

Symmetry and Class Action Litigation

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ABSTRACT

In ordinary litigation, parties often have different resources to devote to their lawsuit. This is a problem because the adversarial system is predicated on two (or more) parties, equal and opposite one another, making their best arguments to a neutral judge. The class action is a procedural device that aims to solve this problem by equalizing resources between individual plaintiffs and organizational defendants. It does this by allowing plaintiffs to pool their claims. Current developments in class action doctrine, however, reinforce in the courtroom the asymmetry that exists between individual plaintiffs and organizational defendants outside the court. This Article explores these trends and the questions they raise. Why is it that critics of class actions (and some judges) argue that class actions ought not to be certified for litigation purposes because they “blackmail” defendants into settling suits, but they approve of the practice of certifying class actions for settlement when defendants seek to settle clearly meritless claims? Why is the blackmail argument so resilient in the class action context, and what insight does this lend to the context of binary litigation where litigants are more likely to have unequal resources to devote to litigation and, as a result, more likely to enter into settlements that do not reflect the true value of their claim? Should asymmetry of resources in litigation be considered a problem for our court system, or is it right for courts to take litigants as they find them, even if litigants have vastly unequal resources to devote to pursuing their lawsuits?

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INTRODUCTION

To what extent should procedural law take into account the resources of participants in the legal system?¹ The assumption in the United States is that the legal system does not require symmetry between litigants. Courts take litigants as they find them. There are at least three exceptions to this general rule: the provision of an attorney by the state in certain limited circumstances,² fee shifting in the prevailing plaintiff's favor,³ and the class action lawsuit.⁴ This Article, a tribute to Stephen Yeazell, considers the last of these.

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1. This Article draws from an ongoing conversation about equality that has emerged in the political theory literature, but it does so with respect to the very concrete question of participants in class action litigation and is aimed at a general legal audience. For a general description of the debate see Richard Arneson, *Egalitarianism*, STANFORD ENCYCLOPEDIA PHIL., <http://plato.stanford.edu/entries/egalitarianism/> (last updated Apr. 24, 2013). What I mean by resources is the money that litigants have to fund litigation and the human capital (such as education, knowledge of the law) they have in pursuing litigation. I assume that the more resources a person has to litigate, the greater her capacity to sue or defend herself in litigation. By capacity, I mean the freedom to choose different litigation options. This idea of capacity is considerably narrower than the idea of capabilities used by philosophers. See, e.g., MARTHA C. NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT: THE CAPABILITIES APPROACH* (2000). The Article does not engage the debate over the idea of luck egalitarianism but instead looks at the legal system from the perspective of a version of relational equality: the notion that people should be able to relate to one another as equals, in this case as equals in power before the court. For a philosophical discussion, see Elizabeth S. Anderson, *What Is the Point of Equality?*, 109 ETHICS 287 (1999). For other work addressing litigant equality, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1866–68 (2002), which discusses equality of the capacity to sue, and Alan Wertheimer, *The Equalization of Legal Resources*, 17 PHIL. & PUB. AFF. 303 (1988), which advocates equality in legal resources.
 2. A state-appointed lawyer is available in the criminal law context. See *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (requiring court-appointed counsel for most criminal defendants). In rare cases, counsel will be provided by the state in the civil context. See Judith Resnik, *Constitutional Entitlements to and in Courts: Remedial Rights in an Age of Egalitarianism: The Childress Lecture*, 56 ST. LOUIS U. L.J. 917, 975 (2012) (describing the “Civil Gideon” movement as an “effort . . . [which] aims to guarantee counsel rights for certain categories of impoverished [civil] litigants.” (internal quotation marks omitted)); Stephen C. Yeazell, *Re-financing Civil Litigation*, 51 DEPAUL L. REV. 183 (2001) (describing historical and present trends in financing of civil litigation at the retail level). But see *Turner v. Rogers*, 131 S. Ct. 2507 (2011) (holding that appointment of counsel for indigent defendant in contempt hearing is not necessary). It is not clear that appointing a lawyer always improves outcomes. See, e.g., D. James Greiner & Cassandra Wolos Pattanayak, *Randomized Evaluation in Legal Assistance: What Difference Does Representation (Offer and Actual Use) Make?*, 121 YALE L.J. 2118 (2012) (describing a study indicating that lawyers do not improve outcomes in some proceedings).
 3. Fee shifting is mostly associated with civil rights cases. See, e.g., 42 U.S.C. § 1988(b) (2006). It is also sometimes available in consumer cases. See, e.g., 15 U.S.C. § 1681n(a)(3) (2006).
 4. See FED. R. CIV. P. 23.

Professor Yeazell's scholarship has consistently pushed readers to look beyond the formal structures of the law to the cultural and political context in which law operates. As he wrote in an early piece, the class action is a "useful—perhaps an essential—bastard, but one whose existence nonetheless makes us question the categories that polite legal society uses to order the world."⁵ In his influential book on the history of the class action and in related articles, he showed how this anomalous procedural device was used in different historical periods for different purposes.⁶ In the spirit of Professor Yeazell's work, this Article is likewise pragmatic and contextual, though focused in the present. It questions some assumptions in the current legal order so that we might see it in a new light. My focus is on the baseline assumption that the courts take litigants as they find them.

The class action lawsuit departs from the allocation of resources under the status quo ante by aggregating claims. One traditional justification for its use is that the class action solves a collective action problem and thereby allows individuals to bring claims that would otherwise be too small to pursue.⁷ This procedural device is controversial because it purports to bind absent class members without their express consent or participation.⁸ The class action is also controversial because aggregation equalizes power between the plaintiffs and the defendant by pooling claims. This equalization is the source of the argument that class suits pressure defendants into settling meritless claims, a constant refrain since the advent of the modern class action.⁹

5. Stephen C. Yeazell, *Group Litigation and Social Context: Toward a History of the Class Action*, 77 COLUM. L. REV. 866, 866 (1977).

6. See STEPHEN C. YEAZELL, FROM MEDIEVAL GROUP LITIGATION TO THE MODERN CLASS ACTION (1987).

7. See Bruce Hay & David Rosenberg, "Sweetheart" and "Blackmail" Settlements in Class Actions: Reality and Remedy, 75 NOTRE DAME L. REV. 1377, 1380–81 (2000); Yeazell, *supra* note 5, at 877.

8. Defendants have made creative arguments that assert the individual rights of class members to be free from collective treatment as a way to defeat class actions and reinstate the status quo ante. See, e.g., Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 803–06 (1985) (permitting defendant to challenge Kansas state courts' personal jurisdiction over certain members of the plaintiff class).

9. See generally Hay & Rosenberg, *supra* note 7 (critiquing blackmail arguments and suggesting reforms); Charles Silver, "We're Scared to Death": Class Certification and Blackmail, 78 N.Y.U. L. REV. 1357 (2003) (describing and parsing arguments made by prominent jurists that class actions blackmail defendants into settling meritless claims); Stephen C. Yeazell, *The Past and Future of Defendant and Settlement Classes in Collective Litigation*, 39 ARIZ. L. REV. 687, 695–97 (1997) (discussing the blackmail argument and alternative views). For judicial articulation of the blackmail argument, see *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011), which notes "the risk of 'in terrorem' settlements that class actions entail," and *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1299–1300 (7th Cir. 1995), which explains that class actions force defendants to settle due to fears of exorbitant judgments on

Current developments of class action doctrine, however, are reinforcing in the courtroom the asymmetry that exists between individual plaintiffs and organizational defendants outside litigation. The first trend is familiar: Certifying a class action for litigation purposes has become quite difficult.¹⁰ At the same time, a second trend has surfaced. A number of recent decisions have approved settlement-only class actions in cases that would most likely not pass muster as litigated class actions under the currently high standards.¹¹ The Advisory Committee to the Civil Rules is considering formally loosening the standards for certifying settlement class actions.¹² From a policy perspective, the intersection of these trends—the restriction of litigation classes and the liberalization of settlement classes—is likely to result in a one-way ratchet favoring organizational defendants in class actions.¹³ Defendants will enjoy the benefits of global resolution of controversies made possible by the preclusive effect of the class action without ever facing real litigation risk.

The trends favoring settlement classes over litigated classes are driven, at least in part, by a belief that litigation class actions pressure defendants into settling meritless cases to the detriment of defendants and society. The argument is that class plaintiffs are too powerful; if allowed to pursue their suit, they will

meritless claims. See also HENRY J. FRIENDLY, FEDERAL JURISDICTION: A GENERAL VIEW 120 (1973) (arguing the same).

