the same pre-summary judgment 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. 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 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 judg-

[34] We offer our analysis of this scenario for completeness in demonstrating the ability of MSJ to thwart attempts at evasion. It should be noted, however, 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.

ment 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.[35] Foreseeing this result, the defendant would "preemptively" defect from its agreement with the plaintiff by investing $10,000 to oust the class claim at the summary judgment stage.[36] 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.[37]

Finally, for MSJ to retain its full effectiveness against an evasion strategy, the formal, MSJ-designated filing for summary judgment must be deemed complete, unconditional, and irrevocable. Otherwise, MSJ would be vulnerable to a modified evasion strategy when post-summary judgment cost differentials favor the party seeking the nuisance-value payoff. Although throwing

[35] 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. 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 of spending the initial $5000.

[36] To save on bargaining costs, the defendant rationally would reject any settlement offer and choose to file for summary judgment.

[37] These evasion examples, like most of the others we develop throughout this Article, assume that both parties have full information about their own and their adversary's costs of litigation. Obviously this makes for stylized examples, but the analytical conclusions are applicable to the real world of litigation. For our analysis of the effectiveness of MSJ, all that counts is the fact that the parties are willing to settle based on whatever information about relative costs they have. In other words, the quality and symmetry of the parties' information do not affect the mechanism of MSJ.

Erroneous cost-estimates may, however, affect the need for and utility of MSJ. Mistaken calculations will either render MSJ unnecessary, as in the case of the party contemplating pursuit of the nuisance-value strategy substantially under- or overestimating the opponent's cost of summary judgment, or will reinforce the conditions for nuisance-value settlement and consequently the benefits from using MSJ. Similarly, the parties' imperfect or even significantly erroneous cost estimates have no bearing on our analysis of the evasion strategy. If, for example, the proponent of a nuisance-value strategy mistakenly concludes that its post-summary judgment costs are greater than its opponent's costs, it will predict opponent defection and not pursue the strategy. And, if the proponent mistakenly concludes that its post-summary judgment costs are lower than its opponent's costs, it will reject any (unenforceable) pre-summary judgment deal. Indeed, the parties' "moves" signal their assumptions.

summary judgment could, 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, thus reinstating the MSJ barrier. Revocation or supplementation, however, 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. And given the possibility of revocation, the plaintiff would not defect.

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 has the option of throwing summary judgment to gain MSJ authorization for an enforceable 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 would 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 of either 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 then settling the case for some amount less than $10,000, the defendant would choose the latter

course of action. Irrevocability of the summary judgment filing forecloses this game.[38]

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, MSJ may add expense to settling potentially triable cases—cases in which none of the claims or defenses is motivated by a nuisance-value strategy. In this Section, we begin by considering the potential for additional costs stemming from the use of MSJ in the class action context. We then broaden our analysis to examine the costs that MSJ may add if deployed in the conventional separate action process. We conclude first that MSJ generally would add no significant costs to settling non-nuisance-value class actions. This conclusion is based in significant part on the fact that the current standards for judicial approval of class settlements entail at least the same, and oftentimes far more extensive expenditures and substantive analyses to evaluate the merits of the class claim relative to the showing that would be required by MSJ. Second, we conclude that MSJ may 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 the MSJ-designated dispositive motion and supporting documents. Gen-

[38] Moreover, MSJ can readily be designed to thwart an evasion arrangement under which the proponent of the nuisance-value strategy would, in return for the promise of payoff, withdraw or withhold the meritless claim or defense as a ruse to make summary judgment appear unnecessary. MSJ could block the withdrawal ploy by requiring submission of summary judgment or withdrawal of the defense or claim with prejudice prior to allowing the parties to enter into an enforceable settlement agreement. Evasion by withholding a meritless claim or defense could operate through settlement early on in the litigation, before completion of the pleading stage. This strategy might also be employed when the rules of procedure allow a party to delay raising a specific type of claim or defense until the latter stages of litigation. For example, under Federal Rules of Civil Procedure 12(b) and (h), the defense of failure to state a claim upon which relief can be granted need not be made until trial. To preempt evasion by the parties arranging a payoff for withholding a meritless claim or defense, MSJ would simply require, as a condition for entering into an enforceable settlement agreement, prior submission of summary judgment or waiver with prejudice of any previously unasserted claim or defense.

erally, the preparatory work will be done in any event, independently of satisfying MSJ, because the parties' readiness to settle is normally preceded by lawyers conducting relatively extensive investigation and discovery, appraising the results in consultation with experts, and testing the merits and value of the case on one or more dispositive motions. Finally, we assess the cost-saving option of basing MSJ on waiver of summary judgment.

1. Cost 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 disrupt normal pretrial processes and bargaining. 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 them 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 MSJ-designated merits review on a motion to dismiss.[39] And they can reduce the expenses of summary judgment submissions through the use of stipulations, admissions, and other joint or coordinated filings.[40] Cooperative efforts like these can be used to preserve the

[39] See Fed. R. Civ. P. 12(b); see also Thomas E. Willging et al., An Empirical Analysis of Rule 23 to Address the Rulemaking Challenges, 71 N.Y.U. L. Rev. 74, 111–12 (1996) (reporting data on expeditious review of class claims by summary judgment).

[40] 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 often require the parties to stipulate their respective positions as to which of the alleged facts each considers contested and material. See, e.g., 1 Federal Litigation Guide § 5.12; see also Fed. R. Civ. P. 36 (governing the use of requests for admissions); cf. D.D.C. Civ. R. 16.5(d)(1) (recognizing the ability of adverse parties to stipulate agreed upon facts); 11 James Wm. Moore et al., Moore's Federal Practice § 56.14[2][d] (3d ed. 2004) (discussing admissions and stipulations for purposes of summary judgment). In addi-

parties' respective positions on the questions posed for summary judgment while enhancing the efficiency of their attempts to settle the case by reducing the costs of strategic adversarial posturing and ploys, such as inundating the record with superfluous or misleading documents and arguments that serve only to burden and distract the opponent.

