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# Governing the Anticommons in Aggregate Litigation

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## INTRODUCTION

Following the September 11, 2001 terrorist attacks, more than ten thousand rescue and cleanup workers brought individual lawsuits against New York City for respiratory and other illnesses they developed after working in the ruins of the World Trade Center. After years of litigation, the parties put together a comprehensive settlement in 2010. The defendant agreed to pay a total of \$625 million so long as 95% of the plaintiffs accepted the terms of the settlement. If 100% of the plaintiffs signed on, however, the defendant was willing to increase the total settlement amount to be shared among all the plaintiffs to \$712.5 million.<sup>1</sup> In other words, to get the

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1. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011); World Trade Center Litigation Settlement Process Agreement, As Amended §§ II.A, IV, VI.E

last 5% of plaintiffs to sign on, the defendant was willing to pay a substantial premium—more than twice the per-claimant amount for the first 95%. But, because the plaintiffs could get only 95.1% of their ranks to participate by the deadline, they left up to \$87.5 million on the table.<sup>2</sup>

Why did the plaintiffs fail to maximize the collective value of their claims? Looking to property theory, I argue, can help us understand. As this Article will explain, there is an “anticommons” problem in aggregate litigation.<sup>3</sup>

A tragedy of the anticommons occurs when property rights are fragmented. Many owners have the power to block the most efficient use of a resource, but no one has the right to use it without obtaining permission from all the others.<sup>4</sup> In such a dynamic, transaction costs and strategic holdout behavior can prevent the owners from assembling dispersed property rights into a bundle more valuable than the sum of its parts.

Aggregate litigation exhibits the same dynamic. Defendants want peace, and they are often willing to pay for it. Plaintiffs therefore may stand to gain if they can package all of their claims together and sell them to the defendant (i.e., settle) as a single unit; that is, they can charge a premium for total peace. But, because the rights to control those claims are dispersed among many individual plaintiffs, aggregating them into a more valuable collective can be difficult.

(Mar. 11, 2010) [hereinafter World Trade Settlement], available at <http://www.nysd.uscourts.gov/cases/show.php?db=911&id=540>.

2. See Mireya Navarro, *Sept. 11 Workers Agree to Settle Health Lawsuits*, N.Y. TIMES, Nov. 19, 2010, at A1; see also *infra* note 56 (discussing subsequent developments in case).

3. That aggregate litigation exhibits features of “commons” problems has not gone unnoticed in the literature. See Sergio J. Campos, *Mass Torts and Due Process*, 65 VAND. L. REV. 1059, 1085–87 (2012) (noting that mismatch between the scale of resource ownership and the scale of most efficient use can lead to commons and anticommons situations in mass tort litigation and arguing that asymmetric stakes between plaintiffs and defendants are best understood as a tragedy of commons where plaintiffs underinvest in enforcing law through the tort system); Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 VA. L. REV. 1721, 1722, 1747–50 (2002) (arguing that asbestos defendants’ assets constitute a limited common-pool resource and current plaintiffs are rationally overgrazing to the detriment of future plaintiffs); Michael A. Perino, *Class Action Chaos? The Theory of the Core and an Analysis of Opt-Out Rights in Mass Tort Class Actions*, 46 EMORY L.J. 85, 96–97, 125 (1997) (arguing that mass litigation has two kinds of “tragedy of the commons effects”: (1) costs of multiple trials are externalities on other litigants and the judicial system that individual claimants have no incentive to limit, and (2) defendant’s assets form a “common pool” if insufficient to satisfy all claims). While others have applied the “commons/anticommons” framework to some of the collective action and free riding problems in mass tort litigation, my focus here is on an analytically distinct problem: the anticommons dynamic that makes it difficult for parties to craft comprehensive settlements that could leave both sides better off in aggregate litigation.

4. Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624, 674 (1998).

In some circumstances, plaintiffs can use the class action mechanism to offer defendants peace. But the class action has become less and less practical for resolving many types of large-scale aggregate litigation, such as mass torts.<sup>5</sup> Attention has increasingly turned to nonclass aggregate settlements where the parties attempt to resolve claims in bulk, even though the plaintiffs are pursuing formally separate lawsuits.

To obtain peace outside of the class action, the defendant must buy it from each individual plaintiff because each plaintiff retains ultimate control over the decision whether and on what terms to settle. Indeed, the legal ethics rules governing aggregate settlements in all fifty states *require* such fragmentation of control by barring plaintiffs from relinquishing autonomy over settlement decisions. Thus, even as the handful of specialized plaintiffs firms that represent the vast majority of plaintiffs in mass litigation attempt to negotiate large-scale aggregate settlements, they are hampered by their inability to guarantee defendants that every plaintiff will sign on.

In recent efforts to set forth principles to regulate nonclass aggregate settlements, the American Law Institute (“ALI”) recognized that the traditional “aggregate settlement rule”—which requires a lawyer attempting to settle claims in bulk to obtain each client’s individual consent after disclosing all the terms of the deal, including every other client’s share in the settlement—can be an obstacle to comprehensive settlements.<sup>6</sup> The rule empowers any single plaintiff to hold up a global deal by refusing to participate once the deal’s terms have been negotiated. Thus in the most controversial (and perhaps

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5. See, e.g., Wal-Mart Stores, Inc. v. Dukes, 131 S.Ct 2541, 2546, 2551–52, 2561 (2011) (refusing class certification to one and a half million female plaintiffs in employment discrimination case on grounds of insufficient commonality); Ortiz v. Fibreboard Corp., 527 U.S. 815, 864 (1999) (invalidating certification of limited fund settlement class as global resolution of asbestos litigation); Amchem Prods., Inc. v. Windsor, 521 U.S. 591, 628 (1997) (invalidating certification of asbestos settlement class action because of problems with commonality and adequacy of representation); see also Elizabeth Chamblee Burch, *Group Consensus and Individual Consent*, 79 GEO. WASH. L. REV. 506, 507 (2011) (noting shift away from class actions); Myriam Gilles, *Opting Out of Liability: The Forthcoming Near-Total Demise of the Modern Class Action*, 104 MICH. L. REV. 373, 375 (2005) (highlighting flaws in mass tort class actions and suggesting the gradual demise of these class actions in practice); Robert H. Klonoff, *The Decline of Class Actions*, 90 WASH. U. L. REV. (forthcoming 2013) (manuscript at 1), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2038985](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2038985) (arguing that courts have recently restricted availability of class actions); Thomas E. Willging & Emery G. Lee III, *From Class Actions to Multidistrict Consolidations: Aggregate Mass Tort Litigation After Ortiz*, 58 U. KAN. L. REV. 775, 777 (2010) (examining potential shift from class actions to other forms of aggregate litigation).

6. See, e.g., MODEL RULES OF PROF’L CONDUCT R. 1.8(g) (2009) (“A lawyer who represents two or more clients shall not participate in making an aggregate settlement . . . unless each client gives informed consent.”).

most important) recommendation in its *Principles of the Law of Aggregate Litigation*, the ALI proposed modifying the aggregate settlement rule in mass litigation.<sup>7</sup> The ALI proposal would allow plaintiffs sharing a common lawyer to agree in advance to be bound by a supermajority vote on whether to accept a group settlement offer, subject to judicial review for procedural and substantive fairness.<sup>8</sup> By effectively precommitting to be bound by a collective decision—that is, by contractually aggregating their rights—a group of plaintiffs could credibly offer the defendant what it wants: complete peace.

The ALI proposal, however, has drawn fire from several prominent critics.<sup>9</sup> These critics argue that allowing clients to transfer their individual rights to accept or reject a settlement to a group would leave clients vulnerable. Without individual control over their claims, these critics say, clients would not be able to protect themselves against inadequate settlements or unfair allocations arranged by lawyers trying to appease the majority to get a deal done

7. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 3.15–3.18 (2010). Samuel Issacharoff, the Reporter for the *ALI Principles*, described the proposal on nonclass aggregate settlements as “probably the single greatest contribution of [the] project.” *Discussion of Principles of the Law of Aggregate Litigation*, 86 A.L.I. PROC. 229, 269 (2009).

8. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b), (d), (e).

9. See, e.g., Sybil L. Dunlop & Steven D. Maloney, *Justice is Hard, Let's Go Shopping! Trading Justice For Efficiency Under the New Aggregate Settlement Regime*, 83 ST. JOHN'S L. REV. 521, 556–57 (2009) (criticizing ALI proposal on the grounds that it “silence[s] those who are the most likely to challenge the fundamental fairness of established law”); Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 269 (2011) (critiquing the ALI Principles’ lawyer-empowerment idea in mass torts); 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, 718 (2011) [hereinafter Moore, *Absence of Legal Ethics*] (examining consequences of ALI proposal’s failure to discuss legal ethics); Nancy J. Moore, *The American Law Institute's Draft Proposal to Bypass the Aggregate Settlement Rule: Do Mass Tort Clients Need (Or Want) Group Decisionmaking?*, 57 DEPAUL L. REV. 395, 401 (2008) [hereinafter Moore, *Group Decisionmaking*] (explaining ALI proposal problems relating to inadequacy of disclosures to mass tort clients early in a case); Thomas D. Morgan, *Client Representation vs. Case Administration: The ALI Looks at Legal Ethics Issues in Aggregate Settlements*, 79 GEO. WASH. L. REV. 734, 734 (2011) (arguing that the proposal is inadequate and conflicts with ABA Model Rule 1.8(g)); Carol A. Needham, *Advance Consent to Aggregate Settlements: Reflections on Attorneys' Fiduciary Obligations and Professional Responsibility Duties*, 44 LOY. U. CHI. L.J. 511, 515 (2012) (characterizing the ALI proposal as a “wide-angle view” and reiterating the importance of lawyer duties to each individual client). For criticism of an earlier proposal by Charles Silver (Associate Reporter for the *ALI Principles*) and Lynn Baker to allow advance waivers of the aggregate settlement rule, see, for example, Howard M. Erichson, *Beyond the Class Action: Lawyer Loyalty and Client Autonomy in Non-Class Collective Representation*, 2003 U. CHI. LEGAL F. 519, 570–71 [hereinafter Erichson, *Beyond the Class Action*]; Steve Baughman Jensen, *Like Lemonade, Ethics Comes Best When It's Old-Fashioned: A Response to Professor Moore*, 41 S. TEX. L. REV. 215, 216 (1999); Nancy J. Moore, *The Case Against Changing the Aggregate Settlement Rule in Mass Tort Lawsuits*, 41 S. TEX. L. REV. 149, 181–82 (1999) [hereinafter Moore, *Case Against*].

and collect a hefty fee.<sup>10</sup> Further, critics contend that before the settlement offer's terms are known, clients who retain lawyers to pursue their individual cases cannot understand, and therefore consent to, all of the conflicts of interest that will inevitably arise in allocating a group settlement.<sup>11</sup>

These critiques have intuitive appeal. The aggregate settlement rule is aimed at preserving a one-on-one conception of representation where the lawyer owes an undivided duty of loyalty to each individual client. Rules that serve to bond lawyers as agents to the principals they serve—their clients—are laudatory. And by guaranteeing individual autonomy over the decision whether to settle, the aggregate settlement rule assures each client that his or her claims cannot be compromised on terms he or she finds unacceptable. Autonomy empowers individual plaintiffs to protect themselves against opportunism on the part of their lawyers and exploitation at the hands of the majority by rejecting any settlement that would leave them worse off.

But critics of the ALI proposal miss the larger dynamic. In focusing on traditional notions of lawyer loyalty and client autonomy, they have failed to appreciate the implications of the anticommons in aggregate litigation. Sometimes surrendering autonomy can be welfare enhancing—particularly when it offers a way out of the anticommons. If plaintiffs can overcome the collective action problem they face and credibly offer the defendant peace, they all stand to gain.

This anticommons dynamic is far from unique. Similar problems are present in many areas of law ranging from bankruptcy to oil and gas unitization to sovereign debt restructuring. But instead of slavishly insisting on individual autonomy, these bodies of law have developed strategies to facilitate the value-generating aggregation of rights, either by using state power to transfer rights to the collective or by enforcing private agreements to be bound by group decisions.

Drawing on insight from these other contexts, this Article argues that strategies for defeating an anticommons dynamic that require parties to surrender their autonomy in order to achieve joint gains can be legitimate. The challenge comes not in determining that individuals should be permitted to pursue these joint gains, but instead in designing a governance procedure capable of protecting the interests of the individuals within the collective. In other words, the legitimacy of any strategy that compels participation in the

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10. See, e.g., Moore, *Group Decisionmaking*, *supra* note 9, at 406–09.

11. Erichson & Zipursky, *supra* note 9, at 298–311.

aggregation of rights depends on the presence of procedures to ensure that the resulting gains are fairly allocated and not simply appropriated by the majority or agent.

Governance is thus the key to legitimizing attempts to defeat the anticommons in mass litigation through aggregation, whether by regulatory means, such as the class action, or by contractual precommitments to group decisions on nonclass aggregate settlements, as in the ALI proposal.

This Article proceeds in four parts. Part I describes the anticommons dynamic in aggregate litigation and identifies persistent transaction costs that frustrate market attempts at aggregation. Indeed, because formal legal obstacles like the aggregate settlement rule prevent them from using contractual precommitment strategies to overcome the anticommons, parties have sometimes resorted to extralegal means to bundle claims and thus capture the surplus that would otherwise go unrealized.

Part II presents the anticommons dynamic in aggregate litigation as a two-stage problem in which the plaintiffs must, at the first stage, aggregate their rights in order to maximize collective value and then, at the second stage, divide up the resulting surplus in an equitable manner. It argues that where coercion is used to compel participation at stage one, that coercion must be legitimized through a governance procedure at stage two that will ensure equitable allocation and protect individuals from exploitation by their agents or the majority.

Part III examines the strategies by which the law addresses several other instances where splintered property rights could lead to similar anticommons problems. It surveys a range of contexts, including land use, admiralty, bankruptcy, oil and gas extraction, intellectual property, and sovereign debt restructuring. Each of these strategies has adopted the two-stage approach. At stage one they take one of two forms: regulatory strategies where the power of the state is used to transfer rights from individuals to the collective and contractual strategies where parties voluntarily cede their autonomy to a collective decisionmaking process. Regardless of its form, however, each strategy incorporates procedural protections at the second stage—the allocation phase—that help legitimize binding individuals to the aggregation.

Finally, Part IV returns to the law of aggregate litigation and applies lessons from property theory and approaches taken by other areas of law. Part IV.A argues that the class action is a regulatory solution to the anticommons in aggregate litigation and that recognizing it as such sheds light on several features of class action

law. Part IV.B argues that the ALI proposal to modify the aggregate settlement rule—to essentially eliminate a state-imposed transaction cost—is really a very modest step toward facilitating a partial contractual solution to the anticommons in nonclass aggregate litigation. It further argues that the procedural protections the ALI proposal incorporates are sufficient to legitimize the loss of plaintiff autonomy. It then offers suggestions for a more comprehensive approach that would allow groups of clients with *different* lawyers to agree to be bound by a collective decision on settlement.

## I. THE ANTICOMMONS IN AGGREGATE LITIGATION

### A. *The Tragedy of the Anticommons*

As Michael Heller has explained, the tragedy of the anticommons is the mirror image of the classic tragedy of the commons.<sup>12</sup> A tragedy of the commons occurs when too many people have access to a common resource and no one has a right to exclude others.<sup>13</sup> Because the users do not internalize all of the costs of their uses, the resource is prone to overuse. Classic examples include overgrazed fields, depleted fisheries, and polluted air. Assigning private property rights in the resource, forcing each owner to internalize externalities, is often thought of as a solution to the tragedy of the commons.<sup>14</sup>

A tragedy of the anticommons, on the other hand, occurs when there are too many property-rights holders; that is, too many owners have a right to exclude others from using a resource at its most efficient scale, and no one has an effective privilege of use, which often leads to underuse.<sup>15</sup> In other words, as Lee Anne Fennell succinctly

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12. Heller, *supra* note 4, at 624; see also James M. Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons*, 43 J.L. & ECON. 1, 1–2 (2000) (proposing a formal economic model of the anticommons through comparison of commons with anticommons).