10. The latest Supreme Court cases tightening the standards for certifying class actions are *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011) and *Comcast v. Behrend*, 133 S. Ct. 1426 (2013). For thorough support of the claim that class certification is ever more difficult, reviewing cases at all levels of the federal courts, see Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985.
11. See *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012); *Sullivan v. DB Invs., Inc.*, 667 F.3d 273 (3d Cir. 2011); *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, MDL No. 2179, 2012 WL 6652608 (E.D. La. Dec. 21, 2012).
12. See Draft Minutes of January 5–6, 2012 Standing Committee Meeting, reprinted in Report of the Advisory Committee on Civil Rules 32 (Mar. 22–23, 2012) (listing the question of whether criteria for certifying settlement classes should differ from that for certifying litigation classes as one of the top five subjects for the committee's consideration).
13. This trend likely favors those plaintiffs' attorneys who receive substantial payouts by shepherding settlements with a minimum of work. I set aside, for now, important questions such as whether plaintiffs' attorneys in class actions make too much or too little, see, e.g., Brian T. Fitzpatrick, *Do Class Action Lawyers Make Too Little?*, 158 U. PA. L. REV. 2043 (2010), and how their incentives can be better aligned with the interests of the plaintiff class. Instead, my focus is on the benefit of global peace to defendant organizations offered by the class action, a benefit that can be purchased by the defendant at a greater or lesser cost depending on the background rules and competition between plaintiffs' lawyers, with the simplifying assumption that plaintiffs' lawyers' leverage depends on the credibility of the threat to litigate. For a discussion of the dynamics between defendants and plaintiffs' lawyers in settling class actions, see Sean J. Griffith & Alexandra D. Lahav, *The Market for Preclusion in Merger Litigation*, 66 VAND. L. REV. 1053 (2013) and sources cited therein.

drive the defendant to bankruptcy.¹⁴ In almost no other area of procedural law does the argument that litigation asymmetry will result in ruinous losses for one party have the kind of traction it does in the context of class actions. For example, being judgment proof is no defense to tort liability.¹⁵ So why does this argument persist in the class action context where, ironically, procedural law is designed to create symmetry between the parties? Perhaps the argument persists because the class action presents a significant departure from the balance of power outside the courtroom.

The anomaly of duress and blackmail arguments against the class action provides an occasion to reexamine the current legal order and particularly the assumption that power imbalances in the social and political sphere should be reflected inside the courtroom. If it is important that people be able to assert their rights and enforce obligations in relation to one another as a condition of civil society, then the courts need to provide the space where people can do so on equal footing. Since power imbalances undoubtedly affect the vindication of substantive rights—on both sides of the litigation—proponents of a more egalitarian court system need to develop a stronger set of arguments in favor of creating conditions that allow for hearing both sides of a dispute on the merits.

This Article first considers the power dynamics between parties in class actions. Part I explains these dynamics and demonstrates how they create a disparity between class actions certified for settlement only and those certified for litigation. It begins by describing the doctrinal background and then discusses recent decisions that point to a renaissance in settlement-only class actions. These recent decisions imposing very onerous standards for certifying litigated classes and looser standards for certifying settlement classes will alter the power dynamics in favor of defendants and undo the symmetry between parties that the class action procedure was intended to achieve. Defendants can use class

14. For example, Judge Posner wrote of the court's concern of "forcing these defendants to stake their companies on the outcome of a single jury trial, or be forced by fear of the risk of bankruptcy to settle even if they have no legal liability." *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d at 1299. Judge Posner thought *Rhone-Poulenc* represented a special case because individual trials were feasible given the amounts at stake and the plaintiff's history of losses at trial, and he specifically distinguished that case from the low-value consumer class action. That distinction is not always made.

15. Similarly, information regarding defendant's insurance coverage is not admissible because such knowledge might result in a jury taking the defendant's ability to pay into account in determining liability or damages. "Evidence that a person was or was not insured against liability is not admissible to prove whether the person acted negligently or otherwise wrongfully." FED. R. EVID. 411. The advisory committee notes refer to the "the feeling that knowledge of the presence or absence of liability insurance would induce juries to decide cases on improper grounds." *Id.* advisory committee's note.

certification as a way to obtain global peace when they agree to a settlement price, but they can resist collective resolution in all other cases so that litigation is extremely costly for plaintiffs to pursue.

The courts' leniency toward class settlements leads to a paradox. While judges are concerned that a litigated class will exert undue pressure on the defendant to settle, they readily approve of settlements of claims they believe lack merit. One might respond that defendant has consented to the settlement, but arguably courts should also be concerned that the defendant's purported consent is in fact a response to the duress imposed by the threat of a class action. I suggest that the reason for courts' exclusive concern over defendant's duress in litigated classes is that litigated class actions upend the status quo ante whereas settlement classes reinforce it. Ultimately, if judges continue to treat settlement and litigation classes differently, the courts will reflect the asymmetry between plaintiffs and defendants in the real world.

In Part II, the Article considers the problem created by the fact that the class action alters the status quo ante. It asks whether it is possible to defend an egalitarian ideal of adjudication in a society with unequal resource distribution. One possible justification for an egalitarian court system focuses on the special role of the courts in a social order structured around legal rights and obligations that are enforced through litigation. The adjudicative process must treat individuals with equal respect and concern for them to be able to realize rights and enforce obligations. There is much more to be said on this subject. I hope this Article will be the beginning of a conversation on the role of egalitarian principles in litigation.

I. THE POWER DYNAMICS BETWEEN PARTIES IN CLASS ACTIONS

This Part describes the structural inequality created by the difficulty of certifying litigation class actions compared with the ease of certifying settlement classes. It sets the stage for considering some of the deeper issues raised by power imbalances in society and in the courtroom.

A. Limits on Class Certification: 1997–2011

In a settlement class action, the parties often move for class certification and court approval of a settlement simultaneously. Developments in the law of class actions from 1997 onward made settlement classes both more appealing to litigants and harder to certify. That trend shifted about a year ago, as the next Subpart explains.

A class action settlement produces a judgment that binds all absent class members, except those who have opted out of the litigation.¹⁶ In the 1980s and 1990s, litigants attempted to use settlement class actions to resolve large-scale legal disputes arising out of mass torts. The most famous of these were the successful settlement of lawsuits arising out of the use of the defoliant Agent Orange in Vietnam and the unsuccessful attempt to settle lawsuits arising out of widespread exposure to asbestos in the United States.¹⁷ In the late 1990s, the U.S. Supreme Court addressed the propriety of two massive class action settlements of asbestos litigation.¹⁸ In these cases, the Court limited the availability of the class action device to settle mass tort suits, in part by ruling in *Amchem Products, Inc. v. Windsor* that a class action settlement must meet almost all of the requirements of a litigated class action under Federal Rule of Civil Procedure 23.¹⁹

In the aftermath of these developments, the Supreme Court reconsidered the preclusive effect of class suits, including settlement class actions. The finality of class settlements is critical to their success because precluding all class members from subsequent litigation produces global peace for the defendant. In *Stephenson v. Dow Chemical Co.*, a veteran who had developed a disease he claimed was caused by Agent Orange wanted to sue its manufacturer.²⁰ The problem was that a class action certified many years previously included all the claims arising out of the use of Agent Orange and the settlement funds available from that settlement had already been paid out. The manufacturer argued that because Stephenson was a

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16. Class actions bar class members who have not opted out from subsequent litigation as long as they received adequate representation in the first suit. *See Hansberry v. Lee*, 311 U.S. 32, 43 (1940) (holding that a class action cannot bind a litigant absent adequate representation). For other requirements, see Alexandra D. Lahav, *Due Process and the Future of Class Actions*, 44 LOY. U. CHI. L.J. 545–56 (2012).
 17. For a masterful description of the *Agent Orange* litigation and settlement process, see generally PETER H. SCHUCK, *AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS* (1987). The asbestos litigation is described in a number of publications, including Deborah R. Hensler, *As Time Goes By: Asbestos Litigation After Amchem and Ortiz*, 80 TEX. L. REV. 1899 (2002).
 18. *See Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997). For a discussion of these cases and their broader doctrinal significance, see Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337.
 19. Confronted with a request for settlement-only class certification, a district court need not inquire whether the case, if tried, would present intractable management problems, see FED. R. CIV. P. 23(b)(3)(D), for the proposal is that there be no trial. But other specifications of the Rule—those designed to protect absentees by blocking unwarranted or overbroad class definitions—demand undiluted, even heightened, attention in the settlement context. *Amchem Prods., Inc.*, 521 U.S. at 620.
 20. *Stephenson v. Dow Chem. Co.*, 273 F.3d 249 (2d Cir. 2001), *aff'd in part, vacated in part*, 539 U.S. 111 (2003).