There are two other features of class action practice that render the possibility of MSJ adding substantial cost virtually nil. First, parties generally reach class settlement only after conducting extensive discovery, which in turn is often followed by litigation and judicial determinations of motions (and cross-motions) for summary judgment.[41]

A second, independent reason is that 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.[42] The cost of drafting and submitting the motion for summary judgment is likely to be virtually subsumed in preparation of the motion papers presenting the class settlement for judicial evaluation of whether it is "fair, adequate, and reasonable."[43] Such scrutiny of

tion, Federal Rules of Civil Procedure 16 and 26 promote accelerated disposition of the case. Pursuant to these provisions, courts require the parties to confer and reach agreement early on to specify the uncontested areas of fact and law so as to avoid unnecessary discovery and dispute and to frame what remains in terms of questions amenable to resolution by summary judgment.

[41] According to the available data, a large number of class actions (as well as separate actions) involve relatively extensive formal and informal discovery and other pretrial litigation that sets the stage for judicial resolution on dispositive motion or settlement. See Willging et al., supra note 39, at 105–12; see also Janet Cooper Alexander, Rethinking Damages in Securities Class Actions, 48 Stan. L. Rev. 1487, 1496 (1996) (noting the "amazingly high litigation costs" that often occur even with cases that settle in the securities litigation context).

[42] See Fed. R. Civ. P. 23(e). For particularly significant Supreme Court opinions striking down settlement agreements as impermissible, see, for example, *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), and *Amchem Products v. Windsor*, 521 U.S. 591 (1997).

[43] "Fair, adequate, and reasonable" 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 827. See also 7B Charles Alan Wright et al., Federal Practice and Procedure § 1797.1 (2d ed. 1986). The amended Rule 23 includes a variation of this phrase. See Fed. R. Civ. P. 23(e)(1)(C) (amended 2003) ("The court may approve a settlement, voluntary dismissal, or compromise that would bind class members only after a

proposed class settlements entails a merits-review process that is in principle—and frequently in practice—more demanding than summary judgment, both for courts and for party-proponents.[44] Indeed, review of class settlement agreements necessarily goes beyond the summary judgment question whether the class claim presents legally material triable questions of fact by requiring counsel to assess the probable trial outcome, or even to derive expected judgment baselines for comparative valuation of class settlement terms.[45]

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hearing and on finding that the settlement, voluntary dismissal, or compromise is fair, reasonable, and adequate.").

[44] When 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.

Geoffrey P. Miller, Competing Bids in Class Action Settlements, 31 Hofstra L. Rev. 633, 635 (2003).

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 *Reynolds v. Beneficial National Bank*, 288 F.3d 277, 283–86 (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"); and *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").

[45] 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 estimate the value of the class through "[s]ome approximate range of percentages, reflecting the probability of obtaining each of these [four] outcomes in a trial (more likely a series of trials)"). For a similar account, see *Mirfasihi v. Fleet Mortgage Corp.*, 356 F.3d 781, 786 (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. As is the case with Federal Rule of Civil Procedure 11 and other devices for detecting and sanctioning frivolous litigation ex post, it is doubtful that courts could effectively carry out their Rule 23(e) monitoring functions, especially in the face of party dissembling, because

2. Cost of MSJ in the Separate Action Process

In contrast to the class action context, the application of MSJ in the conventional separate action context creates some appreciable potential of adding to the cost and burden of settling non-nuisance-value claims. Still, MSJ may add little or no significant litigation costs in many cases. Indeed, a sizable number of separate actions involve extensive litigation, including discovery and dispositive motions, before resolution by a ruling on dispositive motion or by settlement.[46] Moreover, the parties to separate actions can hasten merits-review submission to the pleadings stage by converting the complaint into a motion for summary judgment.[47] They can reduce settlement costs through the use of stipulations and other joint or coordinated preparation.[48] All of these factors serve to limit the costs that MSJ may add to the settlement of non-nuisance-value claims.

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of difficulties in distinguishing nuisance-value payoffs from reasonable settlements of cases that simply happen to have a low probability of surviving summary judgment.

Further, efforts to police against nuisance-value settlements pursuant to Rule 23(e) review authority would be vulnerable to the evasion strategy discussed in Section II.A.3. To foreclose evasion, Rule 23(e) review would require the implementation of something like MSJ's precommitment device—a device compelling the parties to submit the case on summary judgment as a precondition to entering into an enforceable settlement agreement capable of surviving Rule 23(e) review. Summary judgment and "fairness" review can take place in a single proceeding, but preventing the evasion strategy requires some short period of time separating the two phases to allow for defection that would preempt a deal to throw summary judgment.

[46] Professor Miller concludes that "increased use of summary judgment has become marked," noting the widespread federal practice of judges employing Federal Rule of Civil Procedure 16, providing case management authority, to effectively implement summary judgment merits review sua sponte. Miller, supra note 7, at 1006, 1052, 1055–56 (observing that federal courts increasingly rely on Rule 16 and broadened warrant for summary judgment to 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. at 1006. Cf. Alexander, supra note 1, at 524–25 (reporting estimates that judicial decisions on motions to dismiss or for summary judgment resolve a large fraction of civil cases, perhaps as high as 35%).

[47] See Fed. R. Civ. P. 12(c).

[48] See supra note 40.

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.[49] 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 raises the possibility of MSJ devaluing, or even rendering unmarketable, some claims or defenses.