13. Garrett Hardin, *The Tragedy of the Commons*, 162 SCIENCE 1243, 1244–45 (1968).

14. Michael A. Heller, *Common Interest Developments at the Crossroads of Legal Theory*, 37 URB. LAW. 329, 330 (2005) (citing Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. PAPERS & PROC. 347 (1967)).

15. *Id.*; see also Frank I. Michelman, *Ethics, Economics, and the Law of Property*, in ETHICS, ECONOMICS, AND THE LAW: NOMOS XXIV, at 3, 6, 9 (J. Roland Pennock & John W. Chapman eds., 1982) (positing an imaginary property regime that is the converse of a commons where no person can make use of a resource without obtaining the permission of every other person). Although typically associated with underuse, an anticommons can sometimes lead to overuse when the rights to prevent activity are dispersed, as, for example, when difficulty assembling contiguous parcels of land prevents the creation of a nature preserve. See Lee Anne Fennell, *Commons, Anticommons, Semicommons*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 35, 42–43 (Kenneth Ayotte & Henry E. Smith eds., 2011).

put it, because property rights are widely dispersed, “a value-enhancing assembly—one that could leave every party better off than the status quo—will fail to occur as a result of strategic holdout behavior and other transaction costs.”<sup>16</sup>

The classic example comes from early postsocialist Moscow where kiosks filled with goods sprang up on the streets while newly privatized storefronts sat empty.<sup>17</sup> The problem was that the transition government had not given any individual a bundle of rights in the storefronts that reflected full ownership. Instead, it had distributed fragmented rights to various socialist-era stakeholders, dispersing the rights to sell, to lease, to receive revenue, to determine use, and to occupy across a web of private, quasi-private, and governmental entities.<sup>18</sup> Thus, no single entrepreneur could set up shop without first collecting the disaggregated rights from all the other owners.

In a world without transaction costs, of course, people could easily avoid tragedies of the commons or anticommons by trading their rights.<sup>19</sup> But in the real world, transaction costs exist. Not only can it be costly to identify, locate, and negotiate with all of the various rights holders, but some may act strategically and hold out for a greater share of the assembly surplus. Thus the anticommons dynamic that occurs when there are gains to be had from aggregating rights into a useful collective, but rights are disaggregated among many owners, can persist.<sup>20</sup>

### *B. The Aggregate-Litigation Anticommons*

The anticommons dynamic is present in many types of aggregate litigation. When a number of plaintiffs have similar claims

16. Fennell, *supra* note 15, at 41. There is some dispute in the property literature about the scope of the anticommons concept. Larissa Katz argues that a true anticommons exists only where owners have independent but overlapping authority over the same resource, such that no owner can act if the others do not simultaneously ratify the action, and the concept does not apply to owners of separate but complementary goods whose spheres of authority do not overlap. Larissa Katz, *Red Tape and Gridlock*, 23 CAN. J. L. & JUR. 99, 110, 117–18 (2010). Here, I adopt a broader definition, more in line with Heller and Fennell, that an anticommons exists where some uses of the resource are still possible, but its highest-value use (or use at the most efficient scale) is blocked by the transaction costs that must be incurred to aggregate rights. *Id.* at 100 & n.8; see also Fennell, *supra* note 15, at 41–42 (“The anticommons tragedy is an assembly problem, nothing more and nothing less.”).

17. Heller, *supra* note 4, at 622–23.

18. *Id.* at 635–39.

19. See Ronald H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 15 (1960).

20. Michael A. Heller & Rebecca S. Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE 698, 698 (1998).

against a common defendant, those claims are often worth more bundled together than standing alone. But the rights to control those claims are dispersed among the individual plaintiffs and may be difficult to aggregate into a more valuable collective.

### 1. Aggregation Can Generate Value

Aggregation yields several benefits for plaintiffs. First, plaintiffs can take advantage of economies of scale in developing their cases.<sup>21</sup> Plaintiffs can share the (often considerable) costs of investigation, discovery, and legal development of common issues of law and fact, as well as other expenses like hiring expert witnesses. These efficiencies allow plaintiffs to pursue what otherwise might be negative-value claims.<sup>22</sup>

Second, as a group, plaintiffs have enough money at stake that they (and their lawyers) can rationally invest in the litigation on something approaching the same scale as the defendant.<sup>23</sup> As a group, plaintiffs can spread expenses over a portfolio of cases, allowing them to rationally spend more on a trial in one case than it may yield because they know they can recoup the expenses in the increased settlement value of the other cases in the portfolio. And aggregation helps mitigate the public-goods problem that might otherwise lead plaintiffs to underinvest in the hope of a free ride on others' efforts to develop common factual and legal issues.<sup>24</sup> This helps to equalize the balance of power between individual plaintiffs and defendants who, facing many claims, have natural economies of scale, opportunities to spread costs, and incentives to invest in the litigation as a whole.

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21. See, e.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 545–50; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733, 744–45 (1997).

22. See, e.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 545.

23. See, e.g., *id.* at 545–48 (explaining that leveling the playing field with defendants requires a sufficient number of claims to justify expensive and time consuming litigation); Silver & Baker, *supra* note 21, at 747 (“Aggregation brings the plaintiffs’ and defendants’ incentives to invest in litigation more nearly into balance.”); cf. David Rosenberg, *Mandatory-Litigation Class Actions: The Only Option for Mass Tort Cases*, 115 HARV. L. REV. 831, 847–53 (2002) [hereinafter Rosenberg, *Only Option*] (arguing that only mandatory class actions can truly allow plaintiffs to invest in litigation on the same scale as defendants); David Rosenberg, *Class Actions for Mass Torts: Doing Individual Justice by Collective Means*, 62 IND. L.J. 561, 570–72 (1987) (advocating for mandatory class actions as a way to avoid exploitation of plaintiffs by defendants).

24. See Rosenberg, *Only Option*, *supra* note 23, at 847 (explaining that only complete aggregation can address the collective action problem in mass torts); cf. Campos, *supra* note 3, at 1087 (arguing that not only development of common issues, but also “law enforcement in mass tort litigation is a ‘public good’ ”).

And third, aggregation allows plaintiffs to share risk. Single-shot plaintiffs tend to be more risk averse than repeat-player defendants.<sup>25</sup> Each plaintiff faces the undiversifiable risk of losing a claim that might (at least in some personal-injury cases) be among his or her largest assets.<sup>26</sup> Defendants, on the other hand, face a more diversified portfolio of claims and are able to offload some risk onto insurers, allowing them to take a more risk-neutral approach to the litigation and drive a harder bargain in settlement negotiations.<sup>27</sup> By aggregating their claims, plaintiffs can share some of the risk that they might not prevail in their individual suits and help to balance their risk profiles with that of the defendant.<sup>28</sup>

Because of these benefits, aggregation tends to increase plaintiffs' leverage in settlement negotiations with the defendant.<sup>29</sup> But complete or near-complete aggregation can create value for defendants as well, if it allows for the final resolution of all the claims against them. As a result, defendants are sometimes willing to pay a premium for total peace.

There are several reasons why defendants might be willing to pay a "peace premium" for a comprehensive settlement. The first is to avoid adverse selection. Plaintiffs have both an informational advantage and a first-mover advantage. They (and their lawyers) tend to know more about the relative values of their own claims than defendants, and they can threaten trial with their strongest cases and voluntarily dismiss the weaker ones as trial dates approach. If a group settlement is incomplete—that is, if individual plaintiffs are allowed to elect whether or not to participate—there is a danger that those with the strongest claims will opt out and free ride on work done by

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25. See Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 83–89 (2010) (arguing that willingness of repeat players to accept trial risks gives them greater bargaining power); Silver & Baker, *supra* note 21, at 748 (discussing defendants' risk advantages and greater risk-bearing capabilities).

26. See Silver & Baker, *supra* note 21, at 748.

27. See Molot, *supra* note 25, at 83–89.

28. Indeed, even if it comes with a sort of rough-justice "damages averaging," risk-averse plaintiffs with large claims might welcome an increased chance of lower recovery in an aggregate settlement. *But see* Moore, *Case Against*, *supra* note 9, at 168–69 (arguing that damages averaging hurts claimants with high-value claims). For a discussion of damages averaging in aggregate settlements, see Katherine Dirks, Note, *Ethical Rules of Conduct in the Settlement of Mass Torts: A Proposal to Revise Rule 1.8(g)*, 83 N.Y.U. L. REV. 501, 517–20 (2008). Additionally, aggregation can help conserve the defendant's assets and preserve its value as a going concern in cases where those assets might not be sufficient to cover all of the plaintiffs' claims. Silver & Baker, *supra* note 21, at 749.

29. See, e.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 548–49; Silver & Baker, *supra* note 21, at 745–48.

the group.<sup>30</sup> Defendants understandably do not want to pay top dollar to settle a collection of weak claims only to be left facing the strongest claims in continued litigation. Because they must hold back money to litigate against the opt-outs, where such adverse selection is possible, defendants will necessarily pay less per plaintiff to settle the incomplete aggregation.

Second, a global settlement generates efficiencies and saves on transaction costs for defendants as well as plaintiffs. Handling claims in bulk is more cost effective for defendants. Accordingly, the cost of litigating against a few opt-outs may be disproportionately high—the flip side of the economies of scale in aggregation. There are simply fewer cases across which to spread the costs of developing common factual or legal issues that will arise at trial. Further, if defendants can offer a lump sum and disclaim any role in the allocation, they can avoid the cost of valuing and negotiating individual claims.<sup>31</sup> And broad settlements give defendants better returns on the sunk costs they have already spent on valuation and negotiation.<sup>32</sup> The marginal cost of adding another claim to a group settlement is typically less than the cost of negotiating a separate settlement. For similar reasons, defendants will often pay to settle even weak claims as part of a global deal to avoid the nuisance of protracted litigation.<sup>33</sup>

Third, defendants may be willing to pay extra for finality because it reduces the chances that future losses at trial or serial settlements will encourage the filing of new claims. In the fen-phen diet-drug litigation, for example, the well-publicized announcement of a generous but incomplete settlement led to a massive influx of new claims.<sup>34</sup> Many of these claims were based on dubious medical diagnoses and exacerbated the adverse selection problem, as claimants with stronger claims opted out of the depleted settlement fund.<sup>35</sup>

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30. See Silver & Baker, *supra* note 21, at 760–63. This is exactly what happened in the fen-phen settlement, where ninety thousand of the strongest claims opted out. See John C. Coffee, Jr., *Litigation Governance: Taking Accountability Seriously*, 110 COLUM. L. REV. 288, 318 (2010); see also Erichson & Zipursky, *supra* note 9, at 275–76 (noting failure of incomplete aggregate settlements to achieve closure in OxyContin, Zyprexa, and Ortho Evra litigations).

31. See Howard Erichson, *The Trouble with All-or-Nothing Settlements*, 58 KAN. L. REV. 979, 1010 (2010) [hereinafter Erichson, *All-or-Nothing*].

32. See Silver & Baker, *supra* note 21, at 761–62, 766.

33. See *Sullivan v. DB Invs., Inc.*, 667 F.3d 273, 311 (3d Cir. 2011) (“Settlements avoid future litigation with all potential plaintiffs—meritorious or not.”); *id.* at 339 (Scirica, J., concurring) (noting that defendants may have incentives to settle even weak claims in a class).

34. See RICHARD A. NAGAREDA, MASS TORTS IN A WORLD OF SETTLEMENT 143–51 (2007).

35. See *id.* at 145–48.

Finally, closure eliminates contingent liabilities for defendants, allowing them to focus on their businesses going forward, reduce uncertainty, and release reserves. By contrast, continued litigation against even a handful of plaintiffs may result in additional negative publicity, attract unwanted regulatory scrutiny, and hamper access to capital markets—hard-to-quantify costs that may be greatly disproportionate to the number or value of remaining claims.<sup>36</sup>

In short, because a defendant may face disproportionate risks or costs from continued litigation with a handful of nonsettling plaintiffs, a group of plaintiffs can charge a premium if they can package all of their claims together and settle them as a single unit. The Third Circuit recognized as much in *Sullivan v. DB Investments, Inc.*, where Judge Scirica explained that a defendant “may be motivated to pay class members a premium and achieve a global settlement in order to avoid additional lawsuits . . .”<sup>37</sup>

The size of this peace premium in any given case is an empirical question, worthy of study in its own right, but its existence is clear, as defendants often insist on participation by all or nearly all of the plaintiffs as a condition of settlement.<sup>38</sup> “Walk-away” provisions that allow defendants to back out if too few plaintiffs sign on are a regular feature of aggregate settlements.<sup>39</sup> And, in some cases, such as

36. As Judge Scirica noted in *Sullivan v. DB Investments, Inc.*:

[A] defendant may desire global settlement for several possible reasons: (1) redressing plaintiffs' injuries; (2) the possibility of liability; (3) the direct costs of defending suits, often in multiple fora; (4) the risk of financially unmanageable jury verdicts which may threaten bankruptcy; (5) *the effects of pending or impending mass litigation on its stock price or access to capital markets*; (6) *the stigma of brand-damaging litigation*; and (7) *maintaining financial stability*.

667 F.3d at 339 n.9 (Scirica, J., concurring) (emphasis added).

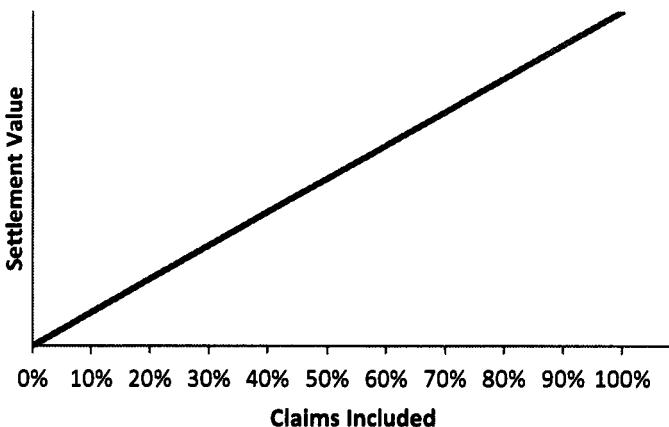
37. *Id.* at 339; *see also id.* at 311 (majority) (“From a practical standpoint . . . achieving global peace is a valid, and valuable, incentive to class action settlements.”); *id.* at 313 n.44 (“[T]he settlement amount to which DeBeers has agreed must be based in large part on the number of potential class members and on securing global peace.”).

38. See, e.g., Erichson, *All-or-Nothing*, *supra* note 31, at 979. I am not aware of any empirical studies of the size of the peace premium, but one study of securities class action settlements provides potential support for its existence. James Cox and Randall Thomas found that the ratio of settlement amounts to estimated provable losses has declined since the passage of the Private Securities Litigation Reform Act (“PSLRA”). James D. Cox & Randall S. Thomas, *Does the Plaintiff Matter? An Empirical Analysis of Lead Plaintiffs in Securities Class Action*, 106 COLUM. L. REV. 1587, 1627 (2006). In the same time frame, institutional investors have been opting out with increasing frequency. See Coffee, *supra* note 30, at 311–14. Correlation is not causation of course, but the declining settlement amounts per claimant may represent the loss of the peace premium as defendants pay less to settle class claims when they must face significant numbers of opt-outs. Further study is needed to confirm any causal effect.

39. See Elizabeth Chamblee Burch, *Disaggregating*, WASH. U. L. REV. (forthcoming) (manuscript at \*10–11 & n.42), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2137782](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2137782).

the World Trade Center Disaster Site settlement discussed at the outset of this Article, defendants are even willing to make sizable “bonus payments” for 100% participation.<sup>40</sup>

*Figure 1: Slope Good*



In property-theory terms, settlement of mass litigation is often a “step” or “lumpy” good, as opposed to a “slope” good.<sup>41</sup> In other words, the surplus generated by an aggregate settlement does not increase along a steady slope as more claims are included (Fig. 1). Instead, the value generated by a settlement may jump considerably once a certain threshold of aggregation is reached.