member of the class in the previous lawsuit, the court-approved settlement precluded him from bringing a subsequent suit. Stephenson argued that he should be still be able to sue because the lawyers had not adequately represented future claimants like himself, whose injuries manifested only after the settlement closed. A divided Court upheld that collateral attack against the Agent Orange settlement. As a result, classwide mass tort settlements in which there may be future claimants are very difficult or impossible to sustain.²¹

Stephenson seemed to signal a shift in the Court's jurisprudence. In 1996, the Court upheld an expansive securities settlement against a collateral attack in *Matsushita Electrical Industrial Co. v. Epstein*.²² That case involved two class actions arising out of the same events and proceeding in parallel, one in Delaware state court and the other in federal court. The Delaware action settled, and the question presented was whether that settlement could bind all class members even as to securities claims over which the federal courts have exclusive jurisdiction. The Supreme Court affirmed the power of state courts to settle all claims brought in class actions, even those that could not have been adjudicated by that court.²³

The appeal of class settlement in state courts is that the rules of procedure or the judiciary in some states can be more forgiving with respect to the requirements for class certification compared to the rules or judiciary in federal courts.²⁴ The ruling in *Matsushita* made collateral attacks on settlements reached in state courts very difficult and provided an easier path to global peace for defendants.

21. *Id.*; see also Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. PA. L. REV. 1649 (2008) (describing debate over preclusion in class action context); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 COLUM. L. REV. 1148, 1148–50 (1998) (arguing in favor of an expansive ability for absent class members to challenge class actions); William B. Rubenstein, *Finality in Class Action Litigation: Lessons From Habeas*, 82 N.Y.U. L. REV. 790 (2007) (describing the difficulties in determining scope of collateral attack); Tobias Barrington Wolff, *Preclusion in Class Action Litigation*, 105 COLUM. L. REV. 717 (2005) (analyzing preclusive effect of class actions on absent class members and proposing reforms).

22. 516 U.S. 367, 381–82 (1996).

23. *Id.* (upholding class settlement of all securities and corporate related claims in Delaware state court even when the Delaware courts could not adjudicate some of the claims discharged in the settlement).

24. See Alexandra D. Lahav, *Fundamental Principles for Class Action Governance*, 37 IND. L. REV. 65, 79 n.56 (2003) (“For example, when the Third Circuit overturned a somewhat notorious settlement in the *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litigation*, [134 F.3d 133 (3d Cir. 1998),] the parties re-filed the settlement in Louisiana state court, where it was approved.”); see also *Smith v. Bayer Corp.*, 131 S. Ct. 2368 (2011) (holding that denial of class certification in federal court did not bind subsequent state court’s determination of class certification and noting differences in interpretation of the federal and state class action rule despite nearly identical language).

Many class action opponents complained that plaintiffs were filing in friendly state courts to force defendants to settle meritless claims or, in the alternative, to settle claims too cheaply at the expense of class members. In reaction to this perceived forum shopping, Congress passed the Class Action Fairness Act (CAFA) in 2005, which federalized most class actions.²⁵ Combined with the imperative that settlement class actions in federal court meet the rigorous requirements of Rule 23, and the availability of collateral attack for some class members after *Stephenson*, the passage of CAFA initially seemed to limit settlement class actions even further. As discussed in the next Subpart, this prediction was predicated on the tightening of standards for class certification in federal courts.

Beginning with the Supreme Court's decision in *Amchem* in 1997, federal courts have consistently tightened their interpretation of two of the Rule 23 requirements for class certification: commonality and predominance.²⁶ In 2011, the Supreme Court imposed a more rigorous interpretation of commonality, that is, the requirement that class members share a common issue of fact or law.²⁷ The Court held that the common issue of fact or law must be such that "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke."²⁸ It is not entirely clear that this new standard necessarily tightens the commonality requirement given that prior to *Wal-Mart* courts required that the common issue be one that is relevant to the litigation, but it does seem to have inspired some courts to deny certification where they might otherwise have granted it.²⁹ Predominance, a second provision specific to money damages class actions, requires that common issues predominate over individual issues. Federal courts have for some time adopted a stringent interpretation of the predominance requirement that limits the viability of most

25. The relevant provisions can be found at 28 U.S.C. § 1332(d) (2006). The Supreme Court considered the scope of the Class Action Fairness Act (CAFA) for the first time this term in *Standard Fire Insurance Co. v. Knowles*, 133 S. Ct. 1345 (2013), holding that class representative's stipulation that the amount in controversy was below the CAFA threshold of \$5 million was not binding and therefore would not bar federal jurisdiction. For a history of CAFA in broader context, see Edward A. Purcell, Jr., *The Class Action Fairness Act in Perspective: The Old and the New in Federal Jurisdictional Reform*, 156 U. PA. L. REV. 1823 (2008).

26. FED. R. CIV. P. 23(a)(2) (requiring that there be "questions of law or fact common to the class"); FED. R. CIV. P. 23(b)(3) (requiring that "questions of law or fact common to class members predominate over any questions affecting only individual members").

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

28. *Id.* at 2551.

29. Compare *M.D. ex rel. Stukenberg v. Perry*, 675 F.3d 832 (5th Cir. 2012) (denying class certification and remanding in class action alleging abuses in foster care system), with *Connor B. ex rel. Vigurs v. Patrick*, 278 F.R.D. 30, 33 (D. Mass. 2011) (certifying similar class action and stating that *Wal-Mart* did not alter class action law).

national consumer class actions. Consumer class actions often raise state law claims, but differences in states' consumer protection laws mean that individual issues can be found to predominate over collective ones.³⁰ These federal rulings took on increased importance after the passage of CAFA because now they govern almost all class actions, whereas for some period state courts adopted looser interpretations of these requirements and were more willing to certify national classes. Today both commonality and predominance present significant barriers to certifying class actions of any type—from civil rights to consumer protection.

Until very recently, the trend in class action doctrine moved in one direction: Class actions were increasingly difficult to certify for both litigation and settlement purposes. The biggest barriers to class actions were the courts' concern for future claimants in the mass tort context, their openness to collateral attacks on settlements, and the increasingly narrow reading of the requirements of Rule 23, especially the commonality requirement for all class actions and the predominance requirement for money damages class actions. This past year, however, has brought a liberalization of settlement class actions, while litigation classes remain as difficult as ever to certify.

B. The Settlement Class Renaissance: 2012 Onward

In the last twelve months, the barriers to certifying settlement class actions have appeared to diminish. Courts have given certification requirements a more generous reading and they have been more tolerant of differences among class members when presented with a settlement than when presented with a motion to certify a class for litigation. This new leniency alters the power dynamic between the parties, making class certification depend on whether the defendant agrees to a settlement.

One way courts have achieved this new leniency is by recategorizing the requirements of Rule 23. For example, in the recent case *In re American International Group, Inc. Securities Litigation*³¹ (*AIG*), the Second Circuit held that settlement class actions can overcome problems posed by a legal requirement of individual reliance. A reliance requirement in the substantive law presents a significant barrier to class certification because reliance is ordinarily an individualized question that focuses on the subjective experience of plaintiffs. The district court initially refused to certify the class on the grounds that the plaintiffs

30. See Samuel Issacharoff, *Settled Expectations in a World of Unsettled Law: Choice of Law After the Class Action Fairness Act*, 106 COLUM. L. REV. 1839, 1860 (2006) (describing the effect of the current choice of law regime in cases where there is a national market).

31. 689 F.3d 229 (2d Cir. 2012).

would have to prove individual reliance because the fraud-on-the-market presumption did not apply. Since plaintiffs were required to prove individual reliance, individual issues would predominate over common ones and a money damages class action could not be certified. The Second Circuit reversed and remanded, holding that even if the fraud-on-the-market presumption did not apply (and it declined to reach this question), this was not a barrier to settlement class certification.³² The class action would not be manageable as a litigation class if plaintiffs had to prove individual reliance, but it could still be certified as a settlement-only class because “with a settlement class, the manageability concerns posed by numerous individual questions of reliance disappear.”³³ The manageability question is not coequal with the predominance requirement, the Second Circuit explained. Manageability is a component of the predominance inquiry that the court need not consider in the settlement-only context. The court noted that other concerns, such as an overbroad class definition, the disposition of valuable state-law claims of some class members, or other interclass conflicts, might still affect the certification inquiry.³⁴

Similar reasoning was the basis of the Third Circuit’s approval of a settlement in *Sullivan v. DB Investments, Inc.*³⁵ *Sullivan* involved the settlement of state antitrust claims against DeBeers arising out of direct and indirect diamond sales all over the United States. Objectors appealed the settlement, claiming that some class members had no viable claims under state law. Presumably, some settlement funds that might have gone to claimants with meritorious claims would be used to pay claimants who had no viable state law claims, thus diluting the former group’s compensation. The Third Circuit rejected this argument, finding that although differences in state laws may be a barrier to a litigated class, those differences presented a manageability issue that was not a barrier to certifying a settlement-only class.³⁶

Both *Sullivan* and *AIG* illustrate the malleability of the categories that courts consider in determining whether a class can be certified. Individual reliance can be categorized as a manageability issue to the extent that proving individual reliance would be impossible in a collective proceeding, rendering the

32. *Id.* at 241–43.