Ultimately, the aggregate social welfare consequences of adopting MSJ for separate actions are indeterminate. Whether applying MSJ in the separate action context produces a net benefit depends on the magnitude of the nuisance-value settlement problem and on the relative cost-effectiveness of alternative means to solve it.[50]

3. MSJ Based on Summary Judgment Waiver

In this Section, 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

[49] 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 falls outside the scope of this Article.

[50] See generally Part III and the Conclusion. The most likely candidates for fruitful investigation into the net benefit of using MSJ are those types of litigation about which legislatures and courts have evinced special, heightened concern regarding the risk of nuisance-value settlements and "strike suits." A notable example is medical malpractice litigation. See, e.g., Thomas B. Metzloff, Researching Litigation: The Medical Malpractice Example, 51 Law & Contemp. Probs. 199, 199–200 (1988). Derivative and other non-class action securities litigation offer another example. The heavy-duty combination of ex ante and ex post merits-screening devices that Congress has recently put in place under the Private Securities Litigation Reform Act, 15 U.S.C. §§ 77z-1–78u-5 (2000), to deter nuisance-value litigation has raised questions about excessive deterrence and cost. See Stephen J. Choi, Do the Merits Matter *Less* After the Private Securities Litigation Reform Act? 40 (Public Law & Legal Theory Research Series, Research Paper No. 558285, 2004), at http://ssrn.com/abstract=558285 (on file with the Virginia Law Review Association) (detecting evidence of overdeterrence). This potential for over-deterrence and high cost warrants investigating MSJ as a viable replacement for some or all of the existing regulations.

the potential costs of settling non-nuisance-value cases while retaining all the benefits of MSJ.[51]

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[52] 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 waives summary judgment would face the same voluntary compliance problem discussed above: 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 to exploit the defendant's relinquishing of 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 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

[51] 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.

[52] See supra Section II.A.3.

class claim for standard, post-summary judgment merits review. 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. Rather, the cancellation option is operational only in non-nuisance-value suits where the settlement demand would reflect the parties' relative expected costs and benefits from litigation to final judgment. In such a suit, 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 being resolved through 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 proceed no further than the exchange of pleadings.[53]

Despite its systematic cost-effectiveness, however, 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 when the parties have markedly different estimates of the expected judgment, they will be driven to common ground by the desire to avoid the costs of trial. But the resistance to trial, combined with the parties' adversarial stance 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.

[53] 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).

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: that is, 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 situations. In many cases, the ploy promises no profit because it would impose otherwise avoidable litigation costs and consequently diminish the parties' mutual gain from settlement, if and when settlement were to occur.[54]

III. NUISANCE-VALUE CLASS SETTLEMENT: ASSESSMENT OF THE PROBLEM AND MSJ VERSUS PCMR AS SOLUTIONS

Even though separate actions present numerous opportunities for nuisance-value strategies, courts and commentators seem most troubled by the prospect of nuisance-value settlement of class actions.[55] The view that class action poses a special problem, however, generally is not based on any comparative assessment of the mechanism and magnitude of the nuisance-value problem in the class and separate action contexts. Rather, it is merely asserted 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 with meritless claims.[56] This concern has prompted increasingly insistent calls for a special solution, and, in particular,

[54] A possible comprehensive, virtually costless alternative to waiver of MSJ-designated summary judgment is simply to give a party the option of irrevocably waiving settlement—that is, of waiving the enforceability of any settlement agreement he or she may enter into to resolve the case. A party would elect this option only when the opposing litigant's claim or defense certainly would not survive summary judgment, or, if there were some positive probability of success on the merits, when the opposing litigant would withdraw the claim or defense in the face of prohibitive trial costs. We thank Steven Shavell for this idea.

[55] See sources cited infra note 90.

[56] 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.").

for use of one or another version of precertification merits review.[57] This Part assesses 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. It 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 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, our analysis shows 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 challenging claims that class action systematically vests the class with dominant bargaining power to extract nuisance-value payoffs from defendants. In fact, 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 a defendant's ability in the separate action process to treat groups of individual claims as part of a de facto class action. More generally, we argue that a systematic strategic edge in employing nuisance-value strategies correlates directly with litigation scale advantage. 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

[57] See, e.g., id at 570–73.

strategies is to transform mass production cases of asymmetric litigation scale into the more symmetric confrontations that characterize conventional, sporadic separate actions.

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 categorized according to the parties' relative opportunities to exploit litigation scale, ranging from "true" separate actions to formally certified comprehensive class actions. Focusing first on non-classed claims, we discuss three types of 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 of 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. We then 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.

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.[58] Such an action is "truly" separate, in that neither

[58] In fact, even in "sporadic" automobile cases involving two individual (non-commercial) drivers, the parties can exploit litigation scale derived from long-run 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 and relational as well as reputational interests, the litigation effort of both parties is often supported by the legal and financial resources of a major insurer (a liability insurer on the defendant's side, a subrogated insurer on the plaintiff's side) 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.

Having mentioned "repeat players," we distinguish our metric of litigation scale from the conventional view of the balance of litigation power. See Marc Galanter, Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change, 9

party (nor, we assume for analytic convenience, the parties' respective lawyers and insurers) is involved in any litigation similar to the given case that might allow for cost-spreading or other advantages stemming from litigation scale. Recall the general framework of the individual litigation example from Section I.A, and substitute the possibility of one driver in an automobile accident filing 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 make a nuisance-value demand of up to $5000. The defendant, though, may have nuisance-value opportunities of his or her own. To illustrate, recall the example from Section I.A 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 to the plaintiff to defeat it, then the plaintiff's settlement demand

Law & Soc'y Rev. 95 (1974). That view portrays a stark imbalance by focusing on the plaintiff as an individual with far less wealth than the defendant, who is typically a mass producer business or government. This depiction, however, is not only overdrawn in neglecting the lawyer and insurer repeat players on the plaintiff's side, but also analytically incomplete in failing to recognize that the balance of litigation power depends on the relative opportunity of the parties to exploit litigation scale. An asymmetry in this opportunity generally correlates with an asymmetry in the productivity of litigation investments; in other words, the advantaged side is in a position to reduce the overall cost and increase the overall quality of its litigation effort giving it a greater chance of winning.