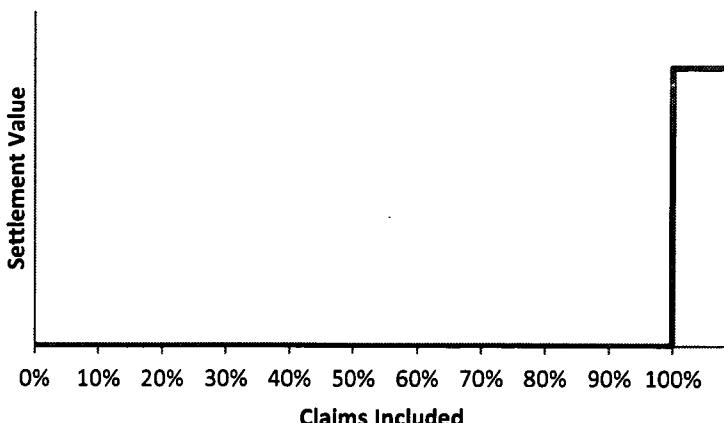
Settlements for some forms of relief, like injunctions, can be step goods (Fig. 2). There is very little value for the defendant in an incomplete settlement because any plaintiff suing alone could obtain the same injunctive relief as the group.<sup>42</sup> But once the last plaintiff is persuaded to sign on, the value of settlement may be considerable.

40. See *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 189–90 (S.D.N.Y. 2011); World Trade Settlement, *supra* note 1, §§ II.A, IV, VI.E; see also *infra* note 55.

41. See Lee Anne Fennell, *Common Interest Tragedies*, 98 NW. U. L. REV. 907, 957–61, 971–78 (2004) [hereinafter Fennell, *Common Interest Tragedies*] (“A step good . . . delivers no benefits at all until a certain contribution threshold is reached; it then delivers all of the benefits in a single lump upon reaching that threshold, and delivers no additional benefits beyond that point.”); see also Lee Anne Fennell, *Lumpy Property* 1 (Univ. of Chi. Inst. for Law & Economics Olin Research Paper No. 585, 2012) (stating that a “bridge that only spans three-quarters of the distance across a chasm” is a “standard . . . lumpy, indivisible, or step good . . .”).

42. See Silver & Baker, *supra* note 21, at 762 (observing that where any plaintiff alone may obtain an injunction, “[f]reedom from the threat of an injunction [is] therefore a lumpy or step

Figure 2: Step Good



For other types of claims, aggregate settlements may be lumpy goods, where the surplus generated by additional plaintiffs signing on does not steadily increase in a linear fashion, but does not come all in one step either when complete aggregation is reached, as with an injunction (Fig. 3). In other words, it is not necessary for *all* the claims to be assembled for there to be *any* surplus, but the value of settling each additional claim approaching a certain threshold may be disproportionately high.<sup>43</sup> Thus, the defendant may be willing to pay something to settle an incomplete aggregation but would be willing to pay a considerable peace premium for a settlement that includes the claims at the threshold.<sup>44</sup> Note that this threshold need not

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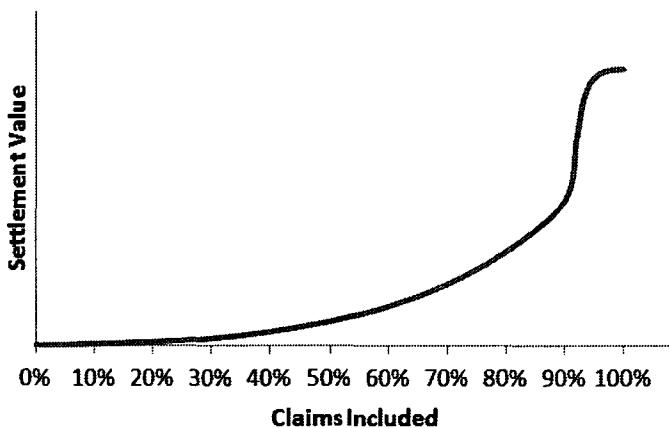
good that only the entire plaintiff group could deliver"); *cf. Knisley v. City of Jacksonville*, 497 N.E.2d 883, 884–87 (Ill. App. Ct. 1986) (involving attempted aggregate settlement of claims seeking injunction against construction of certain buildings). This assumes that the plaintiffs' chances of obtaining an injunction are highly correlated—a realistic assumption when similarly situated plaintiffs seek injunctive relief against a common defendant. If their chances were independent, then the defendant might pay to settle some of the claims to reduce the number of opportunities for plaintiffs to "roll the dice," though the value of settlement to the defendant would still increase exponentially with the number of claims. The chances of error will always be independent to some degree, so an injunction may not be a true step good, but without the uncertainty of a jury trial, the chances of error may not be a significant factor in the defendant's settlement calculus. I thank Andrew Hayashi for pressing me on this point.

43. Fennell, *Common Interest Tragedies*, *supra* note 41, at 971–73.

44. The World Trade Center Disaster Site settlement provides a stark illustration of the premium a defendant will pay to get the last few claimants to sign on. See *supra* notes 1–2, 40 and accompanying text. For another example of the peace premium in action, compare the Gulf Coast Claims Facility ("GCCF") that BP set up to resolve claims stemming from the *Deepwater Horizon* oil spill with the recent class action settlement that superseded it. Compare BDO CONSULTING, INDEPENDENT EVALUATION OF THE GULF COAST CLAIMS FACILITY REPORT OF

necessarily be 100% participation. It is possible that once a certain threshold has been reached, the handful of claims left over may not, as a practical matter, be viable to litigate individually and thus not worth any additional premium to include in the settlement.<sup>45</sup> But defendants might still prefer total peace since they are at an informational disadvantage and cannot be sure that all viable claims are included.

*Figure 3: Lumpy Good*



## 2. Control Rights Are Dispersed

Although their claims can be worth more in the aggregate, the rights to control those claims are dispersed among the individual plaintiffs. Each plaintiff has a property right—a chose in action—to control his or her own claim and to determine how it will be pursued

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FINDINGS & OBSERVATIONS (2012), available at [www.justice.gov/iso/opa/resources/66520126611210351178.pdf](http://www.justice.gov/iso/opa/resources/66520126611210351178.pdf), with Deepwater Horizon Econ. & Prop. Damages Settlement Agreement as Amended on May 2, 2012, *In re Oil Spill by the Oil Rig “Deepwater Horizon” in the Gulf of Mex., on April 20, 2010*, (MDL No. 2179) (E.D. La. May 2, 2012) [hereinafter *Deepwater Horizon* Settlement], available at [http://www.deepwaterhorizonsettlements.com/Documents/Economic%20SA/Settlement\\_Agreement.pdf](http://www.deepwaterhorizonsettlements.com/Documents/Economic%20SA/Settlement_Agreement.pdf). The class settlement, which could offer BP a greater degree of finality, resulted in higher payments per claimant than the GCCF, which could not offer closure. For a more detailed comparison, see Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. (forthcoming 2013) (on file with author).

45. This is most likely when the claims are relatively small or uniform, such as consumer claims, and less likely when the claims are large and subject to adverse selection, such as mass torts.

and on what terms it will be settled.<sup>46</sup> Plaintiffs thus face a collective action problem. If they can cooperate they can capture the peace premium. But if any individual refuses to participate in a comprehensive settlement, the plaintiffs cannot maximize the value of their claims. In such a dynamic, holdout problems are likely to accompany the standard transaction costs of locating and negotiating among a dispersed group of rights holders (which can, themselves, be considerable).

Holdouts might occur for either genuine or strategic reasons. The natural variation in risk preferences across the group of plaintiffs may lead risk seekers to reject a deal that risk-averse plaintiffs would accept.<sup>47</sup> Likewise, plaintiffs with idiosyncratic (or even irrational) valuations of their claims or those litigating for noneconomic reasons might reject a settlement offer that the rest of the plaintiffs would accept. But some plaintiffs may act strategically and threaten to wreck an all-or-nothing deal by withholding their consent to settle unless they are given a disproportionately greater share of the allocation.<sup>48</sup> The problem is that it can be very difficult to tell the difference between plaintiffs who withhold their consent for genuine or strategic reasons.<sup>49</sup> And the mere anticipation of strategic behavior, even in the absence of actual holdouts, may be enough to prevent value-generating aggregation from occurring, regardless of the plaintiffs' true motivations.<sup>50</sup>

46. Phillips Petroleum Co. v. Shutts, 472 U.S. 797, 807 (1985) ("[A] chose in action is a constitutionally recognized property interest possessed by each of the plaintiffs."). The nature of this property right is somewhat peculiar. Each claim is an entitlement to seek payment from the defendant under a liability rule where the court (or jury) sets the price. But, given the costs and uncertainty of litigating a claim to judgment, settlement will often be a higher-value use of the entitlement than trial. The important point is that, in the settlement context, the entitlement functions under a property rule where each plaintiff retains dictatorial control over whether and under what circumstances to surrender the claim. See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972).

47. See, e.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 573. Some scholars refer to individuals who refuse to participate for genuine reasons as "hold-ins." E.g., Gideon Parchomovsky & Peter Siegelman, *Selling Mayberry: Communities and Individuals in Law and Economics*, 92 CALIF. L. REV. 75, 128–29 (2004).

48. See Silver & Baker, *supra* note 21, at 767–68.

49. See Fennell, *Common Interest Tragedies*, *supra* note 41, at 983.

50. See *id.* at 928 (noting that anticipation of strategic behavior may "discourag[e] a would-be assembler from bothering to incur the cost of attempting an assembly"); see also AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17 cmt. b (2010) ("Even the threat of such a holdout may cause the defendant to withhold the premium associated with complete peace, thereby inuring to the detriment of all the represented claimants.").

It is important to recognize that, contrary to the assumptions of some commentators,<sup>51</sup> the risk of strategic holdouts does not depend on an all-or-nothing settlement offer. While the holdout problem is most acute in attempts to craft a truly comprehensive peace, strategic holdouts are possible even where the defendant does not demand unanimous participation. If the settlement terms allow the defendant to walk away if a certain threshold number of plaintiffs refuse to participate (for example, the settlement might require 95% participation), then any feasible subgroup larger than that threshold can hold out.<sup>52</sup> A subgroup of plaintiffs would, of course, need to overcome their own collective action problem to credibly threaten to hold out, but preexisting relationships might facilitate cooperation and allow them to threaten to vote as a bloc. Such cohesive voting blocs are frequently present in aggregate litigation when a subset of plaintiffs are referred to the larger group by the same referring lawyer—who will have a natural incentive to coordinate the holdout bloc to maximize his contingent referral fee.

Indeed, in the recent BP oil-spill settlement, the parties recognized the potential for a subgroup of plaintiffs to hold out and crafted a creative walk-away provision to address the problem. The threshold number of opt-outs that the defendant and Plaintiffs Steering Committee agreed would allow the defendant to walk away was filed with the court in a sealed envelope.<sup>53</sup> Keeping the threshold confidential makes it more difficult for any strategic player attempting to coordinate a holdout bloc to know whether he has enough support to make a credible threat. But this feature of the BP settlement prompted objections in the district court and could arguably run afoul of a strict reading of the plaintiffs' lawyers' ethical obligations to disclose settlement terms to all clients.<sup>54</sup>

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51. E.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 574 (stating that holdouts "should not present a significant problem unless defendants insist on all-or-nothing package settlement deals"); Erichson, *All-or-Nothing*, *supra* note 31, at 1013 ("[T]he holdout problem should be understood . . . as a problem with deals that are structured to require full participation."); Erichson & Zipursky, *supra* note 9, at 317–19 (discussing the power enjoyed by individual plaintiffs in all-or-nothing settlements); Moore, *Group Decisionmaking*, *supra* note 9, at 403 (recognizing that "[s]trategic holdouts might be a problem if unanimity is required before a settlement can become effective as to any of the clients" but arguing that defendants do not often structure settlements to require 100% participation).

52. See Fennell, *Common Interest Tragedies*, *supra* note 41, at 963.

53. *Deepwater Horizon* Settlement, *supra* note 44, at § 21.3.6.

54. See MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2012); Halliburton Energy Servs., Inc.'s Preliminary Objections at 6, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mex.*, on April 20, 2010, (MDL No. 2179) (E.D. La. Dec. 21, 2012).

Value also may be lost when the potential for holdouts makes complete aggregation impossible. A defendant might be willing to settle with a 95% participation threshold (if it creates some surplus over serial individual settlements or trials) and pay some premium for near-complete peace, but the defendant might have paid disproportionately more for complete participation. In the World Trade Center Disaster Site settlement, for example, the defendant was willing to pay more than twice as much per claimant to get the last 5% to sign on.<sup>55</sup> But because the plaintiffs could get only 95.1% to participate by the deadline, they left up to \$87.5 million on the table.<sup>56</sup> Without the assurance of finality, defendants must inevitably hold back money both to cover the costs of litigating or settling the higher-value claims that (through adverse selection) are most likely to opt out and to pay off strategic players who threaten to derail a beneficial settlement in order to extort a larger payment. The mere potential for holdouts therefore prevents plaintiffs from maximizing the value of their claims by capturing the full peace premium.

Aggregate litigation thus presents a familiar anticommons problem: the plaintiffs' rights are worth more if they can be assembled into a single unit for sale to the defendant, but because ownership of those rights is dispersed, transaction costs and holdout problems can prevent successful value-generating aggregation.

55. The World Trade Settlement Disaster Site settlement had a graduated bonus payment structure. If 95% of plaintiffs participated, the defendant would pay them a lump sum of \$625 million. If fewer participated, the defendant could walk away. For each additional percentage point over the 95% threshold, the defendant would increase that lump sum by 2% of the initial settlement amount (i.e., an additional \$12.5 million), up to 98% participation. For each additional 0.1% over 98% participation, the defendant would pay an additional 0.2% (i.e., \$1.25 million). Thus 100% participation would bring the total to be shared among the plaintiffs to \$687.5 million. The defendant also agreed to make "contingent payments" of up to \$25 million in the years following the settlement if the cost of litigating against opt-outs and future claims did not exceed certain thresholds, bringing the plaintiffs' potential total recovery for 100% participation to \$712.5 million. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d 184, 189–90 (S.D.N.Y. 2011); World Trade Settlement, *supra* note 1, §§ II.A, IV, VI.E.

56. See Navarro, *supra* note 2. The district court subsequently dismissed several hundred unresponsive plaintiffs' claims, reducing the denominator and bringing the participation rate up to 99.4%. *In re World Trade Ctr. Disaster Site Litig.*, 834 F. Supp. 2d at 193. Defendants' challenge to basing bonus payments on the higher participation rate is pending in the Second Circuit. *Cirino v. City of New York*, No. 11-4021-cv(L) (2d Cir. filed Oct. 5, 2011). Even with the 99.4% participation rate, the plaintiffs left \$7.5 million in bonus payments on the table, and the defendants held back an additional \$25 million in "contingent payments" to cover the cost of litigating or settling with the opt-outs. World Trade Settlement, *supra* note 1, §§ IV, VI.E.