33. *Id.* at 241 (citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 620 (1997)).

34. The court remanded on the question whether the claims of the class members “are sufficiently similar as to yield a cohesive class.” *Id.* at 240.

35. 667 F.3d 273 (3d Cir. 2011).

36. *Id.* at 303 (“[I]n the settlement context, variations in state antitrust, consumer protection and unjust enrichment laws [do] not present ‘the types of insuperable obstacles’ that could render class litigation unmanageable.” (quoting *In re Prudential Ins. Co. of Am. Sales Practices Litig.*, 148 F.3d 283, 315 (3d Cir. 1998))).

action unmanageable. It can also be characterized as a predominance issue in the sense that the question of whether each plaintiff individually relied becomes central to the litigation, overshadowing common issues regarding the defendant's conduct. Either characterization is reasonable.³⁷

To the extent that courts' characterization depends on whether a settlement is in offering, the choice allows the class action to be transferred to the defendant's control. Only if the defendant agrees to settle will the barriers to certification fall by virtue of the interpretation that the individualized issues go to manageability and therefore need not impede a settlement-only class. One might argue that this is not an asymmetry, instead the defendant is merely waiving a right in settlement that he might otherwise insist on at trial. The problem is that the requirements for certification are not the defendant's to waive; they are intended to protect absent class members. Scholars and judges have been especially concerned about the misalignment of interests between class counsel and class members in the settlement context.³⁸ A practice of allowing the defendant to waive Rule 23 requirements only when its settlement terms are met will likely exacerbate these problems.³⁹

The characterization of an issue falling into the predominance or manageability requirements is not the only barrier to certification. Consideration of the potentially competing interests of class members weighed heavily in both *Sullivan* and *AIG*. This is another legacy of the Supreme Court's decision in *Amchem*, in which the Court expressed concern about the conflicts of interest between those presently injured by exposure to asbestos and those with future claims.⁴⁰ The appellate courts' attention to interclass conflicts points to continued concern for the interests of individual class members within the class. In *Sullivan*, the Third Circuit declined to order subclassification into different groups because of concerns about balkanization of the class.⁴¹ But in *AIG* the court remanded

37. Other courts have found reliance to be a predominance issue rather than a manageability issue in contexts outside securities when there was no settlement proposed. *See, e.g., Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) (decertifying consumer class action because individual reliance issues meant individual questions predominated).

38. *See Lahav, supra* note 24, at 90–92 (describing concerns regarding abuse of settlement class actions). Without the realistic threat of litigation, plaintiffs' lawyers are even more likely to capitulate to settlements that sell their client's interests short. Something is better than nothing.

39. Howard M. Erichson, *The Problem of Settlement Class Actions* (Fordham Law Legal Stud. Research Paper No. 2243155, 2013) (arguing against a special, looser rule for settlement class actions), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2243155.

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

41. *Sullivan*, 667 F.3d at 327–28. This is consistent with precedent in the Third Circuit, which orders subclassification less often than other circuits. *See In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 272 (3d Cir. 2009) (approving a class action settlement that allocated the recovery among three distinct classes of plaintiffs without creating subclasses).

the question of whether the claims of the class members “are sufficiently similar as to yield a cohesive class.”⁴²

In another high-profile case, the Second Circuit rejected the class action settlement of a copyright infringement suit because of the failure to create a subclass for the least favored group of claimants. In *In re Literary Works in Electronic Databases Copyright Litigation*, the appellate court held that failure to create a subclass representing those claimants who had not copyrighted their works doomed the class action.⁴³ The Fifth Circuit has also rejected class settlements in which the court perceives wide differences among class members.⁴⁴

Although it is not clear to what extent differences in class members’ entitlements will continue to present a barrier to approval of settlement classes, it is still much easier to structure a settlement around these differences than to litigate such a class action. Courts are more lenient on certification and tolerant of differences among class members when presented with a settlement than when presented with a motion to certify a class for litigation. As a result, the key to the door of class certification is in the hands of the defendant. The defendant decides whether to settle, thereby making the class action possible.

C. “A Business Planner’s Dream”

The recent renaissance in settlement classes allows defendants to obtain global peace when they agree to a settlement price, but they can resist collective resolution in all other cases so that litigation is extremely costly for plaintiffs to pursue. This is why defendants are pushing for leniency in the certification of settlement class actions, even as they would like to limit litigation classes. Defendants may find themselves arguing for a lenient interpretation of predominance in settlement and a rigorous application in litigation, although in both cases the same provision of the rule is in play.⁴⁵ The reason for this preference is that the class settlement disposes of every claim in the class except for those of the

42. *In re Am. Int’l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 240 (2d Cir. 2012).

43. *In re Literary Works in Elec. Databases Copyright Litig.*, 654 F.3d 242, 254–55 (2d Cir. 2011).

44. *In re Katrina Canal Breaches Litig.*, 628 F.3d 185, 191–92 (5th Cir. 2010) (rejecting limited fund settlement on the basis that no procedures had been specified for the allocation of the fund among a wide range of differently situated class members).

45. Some might argue that this inconsistency is unnecessary because a court can deny certification of a litigation class on manageability but certify a settlement class without meeting that requirement. My response is that defense lawyers ought to argue against certification both on predominance and on manageability grounds in the litigation context. It may be intellectually inconsistent, but the motivation in any particular case ought to be to win the motion for the client.

rare individuals who decide to opt out, promising the defendant that no future suits will be brought. This is known as global peace. Global peace is a benefit so substantial that smart potential defendants should not argue that the class action is unconstitutional.⁴⁶ Stephen Yeazell described the settlement class action best:

From the defendant's standpoint, it is a business planner's dream. A massive and contingent liability has become knowable; indeed, the defendant has probably improved its credit worthiness with such an agreement, for so long as *res judicata* can bar other claims, it has gained control of a great business uncertainty.⁴⁷

If the class action did not exist, defendants would have to invent it. Where class actions are not available, lawyers have structured settlement to simulate class treatment. In one high-profile case, defendants achieved global peace only with government intervention. When the attempt to bring a class action arising out of the use of slave labor in World War II failed, the U.S. government offered immunity from suit to the German government in exchange for payment to the victims.⁴⁸ Parties have also reinvented collective litigation in the mass tort litigation context as class actions became nearly impossible to certify. Instead of certifying classes, defendants' and plaintiffs' lawyers have worked together in aggregated mass tort suits to produce settlements that provide the functional equivalent of global peace.⁴⁹ Some refer to these settlements as "quasi-class action[s]."⁵⁰

Aggregate settlements are not as good at providing global peace as class action settlements for two reasons. First, in mass torts, if statutes of limitations have not yet run when reaching a settlement, more individuals can file suit,

46. Some law professors have argued that the class action is unconstitutional because, among other reasons, it alters the substantive law. See, e.g., MARTIN H. REDISH, *WHOLESALE JUSTICE: CONSTITUTIONAL DEMOCRACY AND THE PROBLEM OF THE CLASS ACTION LAWSUIT* (2009). I have criticized this analysis. See Alexandra D. Lahav, *Are Class Actions Unconstitutional?*, 109 MICH. L. REV. 993 (2011) (reviewing REDISH, *supra*).

47. Yeazell, *supra* note 9, at 701.

48. Whether the promise of protection from lawsuits has any value given the treaties and underlying law is disputed. See Anthony J. Sebok, *Un-settling the Holocaust (Part II)*, FINDLAW'S WRIT (Aug. 29, 2000), <http://writ.news.findlaw.com/sebok/20000829.html>.

49. The most discussed of these is the *Vioxx* settlement. For a description and a critique of this settlement, see Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265 (2011).