Contrary to the conventional view, in the true separate action the parties' litigation power would be roughly equivalent because neither would have litigation scale to exploit. In mass production cases, however, the standard separate action process creates a structural bias against plaintiffs, primarily because the defendants have far greater opportunity to exploit litigation scale; indeed, they invest in developing common issues with the efficiency and effectiveness that only a mandatory class action could provide to plaintiffs. In a system relying on the adversary process, this asymmetry will distort outcomes, favoring defendants on average and undermining the deterrence and compensation objectives of civil liability. Class action changes the balance of litigation power because it enables plaintiffs to make their case by exploiting litigation scale with a degree of efficiency and effectiveness approaching that of mass producer defendants. See Rosenberg, supra note 6, at 847–53; Note, Locating Investment Asymmetries and Optimal Deterrence in the Class Action, 117 Harv. L. Rev. 2665 (2004).

would fall by some amount short of the plaintiff's cost of defeating the nuisance-value defense on a motion for summary judgment.

As illustrated by this 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 a truly separate action is likely to have advantages in litigation scale economies, both sides may engage in nuisance-value strategies to more or less offsetting effect, with any advantage determined by non-systematic, case-specific circumstances.[59]

2. Separate Actions in Mass Production Cases

A large amount 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, securities or consumer fraud, employment discrimination, and environmental contamination exemplify 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 (essentially as presenting common questions of fact and law). That is, the salient feature of these actions for present purposes is that the defendant effectively and automatically "aggregates" and exercises proprietary control over 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

[59] It is also possible that the 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 seems unlikely, as a basis for the parties to commit credibly to refraining from such behavior.

separate action process as if the defense interests in all similar claims were aggregated by mandatory class action into a de facto class.

In this Section, 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 can exploit scale economies by spreading its common defense costs across the plaintiffs' claims and otherwise increasing its defense 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.[60] 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 would persuade a court to render summary judgment dismissing any individual plaintiff's claim, then the defendant

[60] See supra Section I.A.

could avoid making any nuisance-value payoff. The defendant would realize that its scale economies allowed it to invest $5000 one time 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.[61] 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 to the plaintiffs from adopting a nuisance-value strategy. As such, no plaintiff would file such a claim in the first place.

While the defendant's 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. Indeed, the problem is a systematic one; defendants generally have litigation scale advantages that 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.

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

[61] Of course, this latter assumption is simplified for purposes of the example; in current practice, at least some of the defense costs would not be common, meaning that the defendant could not spread the entire $5000 across all actual and potential claims. Still, this consideration does not alter the conclusions stemming from our analysis.

$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.[62] 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.[63] Such fractional aggregation of claims enables plaintiffs to bring about a favorable change in the "litigation units ratio"—the ratio of independently prosecuted claims ("claim units") to independently asserted defenses ("defense units").[64] The litigation units ratio represents the defendant's

[62] See Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 Notre Dame L. Rev. 1377, 1387 (2000).

[63] 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 7, at 1002 (discussing the Multiparty, Multiforum Trial Jurisdiction Act). Statewide (as opposed to national) class actions also result in fractional aggregation. Informal measures can include anything from structured training workshops for plaintiffs' 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.

[64] "Litigation unit" refers to the number of mass production claims or defenses that are litigated independently as a functional matter, 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.

relative investment advantages that result from litigation scale economies. The greater the litigation units ratio—that is, the greater the number of claim units relative to each defense unit—the greater the defendant's investment advantage over plaintiffs 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 at 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 potential for defendants to employ nuisance-value strategies systematically against plaintiffs. 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 lowers the number of claim units and thereby lowers the litigation units ratio, the defendant's ability to employ nuisance-value strategies is reduced.[65]

A few numerical examples will help to explain this analysis. Returning to the example set out above, suppose that 20 competing

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. 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 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 are left with 10 claim units, and the ratio of defendant's advantage from litigation scale will be 10:1.

[65] The relative decrease in the number and dispersion of claims therefore serves as a useful proxy for litigation scale benefits from fractional aggregation.

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 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 claims market, the defendant's nuisance-value strategy remains 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 providing it with a positive return from its employment of a nuisance-value strategy. The key consideration is that, despite the increased concentration of *claims* into a given 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.[66] 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 the example only when the number of claim units is reduced to 10

[66] Claim aggregation produces benefits from litigation scale apart from simply diluting defendant's nuisance-value incentives. See Rosenberg, supra note 6, at 840–66; see also Locating Investment Asymmetries and Optimal Deterrence in the Mass Tort Class Action, supra note 58. Accordingly, a group of plaintiffs with a large number of claims in their claim unit is in better shape than a group with fewer claims. This difference is based on the plaintiffs' greater opportunities to exploit litigation scale.

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 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.[67]

Fractional claim aggregation also functions to alter nuisance-value strategy dynamics by providing plaintiffs with more opportunities to profit from *offensive* 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 action, 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 maximum payoff of $10,000, so the plaintiffs would not initiate these claims.

If there were substantial aggregation of claims into a small number of claim units, however, 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.

[67] In reality, litigation scale and corresponding nuisance-value opportunities are continuous (subject to diminishing marginal returns) rather than discontinuous as represented in the example. Consequently, only a 1:1 litigation unit ratio would nullify a mass producer defendant's advantage in resorting to nuisance-value tactics.