### C. Market Solutions and Persistent Transaction Costs

Sometimes market forces will solve anticommons problems. In the absence of transaction costs (or if they are sufficiently low) dispersed rights holders will sell their rights to the collective if it will generate a surplus.<sup>57</sup> Even in the face of transaction costs, the market often develops private structural arrangements to reduce the costs of bundling rights when the background rules threaten to waste resources.<sup>58</sup> For example, in intellectual property, copyright collectives and patent pools have emerged as market solutions to potential anticommons problems.<sup>59</sup> Likewise, in sovereign debt restructuring, sovereign bond contracts have incorporated collective action clauses to limit the power of holdouts.<sup>60</sup>

In fact, the market goes a long way toward effecting aggregation in mass litigation. Attorney advertising and referral networks concentrate similar claims in the hands of a few plaintiffs' attorneys.<sup>61</sup> And these attorneys cooperate to coordinate claims through formal and informal mechanisms, such as loose coalitions of firms or court-appointed steering committees in cases consolidated in a multidistrict litigation ("MDL").<sup>62</sup> Indeed, some scholars have concluded that aggregate settlements are "inevitable."<sup>63</sup>

But persistent transaction costs prevent plaintiffs from capturing all of the benefits of complete aggregation—like the peace

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57. See Coase, *supra* note 19, at 1–15.

58. See, e.g., Heller, *supra* note 4, at 674 ("Despite the presence of transaction costs, people will be able in many cases to negotiate with each other to overcome an anticommons and put the property to more efficient use . . ."); Heller & Eisenberg, *supra* note 20, at 700 (citing the music industry as one group of property owners who have "developed institutions to reduce transaction costs of bundling multiple licenses").

59. Richard A. Epstein & Bruce N. Kuhlik, *Is There a Biomedical Anticommons?*, REGULATION, Summer 2004, at 54, 56 (describing how patent pooling overcomes the anticommons); Heller & Eisenberg, *supra* note 20, at 700 (noting the emergence of such patent pools in "communities of intellectual property owners"); see also *infra* Part III.B.1.

60. See, e.g., Lee C. Buchheit & Mitu Gulati, *Drafting a Model Collective Action Clause for Eurozone Sovereign Bonds*, 6 CAP. MARKETS L.J. 317 (2011) [hereinafter Buchheit & Gulati, *Model CAC*]; see also *infra* Part III.B.2.

61. See Erichson, *Beyond the Class Action*, *supra* note 9, at 532–39; Howard M. Erichson, *Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits*, 50 DUKE L.J. 381, 386–401 (2000); Charles Silver, *Ethics and Innovation*, 79 GEO. WASH. L. REV. 754, 765–67 (2011).

62. See Erichson, *Beyond the Class Action*, *supra* note 9, at 539–43; cf. ELINOR OSTROM, GOVERNING THE COMMONS: THE EVOLUTION OF INSTITUTIONS FOR COLLECTIVE ACTION 88–102 (1990) (positing that common pool resource problems are best managed by populations exhibiting strong institutions and norms of cooperative behavior).

63. Samuel Issacharoff & John Fabian Witt, *The Inevitability of Aggregate Settlements: An Institutional Account of American Tort Law*, 57 VAND. L. REV. 1569, 1634 (2004).

premium. Where claims are small, as with negative-value claims, transaction costs are often insurmountable. The costs of coordination are simply not worth the effort. Only a regulatory solution—the class action—allows lawyers to assemble these claims into a collective worth litigating.<sup>64</sup> But doctrinal and practical barriers prevent the use of class actions for many types of larger claims, like mass torts, where individual issues of causation and damages will often predominate over common issues, and choice-of-law problems for state-law claims may make nationwide classes unmanageable.<sup>65</sup>

Even where claims are large enough to justify the costs of coordination without the class action mechanism, some state-law legal ethics rules act as barriers to market-driven aggregation. For example, restrictions on the sale of legal claims, like rules prohibiting champerty and limiting fee sharing, prevent potentially efficient bundling transactions.<sup>66</sup> Plaintiffs cannot simply trade their rights on

64. As the Court explained in *Amchem Products, Inc. v. Windsor*:

The policy at the very core of the class action mechanism is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her rights. A class action solves this problem by aggregating the relatively paltry potential recoveries into something worth someone's (usually an attorney's) labor.

521 U.S. 591, 617 (1997) (internal citation omitted); see also Judith Resnik, *Money Matters: Judicial Market Interventions Creating Subsidies and Awarding Fees and Costs in Individual and Aggregate Litigation*, 148 U. PA. L. REV. 2119, 2145–46 (2000) (“The class action rule . . . [gives lawyers incentives] to subsidize access to courts for small claimants . . . .”); Rosenberg, *Only Option*, *supra* note 23, at 861 (“Litigation class action is a form of regulation that overrides the market in mass tort claims.”).

65. See, e.g., Andrew D. Bradt, *The Shortest Distance: Direct Filing and Choice of Law in Multidistrict Litigation*, 88 NOTRE DAME L. REV. 759, 761 (2012); Klonoff, *supra* note 5.

66. See MODEL RULES OF PROF'L CONDUCT R. 5.4(a) (2012) (“A lawyer or law firm shall not share fees with a nonlawyer . . . .”); 14 AM. JUR. 2D *Champerty, Maintenance, and Barratry* §§ 1–15 (2013) (explaining that rules against champerty prohibit nonparties from acquiring an interest in the recovery from a lawsuit). Some scholars have suggested relaxing restrictions on the sale of legal claims to allow third parties to buy claims or otherwise finance litigation, or to allow lawyers themselves to buy claims outright. See, e.g., Jonathan R. Macey & Geoffrey P. Miller, *The Plaintiffs' Attorney's Role in Class Action and Derivative Litigation: Economic Analysis and Recommendations for Reform*, 58 U. CHI. L. REV. 1, 105–10 (1991) (“[T]he legal system should experiment with an auction approach to large-scale, small-claim cases and derivative suits.”); Molot, *supra* note 25, at 72 (suggesting that making a settlement resemble a market may help “to offset the imbalances in risk preferences that might otherwise threaten to overpower the merits in settlements negotiations”); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 MINN. L. REV. 1268, 1270–73 (2011) (explaining the potential of litigation funding). There are practical obstacles to such solutions, as any transfer would have to ensure the plaintiffs' cooperation for the claims to retain value. See Molot, *supra* note 25, at 108 (“[A] plaintiff's lack of incentive to win the case might render the claim less valuable . . . .”). And holdout problems may persist, as “vulture funds” might try to buy up enough claims to establish a blocking position and hold out for a greater share of any aggregate settlement—as they have tried to do in sovereign debt restructuring. See Sean Hagan, *Designing a Legal*

the open market or sell their claims to a collective.<sup>67</sup> They can only sell their claims to one party—the defendant.<sup>68</sup> Likewise, the defendant can buy peace only by purchasing all of the claims from the plaintiffs. There are no substitute goods. The market for claims is thus necessarily thin, and the plaintiffs and defendant are locked in a bilateral monopoly.<sup>69</sup>

Market-based attempts to overcome the anticommons have also run afoul of the ethical rules governing aggregate settlements. In cases where the peace premium is large enough, claimants may rationally want to trade their autonomy to participate in a collective that could credibly offer the defendant finality. Thus they may attempt to craft private governance structures to reduce transaction costs and prevent holdout problems. For example, each plaintiff might agree in advance to be bound by a group decision on whether to accept or reject a settlement offer, thereby guarding against strategic or irrational behavior once money is on the table and empowering the group to negotiate for a peace premium. Indeed, groups of plaintiffs and their lawyers have attempted to craft such private governance arrangements on several occasions.<sup>70</sup>

But courts have uniformly interpreted the traditional aggregate settlement rule, exemplified by ABA Model Rule of Professional Conduct 1.8(g), to prohibit plaintiffs from contractually precommitting to group decisions on settlement.<sup>71</sup> The aggregate

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*Framework to Restructure Sovereign Debt*, 36 GEO. J. INT'L L. 299, 309–11 (2005) (noting that such blocking by “vulture funds,” while rare, has occurred in restructuring cases).

67. Many claims—including personal injury claims—are personal to the plaintiff and cannot be validly assigned to a third party. See, e.g., 6 AM. JUR. 2D *Assignments* §§ 46, 48, 55 (2013). Even those that can be assigned must ultimately be sold to the defendant.

68. Plaintiffs can, and often do, sell portions of their claims to their lawyers as contingency fees. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 35(1) (2000). But they cannot assign their entire claims to their lawyers. *Id.* § 36(1). And lawyers would be prohibited from paying clients cash for those claims. MODEL RULES OF PROF'L CONDUCT R. 1.8(e). Nor can clients even assign control over settlement decisions to their lawyers. RESTATEMENT (THIRD) OF THE LAW GOVERNING LAWYERS § 22 (2000). Thus, while partial sale of claims to lawyers inevitably creates an agency problem, it does not solve the holdout problem—as other agency relationships like corporations do by separating ownership and control—because the individual clients must always retain control over the critical decision whether to settle. Cf. Macey & Miller, *supra* note 66 (proposing to eliminate agency costs by allowing class of plaintiffs to sell claims to attorney-entrepreneurs).

69. See Thomas W. Merrill, *The Economics of Public Use*, 72 CORNELL L. REV. 61, 75–77 (1986) (discussing bilateral monopolies).

70. See, e.g., Hayes v. Eagle-Picher Indus., 513 F.2d 892, 894 (10th Cir. 1975); Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 521, 523 (N.J. 2006).

71. E.g., Hayes, 513 F.2d at 894; Knisley v. City of Jacksonville, 497 N.E.2d 883, 887–88 (Ill. App. Ct. 1986); *In re Hoffman*, 883 So.2d 425 (La. 2004). See generally Erichson & Zipursky, *supra* note 9, at 296–98 (discussing court treatment of aggregate settlements). Bar association ethics opinions have reached the same conclusion. See, e.g., ABA Comm. On Ethics & Prof'l

settlement rule requires a lawyer attempting to settle claims on behalf of multiple clients to obtain the individual consent of *each* client *after* disclosing all of the settlement's terms—including every other client's share. This empowers each client to refuse to participate at the back end and potentially wreck a global deal.

For example, in *Abbott v. Kidder Peabody & Co.*, a group of more than two hundred investors suing the same defendant for fraud tried to create a private governance structure to maximize their leverage in settlement negotiations.<sup>72</sup> Each client signed a representation contract that created a steering committee elected by a majority to manage the litigation and determine whether to settle.<sup>73</sup> They agreed that settlement proceeds would be shared by the entire group, according to a predetermined allocation formula.<sup>74</sup> And any plaintiff who settled individually would have to place the funds in escrow pending resolution of the group's claims, to be shared according to the allocation formula with the group.<sup>75</sup>

The arrangement worked well, and even though the defendant tried to pick off plaintiffs one by one and settle their claims in court-supervised individual settlement conferences, the plaintiffs repeatedly opted “to stay with the group.”<sup>76</sup> Frustrated that the plaintiffs kept resisting its attempts to divide and conquer, the defendant asked the court to declare the group governance provisions of the representation contract unenforceable.

Siding with the defendant, the court was unreceptive to the plaintiffs' attempt to structure their collective representation to defeat the anticommons dynamic. The court found that even though the plaintiffs had “freely and voluntarily” agreed to the representation contract, which “represent[ed] the clients' preferences for the handling of the case,” the arrangement was unenforceable because it was inconsistent with the Colorado Rules of Professional Conduct. Accordingly, the court disqualified the plaintiffs' lawyer from representing the group.<sup>77</sup>

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Responsibility, Formal Op. 06-438 (2006); Ass'n of the Bar of the City of N.Y., Formal Op. 2009-6 (2009).

72. 42 F. Supp. 2d 1046, 1048 (D. Colo. 1999); *see also* Silver, *supra* note 61, at 758–60 (discussing the *Abbott* case).

73. *Abbott*, 42 F. Supp. 2d at 1048.

74. *Id.* at 1048–49.

75. *Id.*

76. *Id.* at 1049; cf. Yeon-Koo Che & Kathryn Spier, *Exploiting Plaintiffs Through Settlement: Divide and Conquer*, 164 J. INSTITUTIONAL & THEORETICAL ECON. 4 (2008).

77. *Abbott*, 42 F. Supp. 2d at 1050–51.

Similarly, in *Tax Authority, Inc. v. Jackson Hewitt, Inc.*, a group of tax-preparation business owners crafted a private governance structure in their breach-of-contract suits against a common franchisor.<sup>78</sup> All 154 plaintiffs signed identical retainer agreements with the same lawyer to represent them collectively, creating a steering committee and providing that all the plaintiffs would be bound if a weighted majority approved a settlement.<sup>79</sup> The retainer agreements also specified a formula for allocating the settlement proceeds as well as sharing responsibility for fees and costs.<sup>80</sup> The steering committee negotiated a settlement with the defendant and a weighted majority of the plaintiffs approved it, but one dissenter did not want to be bound and challenged the arrangement.<sup>81</sup>

The New Jersey Supreme Court held that the majority-rule provisions of the retainer agreement violated the aggregate settlement rule, which “forbids an attorney from obtaining consent in advance from multiple clients that each will abide by a majority decision in respect of an aggregate settlement.”<sup>82</sup> The court explained: “Before a client may be bound by a settlement, he or she must have knowledge of the terms of the settlement and agree to them.”<sup>83</sup> But the court applied its ruling only prospectively, allowing the settlement to stand and—perhaps signaling that the time had come to reconsider the aggregate settlement rule in New Jersey—referred the issue to the state bar Commission on Ethics Reform.<sup>84</sup> The Commission has not modified the rule.

Recognizing that mechanical application of the aggregate settlement rule can frustrate large-scale beneficial settlements, the recent ALI *Principles* proposed a modification of the rule in mass litigation. The ALI’s proposal would allow joint clients to waive the individual-consent requirement and instead agree in advance to be bound by a supermajority vote on group settlements—to essentially do what the plaintiffs in *Tax Authority* tried to do—subject to judicial review for procedural and substantive fairness.<sup>85</sup> But, to date, no state or court has adopted the ALI’s proposal. And at least one bar

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78. 898 A.2d 512, 515 (N.J. 2006). Their franchise agreements prohibited class actions. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 516–17.

82. *Id.* at 522.

83. *Id.*

84. *Id.* at 522–23.

85. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010).

association ethics opinion has expressly rejected it, stressing the need to protect client autonomy over settlement decisions.<sup>86</sup>

By frustrating market-driven attempts to reduce transaction costs and prevent holdouts through private governance structures for group decisionmaking, legal ethics rules aimed at preserving client autonomy allow the anticommons problem in aggregate litigation to persist. While these ethical rules may be good ways to protect clients and ensure lawyer loyalty in the paradigm of one-on-one representation, they function as state-imposed transaction costs on value-generating aggregation and can prevent the very clients they are trying to protect from maximizing the values of their claims.

#### *D. Novel and Extralegal Attempts to Capture the Peace Premium*

Despite these formal legal obstacles, the market is straining for a solution that would allow parties in mass litigation to capture the peace premium. Anticommons problems can sometimes induce parties to resort to extralegal means to get around formal legal rules that impede otherwise-efficient transactions. For example, in postsocialist Moscow, while excessive fragmentation of rights prevented retailers from opening storefronts, entrepreneurs were able to operate street kiosks through the comparatively simple process of bribing a handful of municipal officials and making protection payments to easily identifiable criminal organizations.<sup>87</sup> Similarly, predatory Moscow real-estate bundlers attempting to convert *komunalkas*—socialist-era group apartments jointly owned by dozens of tenants—into marketable single-family units frequently used coercive tactics to overcome the anticommons by intimidating or even murdering tenants who attempted to hold out for a greater share of the bundling surplus.<sup>88</sup> Through extralegal means, parties can capture some of the otherwise wasted surplus created by overcoming the anticommons, but such attempts frequently involve illegal and unfairly coercive behavior.<sup>89</sup>

Similarly, pressure to capture the peace premium in aggregate litigation, along with parties' inability to use *ex ante* contractual arrangements to modify the aggregate settlement rule, has led to both

86. Ass'n of the Bar of the City of N.Y., Formal Op. 2009-6 (2009).

87. Heller, *supra* note 4, at 642–44.

88. *Id.* at 650–54.