50. See *In re Zyprexa Prods. Liab. Litig.*, 424 F. Supp. 2d 488, 491–92 (E.D.N.Y. 2006) (coining the term quasi-class action); Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-district Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107 (2010) (describing the phenomenon).

resulting in either a diluted settlement or an exploded one.⁵¹ By contrast, if a class action can bind all potential class members, it can provide true repose for the defendant. Second, ethical rules that place limitations on lawyers' abilities to bind individual clients are not operative in the class context.⁵² In class actions the lawyers can bind all class members even without their individual consent, making a global settlement easier to reach.

Accordingly, although aggregate settlements can provide an alternative road to global peace, defendants should still prefer the class action as a way to settle complex cases presenting significant outstanding liability if one can be certified. One illustration of this point is the recent certification of the class action settlement in the litigation against British Petroleum (BP) surrounding the massive oil spill that resulted from the explosion of the Deepwater Horizon offshore oil-drilling rig in the Gulf of Mexico.⁵³ The litigation involves tens of thousands of lawsuits transferred to the Eastern District of Louisiana as part of a multidistrict litigation. Each plaintiff had a different story, from shrimpers who were unable to work in the aftermath of the spill, to restaurants that were unable to serve shrimp, and to employees of those restaurants. The case could have settled in an aggregate settlement, but the parties preferred class certification. The punitive damages litigation arising out of the Exxon Valdez oil spill in Alaska provides a similar example of defendant's preference for class actions where there is a significant outstanding mass tort liability. There the defendant succeeded in certifying a class action for punitive damages. Exxon appealed the resulting verdict all the way to the Supreme Court where that award substantially reduced and provided a vehicle for limiting punitive damages awards in other cases.⁵⁴ This was a high-risk strategy, but in the end a successful one from defendant's point of view.

51. For example, after the settlement announcement, more claimants than was expected may come out of the woodwork and thereby dilute the settlement fund. Francis E. McGovern, *The What and Why of Claims Resolution Facilities*, 57 STAN. L. REV. 1361, 1383–84 (2005) (describing elastic mass torts). Or there may be fraudulent claims or other problems that increases the cost of settling or of administering the settlement. See Alexandra D. Lahav, *The Law and Large Numbers: Preserving Adjudication in Complex Litigation*, 59 FLA. L. REV. 383, 414–15 (2007) (discussing fraud and other reasons for the implosion of the *Diet Drugs* Litigation settlement).

52. See Nancy J. Moore, *The Absence of Legal Ethics in the ALI's Principles of the Law of Aggregate Litigation: A Missed Opportunity—and More*, 79 GEO. WASH. L. REV. 717 *passim* (2011).

53. *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, MDL No. 2179, 2012 WL 6652608 (E.D. La. Dec. 21, 2012).

54. *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (vacating and remanding punitive damages award and announcing a ratio of 1:1 between punitive and compensatory damages). For a discussion see Catherine M. Sharkey, *The Exxon Valdez Litigation Marathon: A Window on Punitive Damages*, 7 U. ST. THOMAS L.J. 25 (2009).

It is difficult to imagine that the case against BP could be certified as a litigation class action, but it has already been certified at the district court level as a settlement class action. Without BP's agreement to a global settlement, plaintiffs would have to proceed in a much messier, aggregated fashion. Ordinarily, lacking the opportunity to litigate the case as a class, the plaintiffs' leverage against the defendant is diminished. There is one caveat to this general observation in the mass tort context not present in the consumer law or small claims context. Whereas a consumer case cannot be brought absent the class action device because the amount at stake for each litigant is too small to proceed individually, in a mass tort the individual damages are greater and therefore the threat that lawyers will proceed individually may be credible, increasing their leverage.

The renaissance of settlement class actions presents a serious problem from a societal point of view because it limits the ability of citizens to vindicate their rights and is more likely to result in inadequate settlements, eroding the deterrent effect of litigation.⁵⁵ How does this happen? If plaintiffs can certify a litigated class, they will have leverage in settlement negotiations and in the alternative can litigate the case to judgment. If they cannot certify a litigated class but can only certify a settlement class, plaintiffs lose this leverage. The result is a renewed asymmetry between plaintiffs and defendants, which reflects the asymmetry that exists outside the courts or in individual litigation between individuals and organizations.⁵⁶ This is likely to lead to poorer settlements or no settlements at all.

55. The disputed empirical question of whether litigation has or can have a deterrent effect exceeds the scope of this Article. For purposes of this Article, I make the reasonable assumption that when litigation succeeds in extracting appropriate damages, it has a deterrent effect. Whether class actions in fact extract appropriate damages depends, in part, on the leverage that plaintiffs have to demand such damages or their insistence on litigating the case so that the court can determine damages.

56. There is considerable scholarship on the barriers individuals face in litigation in contrast to organizations. See Gillian K. Hadfield, *Exploring Economic and Democratic Theories of Civil Litigation: Differences Between Individual and Organizational Litigants in the Disposition of Federal Civil Cases*, 57 STAN. L. REV. 1275, 1293–1305 (2005) (reviewing empirical studies of advantages organizational defendants have in litigation). When corporate plaintiffs sue individuals, they win 90 percent of the time whereas when corporations sue corporations, plaintiffs win approximately 75 percent of the time. Individuals suing corporations win only 50 percent of the time. Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. S92, S102–03 (1997). Big corporations do especially well as compared with nonbusinesses. A study of Fortune 200 companies found that when they are plaintiffs (against all types of defendants) they win 70 percent of the time and when they are defendants they win 60 percent of the time. By contrast, nonbusiness plaintiffs win 60 percent of the time and nonbusiness defendants win only 28 percent of the time. Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 558 (1996).

Asymmetry is a special problem in small claims actions, in which plaintiffs cannot credibly threaten to bring individual actions and the defendant knows that absent its consent, plaintiffs cannot proceed on a classwide basis. The only reason for a defendant to settle in that type of case is to minimize transaction costs. It is reasonable to assume that although transaction costs are high in class action litigation they are not nearly as high as the expected value of the underlying lawsuit.⁵⁷ Yet small claims are exactly the ones for which the class action is most needed if the law is to be enforced. The combination of these two developments means that the class action loses its equalizing function.

D. The Paradox of the Blackmail Thesis

The argument that class action lawsuits pressure defendants to settle in ways that constitute duress, sometimes even described as metaphorical blackmail, continues to gain traction. In 2011 the Supreme Court described class actions as leading to “in terrorem” settlements.⁵⁸ Yet despite the Supreme Court’s admonition to the contrary, district and appellate courts continue to make it easier to certify settlement-only class actions even for claims they acknowledge are meritless, while the standards for certifying litigated class actions become more onerous. This trend will ultimately result in the class action becoming a vehicle for settlement for defendants who wish to obtain global peace without the threat of real litigation.

In both *Sullivan* and *AIG*, the fact that the defendant was settling allegedly meritless claims did not concern the courts. That defendant’s consent might have been less than voluntary because of the impending threat of costly litigation should they refuse to settle did not enter the calculus. The judges assumed that the defendants paid additional money to achieve global peace and did not question the defendants’ business judgment in this respect. In *Sullivan*, the court rejected both the argument that settlement funds that ought to go only to meritorious claims were being distributed to individuals with nonmeritorious claims and, presumably, the argument that defendants should not pay for

57. A Federal Judicial Center survey found that litigation costs for plaintiffs ranged from a low of \$1,600 (10th percentile) to a high of \$280,000 (95th percentile) and for defendants ranged from \$5,000 (10th percentile) to \$300,000 (95th percentile). EMERY G. LEE III & THOMAS E. WILLGING, FED. JUDICIAL CTR., NATIONAL, CASE-BASED CIVIL RULES SURVEY: PRELIMINARY REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 2 (2009), [http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/\\$file/dissurv1.pdf](http://www.fjc.gov/public/pdf.nsf/lookup/dissurv1.pdf/$file/dissurv1.pdf). Assuming most federal class actions are valued at over five million, the threshold for federal jurisdiction under the Class Action Fairness Act, any suit meeting the minimum threshold with a probability of success of 10 percent will be valued above transaction costs.

58. *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1752 (2011).

meritless claims as a matter of principle. In *AIG*, the Second Circuit considered the argument that defendants should not pay for meritless claims and explained, “[d]efendants in class action suits are entitled to settle claims pending against them on a class-wide basis even if a court believes that those claims may be meritless, provided that the class is properly certified under Rules 23(a) and (b) and the settlement is fair under Rule 23(e).”⁵⁹ Note the difference between this statement and the blackmail argument. For the Second Circuit, settling meritless claims is nothing more than a business decision. In the blackmail formulation, the same dynamic is analogized to a crime.