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 advantage determined largely by nonsystematic circumstances of particular mass production cases.[68]

When the class action is viewed as part of a continuum of litigation processes, its contribution 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.

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 designed to solve it, we now compare MSJ with precertification merits review as potential solutions for cost-effectively addressing the nuisance-value class settlement problem. Though its validity as a purely judicial

[68] See supra Section III.A.1.

creation remains questionable in the federal system,[69] PCMR has been gaining support in recent years from influential commentators[70] and federal appellate courts[71] alike. While PCMR responds to

[69] In *Eisen v. Carlisle & Jacquelin*, the Supreme Court appeared to decide that Rule 23 precludes PCMR. 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."). Eight years later, however, the Court muddied its stance on merits review before certification by accepting that "class determination generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." Gen. Tel. Co. v. Falcon, 457 U.S. 147, 160 (1982) (internal quotations and citations omitted). How much of *Eisen* survives *Falcon* is an open question, and one on which appellate courts have split. For a recent analysis of the relationship between *Eisen* and *Falcon* and of the circuit courts' treatment of PCMR, see David S. Evans, Class Certification, the Merits, and Expert Evidence, 11 Geo. Mason L. Rev. 1, 7–19 (2002).

[70] See, e.g., Robert G. Bone & David S. Evans, Class Certification and the Substantive Merits, 51 Duke L.J. 1251, 1319–20 (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); 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 relation to the claims." (footnote omitted)); Priest, supra note 56, at 572 (arguing for the possibility of a narrower reading of *Eisen*).

[71] 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 class-wide trial. See, e.g., Szabo v. Bridgeport Machs., 249 F.3d 672, 675–78 (7th Cir. 2001); 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"). Leading the circuits resisting PCMR is the Second Circuit. See, e.g., Caridad v. Metro-North Commuter R.R., 191 F.3d 283 (2d Cir. 1999). See generally Evans, supra note 69, at 10–19.

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 precertification litigation and the strictness of such determinations vary widely by court. See Willging et al., supra note 39, at 106 (noting that some circuit courts reason, in light of *Eisen*, that Rule 23(c)(1) requires class certification "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," whereas "[o]ther courts have approved precertification rulings on the merits, reasoning that a party filing a pretrial motion to dismiss

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 analysis shows that regardless of the nature and magnitude of the problem, MSJ is the superior solution.[72] It is fully effective and far

or motion for summary judgment may . . . waive the protection against intervention or opting out" (quotation marks and footnotes omitted)); cf. Priest, supra note 56, 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 under the previous Rule. Compare Fed. R. Civ. P. 23(c)(1)(A), with Committee on Rules of Practice & Procedure, Judicial Conference of the United States, Report of the Civil Rules Advisory Committee 244–45 (May 20, 2002), http://www.uscourts.gov/rules/Reports/CV5-2002.pdf (on file with the Virginia Law Review Association). In offering some aid in interpreting this proposed revision, the Committee stated that "an evaluation of the probable outcome on the merits is not properly part of the certification decision." Report of the Civil Rules Advisory Committee, supra, at 95. Still, the Committee instructed:

> Discovery 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.

Congress's recent enactment of the Private Securities Litigation Reform Act of 1995, 15 U.S.C. §§ 77z-1–78u-5 (2000), may also supply impetus for adopting PCMR to govern class actions generally. That Act establishes, in part, an ex ante review regime by combining heightened pleading requirements for Rule 10b-5 and other securities fraud class actions with a mandatory motion to dismiss as the gateway to discovery for surviving claims. Cf. Stephen J. Choi, The Evidence on Securities Class Actions 5–9 (Public Law & Legal Theory Research Paper Series, Research Paper No. 528145, 2004), at http://papers.ssrn.com/paper.taf?abstract_id=528145 (on file with the Virginia Law Review Association) (explaining the increase in precertification litigation in securities class action suits due to the Private Securities Litigation Reform Act of 1995).

[72] Precertification merits review has also been rationalized on the contention that the class certification decision represents a court's "last word" on the merits of the class claim. See *Szabo*, 249 F.3d at 674, 676–77. 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 Willging et al., supra note 39, at 104 (compiling evidence from four federal district courts contradicting the assumption that class

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 overshadowed by prohibitive costs.

Preliminarily, we 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 adequately deter nuisance-value class settlements, PCMR (like MSJ) must employ the precommitment device of making submission for PCMR a precondition to 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 resorting to nuisance-value settlement strategies in much the same way they do currently, with the pre-PCMR timing of the payoff agreements representing the only difference. Such maneuvering 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

action proceeds directly from certification of a class to settlement without judicial examination of the merits of the claims). The "last word" justification also disregards the opportunity for merits review provided by the requirement of judicial evaluation of the fairness, adequacy, and reasonableness of the class 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, classwide 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, which is, as we explain below, a highly dubious assumption—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 dismissal occurs 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 that was more stringent (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.[73] The problem, however, is that this effect might not be desirable. To justify heightening the prevailing merits threshold for class claims, and

[73] For one proposal of such a review standard, see Bone & Evans, supra note 70, 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 discuss below, 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.

thereby rendering summary judgment irrelevant in class actions, PCMR proponents would have to 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. And 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 test for certified class claims by amending the conventional standard for summary judgment.

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, that timing of merits review affects the parties' relative abilities to exploit litigation scale economies and investment opportunities to develop their respective cases. 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.