89. *Id.* at 644–45 (citing HERNANDO DE SOTO, THE OTHER PATH: THE INVISIBLE REVOLUTION IN THE THIRD WORLD 151–82 (1989)); see also RICHARD A. EPSTEIN, BARGAINING WITH THE STATE 41–42 (1993) (arguing that coercion leads to deadweight social loss).

innovative settlement structures that push the boundaries of legal ethics and outright abusive practices.

### 1. The Vioxx Settlement Lawyer-Withdrawal Requirement

The settlement of the massive product-liability litigation over the drug Vioxx provides an example of the creative lengths to which parties will go to achieve complete peace. The defendant, Merck, reached an agreement with the plaintiffs' lawyers to recommend participation in a global settlement to all of their clients and to withdraw from representing any client who rejected the settlement.<sup>90</sup> Thus clients who wished to reject the settlement would have to find themselves another lawyer (and their current lawyers had little incentive to help them because the settlement barred them from receiving a referral fee for doing so or otherwise retaining any financial interest in any case that remained in the litigation).<sup>91</sup> The Vioxx settlement was successful in achieving \$4.85 billion in compensation for the 99.79% of claimants who enrolled, but the settlement has attracted much criticism for pushing the boundaries of several ethics rules and failing to reflect the true consent of clients.<sup>92</sup>

The lawyer-withdrawal features of the Vioxx settlement bear a striking resemblance to a coercive technique sometimes used to prevent holdouts in sovereign debt restructuring. When a country's sovereign debt reaches an unsustainable level, it is often in the interests of both the sovereign and its creditors to restructure that debt with all of the creditors agreeing to take a haircut to avoid a

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90. Settlement Agreement Between Merck & Co., Inc., and the Counsel Listed on the Signature Pages Hereto § 1.2.8 (Nov. 9, 2007), available at [http://www.legalexaminer.com/uploadedFiles/InjuryBoardcom\\_Content/Overviews/VioxxMasterSettlementAgreement.pdf](http://www.legalexaminer.com/uploadedFiles/InjuryBoardcom_Content/Overviews/VioxxMasterSettlementAgreement.pdf). For competing takes on the dynamics and features of the Vioxx settlement, see Erichson & Zipursky, *supra* note 9, at 274–81, and Samuel Issacharoff, *Private Claim, Aggregate Rights*, 2008 SUPREME CT. REV. 183, 215–19.

91. See Erichson & Zipursky, *supra* note 9, at 266 (“A client wishing to decline the settlement . . . faced the prospect of losing her lawyer and finding that every other lawyer handling Vioxx claims was similarly unavailable.”); Issacharoff, *supra* note 90, at 218 (describing the prohibition on referral fees or ongoing interests for referring attorneys).

92. See, e.g., Conn. Bar Ass'n, Informal Op. 08-01 (2008) (determining that a settlement agreement like that in the Vioxx case interferes with a client's decision regarding settlement, creates conflicts of interest, and deprives clients of independent advice from their lawyers); Erichson & Zipursky, *supra* note 9, at 281–92 (describing various problems with the settlement agreement from a legal ethics perspective); Erichson, *All-or-Nothing*, *supra* note 31, at 1000–04 (same); cf. Richard A. Nagareda, *Closure in Damage Class Settlements: The Godfather Guide to Opt-Out Rights*, 2003 U. CHI. LEGAL F. 141, 158–60, 167–69 (describing similar strategies to destroy litigation value of opt-out claims).

costly default and the prospect of not being paid at all.<sup>93</sup> In other words, restructuring before default can generate value. But, because the debt is held primarily by individual bondholders, an anticommons dynamic exists: coordination in restructuring is difficult and holdouts are likely.<sup>94</sup> Some hedge funds—known as “vulture funds”—even specialize in buying up distressed sovereign bonds at a discount in order to hold out for higher payments.<sup>95</sup>

Traditionally, for bonds issued under New York law (which make up the majority of sovereign bonds), the unanimous consent of all bondholders was needed to modify payment terms, making any attempt to restructure by amending the bond contracts to reduce or postpone payment particularly vulnerable to holdouts.<sup>96</sup> But countries looking to restructure without paying off holdouts took advantage of the fact that the bonds’ *nonpayment* terms could be modified by a simple majority vote. What they did was offer to exchange outstanding bonds for a new issuance of bonds containing lower payment terms, but only on the condition that participating bondholders consent to a modification of the nonpayment terms of the old bonds.<sup>97</sup> These “exit consents” were designed to make holding out unattractive by destroying the value and liquidity of the old bonds by removing bondholder protections such as cross default protections and public-listing requirements.<sup>98</sup>

While exit consents can help overcome the collective action problem and make both debtors and creditors better off than if no restructuring occurred,<sup>99</sup> they do so only by destroying the value of bonds held by creditors who do not participate.<sup>100</sup> And they make it possible for the debtor and the majority of creditors to collude at the

93. William W. Bratton & G. Mitu Gulati, *Sovereign Debt Reform and the Best Interest of Creditors*, 57 VAND. L. REV. 1, 18, 21–22 (2004); Hagan, *supra* note 66, at 307–08, 316.

94. See Hagan, *supra* note 66, at 309–11.

95. *Id.* at 322.

96. *See id.* at 317–18.

97. See Lee C. Buchheit & G. Mitu Gulati, *Exit Consents in Sovereign Bond Exchanges*, 48 UCLA L. REV. 59, 65–66 (2000) [hereinafter Buchheit & Gulati, *Exit Consents*].

98. *Id.* at 68–70.

99. Ran Bi, Marcos Chamon & Jeromin Zettelmeyer, *The Problem that Wasn’t: Coordination Failures in Sovereign Debt Restructurings* 15–17 (IMF Working Paper No. 11/265, 2011), available at [www.imf.org/external/pubs/ft/wp/2011/wp11265.pdf](http://www.imf.org/external/pubs/ft/wp/2011/wp11265.pdf).

100. See *id.* at 8; Buchheit & Gulati, *Exit Consents*, *supra* note 97, at 66, 68–69; see also Christian Engelen & Johann Graf Lambsdorff, *Hares and Stags in Argentinean Debt Restructuring*, 78 J. INT'L ECON. 141, 146 (2009) (explaining how exit consents favor the debtor by imposing costs on bondholders outside restructuring).

expense of the minority.<sup>101</sup> These features tend to shift bargaining power from the creditors to the debtor.<sup>102</sup> It is easy to see why this is the case. By destroying the value of bonds outside of the restructuring, exit consents make it difficult for bondholders to vote against an inadequate deal. If they vote with their feet and refuse to participate, they get none of the benefits of the restructuring and are left with an illiquid and devalued bond; there is no process through which they can voice their objections and still participate in the restructuring if they are outvoted. In short, the aggregation made possible by coercive exit consents can still generate value, but the debtor captures more of the surplus.

Like exit consents, the lawyer-withdrawal terms of the Vioxx settlement were designed to effectively impair the litigation value of any would-be holdout's claims. And the terms were, in fact, quite successful in doing so. With the litigation value of their claims impaired, claimants who opposed the settlement would find it very difficult to express their opposition. There was no voting process through which claimants could "voice" their opposition, and the "exit" option was rendered unattractive by the need to find a new lawyer.<sup>103</sup> While such a coercive tactic likely helped the parties realize a peace premium in overcoming the anticommons, it risked collusion between the defendant and majority at the expense of the minority and likely allowed the defendant to capture a relatively greater share of the surplus generated by the comprehensive settlement.<sup>104</sup>

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101. See Bratton & Gulati, *supra* note 93, at 23 (acknowledging the possibility that exiting bondholders could approve an amendment lifting the contractual protections of holdouts, benefitting themselves and the debtor at the holdouts' expense).

102. Bi, Chamon & Zettelmeyer, *supra* note 99, at 15; Engelen & Lambsdorff, *supra* note 100, at 146.

103. See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

104. The Sulzer Hip Implant class settlement also illustrates the risk that coercive tactics can shift bargaining leverage in favor of the defendant. The original settlement agreement sought to deter opt-outs by creating a trust fund for the settling class secured by a lien on all of the defendant's assets. *In re Inter-Op Hip Prosthesis Liab. Litig.*, 204 F.R.D. 330, 353–54 (N.D. Ohio 2001). The lien would have delayed payment of any settlement or judgment to opt-outs until after all class members were paid—a process expected to take six years with no guarantee that anything would be left. *Id.* at 354; see also Nagareda, *supra* note 92, at 157–59. But once these features aimed at impairing the value of opt-out claims were removed (after the Sixth Circuit expressed "serious doubts as to [their] legitimacy," *Drummer v. Sulzer Orthopedics, Inc.*, No. 01-4039, 2001 WL 1774017, at \*1 (6th Cir. Oct. 29, 2001))), the final class settlement resulted in higher and more liquid payouts to the settling plaintiffs. See Nagareda, *supra* note 92, at 160–63.

## 2. Illegal and Unethical Practices by Lawyers

In other instances, pressure for finality has led to outright abuse by plaintiffs' lawyers, who stand to gain the most from the ability to offer complete peace to the defendant.<sup>105</sup> (In mass litigation, the lawyer's contingent-fee share of the total recovery typically dwarfs the share of any individual client, thus the lawyer has a greater incentive than any individual to capture the peace premium for the group.) Without the ability to agree with clients in advance on structures of representation that would allow them to credibly offer finality, lawyers have engaged in abusive practices, such as maintaining slush funds to pay off holdouts, lying to clients about settlement terms, and unduly pressuring clients to settle.<sup>106</sup>

Examples of abusive practices can be found in several aggregate settlements despite the dictates of the aggregate settlement rule. In the Philips Petroleum explosion settlement the plaintiffs' lawyers falsely told them their settlement amounts had been individually negotiated with the defendant based on a review of their medical records in an attempt to make sure that all of the plaintiffs accepted the defendant's lump-sum offer.<sup>107</sup> And some of the clients who objected were offered larger sums (taken from the allocation set aside for other clients) while other objectors were told that the lawyers would not pursue their cases outside of the settlement and that, if they hired other lawyers, they would have to pay contingency fees to both firms.<sup>108</sup>

Similarly, Professor Howard Erichson has recently documented lawyer abuses in a number of aggregate settlements where lawyers used high-pressure tactics to ensure full participation in agreements to settle their entire inventories of claims.<sup>109</sup> He describes lawyers lying to their clients about how allocation determinations were made, withholding portions of the settlement to create slush funds to pay off

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105. See Silver, *supra* note 61, at 764–71 (describing various unethical actions taken by plaintiffs' lawyers, particularly in the context of "all-or-nothing" settlement arrangements, and the incentives for ensuring that defendants are not encouraged to "kill a deal").

106. See, e.g., Erichson, *All-or-Nothing*, *supra* note 31 (describing ethically dubious actions taken by attorneys in a number of "all-or-nothing" settlement cases); Paul D. Rheingold, *Ethical Constraints on Aggregated Settlements of Mass Tort Cases*, 31 LOY. L.A. L. REV. 395, 408 (1998) (noting the "wide chasm which exists between professional ethics rules and actual practice").

107. *Burrow v. Acre*, 997 S.W.2d 229, 232 (Tex. 1999); see also Lester Brickman, *Anatomy of an Aggregate Settlement: The Triumph of Temptation over Ethics*, 79 GEO. WASH. L. REV. 700, 711–12 (2011); Erichson, *All-or-Nothing*, *supra* note 31, at 1004–06.

108. Brickman, *supra* note 107, at 712.

109. Erichson, *All-or-Nothing*, *supra* note 31.

objectors, and accepting side payments from the defendant in exchange for getting every client to sign on.<sup>110</sup>

Erichson attributes these abuses to the all-or-nothing nature of the settlements. He argues that such settlements should be eschewed in favor of “most-or-nothing” settlements, where the risk of holdouts—and the pressure to get the last client to agree—will be lessened.<sup>111</sup> But Erichson sidesteps the reason why parties tried so hard for closure: defendants value closure and are willing to pay a premium for it. Complete aggregation can generate a surplus over incomplete aggregation. Plaintiffs in most-or-nothing settlements are thus forfeiting the peace premium they could demand in exchange for finality. Also, as noted above, Erichson underestimates the potential for holdouts in settlements that do not require unanimous consent.<sup>112</sup>

When an anticommons dynamic causes parties to leave money on the table, there will inevitably be pressure to circumvent whatever formal legal obstacles stand in the way of capturing the surplus. And arrangements by which lawyers use creative or extralegal means to bundle claims for sale to the defendant frequently benefit the parties at the negotiating table—lawyers and defendants—at the expense of plaintiffs.

## II. STRATEGIES FOR DEFEATING THE ANICOMMONS AND THE PROBLEMS THEY CREATE

Recognizing the anticommons in mass litigation reveals that complete (or near complete) aggregation can generate value and that transaction costs can prevent such value-generating aggregation from

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110. *Id.* at 989–1000; see also *Johnson v. Nextel Commc’ns, Inc.*, No. 06-CV-5547 (DMC), 2007 WL 2814649, at \*1 (D.N.J. Sept. 21, 2007) (describing side payments to plaintiffs’ attorneys by defendant); *Buckwalter v. Napoli, Kaiser & Bern, LLP*, No. 01 Civ. 10868LTSHPB, 2005 WL 736216, at \*2–3 (S.D.N.Y. Mar. 29, 2005) (describing misleading statements made by lawyers to plaintiffs in fen-phen litigation); *Morris v. Greitzer & Locks of N.J., L.L.C.*, No. A-4672-OGT3, 2009 WL 2525452, at \*2–6 (N.J. Super. Ct. App. Div. Aug. 20, 2009) (describing a dispute among attorneys about referral fees based on a misstatement of a settlement amount).

111. Erichson, *All-or-Nothing*, *supra* note 31, at 1022–25. The pressure for abuse, however, is still present in most-or-nothing settlements, as the Sixth Circuit’s recent affirmance of twenty-and twenty-five-year sentences for two lawyers in *United States v. Cunningham*, 679 F.3d 355 (6th Cir. 2012), demonstrates. There, the lawyers negotiated a \$200 million lump-sum settlement contingent upon 95% of their 440 clients signing on. *Id.* at 364. But through a combination of lies, slush funds, and pressure, the lawyers convinced their clients to accept distributions of only about a third of that amount, and the lawyers pocketed the rest. *Id.* at 365–66.

112. See *supra* notes 51–52 and accompanying text. But see Erichson, *All-or-Nothing*, *supra* note 31, at 1013 (“[T]he holdout problem should be understood not as a problem with the aggregate settlement rule’s requirement of informed consent, but rather as a problem with deals that are structured to require full participation.”).

occurring. Some transaction costs are inevitable when rights are dispersed. But other transaction costs, like the aggregate settlement rule, are artificially imposed by law. Paradoxically, rules intended to protect plaintiffs in litigation can prevent them from maximizing the value of their claims. By barring plaintiffs from transferring their exclusion rights (i.e., the individual right to reject a settlement) to the group in an enforceable manner, the aggregate settlement rule prevents some transactions that could leave everybody better off.

Ordinarily, the law should facilitate, not block, transactions that will result in joint gains. But maximizing aggregate value is not the only consideration that should come into play. It is merely the first stage in what is essentially a two-stage problem presented by the anticommons. The second stage is determining how to allocate the bundling surplus.

#### *A. The Two-Stage Dynamic and the Need for Coercion*

In the aggregate litigation context, the anticommons dynamic presents a two-stage problem for plaintiffs: Stage one is the negotiation phase (which includes litigation efforts necessary to maximize negotiating position) where, because claims are worth more in the aggregate, there are gains to be had from cooperation. Stage two is the allocation phase, where the plaintiffs must divide up a limited fund in a zero-sum game.