Since the class action rule was first adopted, some critics have raised concerns about the capacity of this procedural device to force defendants to settle otherwise nonmeritorious cases.⁶⁰ As Judge Richard Posner explained in a recent case, *Kohen v. Pacific Investment Management Co. (PIMCO)*, even where the probability that a “plaintiff will succeed in establishing liability is slight, the defendant will be under pressure to settle rather than to bet the company, even if the betting odds are good.”⁶¹ This Seventh Circuit decision highlights the problems with the blackmail thesis and what appears to be a significant inconsistency in courts’ perceptions of class actions.⁶²

PIMCO involved an alleged monopoly over the futures market in long-term treasury notes.⁶³ Defendant appealed a class certification order arguing that the class definition included plaintiffs who may have in fact benefitted from the alleged monopoly. In other words, some of the plaintiffs had meritless claims and this made the class definition too broad. To correct this, the defendant argued, plaintiffs must demonstrate that they were in fact injured as a condition of class certification. As Judge Posner pointed out, this would involve a trial on the merits before the certification motion. He implied that such a consideration might be necessary when the risk of loss is so great that it endangers the company’s existence.⁶⁴ In *PIMCO* Judge Posner found that the litigation did not endanger the company’s existence, but he indicated that if it did, a more stringent standard might apply.⁶⁵

As a formal matter, a court may consider whether a class definition is sufficiently clear, whether there are issues of fact or law common to all class members, and whether these issues predominate over individualized questions.

59. *In re Am. Int’l Grp., Inc. Sec. Litig.*, 689 F.3d 229, 243–44 (2d Cir. 2012).

60. See sources cited *supra* note 9.

61. *Kohen v. Pac. Inv. Mgmt. Co.*, 571 F.3d 672, 678 (7th Cir. 2009).

62. The opinion was also cited approvingly by the Supreme Court. *AT&T Mobility*, 131 S. Ct. at 1752.

63. *Pac. Inv. Mgmt. Co.*, 571 F.3d at 674.

64. *Id.* at 678.

65. *Id.*

A court could find that the presence of claimants with clearly meritless claims violated one of these rule-based requirements. But there is no basis in the rule for tying the stringency of these evaluations to the risk that the defendant faces in the litigation. Courts are not empowered to consider the effect of a dispositive motion on the ultimate financial health of either party unless their finances are relevant to the liability or compensation inquiry.⁶⁶ Motions are meant to be decided based on the applicable law and relevant facts. One can imagine a regime that requires determination of the merits in every class action as part of the certification inquiry, but that would require a change in the class action rule and if such a change were to be adopted, there is no good reason to single out the “bet the company cases” for this treatment.⁶⁷

What about the suggestion that when the probability that “plaintiff will succeed in establishing liability is slight,” the rules ought to take into account the amount of the requested relief and its effect on defendant’s financial health? This idea is erroneous. Understanding why requires a more nuanced view of the risk of liability. The expected value of a lawsuit is calculated by multiplying the risk of a finding of liability by the predicted award if the defendant were found liable. If liability risk is a probability, then out of a set of cases, some number is likely to result in a liability finding. So if a lawyer were to tell his client that there is a 10 percent chance that he will be found liable, what the lawyer means is that out of one hundred similar cases tried, ten would result in liability and ninety would not. Where the case is truly meritless, the risk of liability should be zero. The statement that different rules ought to apply where the plaintiffs’ chances of success are low assumes that as the probability of success approaches zero, the

66. As noted above, the rules of evidence expressly prohibit the introduction of evidence of insurance coverage, FED. R. EVID. 411, and the financial well being of a party is otherwise not relevant and probably prejudicial if the party has a deep pocket. FED. R. EVID. 401, 403. People are still interested in these questions, however, as demonstrated by juror questions regarding insurance coverage in deliberations. See Shari Seidman Diamond et al., *The “Kettleful of Law” in Real Jury Deliberations: Successes, Failures, and Next Steps*, 106 NW. U. L. REV. 1537, 1576 (2012) (describing insurance as “a legally irrelevant issue in determining damages that . . . jurors in tort cases often spontaneously consider as they discuss compensation”).

67. At least one judge has proposed holding “exemplary trials” of the class representative to determine the merit of a claim before certifying a class action. *Glick v. Banker’s Life & Casualty Ins. Co.*, No. 12-cv-11579-WGY (D. Mass. Dec. 6, 2012). Another proposed solution is a class certification standard that approximates the standard for preliminary injunctions in which the likelihood of success on the merits is evaluated prior to certification. Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 DUKE L.J. 1251, 1279–80 (2002). The problem with this standard is that a case may have a low likelihood of success on the merits and still destined to win, yet be unable to obtain class certification. In small claims actions too small to litigate individually, the case would be barred merely because the likelihood of success is low.

case can be classified as meritless. This misunderstands the nature of a probability distribution. In the case of a 10 percent chance that defendant would be found liable, in one of ten cases the defendant will lose. How can we know if this case is that one? Until the case is litigated, nobody knows. If the one case in ten loses, this does not mean that this loss was an error and that plaintiff should have no right to recovery even though plaintiff prevailed. It may be that given the facts of the case and the evolving law, a liability finding was appropriate.⁶⁸ Now imagine that the lawyer tells the client that the risk of liability is in fact zero, but that there is a 10 percent risk of judicial error. A number of procedural rules address such errors.⁶⁹ When commentators or judges describe a class action lawsuit as having a low probability of success, they seem to me to be referring to the risk of liability, not risk of judicial error.

The acceptance of the erroneous assumption that low probability cases are meritless, central to the blackmail thesis, is consistent with the trend toward earlier and less fact-driven determinations of lawsuits.⁷⁰ This assumption was evident in recent arguments before the Supreme Court in *Amgen Inc. v. Connecticut Retirement Plans and Trust Funds*.⁷¹ That case concerned whether a plaintiff in a securities class action must prove that the statement made by the defendant

68. Risk must be distinguished from uncertainty. Uncertainty is a nonquantified risk—an unknown probability. Sarah B. Lawsky, *Modeling Uncertainty in Tax Law*, 65 STAN. L. REV. 241, 243 (2013) (defining uncertainty as an unknown probability). Lawsky's illustration is excellent. To paraphrase, imagine that you have an urn filled with one hundred red and black balls. If you know the probability of pulling out a red ball is ten percent, you know that there are ten red and ninety black balls in the urn. Under conditions of uncertainty, you know the urn holds both black and red balls, but you do not know how many red balls the urn holds. Lawsky points out that most people prefer the "Known Urn"—that is, they are averse to uncertainty. *Id.* at 261.

69. The most important protection against judicial error is the right to appeal. An interlocutory appeal of class certification motions is available. FED. R. CIV. P. 23(f). A defendant can also bring a motion to dismiss for failure to state a claim, FED. R. CIV. P. 12, a motion for summary judgment, FED. R. CIV. P. 56, or a motion for judgment as a matter of law, FED. R. CIV. P. 50. The screening function of pleadings, for example, should assuage concerns that defendants are suffering from duress as they can always bring motions to dismiss the moment a suit is filed. *See, e.g.,* *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (articulating new "plausibility" pleading standard). The transaction costs imposed by different motions and how these costs alter litigation choices are important subjects of study beyond the scope of this Article. *See, e.g.,* Samuel Issacharoff & George Loewenstein, *Second Thoughts About Summary Judgment*, 100 YALE L.J. 73, 75 (1990) (demonstrating that summary judgment "fundamentally alters the balance of power between plaintiffs and defendants by raising both the costs and risks to plaintiffs in the pretrial phases of litigation while diminishing both for defendants").

70. *See generally* Kevin M. Clermont & Stephen C. Yeazell, *Inventing Tests, Destabilizing Systems*, 95 IOWA L. REV. 821 (2010) (discussing impact of new pleading standards).

71. 133 S. Ct. 1184 (2013). The Court held that plaintiffs need not prove materiality at the class certification stage. *Id.* at 1197.

corporation was material in order for a class to be certified. In the oral argument, Justice Scalia questioned counsel for the plaintiffs on whether the enormous pressure to settle claims was a reason to review materiality at the certification stage. The idea behind this line of questioning is that without knowing whether a defendant is in fact liable, the courts ought not expose the defendant to a risk of liability.⁷²

Setting aside the question of whether the class certification standard ought to include a merits inquiry across the board, it is not a good idea to decide class certification motions based on the financial effect of judgment on the parties on either side of the litigation. A rule that allows courts to consider the risk that a judgment may cause financial ruin in determining any procedural question would create perverse incentives. A defendant would find it much easier to avoid class certification by perpetuating a very significant and costly violation of the law, preferably affecting people for whom suing individually did not make economic sense. Or a defendant might deliberately undercapitalize so that it could plead financial ruin in the event of a suit.⁷³ Plaintiffs injured by wrongful actions would not obtain relief not because the substantive law required this outcome but because the defendant lacked the capital to pay them. Even strong adherents to the blackmail thesis in class actions would agree that a defendant facing significant, enterprise-threatening liability in a meritorious suit should be held to account. For the defendant to settle such a suit would not be bowing to extortion but demonstrating good business sense. It is no defense to wrongdoing that it was on a grand scale.