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. Here, we consider a version of PCMR that would operate on a lower trial-preclusive standard than mere triability, such as one that excludes class claims deter-

mined to be patently "frivolous" or an "abuse of process."[74] While PCMR using such a 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 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 it completely disappears in practice, given the necessity of bearing equivalent or greater costs for obtaining judicial approval of the class settlement as fair, adequate, and reasonable under Rule 23(e).[75] Moreover, lowering the merits threshold below triability would admit some nuisance-value class claims, defined as claims that summary judgment testing for triability would otherwise exclude under the current summary judgment standard. Thus, it is highly doubtful that a net benefit equivalent to that offered by MSJ would be produced by PCMR's allowing class settlements of both triable and nuisance-value class claims prior to postcertification summary judgment. As the next Section shows, numerous other significant costs of PCMR operating on a less stringent standard than summary judgment would far outweigh any possible gain stemming from its adoption and render it decidedly inferior to MSJ as a solution to the nuisance-value class settlement problem.

2. Comparative Cost Assessment of MSJ Versus PCMR

In terms of the cost of each proposal, MSJ is superior to PCMR on several basic dimensions. 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

[74] This version of PCMR might enforce the standards for sanctionable pleadings established by Federal Rule of Civil Procedure 11.

[75] See supra Section II.B.

were to survive PCMR presumably would still be subject to full-scale, postcertification 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 that would require supplemental merits-review processes to screen out the nuisance-value class claims that survived PCMR. Rather, the additional expense would 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 that employs 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.[76] This condition stems from the inherent misalignment of PCMR with the functional benefits sought through the availability of the class action vehicle. A critical consequence of classing claims relates to the effect on plaintiffs' counsel's investment incentives. When representing a certified class of plaintiffs, plaintiffs' counsel has enhanced incentives to invest in the litigation as compared with the incentives derived from representing some fraction of claimants, due to the increased returns on investment yielded from class-wide litigation scale.[77] But at the precertification litigation

[76] See supra note 62.

[77] 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 (7th Cir. 1997) ("The policy at the very core of the class action mechanism is

stages, this incentive effect is not optimal in many cases for two 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.[78] 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, having to defend against the total number of outstanding claims (assuming that the claims are marketable individually or through some degree of fractional aggregation) regardless of class certification, will accordingly exploit scale economy and investment opportunities more effectively than plaintiffs' counsel can.[79] 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 de-

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.").

[78] See David Rosenberg, Mass Tort Class Actions: What Defendants Have and Plaintiffs Don't, 37 Harv. J. on Legis. 393, 400–01 (2000).

[79] 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. 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 on the merits to a point in time preceding the court's certification decision. Cf. Choi, supra note 71, at 4–10 (explaining that the substantial increase in litigation cost for plaintiffs resulting from the special mechanism for screening out nuisance-value class claims under the Private Securities Litigation Securities Reform Act of 1995 will deter the initiation and vigorous prosecution of meritorious securities class actions).

veloping the merits at the PCMR stage.[80] 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.[81]

Finally, the preclusive ramifications of MSJ versus PCMR 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 probability 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, and presumably before the putative class is even evaluated for factors such as commonality, typicality, and adequacy of representation. Thus, it would seem that the ousting of a putative class action on PCMR would not bind members of the "non-class," other than the named class representatives, to the PCMR judgment.[82] In contrast to MSJ, which operates postcertification and binds all class members to the ruling dismissing the class claim as untriable, PCMR—which occurs before the class certification decision is made, and thus before adequacy of representation

[80] 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 investigating potential claims in the action." Fed. R. Civ. P. 23(g)(1)(C)(i). Whether this criterion for appointment of counsel will prove to be of significant benefit in practice is an open question.

Still, the criterion is also likely to add wasteful 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.

[81] See Rosenberg, supra note 78, at 400–12.

[82] But cf. In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig., 333 F.3d 763, 769 (7th Cir. 2003) (concluding that a previous denial of class certification was binding, through the doctrine of issue preclusion, on all members of the non-class). Even Judge Easterbrook's opinion for the court, though, recognized that "[a] decision with respect to the class is conclusive only if the absent members were adequately represented by the named litigants and class counsel." Id. at 768.

is scrutinized[83]—does not bar absentee class members from repetitively filing and seeking to satisfy PCMR in subsequent class actions until one finally succeeds in achieving certification. In failing to preclude repeated 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.[84]

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 of success and translating into a total expected cost of $100. This effect itself is problematic with respect to the goals of the tort system, and argues strongly for preferring MSJ. The problem, however, 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

[83] See id. One might attempt to remedy this problem with PCMR by including an adequacy of representation determination, along with the definition and assessment of the putative class that such a determination entails, at the PCMR stage. But such a remedy only serves to convert PCMR into something resembling the class action certification decision, with the added pitfall that PCMR in advance of the certification decision will exacerbate the investment asymmetries that plaintiffs suffer until the certification decision ultimately is made.

[84] 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, the amended Rule 23's spirit allows opt-out opportunity after opt-out opportunity. See Fed. R. Civ. P. 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 affords a new opportunity to request exclusion to individual class members who had an earlier opportunity to request exclusion but did not do so."). We thus wonder whether opt-out would be allowed (with required classwide notice) even during the PCMR stage.

PCMR test, then its ex ante cumulative expected loss is not $100, but rather $190, the sum of a 90% chance of avoiding class certification on the first application of PCMR and a 10% chance of erroneous class certification on the second application.[85] This compounding effect results from the phenomenon of repeated, independent PCMR determinations.[86] If the defendant faces additional applications, its expected loss will continue to rise, 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 distorted incentives for the defendant to take precautions,[87] as well as increased incentives for potential plaintiffs to file nuisance-value class actions.[88]

[85] 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% x $1000 = $100; and, second, the expected loss from the class failing the first round of PCMR but surviving the second round, or 90% x 10% x $1000 = $90. The total expected loss for the defendant, then, becomes $190.

[86] 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.