Absent transaction costs, when parties can create value by trading their rights at stage one they will do so and then determine for themselves how to share the resulting surplus at stage two. But in an anticommons dynamic, where transaction costs and strategic behavior make bargained-for aggregation impracticable, coercion of some form is typically required to realize the joint gains at stage one.<sup>113</sup> That coercion might come in the form of state regulatory power used to force transfers of rights to a collective, like the use of eminent domain to transfer tracts of land to a developer,<sup>114</sup> or the certification of a class, giving class counsel control over the claims of absent class members. It might stem from enforcement of contractual precommitments to be bound by a future group decision, as the plaintiffs in *Abbot and Tax Authority* attempted. Or it might come in the form of intimidation, as in the case of the Moscow real-estate

113. Small groups of rights holders with preexisting relationships may be able to overcome anticommons problems without coercion, particularly if they are repeat players, but large, dispersed groups of unconnected individuals have a much harder time coordinating activity without some form of coercion. See generally OSTROM, *supra* note 62.

114. E.g., *Kelo v. City of New London*, 545 U.S. 469, 472 (2005).

bundlers attempting to convert *komunalkas* into single-family residences,<sup>115</sup> or lawyers lying to and pressuring their clients to accept an all-or-nothing settlement.

As these examples illustrate, strategies for overcoming the anticommons can take three general forms. The first is a regulatory solution where the state forces aggregation by simply taking the individual property rights or empowering an agent to do so. The second is an ex ante contractual solution where the rights holders precommit to be bound by group decisions made under a nonunanimous-voting rule or empower an agent to make binding decisions for the group. And the third is for a bundler to use force or intimidation to override the consent of the rights holders and take all of the rights for himself.

While these strategies can help solve the holdout problem typical of the anticommons, their use of coercion gives rise to new problems. Any strategy that allows joint decisions to be made without unanimous consent creates a risk that the majority will exploit the minority by directing benefits to themselves and costs to the minority.<sup>116</sup> And any strategy that empowers an agent to coordinate group activity creates a principal-agent problem, in which the agent might shirk in his efforts to advance the group's interests or, worse, direct benefits to himself at the group's expense.<sup>117</sup>

In an anticommons dynamic, therefore, aggregation has the potential to make everyone better off, but once coercion is involved there is no guarantee that it will. When the individual consent of all rights holders must be obtained, each individual has the power to block a transaction that will make him or her worse off.<sup>118</sup> Only transactions that make some parties better off without making any party worse off (Pareto improvements) can go forward. The power to hold out is also the power to avoid exploitation.

But when that consent can be overridden, there is no longer any guarantee that no party will be made worse off. Those with coercive power can take all of the bundling surplus—and more—for

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115. Heller, *supra* note 4, at 653–54.

116. Cf. EPSTEIN, *supra* note 89, at 70 (noting that externalities created when the majority can take advantage of a minority can lead to distributional inequities and overall efficiency loss); Richard A. Epstein, *Holdouts, Externalities, and the Single Owner: One More Salute to Ronald Coase*, 36 J.L. & ECON. 553, 559 (1993) (noting that parties are sometimes empowered to protect their own interests through the mechanism of unanimous consent to prevent other parties from exploiting a position of dominance).

117. See Michael C. Jensen & William H. Meckling, *The Theory of the Firm: Managerial Behavior, Agency Costs, and Ownership Structure*, 3 J. FIN. ECON. 305 (1976).

118. See Calabresi & Melamed, *supra* note 46, at 1107–08 (applying this principle in the context of eminent domain and property taxes).

themselves. The majority can exploit the minority, and agents can exploit their principals, leaving some or all of the original rights holders worse off. In other words, the coercion needed to solve the holdout problem creates a tyranny-of-the-majority problem and an agency problem. This coercion is typically necessary for plaintiffs to maximize the value of their claims at stage one, but it leaves them vulnerable to exploitation; the challenge comes in figuring out how to fairly allocate the resulting surplus at stage two.

### *B. Evaluating the Use of Coercion To Defeat an Anticommons*

When an anticommons dynamic blocks aggregation of rights through voluntary transactions, the normative criteria for evaluating the use of coercion to achieve aggregation track the two stages of the anticommons problem: First, will the aggregation result in collective gain, that is, does it create value? And second, will the parties to the aggregation jointly realize the resulting surplus? These criteria stem from what rational players in an anticommons dynamic would want—that is, the opportunity to increase the size of the pie, but only with the assurance that they will share in the collective gain and not be exploited once they surrender their autonomy. The normative baseline is thus whether the coerced aggregation will leave all parties at least as well off as if no aggregation had occurred.<sup>119</sup>

But requiring the aggregation to benefit (or at least not hurt) *every* party is a demanding threshold when transaction costs and holdout problems prevent the parties from voluntarily trading their rights, particularly if measured *ex post*. Because the parties may not reveal their subjective valuations of their rights, it may be difficult to determine whether any involuntary aggregation in fact left every party at least as well off. Indeterminacy, however, is not a good reason for the law to abandon efforts to allow value-generating aggregation to occur—particularly when the prospect of wasted resources may cause parties to resort to extralegal means of coercion to capture them.<sup>120</sup>

Indeed, recognizing the transaction costs, uncertainty, and potential for holdouts, parties might be quite willing to trade their autonomy for a chance at overcoming the anticommons, even if there is no guarantee that they will be made better off in the end. This is essentially what happens in contractual strategies for defeating the

119. The baseline is thus Pareto superiority. See Jules L. Coleman, *Efficiency, Utility, and Wealth Maximization*, 8 HOFSTRA L. REV. 509, 515–17 (1980) (describing the Pareto-superior standard).

120. See *supra* Part I.D (describing examples of such methods).

anticommons. From an *ex ante* perspective, each party is made better off by precommitting to be bound by a group decision (assuming, of course, that the other parties also commit to be bound), given the expected surplus from aggregation and each party's expected share in the allocation. Thus, aggregation may be an improvement for every party at the relevant time, even if the *ex post* allocations do not work out to the benefit of each party.<sup>121</sup>

### C. Governance and the Legitimacy of Aggregation

In a world with transaction costs and incomplete information, we might accept something less demanding than an *ex post* improvement for every party so long as the *procedures* for allocating the collective gain from coercive aggregation were fair. Thus, the second normative criterion becomes one of governance instead of *ex post* outcome: Are there adequate procedures in place to fairly allocate the bundling surplus? These procedures must be able to deal with the problems created by the use of coercion at the first stage to override individual consent in favor of a group decision; that is, they should be designed to combat opportunistic behavior by either the majority at the expense of individuals or the agent at the expense of the principals.<sup>122</sup> In short, the legitimacy of using coercion to compel participation in a value-generating bundling transaction at the first stage depends on the presence of some form of governance mechanism

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121. This insight escaped the Second Circuit in follow-on litigation to the Agent Orange class settlement, which set up a \$180 million fund for claimants who developed an Agent-Orange-related disease within ten years—an attractive offer, when viewed *ex ante*, for exposure-only claimants who did not know if or when they might get sick. But in *Stephenson v. Dow Chemical Co.*, 273 F.3d 249, 261 (2d Cir. 2001), the court adopted an *ex post* perspective and held that two disappointed plaintiffs who manifested injuries *after* the ten-year period were not bound because the interests of such postfund future claimants were not adequately represented at the time of the settlement. Viewed in light of the anticommons, however, *Stephenson* should be read narrowly for the proposition that the governance structures to protect future claimants were inadequate (because the district court had declined to appoint a future-claims representative), not that future interests can never be protected in a time-limited manner or that class settlements are always open to collateral attack by future claimants. Contrast *Stephenson* with *Uhl v. Thoroughbred Technology & Telecommunications, Inc.*, 309 F.3d 978, 980–81 (7th Cir. 2002), which evaluated a class settlement from an *ex ante* perspective. Cf. EPSTEIN, *supra* note 89, at 97–98 (arguing that when parties' initial expectations are in rough parity, the right incentives exist to maximize collective gain, even if an *ex post* division of surplus does not work out precisely *pro rata*).

122. It may be necessary to pay the bundler a share of the surplus—quite possibly a large share—to encourage investment in overcoming the transaction costs of aggregation, Fennell, *Common Interest Tragedies*, *supra* note 41, at 963, but the aggregation should also redound to the benefit of the original rights holders.

to ensure that the resulting surplus is fairly allocated at the second stage.

It is natural to address problems of coercive aggregation in governance terms, as scholars approaching aggregate litigation from the angles of political theory<sup>123</sup> and corporate governance<sup>124</sup> have noted. Indeed, the same fundamental problem is present in political theory. Though he did not speak in those terms, Hobbes recognized a form of anticommons in the state of nature, where the complete autonomy of every individual made value-generating cooperation impossible.<sup>125</sup> Only by surrendering their autonomy to a centralized authority with coercive power could individuals overcome the collective action problem and realize the gains from cooperation. For Hobbes, the inevitable solution was monarchy; he was not particularly concerned with the allocation stage. But, as Professor Samuel Issacharoff has explained in drawing the analogy between governance of the state and of class actions, political theory has progressed quite a bit since Hobbes.<sup>126</sup> While all theories recognize that coercive power is necessary for society to realize joint gain, the “legitimacy of any particular governmental arrangement then turns on the ability to curb oppressive, abusive, or self-serving behavior that may emerge from within the newly created governing class.”<sup>127</sup> In other words, governance is how society goes about fairly allocating the gains from cooperation.

Two of the central problems that political governance aims to address are how to prevent the majority from oppressing the minority and how to control agent opportunism once the power to override individual consent is given to a governing authority.<sup>128</sup> This was James Madison’s central insight in *The Federalist 51*, where he explained: “In framing a government which is to be administered by men over men, the great difficulty lies in this: You must first enable

123. Samuel Issacharoff, *Governance and Legitimacy in the Law of Class Actions*, 1999 SUP. CT. REV. 337, 338–39; see also NAGAREDA, *supra* note 34, at 219–23 (describing mass torts as a “problem of governance”).

124. Coffee, *supra* note 30, at 289–96; John C. Coffee, Jr., *Class Action Accountability: Reconciling Exit, Voice, and Loyalty in Representative Litigation*, 100 COLUM. L. REV. 370, 375–77 (2000).

125. See THOMAS HOBBES, *LEVIATHAN* 81–86 (1651) (describing man’s state of nature as a lawless condition of strife and war).

126. Issacharoff, *supra* note 123, at 339.

127. *Id.*

128. Cf. Fennell, *Common Interest Tragedies*, *supra* note 41, at 983 n.265 (citing JAMES M. BUCHANAN & GORDON TULLOCK, THE CALCULUS OF CONSENT: LOGICAL FOUNDATIONS OF CONSTITUTIONAL DEMOCRACY 65–73 (1962)) (stating that representative bodies must either operate by unanimous consent or accept that the interests of some members will necessarily be subordinated).

the government to control the governed; and in the next place oblige it to control itself.”<sup>129</sup> Thus, the U.S. Constitution aimed to create structural protections— “[a]mbition must be made to counteract ambition”—to prevent the tyranny of the majority and limit agent opportunism.<sup>130</sup> And judicial review serves as a backstop when these structural protections fail.<sup>131</sup> Boiled down to its essentials, the social contract creating a system of political governance consists of individuals surrendering their autonomy and subjecting themselves to majority rule in order to capture the surplus from cooperation, but only with the assurance that structural protections—including judicial review—are in place to protect them from exploitation at the hand of their agents or the majority.

Likewise, the same set of problems is present in corporate governance. As Ronald Coase explained, business firms are a response to market failures, in the form of transaction costs and fear of opportunism, that prevent people wishing to pool assets for profitable projects from doing so through contracts alone.<sup>132</sup> In other words, corporations offer a solution to the anticommons by consolidating the assets of diffuse investors into a single entity that is subject to hierarchical control and can allocate resources by fiat rather than by unanimous agreement.<sup>133</sup> The resulting surplus is then distributed among the investors in the form of dividends or increased share value. Separating ownership and control in such a manner, of course, creates agency problems and the risk of majority opportunism, but the law of corporate governance has developed doctrines to mitigate these problems.<sup>134</sup> The corporate structure, therefore, largely solves the

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129. THE FEDERALIST No. 51, at 281 (James Madison) (Benjamin Warner ed., 1818).

130. *Id.*; see also *id.* No. 10, at 50–56 (arguing for the necessity of limiting the effects of factions by tilting the interests of such factions against those of others).

131. See, e.g., *United States v. Carolene Prods. Co.* 304 U.S. 144, 152 n.4 (1938) (noting that heightened judicial review is warranted when legislation violates a provision of the Constitution, distorts the political process, or targets “discrete and insular minorities”); JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 87 (1980) (arguing that judicial review should be applied to reinforce participation and representation in the democratic process); cf. D. Theodore Rave, *Politicians as Fiduciaries*, 126 HARV. L. REV. 671, 676–79 (2013) (arguing that courts should take an active role in limiting incumbent self-dealing).

132. R. H. Coase, *The Nature of the Firm*, 4 ECONOMICA 386, 390–92 (1937); see also OLIVER E. WILLIAMSON, THE MECHANISMS OF GOVERNANCE 3–4 (1996) (developing nonstandard business practices and organizational forms can be explained as an attempt to economize transaction costs); Amnon Lehavi & Amir N. Licht, *Eminent Domain, Inc.*, 107 COLUM. L. REV. 1704, 1732–33 (2007) (consolidating assets in a single entity subject to hierarchical control is the key to overcoming the transaction costs of opportunism).

133. Lehavi & Licht, *supra* note 132, at 1733.

134. *Id.* at 1736.

anticommons by denying each shareholder a veto while providing sophisticated defenses against majority abuse and agent disloyalty.<sup>135</sup>

As long as there are adequate governance procedures in place to ensure that the burdens and gains from cooperation are fairly allocated at the second stage, the use of coercion at the first stage can be justified. Thus the legitimacy of both regulatory and contractual strategies for overcoming an anticommons depends on (1) their ability to generate a surplus through aggregation and (2) the presence of an internal governance procedure that will address the agency and tyranny-of-the-majority problems and allow the parties to the aggregation to fairly divide up the surplus. Indeed, as the next Part will illustrate, this pattern is typical of many areas of law. The third strategy for defeating the anticommons—the use of force or intimidation—is plainly illegitimate on these grounds, but it cannot be ignored as the potential for a surplus may induce parties to resort to illegal means to capture it, particularly when the background legal rules prevent the use of other strategies.

### III. ATTACKING THE ANICOMMONS IN OTHER AREAS OF LAW

Using coercion to defeat an anticommons and achieve coordinated gains is a familiar move in the law. Several areas of law exhibit the same two-stage dynamic as aggregate litigation, but, instead of slavishly insisting on individual autonomy, they employ regulatory or contractual strategies to overcome anticommons problems. Whichever strategy is adopted, the use of coercion at the first stage is typically conditioned on—and legitimized by—the presence of governance procedures to ensure that the resulting surplus is fairly allocated at the second stage. Some of these solutions work so well that it is easy to overlook the underlying anticommons dynamic. Nevertheless, these two-stage responses hold important lessons for addressing the anticommons in aggregate litigation.

#### *A. Regulatory Solutions*

An anticommons can often be a justification for regulation.<sup>136</sup> Here, I survey examples of regulatory responses to anticommons

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135. *Id.* at 1748. A similar approach to class actions would view the class as an “entity.” See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 NOTRE DAME L. REV. 913, 919 (1998).

136. See, e.g., Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 779–81 (1973); Michael Heller & Rick Hills,

problems in four areas: land assembly, admiralty, bankruptcy, and oil and gas extraction. While they do not all promise never to leave any individual worse off, their use of coercion is legitimized in part by the fairness of the procedures used at the allocation stage and their attention to the governance problems of limiting agency costs and minority exploitation. Because the power of the state is used to override individual consent, procedural attention to allocation is particularly important.

### 1. Land Assembly Through Eminent Domain

The classic example of a regulatory solution to an anticommons problem is the use of eminent domain for land assembly. It is also one of the more problematic examples. States turn to eminent domain when contiguous parcels of land owned by many individuals could be put to better use as a single larger parcel, but transaction costs and holdouts make assembly through voluntary transactions prohibitively costly.