In all civil actions, courts must decide motions and require onerous tasks of litigants, not least of which is discovery, before determining liability. It would be convenient if the civil justice system could operate on the same principle as the police in the Philip K. Dick science fiction story *The Minority Report* and determine liability as the suit is filed.⁷⁴ In that case the small individual defendant who feels forced to pay \$3000 for a meritless copyright claim against him, the large corporation that pays a multimillion dollar class action settlement unnecessarily,

72. Assistant to the Solicitor General Melissa Sherry, arguing for the United States, explained that certain liability is not a prerequisite to class certification. Indeed, she stated, "The class rises or falls together. And class certification is not about only certifying meritorious cases." Transcript of Oral Argument at 48, *Amgen Inc.*, 133 S. Ct. 1184 (No. 11-1085).

73. In some instances, the doctrine of piercing the corporate veil may be available as a remedy for undercapitalization but only if the court agrees to adjudicate the issue. See generally 2 PHILLIP I. BLUMBERG ET AL., *BLUMBERG ON CORPORATE GROUPS* (2d ed. 2005).

74. In the story, the police are able to predict crimes before they happen and arrest the future perpetrator. PHILIP K. DICK, *THE MINORITY REPORT* (1987). The story was adapted into a feature film directed by Steven Spielberg in 2002.

and the plaintiff with the meritorious tort claim who settles too cheaply would all receive every procedural advantage. But at the outset of the litigation, distinguishing between meritorious and nonmeritorious claims is almost impossible. Screening cases without factual development is very difficult.⁷⁵ Developing facts is what the nontrial procedures of civil litigation are for.⁷⁶ It would not be appropriate for courts to make determinations of class certification (or any other motion) based on an assumption that the plaintiffs' case is without merit, rather than making a fact-determined ruling with the appropriate evidentiary foundation. This is because judges in our system are supposed to be impartial. Reliance on an assumption rather than demonstrated facts produced through the proper procedures evidences bias.

This brings us to an inconsistency in the class action case law. The blackmail argument appears only in class actions that are proposed to be litigated. Superficially, this makes sense. Under Judge Posner's oft-cited formulation of the blackmail argument, a defendant experiences the pressure to settle only when there is a small risk of significant loss at trial.⁷⁷ If no trial is proposed, that risk is not present. In a settlement-only class, the defendant has already agreed to settle. Oddly, courts accept defendants' business judgment *ex post* but reject it *ex ante*. This makes sense if you assume that settlement negotiations take place in a low-pressure environment where there is no real threat of class certification, lending significant leverage to defendant's position. In that case, however, one would have to be concerned about adequacy of plaintiffs' representation. A useful example is the adjudication of *In re Rhone-Poulenc Rorer Inc.*, a class action brought by hemophiliacs who had received tainted blood transfusions.⁷⁸ Judge Posner refused to certify a litigated class in a well-known opinion citing the blackmail thesis. In a subsequent and less cited opinion, he approved a settlement-only class action pertaining to the same subject matter, disapprovingly calling the settlement terms "downright weird."⁷⁹ More recently, the *AIG* case is an extreme example of courts' preference for defendant-driven settlements in class actions. In that case, after denying the class certification motion, the district court

75. See Robert G. Bone, *Plausibility Pleading Revisited and Revised: A Comment on Ashcroft v. Iqbal*, 85 NOTRE DAME L. REV. 849 (2010) (discussing the uses and potential abuses of screening mechanisms for complaints).

76. See John H. Langbein, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 542–45 (2012) (explaining the availability of discovery to obtain information and evaluate suits as a primary reason trials have declined).

77. Other formulations, and the inconsistencies between them, are laid out thoroughly in Silver, *supra* note 9.

78. *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1294 (7th Cir. 1995).

79. *In re Factor VIII or IX Concentrate Blood Prods. Litig.*, 159 F.3d 1016, 1018 (7th Cir. 1998).

granted a long-dormant motion that had been filed by the defendants at the outset of the litigation (and stayed at their request) seeking judgment on the pleadings.⁸⁰ Nevertheless, the defendants still wanted to settle the case. In both *AIG* and the blood products litigation, the court had already removed the potential for settlement under duress, in the former by denying class certification and in the latter by granting a motion to dismiss. But defendants still wanted to settle all the claims, even potentially meritless ones, and the appellate court approved.

II. SYMMETRY AND EGALITARIANISM IN LITIGATION

An egalitarian approach offers a different perspective on blackmail settlements. Although there is not enough space here to consider an egalitarian approach to litigation thoroughly, a few things may be said.⁸¹ First, our political and legal system largely supports the idea of equality of opportunity. In litigation, this translates into a type of formal equality realized by giving litigants access to the same procedures. The problem with this approach is that litigants are differently positioned, mostly based on the state of affairs outside the courthouse, and these differences affect their ability to use procedures that formally apply the same to all.⁸² Litigants who come into the court with different advantages are not able to utilize the procedural opportunities made available to them with equal effectiveness. If access to more resources systematically affects litigation outcomes in favor of one side, then the court system will have failed in its promise to apply the law impartially. As a corollary, widespread belief that there is a thumb on the scales threatens to undermine faith in our system of laws and, potentially, compliance with court judgments.⁸³ For example, a recent poll found that 83

80. *In re Am. Int'l Grp., Inc. Sec. Litig.*, 689 F.3d 229 (2d Cir. 2012).

81. For a discussion of different types of equality in civil procedure, see Rubenstein, *supra* note 1.

82. See generally Issacharoff & Loewenstein, *supra* note 69 (discussing differing effect of summary judgment rules on plaintiffs and defendants); see also DEBORAH L. RHODE, ACCESS TO JUSTICE 1–19 (2004) (describing how resources affect individual's ability to vindicate their rights).

83. On the link between compliance and perceptions of fair procedures, see generally E. ALLAN LIND & TOM R. TYLER, THE SOCIAL PSYCHOLOGY OF PROCEDURAL JUSTICE (Melvin J. Learner ed., 1988), which describes studies testing procedural justice in various contexts. For a qualitative empirical study of the effect of power and resource disparities on perceptions of fairness, see Ellen Berrey et al., *Situated Justice: A Contextual Analysis of Fairness and Inequality in Employment Discrimination Litigation*, 46 LAW & SOC'Y REV. 1, 1–3 (2012). This study found that plaintiffs in employment discrimination cases perceive the justice system as unfair because of resource disparities between employees and employers, among other reasons. *Id.* at 15. Although Title VII provides for attorney's fees should the plaintiff prevail, presumably assisting with resource inequality, many plaintiffs complained about the quality of their attorneys. *Id.* at 21.

percent of respondents believed that the side with more money generally prevails in litigation.⁸⁴

Any time a lawsuit involves parties with different economic resources, resource disparity will affect the ability of those parties to vindicate their rights.⁸⁵ The American civil litigation system has no mechanism to address the inequalities among individuals upon entry into the system. The poor and the rich receive the same access to procedural devices. But this formal equality may nevertheless lead to different levels of pressure—economic and psychological—as a result of the parties’ differing positions entering the litigation. This is a problem in terms of the system’s ability to live up to its promise of equal treatment, and it is the same problem in the class action context as in any other. Thus an individual with a winning defense against a \$250,000 copyright claim may nevertheless settle for \$3000 because this amount is far less than the cost of litigating the case to judgment or even of hiring a lawyer. So too, a corporation’s management may experience pressure to settle a class action because of significant outstanding liability even if they believe they have a good defense to the claims being made, perhaps because shareholders are adverse to risk. On the other side of the litigation ledger, an individual with a promising tort claim may settle for far less than a jury would award because economic pressures will not permit him or her to wait for a better offer. Or he or she might not bring a claim at all because the cost of litigation exceeds the expected value of the claim.

Organizations facing so-called in *terrorem* settlements are in no different position than any other litigant. Accordingly, one response to the cries of blackmail is to say that the litigation system takes the parties as it finds them. Since the class action device—a court-created procedure—has created symmetry between litigants in contrast to the status quo outside the court, that shift in power seems to need justification. Samuel Issacharoff argues that the justification for collective suits is the necessity to make the parties’ claims “mirror images of each other.”⁸⁶ To the extent that the wrong was a mass wrong, undifferentiated among the many alleged victims, he explains, the plaintiffs should be permitted to formally aggregate so that they can stand toe-to-toe with the institutional

84. LANGER RESEARCH ASSOCS., THE DRI NATIONAL POLL ON THE CIVIL JUSTICE SYSTEM 4 (2012), <http://www.dri.org/News/PublicPolicy> (click “Poll Analysis” under the “2012 Poll” heading).