[87] This analysis can be generalized to explain the utility of applying two-way (that is, mutual) issue preclusion and claim preclusion to a final judgment in the conventional case involving two individual litigants. For development of this point, see David Rosenberg, Avoiding Duplicative Litigation of Similar Claims: The Superiority of Class Action vs. Collateral Estoppel vs. Standard Claims Market (Harvard Law & Economics Discussion Paper No. 394, 2002), at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=354100 (on file with the Virginia Law Review Association).

[88] 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.

Our analysis of the superiority of MSJ to PCMR applies to analogous preliminary merits-screening and review devices used to deter nuisance-value claims in the non-class action context. There are a variety of such mechanisms, aimed mainly at the pleadings, to ensure that claims are grounded in some minimum basis of fact and law. The most general in scope is Federal Rule of Civil Procedure 11, which sanctions counsel for filing pleadings that are not "warranted by existing law or by a nonfrivolous argument" for changing that law and that do not have (and are not likely to have) evidentiary support. Most of the other devices focus on pleading requirements in special categories of cases. For example, Federal Rule of Civil Procedure Rule 9(b) heightens pleading requirements for fraud, mistake, and conditions of mind. See Ross v. A.H. Robins Co., 607 F.2d 545, 557 (2d Cir. 1979) (explaining that Rule 9(b) oper-

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 in class actions. 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 types of separate action litigation. In these concluding remarks, we briefly address the limits of MSJ and our inquiry.

A. MSJ Preempts Only Legally Untenable Litigation

In preempting the strategy of seeking settlement payoffs for untriable claims or defenses, MSJ necessarily will have only partial preclusive effect in preventing "blackmail" class settlements. Moreover, beyond the costs and, in some cases, revelations of information, incident to complying with its requirements, MSJ will not significantly affect the initiation and settlement of "negative expected value" claims.

ates to deter "a largely groundless claim . . . representing an in terrorem increment of the settlement value") (quotation marks omitted).

Similarly, verification requirements have been retained under Federal Rules of Civil Procedure Rule 23.1 and Rule 65(b) to prevent strike suits. Cf. Surowitz v. Hilton Hotels Corp., 383 U.S. 363, 371 (1966) (noting that verification requirements "discourage 'strike suits' by people who might be interested in getting quick dollars by making charges without regard to their truth so as to coerce corporate managers to settle worthless claims in order to get rid of them"). In many states, legislation or judicially enforceable contracts provide for prelitigation arbitration in medical malpractice cases with the expectation that "independent" appraisal of the claim's lack of merit will discourage nuisance-value lawsuits. See, e.g., Metzloff, supra note 50, at 199–200, 222.

We reiterate that final assessment of the net benefit of MSJ in a particular area of non-class action litigation will depend not only on the nuisance-value risk and the costs of applying MSJ to settle non-nuisance-value cases, but also the relative cost-effectiveness of ex post sanctions.

As commonly defined, the blackmail class settlement "problem"[89] stems from the defendant's aversion to the risk of gambling a large sum on the outcome of a single, classwide trial.[90] 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. Because merits review mechanisms are designed to exclude only untriable class claims or defenses, however, neither MSJ nor PCMR will exert any preclusive or salutary constraint against the blackmail effect distorting class settlements of triable class claims and defenses.[91] A comprehensive solution to the blackmail class settlement problem should be sought elsewhere.[92]

Similarly, because MSJ preempts only strategies designed to extract payoffs through assertion of untriable claims and defenses, it will not significantly affect the settlement of negative expected value claims.[93] By definition, negative expected value claims have

[89] 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": Class Certification and Blackmail?, 78 N.Y.U. L. Rev. 1357 (2003).

[90] See Henry J. Friendly, Federal Jurisdiction: A General View 120 (1973). For criticism of the claim that defendants are systematically victimized by class action "blackmail," see Hay & Rosenberg, supra note 62, at 1403 (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"; that the blackmail effect distorts settlements of separate action litigation as well as settlements of class actions; and that, 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).

[91] The timing—pre- or postcertification—of merits review has no relevance to the blackmail effect. See supra at 1890–91.

[92] In previous work, one of us has argued that the complete solution for blackmail class settlements is to provide the parties with the option of holding and averaging the results from multiple trials within the context of the class action. See Hay & Rosenberg, supra note 62, at 1404.

[93] See Bebchuk, Suing Solely, supra note 1. MSJ will, however, deter parties from taking a "flyer": that is, asserting a claim or defense without prior reasonable investigation into its merits. A party might see profit in such a strategy if a claim or defense that proves meritless in discovery can be used to leverage a nuisance-value payoff. See Bone, supra note 1. In denying the possibility of the payoff, MSJ creates an incentive for parties to exercise due diligence in investigating contemplated litigation moves.

some probability of being found triable on summary judgment and of 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.[94] Whether this phenomenon is socially desirable or undesirable is an open question depending on whether a particular type of negative expected value litigation delivers net deterrence benefit; the important consideration for present purposes is that MSJ does not necessarily foreclose assertion of such triable claims.[95]

B. MSJ's Superiority to 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 a party to seek merits review. Two of these alternatives are worth mentioning here: sanctions and fee-shifting.

First, legal sanctions[96] might be used to deter nuisance-value strategies.[97] Courts could penalize parties that employ nuisance-value strategies by imposing such sanctions as those provided by Rule 11 or Rule 37 of the Federal Rules of Civil Procedure,[98]

[94] See Bebchuk, A New Theory, supra note 1, at 1–2; Bebchuk, Suing Solely, supra note 1, at 437–38; Bone, supra note 1, at 523; Croson & Mnookin, supra note 9, at 67–69; Rosenberg & Shavell, supra note 9, at 3. 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.

[95] MSJ may, however, have a salutary effect regarding the incidence of negative expected value claims that succeed in exacting payoffs by masquerading as claims that are economically viable and would go to trial if the defendant were to reject settlement. In complying with MSJ, defendants' discovery may detect some masquerading negative expected value claims. This prospect will not only deter filing of these claims, but also prompt voluntary disclosure by non-masqueraders seeking to share in some of the surplus from defendant's saving of discovery costs.