Eminent domain is a two-stage process.<sup>137</sup> First, in the aggregation stage, the state takes the property from the dispersed owners, assembles it into a more valuable whole, and transfers it to a higher-value user. Second, in the allocation stage, the state provides a process for paying “just compensation” to the individual property owners.<sup>138</sup> This process is typically a judicial determination of the objective “fair market value” of the property prior to the taking.<sup>139</sup>

The use of government coercion to make the aggregation possible is justified by the anticommons dynamic; the land assembly will create value but the potential for holdouts prevents assembly through market transactions.<sup>140</sup> Still, the use of eminent domain for large-scale development projects remains controversial. Much of the resistance—particularly in the wake of *Kelo v. City of New London*<sup>141</sup>—stems from the fact that the surplus generated by aggregation is not shared with the original landowners. Under current doctrine, the original landowners are only entitled to the preproject

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*Land Assembly Districts*, 121 HARV. L. REV. 1465, 1470 (2008) (“[T]he traditional solution to such a tragedy of the anticommons [is] a call for the Leviathan . . . ”).

137. Lebavi & Licht, *supra* note 132, at 1732.

138. U.S. CONST. amend. V.

139. *E.g.*, *United States v. 564.54 Acres of Land, More or Less*, 441 U.S. 506, 511 (1979).

140. *E.g.*, Merrill, *supra* note 69, at 74–81. But see Daniel B. Kelly, *The “Public Use” Requirement in Eminent Domain Law: A Rationale Based on Secret Purchases and Private Influence*, 92 CORNELL L. REV. 1, 5 (2006) (arguing that private developers, unlike government entities, can use undisclosed purchasing agents to avoid holdouts).

141. 545 U.S. 469, 484 (2005).

fair market value of their property.<sup>142</sup> The bundler (either the state or a private developer working with the state) gets the entire bundling surplus.

This is problematic not only because it can result in an unfair allocation if the original landowners do not share in the bundling surplus, but also because it can lead to inefficient assembly.<sup>143</sup> Without a procedure at the allocation stage to ensure that the original landowners share in the surplus, bargaining power is shifted in favor of developers. And there is a risk that public officials and developers will collude to use eminent domain for projects that do not, in fact, generate value over current land uses but confer a concentrated benefit on the developer and achieve some public benefit (such as increased tax revenues) at the expense of a discrete minority of undercompensated landowners.<sup>144</sup>

## 2. Law of General Average Contribution

While eminent domain is problematic at the allocation stage, a venerable admiralty doctrine provides an example of a two-stage regulatory response to an anticommons dynamic that does leave every party better off. The law of general average contribution involuntarily imposes a temporary aggregation of property rights with an ingenious mechanism of allocation that legitimizes the aggregation and thwarts strategic behavior.

When a ship faces peril at sea, the captain has a duty to jettison as much cargo as necessary to save the ship and the remaining cargo.<sup>145</sup> In choosing which cargo to toss overboard, the captain would act most efficiently if he were the sole owner of the ship and all of the cargo—he would start with items of great bulk but little

142. *E.g.*, *United States v. Miller*, 317 U.S. 369, 375 (1943). And any consumer surplus (after all, the landowners did not want to sell at fair market value) is lost. *E.g.*, *Coniston Corp. v. Vill. of Hoffman Estates*, 844 F.2d 461, 464 (7th Cir. 1988) (Posner, J.).

143. Calls for reform at the allocation stage range from increasing the measure of compensation (e.g., to 150% of fair market value), Merrill, *supra* note 69, at 90–91, to more sophisticated governance schemes that would give landowners shares in a corporation holding the assembled property, Lehami & Licht, *supra* note 132, at 1734–35, or allow landowners to vote on whether to assemble their land and sell to a developer, Heller & Hills, *supra* note 136, at 1469–71.

144. *E.g.*, Heller & Hills, *supra* note 136, at 1481–82; Lehami & Licht, *supra* note 132, at 1715, 1718, 1732; Merrill, *supra* note 69, at 86–87; cf. EPSTEIN, *supra* note 89, at 98 (contending that a compensation scheme that does not divide the surplus either pro rata or to promote competitive behavior is unlikely to lead to the socially optimal outcome).

145. *E.g.*, *Mouse's Case*, (1609) 66 Eng. Rep. 1341 (K.B.); 12 Co. Rep. 63; *see also* *Barnard v. Adams*, 51 U.S. 270, 303–07 (1850) (discussing the law of general average contribution in the admiralty context).

value—leaving the collective better off.<sup>146</sup> But cargo is typically owned by many different shippers, none of whom would wish their cargo to be jettisoned to save the cargo of others.

To give the captain the proper incentives to maximize collective welfare at the first stage, the doctrine of general average contribution temporarily imposes common ownership where fragmented ownership is at the wrong scale for efficient decisionmaking.<sup>147</sup> The captain is permitted to jettison the necessary cargo and then allocate the loss among all of the shippers and the owner of the hull in proportion to the value saved.<sup>148</sup> The trick in ensuring a fair allocation at the second stage is to get accurate valuations of all the cargo being shipped.<sup>149</sup> But as long as shippers are required to declare the value of their goods *ex ante*, each will have an incentive to do so honestly to avoid the possibility that his undervalued goods will be jettisoned or that he will be required to bear a larger portion of the loss for his overvalued goods.<sup>150</sup> And by allocating the loss among all of the owners according to the declared value of the goods—effectively aggregating ownership for the duration of the emergency—every cargo owner benefits when the captain maximizes aggregate value for the group.<sup>151</sup>

Several conditions make this elegant system of self-declaration work. First, the declared valuation determines the allocation of both costs and benefits of the aggregation. Second, the declaration is done *ex ante* before heterogeneities among shippers arise, that is before shippers know whether they will pay or receive compensation for jettisoned cargo. And third, shippers are in a good position to know their valuations *ex ante*.

Unfortunately, these conditions are rarely present in aggregate litigation. Plaintiffs will rarely be able to accurately value their claims in advance, before the opportunity for factual development and discovery. And because it is the defendant, not a subset of the plaintiffs, who will bear the costs, all plaintiffs will have incentives to overstate the value of their claims. When these conditions are absent, regulatory responses to the anticommons dynamic must take different

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146. Epstein, *supra* note 116, at 582–84.

147. Anticommons problems can be understood as problems of scale. See Fennell, *supra* note 15, at 37–39. The right scale for efficiently deciding which cargo to jettison would be a complete aggregation of all of the cargo and the hull in the hands of a single owner. But where ownership in a resource best used at an aggregated scale—like the ship and cargo—is fragmented, transaction costs and strategic behavior can result in inefficient decisionmaking.

148. Epstein, *supra* note 116, at 582.

149. *Id.* at 582–83.

150. *Id.* at 583.

151. *Id.*

approaches. But the law of general average contribution demonstrates that when the allocation process can guarantee that every individual will share proportionally in the surplus, it makes little sense to object that individual autonomy is overridden when rights are aggregated.

### 3. Bankruptcy

Bankruptcy is perhaps the most well-developed two-stage regulatory example. Creditors in bankruptcy face the collective action problems typical of the anticommons.<sup>152</sup> The debtor firm is often worth more as a going concern than liquidated, but the rights to extract payments (or liquidation value) from the debtor are dispersed among many creditors. If each creditor could demand full payment or force liquidation, the value generated by keeping the debtor firm together as a going concern would be lost—the classic run-on-the-bank scenario.<sup>153</sup>

Bankruptcy law starts with the assumption that collective resolution is necessary in order to maximize value at the first stage.<sup>154</sup> It thus compels aggregation by bringing all creditors together in a single proceeding to reorganize the debtor and imposing an automatic stay on all other proceedings against the debtor.<sup>155</sup> Bankruptcy disarms potential holdouts by shifting decisionmaking authority from the individual creditors to the group. Approval of the plan for reorganization does not require unanimous consent, but rather a supermajority vote.<sup>156</sup> And the bankruptcy court has the ability to “cram down” a plan even over the objection of a class of dissenting creditors.<sup>157</sup>

But bankruptcy legitimizes this compelled participation at the first stage with a well-developed set of governance procedures designed to protect the minority, control agency costs, and fairly allocate the resulting surplus at the second stage.

152. See Douglas G. Baird & Robert K. Rasmussen, *Antibankruptcy*, 119 YALE L.J. 648, 650–53 (2010) (asserting that trends toward securitization and the rise of distressed-debt professionals have resulted in fragmentation of rights typical of anticommons).

153. See THOMAS H. JACKSON, THE LOGIC AND LIMITS OF BANKRUPTCY LAW 10–13 (1986) (describing bankruptcy law as a solution for a common pool problem in which individuals race to extract resources).

154. Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 963 (2012).

155. 28 U.S.C. § 1334(e) (2006); 11 U.S.C. § 362(a) (2006). Any creditors who decline to participate have their claims discharged in their absence. 11 U.S.C. § 501.

156. 11 U.S.C. § 1126.

157. *Id.* § 1129(b)(1).

Valuation of rights in bankruptcy is not always as simple as the shippers' *ex ante* declarations in admiralty law, as claims against the debtor may be disputed or contingent on future events. But through a claims-allowance procedure, the bankruptcy court estimates the value of claims against the debtor and assigns voting rights to creditors accordingly.<sup>158</sup> These estimates, at least for the purposes of allocating votes, need not be exact.<sup>159</sup>

The voting procedures in bankruptcy are designed to prevent a majority of creditors from adopting a plan that oppresses a discrete minority. Thus to deal with heterogeneities among creditors and protect the minority, creditors must be sorted, for voting purposes, into classes based on whether their claims are substantially similar and of the same level of priority.<sup>160</sup> Voting is done on both a pro rata and per capita basis. Approval of the reorganization plan requires an affirmative vote in each class by a supermajority (two-thirds) by claim amount as well as a majority by number of claims.<sup>161</sup> And while the objections of a dissenting class can be overridden, the "cram down" procedure requires the court to first find that the plan is "fair and equitable" and will not "discriminate unfairly" against any creditors.<sup>162</sup> Indeed, a plan may not be approved over the objection of any impaired class of creditors if it violates the rule of "absolute priority" by making any allocation to junior creditors or shareholders before the senior creditors are paid in full.<sup>163</sup> Thus, judicial review for fair treatment of the minority and horizontal equity in the allocation (on the basis of rights existing prior to bankruptcy) trumps any decision by the majority.<sup>164</sup>

Structural protections are also in place to control agency costs. Representation through creditors' committees gives creditors some voice in the negotiations and helps to monitor lawyers, bankers, and other agents to prevent self-dealing.<sup>165</sup> The United States Trustee acts

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158. *Id.* § 502.

159. *Id.* § 502(c)(1); *see also, e.g.*, *Kane v. Johns-Manville Corp.*, 843 F.2d 636, 643 (2d Cir. 1988) (valuing each pending asbestos claim at one dollar for the purpose of voting).

160. 11 U.S.C. § 1122(a).

161. *Id.* § 1126.

162. *Id.* § 1129(b)(1); *see also* *McKenzie, supra* note 154, at 1008.

163. 11 U.S.C. § 1129(b)(2). *See generally* *Bank of Am. Nat'l Trust & Sav. Ass'n v. 203 N. LaSalle St. P'ship*, 526 U.S. 434 (1999).

164. *See Bratton & Gulati, supra* note 93, at 41 ("A plan with majority support can still be unfair to a particular dissenter . . . ."); Alan N. Resnick, *Bankruptcy as a Vehicle for Resolving Enterprise-Threatening Mass Tort Liability*, 148 U. PA. L. REV. 2045, 2065–66 (2000) ("A plan may be confirmed despite rejection by a class, but only if the plan is 'fair and equitable' and does not unfairly discriminate with respect to the non-accepting class.").

165. *See* 11 U.S.C. § 1102(a); *McKenzie, supra* note 154, at 1009–10.

as an independent institutional monitor tasked with overseeing the overall progress of the bankruptcy case and policing self-dealing behavior by agents.<sup>166</sup> And the entire reorganization process takes place under the supervision of the bankruptcy court.

Finally, bankruptcy provides a backstop to ensure that the reorganization is in the “best interests” of the creditors.<sup>167</sup> The reorganization happens in the shadow of liquidation, which provides a benchmark for assessing the fairness of intercreditor allocations.<sup>168</sup> Even if an individual creditor’s class votes to approve the plan, the dissenting creditor is still entitled to receive at least as much value as it would have received in liquidation.<sup>169</sup> Bankruptcy thus ensures that every creditor is at least as well off as part of the collective as it would have been had no reorganization occurred.<sup>170</sup>

Thus, despite difficulties in valuation and heterogeneities among creditors, bankruptcy is able to impose a value-generating aggregation of rights while still ensuring that the individual rights holders share in the joint gains and are not exploited by their agents or the majority.

Indeed, bankruptcy has been the only method able to provide some degree of closure in the asbestos litigation morass. Section 524(g) of the bankruptcy code allows debtors to set up a trust for payment of asbestos claims and to obtain a “channeling injunction” that forces all asbestos claims—present and future—against the debtor into the trust if, on top of the normal voting requirements, 75% of asbestos claimants approve the plan of reorganization.<sup>171</sup> Although its treatment of future claimants is not entirely satisfactory, section 524(g) gives asbestos claimants a real collective voice in the reorganization without empowering holdouts to block an advantageous resolution. While section 524(g) is limited to asbestos bankruptcies, Professor Troy McKenzie has suggested that

166. See 11 U.S.C. §§ 307, 1102(a); 28 U.S.C. § 586(a)(3)(A) (2006); McKenzie, *supra* note 154, at 1009–10, 1020–21.

167. 11 U.S.C. § 1129(a)(7).

168. See Hagan, *supra* note 66, at 342.

169. 11 U.S.C. § 1129(a)(7).

170. Resnick, *supra* note 164, at 2064. The best-interests-of-the-creditors standard ensures that reorganization is a Pareto improvement over the worst-case outcome—liquidation—but does not contemplate any form of second-best informal aggregation that creditors might attempt if the bankruptcy framework were not available, such as a contractual bond workout. If an analogous standard were applied in aggregate litigation, plaintiffs with negative-value claims would receive no protection, and because the relevant comparator is going it alone rather than pursuing some form of informal aggregation, even large claims may be negative value if they require expensive factual development and expert testimony that a lawyer could not amortize over many cases.

171. 11 U.S.C. § 524(g).

bankruptcy can supply a useful model for aggregate litigation more broadly.<sup>172</sup>

#### 4. Oil and Gas Unitization

Compulsory unitization for extraction of oil and gas from a common pool provides a final regulatory example. Oil and gas reservoirs typically underlie multiple parcels of land, and many property owners or leaseholders hold rights to exploit the common pool. Because the resources are mobile within the reservoir and, under the “rule of capture,” each owner is allowed to keep as much of the oil and gas as he or she can extract, the overextraction and attendant waste typical of a tragedy of the commons is predictable.<sup>173</sup> The property owners therefore stand to gain tremendously if they can cooperate and treat the oil reservoir as a single owner would, either by selling all of their property to a single buyer or by entering a unitization agreement.<sup>174</sup> Unitization is an arrangement where all of the owners exchange their individual holdings in the reservoir for shares of a single, commonly managed enterprise that will make decisions about the most efficient way to exploit the resources and then divide the proceeds among the owners according to some predetermined rule.<sup>175</sup>

But achieving such cooperation has proven exceedingly difficult because the need to obtain each individual property holder’s consent to a voluntary unitization agreement presents an anticommons dynamic.<sup>176</sup> Transaction costs stemming from the number of stakeholders and potential for holdouts frequently frustrate

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172. McKenzie, *supra* note 154.

173. See Vijay Mohan & Prateek Goorha, *Competition and Unitization in Oil Extraction: A Tale of Two Tragedies*, 4 REV. L. & ECON. 519, 519 (2008) (arguing that multiplicity of interests and the rule of capture ensure that the oil industry is susceptible to a tragedy of the commons); see also Fennell, *supra* note 15, at 38 (explaining tragedy of the commons).