85. See generally Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1314–17 (2012).

86. Samuel Issacharoff, *Assembling Class Actions* 12 (Pub. Law & Legal Theory Working Paper Series, Working Paper No. 12-34, 2012), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2103860.

defendant.⁸⁷ The class action makes the plaintiff class into a type of organizational plaintiff that can access the resources necessary to prosecute a suit.

Most litigation today is between individuals and organizations.⁸⁸ Marc Galanter argues that institutions have disproportionate access to legal resources, which so far have been priced out of reach of ordinary persons.⁸⁹ “[I]ndividuals are just the wrong size to use legal services effectively,” Galanter explains.⁹⁰ The class action may be one of those rare instances in which “the kinds of options that are routine for large organizations are feasible and effective for individuals.”⁹¹ But class actions do not truly equalize individuals and organizations because the individual within the class does not participate in the action or direct it, nor will he or she sustain a direct loss or be required to pay attorney’s fees in the event that the suit is unsuccessful.⁹² The class member is a passive participant. Nevertheless, the plaintiff class (despite its internal flaws) can stand on equal footing with an organizational defendant with the same capacity to pursue a lawsuit.

If society does not see fit to remedy inequalities that lead to power and resource differentials, why should the courts not simply reflect that policy decision? Another way of thinking about the same question is that perhaps if we want to consider inequality we should start closer to the core.⁹³ I think the answer lies in the observation that where relationships between individuals (and organizations) are governed by a set of legal rights, obligations, and entitlements that are realizable through litigation, some capacity to litigate is necessary to maintain that social structure.⁹⁴ The rule of law requires equality before the courts. It is the hallmark of equal citizenship in our society that an individual (or organization) may go to court to assert and vindicate those rights and entitlements on equal

87. *Id.* at 10–11.

88. Marc Galanter, *Planet of the APs: Reflections on the Scale of Law and Its Users*, 53 *BUFF. L. REV.* 1369, 1376–77 (2006).

89. *Id.* at 1386.

90. *Id.* at 1385–86.

91. *Id.* at 1386.

92. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985) (discussing differences between plaintiffs and defendants in class litigation).

93. Professor Yeazell suggests that in arguments about access to justice, in addition to arguments for increased access to the capacity to litigate through class actions or access to criminal defense lawyers, claims of poor individuals to the enforcement of existing laws should be paramount. Stephen C. Yeazell, *Socializing Law, Privatizing Law, Monopolizing Law, Accessing Law*, 39 *LOY. L.A. L. REV.* 691, 716–17 (2006). “I believe that the claims of the poorest for freedom from violence, and for control over life’s most intimate relation and society’s most basic unit of social life, ought to be strong ones, even for scarce resources.” *Id.* at 717.

94. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One’s Rights—Part II*, 1974 *DUKE L.J.* 527, 536.

footing with any other litigant. Thus, even if resource inequality characterizes our society, the court system ought not reflect and reinforce those extant inequalities in enforcing legal rights and obligations.

This ideal is reflected in our legal tradition. For example, the opinion establishing the principle of judicial review arose out of a case in which a lowly government officer took the secretary of state to court.⁹⁵ The oath of judicial office requires fidelity to a principle of equality before the court:

I, _____, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as _____ under the Constitution and laws of the United States. So help me God.⁹⁶

An emerging literature develops the idea that equality should be concerned with establishing the conditions for equal citizenship, linked to the notion of equal concern and respect.⁹⁷ The philosopher Elisabeth Anderson posits the conditions of democratic equality:

To stand as an equal before others in discussion means that one is entitled to participate, that others recognize an obligation to listen respectfully and respond to one's arguments, that no one need bow and scrape before others or represent themselves as inferior to others as a condition of having their claim heard.⁹⁸

This description immediately brings to mind the courts, although Anderson does not mean it to apply so narrowly. Anderson's focus is the individual's participation, and translated into the litigation context one might note that participation is mostly not available in class actions.⁹⁹ The same concepts Anderson articulates can also be marshaled in favor of a broader antisubordination ideal applicable to categories of persons that suffer from asymmetrical resources. When what is at stake is the fair and impartial application of the law, a basic element of a democratic and free society, more emphasis on resource inequality before the

95. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 137–38 (1803) (establishing the power of judicial review).

96. 28 U.S.C. § 453 (2006).

97. The significant scholarship on egalitarianism is too broad and complex for this Article to address adequately. Anderson, *supra* note 1, at 332; *see also* Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. (forthcoming 2013) (arguing that the purpose of employment law is to promote social equality).

98. Anderson, *supra* note 1, at 313; *see also* Elizabeth Anderson, *How Should Egalitarians Cope With Market Risks?*, 9 THEORETICAL INQUIRIES L. 239, 265 (2007).

99. *See, e.g.*, Alexandra D. Lahav, *The Case for "Trial by Formula,"* 90 TEX. L. REV. 571 (2012) (discussing the tension between individualism and equality in aggregate litigation).

courts may be warranted. Thinking of this question in a broader political way, Daniel Markovits argues that the obligation of the state is not to lend its legitimacy to enforcing inequality in a morally arbitrary way, an idea he terms “political solidarity.”¹⁰⁰ Perhaps the state is under an obligation not to transform inequality of resources into inequality of enforcement of legal rights and obligations.

It may be practically impossible to overhaul adjudication to reflect these ideals, but they present a good place to begin discussing the value of equal standing before the court, which is an expression of society’s equal respect and concern of all persons. In cases where numerous individuals have been harmed by large organizations and lack the resources to bring suit on their own, these ideals support (at a minimum) forcing symmetry through the class action, even if it upends the status quo ante.

CONCLUSION

A very talented lawyer I worked with once said to me, “The frustrating thing about litigation is that there is always someone equal and opposite you trying to undo everything you do.” The greatest strength of American civil litigation is that it promises equality between litigants in all matters before the court and provides the opportunity for one litigant to stand equal and opposite another. Whatever their relative power outside the courtroom, parties are entitled to equal treatment before the court, to equal use of procedural devices that permit them to obtain hidden information, to call their opponent to account for wrongdoing, and to assert their legal rights in public. But this same promise is also the source of frustration, and sometimes litigation results in waste, such as when two parties equal and opposite wield the tools of procedure to outdo, or perhaps undo, one another. Instead of resolving disputes quickly and amicably, lawsuits can divert resources that could be put to more productive use into a process of writing bulletproof complaints and moving to dismiss them, propounding discovery requests and resisting them, fighting over claim certification, cross moving for summary judgment, and marshaling every resource at trial.

100. In fact, Markovits makes a somewhat stronger argument for political solidarity, explaining that “it is not the degree of inequality that matters, but the fact that inequality is enforced by a purportedly legitimate state. The ‘conception of society as a fair system of cooperation among equals’ requires that the state not lend its legitimacy to supporting *any* inequality in a morally arbitrary way.” Daniel Markovits, *Luck Egalitarianism and Political Solidarity*, 9 THEORETICAL INQUIRIES L. 271, 286 n.50 (2007).

The class action creates symmetry between litigants where outside the courtroom they are unequal. In so doing, it sets in motion a process that lives up to the promise of the American litigation system, with all its flaws. This Article suggests that much of the ire against the class action stems from the fact that this procedural device alters the status quo ante by creating symmetry between litigants. If the inconsistent treatment of settlement and litigation classes persists, this symmetry will be undone and the power dynamic favoring organizations in the larger social order will be enforced within the courts. This is undesirable because the courts ought to be a place where every person can vindicate their rights regardless of size, wealth, and social status.

Even when there is symmetry between litigants, the tension between the pressure to settle and the requirement of rectitude persists.¹⁰¹ Because a lawsuit is costly and the outcome uncertain, litigants may feel pressure to settle even if the law is on their side and they stand on equal footing with their opponents. But matters are made worse when there is significant asymmetrical power distribution. In such cases, the courts cannot hope to achieve their egalitarian promise of evenhanded enforcement of rights and obligations through litigation. For this reason, the civil justice system needs procedures such as the class action to produce greater symmetry between parties. The illusion of symmetry offered by settlement-only class actions is not enough. Enforcing rights and obligations in the courts requires litigation.

101. By rectitude I mean the correct application of law to the facts of the case.