[96] 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. Legal Stud. 39 (2002). See also supra note 15.

[97] See Wade, supra note 1, at 495; see also Polinsky & Rubinfeld, supra note 1, at 404–10.

[98] See Fed. R. Civ. P. 11, 37.

Rule 38 of the Federal Rules of Appellate Procedure,[99] or through judicial contempt powers.[100] Such targeted, ex post sanctions, however, generally require courts to undertake demanding police work, including the task of carefully parsing the often blurry boundary between frivolous, meritless positions and those which are weak and ultimately unsuccessful but nonetheless within the bounds of appropriate zeal and due diligence.[101] Moreover, courts will likely have to inquire into murky questions of state of mind—knowledge, intent, and relative culpability—to determine the basis for and severity of sanctions.[102] These difficulties and the resulting high costs for both courts and litigants, the risk of abuse and error, and the danger of chilling potentially meritorious litigation seriously undermine the effectiveness of ex post sanctions.[103] The same impediments would defeat the use of these ex post sanctions aimed at deterring nuisance-value settlement strategies.[104] The precommit-

[99] See Fed. R. App. P. 38. State professional disciplinary rules also outlaw filing frivolous and unwarranted claims or defenses. See Model Rules of Prof'l Conduct R. 3.1 (2002).

[100] See, e.g., 18 U.S.C. § 401 (2000); see also Private Securities Litigation Reform Act of 1995, 15 USC §§ 77z-1–78u-5 (2000) (mandating judicial review after final adjudication of a securities fraud class action to detect and impose sanctions for frivolous claims). On the extensive range of ex post sanctions under statutory, judicial rule and inherent authority, and common law, see Warren Freedman, Frivolous Lawsuits and Frivolous Defenses (1987); Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse (3d ed. 2000 & Supp. 2004).

[101] See Cooter & Gell v. Hartmarx Corp., 496 U.S. 384, 393 (1990); In re Karlen, 934 F.2d 184, 186 (8th Cir. 1991); Finch v. Hughes Aircraft Co., 926 F.2d 1574, 1578 (Fed. Cir. 1991); Hudson v. Moore Bus, Forms, Inc., 836 F.2d 1156, 1160 (9th Cir. 1987); NLRB v. Cincinnati Bronze, Inc., 829 F.2d 585, 591 (6th Cir. 1987).

[102] See, e.g., Fed. R. Civ. P. 11, advisory committee's notes to the 1993 amendments; Zuk v. E. Penn. Psychiatric Inst., 103 F.3d 294, 301 (3d Cir. 1996). A party's unmeritorious threat to seek ex post sanctions may itself be used to extract a nuisance-value settlement payoff from the opposing party.

[103] See, e.g., Robert J. Martineau, Frivolous Appeals: The Uncertain Federal Response, 1984 Duke L.J. 845; Polinsky & Rubinfeld, supra note 1, at 410–21.

[104] Because the nuisance-value settlement strategy seeks illicit payoffs, the application of ex post sanctions targeting this abuse would likely entail costly effort to sort the deliberately extortionate from the merely frivolous claim or defense. Cf. Lynn A. Stout, Type I Error, Type II Error, and the Private Securities Litigation Reform Act, 38 Ariz. L. Rev. 711, 713–15 (1996).

ment design of MSJ avoids these enforcement problems in achieving its deterrence objective.[105]

A second alternative to MSJ is fee-shifting,[106] which refers to rules imposing some part of a prevailing party's litigation costs, including attorney's fees, on the losing party.[107] Applying fee-shifting rules in 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.[108] A fee-shifting rule that could not be strictly confined to nuisance-value claims, however, would significantly alter the parties' non-nuisance-value litigation incentives and behavior. The utility of such a broad-ranging reform is not obvious, and no empirical studies exist to resolve the matter.[109] It is possible, of course, to design a targeted fee-shifting 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, rather than in reasonable, good faith belief in its triability. To appropriately motivate the summary judgment filings, such a rule must cover the winner's costs of demonstrating that the loser pressed a nuisance-value as well as an untriable claim or defense. But even if substantial risk of

[105] This is not to suggest that MSJ can replace ex post sanctions regarding all abusive litigation problems. For example, it would not prevent meritless litigation aimed at "buying time," a tactic defendants would have an incentive to employ to gain the financial time-value of delaying final judgment. See Richard Posner, The Federal Courts: Challenge and Reform 302–03 (1996) (defending existing limits on federal removal on the grounds that extending it to federal defenses would motivate defendants to take frivolous positions for purposes of delay that removal courts could prevent only by conducting an expensive "trial before the trial"). Use of tailored policing mechanisms to address this problem may well remain necessary. See 28 U.S.C. § 1912 (2000) (authorizing ex post sanctions for "delay").

[106] See Wade, supra note 1, at 491; see also Bebchuk & Chang, supra note 1, at 374–91; Meurer, supra note 1, at 535–38.

[107] See, e.g., 35 U.S.C. § 285 (2000) (fee-shifting provision for patent infringement claims); 42 U.S.C. § 2000e-5(k) (2000) (fee-shifting provision for Title VII claims).

[108] Some settlement payoffs might be extracted if determining reasonable fees to shift is itself a costly and error-prone process.

[109] Theoretical analysis suggests that the social desirability of fee-shifting is largely indeterminate. See Steven Shavell, Basic Theory of Litigation, Foundations of Economic Analysis of Law 389–418 (2004).

error could be eliminated (a very doubtful prospect), such a targeted fee-shifting rule would entail high litigation costs and create potential for abuse. MSJ presents no such problems.