174. See, e.g., Owen L. Anderson & Ernest E. Smith, *Exploratory Unitization Under the 2004 Model Oil and Gas Conservation Act: Leveling the Playing Field*, 24 J. LAND RESOURCES & ENVTL. L. 277, 278, 284 (2004) [hereinafter Anderson & Smith, *Exploratory Unitization*] (explaining that unitization increases total recovery by maintaining efficient levels of pressure in reservoir and reduces waste, environmental impact, and conflicts with surface owners); Owen L. Anderson & Ernest E. Smith, *The Use of Law to Promote Domestic Exploration and Production*, PROC. FIFTIETH ANN. INST. ON OIL & GAS L. & TAX’N 2-1, 2-64-2-76 (1999).

175. Fennell, *supra* note 15, at 38; Gary D. Libecap & James L. Smith, *The Economic Evolution of Petroleum Property Rights in the United States*, 31 J. LEGAL STUD. 589, 591 (2002).

176. Fennell, *supra* note 15, at 43 (observing that an anticommons dynamic stands in the way of attempts to overcome tragedy of the commons through contract); see also Libecap & Smith, *supra* note 175, at 591-97 (providing the historical development of petroleum property rights and noting the difficulty of writing unitization contracts).

negotiations for private unitization arrangements.<sup>177</sup> Private unitization agreements tend to be achievable at the exploration stage, when parties effectively negotiate from behind a veil of ignorance.<sup>178</sup> But agreements tend to be particularly difficult to reach for existing reservoirs where heterogeneity among incumbent stakeholders and cognitive biases lead to disagreements over plans of allocation.<sup>179</sup> And because voluntary unitization requires unanimous consent, each property holder is a potential holdout.

To reduce transaction costs and the risk of holdouts, most petroleum-producing states have adopted compulsory unitization laws, which allow a supermajority of owners to impose a cooperative regime on dissenting minorities.<sup>180</sup> Following the now-familiar two-stage structure, compulsory unitization schemes have sophisticated governance procedures to ensure that the surplus from a coerced aggregation of rights is fairly allocated.

Compulsory unitization typically begins when a group of owners who believe that unitized operations will enhance recovery forms a steering committee to negotiate a reservoir-wide plan of unitization.<sup>181</sup> The steering committee will determine a formula for allocating the costs and benefits of joint resource extraction among all of the owners and will appoint an agent—the unit operator—to manage day-to-day operations.<sup>182</sup> Negotiating the allocation formula can be difficult because interests are rarely homogenous. The formula must take into account many factors beyond just the surface acreage held by each owner, including the amount of oil under each tract, the suitability of each tract for extraction, and existing wells operated by each owner.<sup>183</sup> But without the need for unanimous consent, agreement is often possible.

Before it can take effect and bind dissenting parties, the compulsory unitization plan must be ratified by a supermajority of the

177. Libecap & Smith, *supra* note 175, at 593–94; see also *id.* at 604–06 (describing thirty years of failed negotiations in connection with an attempt to unitize oil and gas fields in Prudhoe Bay, Alaska, despite tremendous potential for gain).

178. Fennell, *Common Interest Tragedies*, *supra* note 41, at 952 n.174.

179. Anderson & Smith, *Exploratory Unitization*, *supra* note 174, at 285; Fennell, *Common Interest Tragedies*, *supra* note 41, at 952; Libecap & Smith, *supra* note 175, at 596.

180. Libecap & Smith, *supra* note 175, at 596.

181. Owen L. Anderson, *Mutiny: The Revolt Against Unsuccessful Unit Operations*, 30 ROCKY MTN. MIN. L. INST. 13-1, 13-3–13-8 (1984). See generally JOHN S. LOWE ET AL., CASES AND MATERIALS ON OIL AND GAS LAW 260–92 (5th ed. 2008).

182. Anderson, *supra* note 181, at 13-6–13-7.

183. *Id.* at 13-5–13-6; see, e.g., OKLA. STAT. tit. 52, § 287.4(b) (West 2012). See generally 5 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 78.2 (Matthew Bender rev. ed. 2012) (discussing the creation, modification, and termination of units).

interest owners in the proposed unit.<sup>184</sup> The required ratification thresholds vary state-to-state from about 63% to 85%.<sup>185</sup> Thus, a handful of dissenting owners cannot block a beneficial unitization plan or hold out for a disproportionate share of the surplus.

But the entire process takes place under the supervision of the state conservation agency which reviews the unitization plan under what is essentially the two-stage anticommons inquiry.<sup>186</sup> The agency asks whether (1) the plan is economically feasible, will prevent waste, and will result in additional recovery that substantially exceeds the costs of unitized operations (i.e., whether the aggregation of rights generates value) and (2) whether the allocation is "fair and equitable" to all interest owners.<sup>187</sup> In reviewing the fairness of the allocation, the agency must ensure that the majority acted in good faith in adopting the unitization plan and that the minority interests are adequately protected and treated on the same terms as the majority.<sup>188</sup> The allocation formula need not be perfect—a sort of rough justice will often suffice<sup>189</sup>—but the majority cannot take advantage of the minority through unequal treatment.<sup>190</sup>

Finally, in addition to protections against majority opportunism, in some states the agent—the unit operator—owes fiduciary duties to the property owners whose interests were joined by compulsory unitizations.<sup>191</sup>

Compulsory unitization laws thus allow value-generating aggregation to be imposed with less than unanimous consent, but only with procedures designed to ensure that majority and agent opportunism will be held in check and that all parties to the aggregation will share in the joint gains. Even when valuation is

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184. *E.g.*, KAN. STAT. ANN. §§ 55-1304–05 (West 2012); OKLA. STAT. tit. 52 § 287.5; *see also* KUNTZ, *supra* note 183, § 78.2 (explaining that many states allow unitization to be imposed upon minority interests).

185. Anderson, *supra* note 181, at 13-8.

186. KUNTZ, *supra* note 183, § 78.2.

187. *E.g.*, KAN. STAT. ANN. § 55-1304; *see also* *Trees Oil Co. v. State Corp. Comm'n*, 105 P.3d 1269, 1282 (Kan. 2005).

188. *Trees Oil Co.*, 105 P.3d at 1277, 1285–86.

189. *See, e.g.*, *Gilmore v. Oil & Gas Conservation Comm'n*, 642 P.2d 773, 779–81 (Wyo. 1982) ("[S]ubstantial waste cannot be countenanced by a slavish devotion to correlative rights. . . . Justice was accomplished here, as much as could be under the circumstances.")

190. *See, e.g.*, *Williams v. Ark. Oil & Gas Comm'n*, 817 S.W.2d 863 (Ark. 1991) (holding that working-interest owners could not be forced to pay a greater percentage share of expenses than their percentage share of production), *overruled on other grounds by* *Great Lakes Chem. Corp. v. Bruner*, 243 S.W.3d 285 (Ark. 2006).

191. *E.g.*, *Hebble v. Shell Western E&P, Inc.*, 238 P.3d 939 (Okla. Civ. App. 2009); *see also* KUNTZ, *supra* note 183, § 78.3 ("[I]t has been held that the unit stands in a fiduciary relation to royalty owners in the unit . . . .")

difficult and heterogeneities are present—just like in aggregate litigation—oil and gas law, like bankruptcy, focuses on addressing those problems and achieving equity in the allocation rather than protecting individual owners' rights to veto uses of their property that might lead to joint gains.

### *B. Contractual Solutions*

In the absence of regulatory means of aggregation, parties have sought to avoid or overcome anticommons problems by privately aggregating their rights. The best examples are found in intellectual property and sovereign debt where parties have sought to facilitate cooperation, avoid holdout problems, and maximize collective value at the first stage by contractually agreeing to be bound by nonunanimous group decisions. In order to get all of the rights holders to agree at the outset, these private governance arrangements typically must specify a fair procedure for allocation at the second stage and provide structural protections for the minority. And, unlike regulatory solutions, the unanimous consent required at the front end lends great legitimacy to the use of coercion to prevent would-be holdouts from opting out at the back end. But even with such consent, judicial review remains an important backstop. Courts sometimes use their equitable powers to condition enforcement of such contractual arrangements on agent faithfulness and fair treatment of the minority.

#### 1. Copyright Collectives and Patent Pools

Copyright collectives and patent pools have emerged as private contractual responses to the anticommons in intellectual property, where increasingly fragmented ownership can make it difficult for users to obtain all of the licenses needed to produce a product or performance.<sup>192</sup> The high transaction costs of contracting in the anticommons dynamic sometimes drive intellectual property owners to pool their rights into collectives that can dramatically lower the costs of exchanging rights.<sup>193</sup> Copyright collectives and patent pools thus

192. See Heller & Eisenberg, *supra* note 20, at 698 (arguing that privatization of upstream biomedical research in the United States may create anticommons). *But see* Epstein & Kuhlik, *supra* note 59, at 54–58 (arguing that there is no biomedical anticommons).

193. Robert P. Merges, *Contracting into Liability Rules: Intellectual Property Rights and Collective Rights Organizations*, 84 CALIF. L. REV. 1293, 1302 (1996); *see also* Jonathan M. Barnett, *Property as Process: How Innovation Markets Select Innovation Regimes*, 119 YALE L.J. 384 (2009) (exploring property regime selection in innovation markets); Carl Shapiro, *Navigating the Patent Thicket: Cross Licenses, Patent Pools, and Standard Setting*, in 1 INNOVATION POLICY AND THE ECONOMY 119, 126–29, 134–36 (Adam B. Jaffe et al. eds., 2001) (“[C]ross licenses and

follow a two-stage structure: first, they contractually aggregate intellectual property rights from diverse sources and price them for sale to users in useful bundles, and, second, they establish internal procedures for dividing licensing revenues.<sup>194</sup> In this way, intellectual property holders can increase their joint welfare; but, unlike in regulatory solutions, each individual must voluntarily opt in and cede autonomy to the collective in exchange for procedural assurances of fair treatment in the allocation stage.

The American Society of Composers, Authors, and Publishers (“ASCAP”), for example, is one of the largest copyright collectives for the music industry.<sup>195</sup> It acts as a central depository, aggregating its members’ copyrights and issuing blanket licenses to media outlets like radio and television stations, which would otherwise have to negotiate with each copyright holder individually. ASCAP centrally sets the rates for blanket licenses for each industry wishing to use songs. And it monitors songs played through a combination of self-reporting by licensees and random sampling and then divides up royalty income among members according to a complex pro rata formula.<sup>196</sup> By regularizing the process of determining approximate valuations instead of negotiating royalties individually, parties can realize significant transaction-cost savings.<sup>197</sup> And copyright holders can take advantage of economies of scale by centralizing monitoring and enforcement functions.<sup>198</sup>

But ASCAP also has detailed governance procedures to ensure that the allocation of royalties is fair and that minorities are not exploited. Royalties are split equally between composers and publishers, and each group has equal representation on the board that manages the organization.<sup>199</sup> ASCAP has established rules for amending its bylaws, voting (with votes weighted pro rata, not per

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patent pools are two natural and effective methods used by market participants to cut through the patent thicket.”); cf. Michael Mattioili, *Communities of Innovation*, 106 NW. U. L. REV. 103, 152–54 (2012) (arguing that government intervention is often necessary to encourage private parties to pool their rights).

194. Merges, *supra* note 193, at 1299, 1347.

195. *About ASCAP*, ASCAP, [www.ascap.com/about](http://www.ascap.com/about) (last visited Feb. 14, 2013). Interestingly, ASCAP started in 1914 as a cost-spreading club for copyright litigation aimed at allowing composers and publishers to amass enough capital and leverage to take on the New York City nightclub owners who threatened a group boycott of any composer who challenged their flagrant infringement practices. Merges, *supra* note 193, at 1329–30.

196. Merges, *supra* note 193, at 1329, 1335–37.

197. *Id.* at 1328, 1340–42.

198. *Id.* at 1319.

199. *Id.* at 1334.

capita), and for the arbitration and appeal of disputes.<sup>200</sup> And it has structural protections for minorities, including a guarantee that “standard” (as opposed to “pop”) composers and publishers would retain representation on the board even as their numbers dwindled.<sup>201</sup>

Patent pools operate similarly, allowing multiple patent holders to assign their individual patent rights to a central entity for collective exploitation through licensing or manufacturing, thereby achieving tremendous transaction-cost savings. And like ASCAP, the contracts creating patent pools specify detailed internal governance structures that provide for valuation, distribution of royalties, monitoring, and dispute resolution.<sup>202</sup>

Copyright collectives and patent pools thus allow intellectual property owners who opt in to enjoy a bundling surplus by exiting the anticommons. And their aggregation of rights is legitimized both by their consensual nature and the governance protections they incorporate to ensure a fair allocation.

Unique intellectual property rights—just like plaintiffs’ claims in litigation—can be difficult to value, and much of the transaction-cost savings offered by copyright collectives and patent pools comes from using predetermined pricing grids or other methods of approximate valuation instead of negotiating licenses individually. Intellectual property owners thus trade precise valuation for the bundling surplus in the hope that, because they are repeat players, any inequities caused by imprecision will tend to even out over time.<sup>203</sup> Settlement in litigation is, of course, a single-shot deal. But plaintiffs may still be willing *ex ante* to trade precise valuations of their individual claims for the scale economies and peace premium of an aggregate settlement. After all, the primary way that settlement generates value over litigation is by substituting a rough approximation of claim value for a precise valuation at trial.

## 2. Collective Action Clauses in Sovereign Bonds

Probably the best example of a contractual solution to an anticommons problem—and the one most analogous to the ALI’s proposal to allow plaintiffs to precommit to group decisions on nonclass aggregate settlements—is the use of collective action clauses in sovereign bond contracts.

200. *Id.* at 1338–39 & n.150.

201. *Id.* at 1338.

202. *Id.* at 1360.

203. *Id.* at 1345.

As explained above, restructuring a sovereign's debt before default is often in the best interests of both the sovereign and its creditors—that is, restructuring can generate value.<sup>204</sup> But an anticommons stands in the way of a successful restructuring, which would require dispersed bondholders to agree to take a haircut.

Because there is no international bankruptcy system to bring everyone together in a coordinated proceeding, the creditors and sovereign debtor must work out a restructuring contractually.<sup>205</sup> Traditionally, the boilerplate used in most sovereign bond contracts required the unanimous consent of bondholders to modify the bond's payment terms, making it easy for an opportunistic bondholder to hold up the restructuring process in the hope of extracting a side payment.<sup>206</sup> But in the wake of the sovereign debt crises of the late 1990s, countries and bondholders (at the encouragement of the International Monetary Fund ("IMF")) attempted to limit the power of holdouts by adopting collective action clauses.<sup>207</sup>

Collective action clauses allow a supermajority (typically 75%) of bondholders to modify the payment terms of *all* of the bonds in the same bond issuance.<sup>208</sup> Thus, as part of a restructuring, a supermajority can agree to take a haircut by reducing the amount due or deferring payment, and that decision will bind all of the bondholders in the same issuance, even those who voted against the modification. Collective action clauses solve the holdout problem by shifting from a unanimity rule to a supermajority-voting rule.

By purchasing bonds with collective action clauses, bondholders effectively agree in advance to be bound by a group decision in the event of a restructuring—essentially the move that the aggregate settlement rule prevents plaintiffs from making in litigation. Empowering the group to guarantee complete participation puts creditors in the best position to negotiate the terms of the restructuring with the sovereign debtor without fear that holdouts will block the deal or siphon off value through side payments. Indeed, collective action clauses were successfully used to obtain near-

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204. See *supra* notes 93–95 and accompanying text.

205. See Lee C. Buchheit & G. Mitu Gulati, *Sovereign Bonds and the Collective Will*, 51 EMORY L.J. 1317, 1322 (2002) [hereinafter Buchheit & Gulati, *Collective Will*] (discussing the search for measures to facilitate sovereign debt workouts). In the early 2000s, the IMF pushed for a more formalized bankruptcy system for sovereign debt, but the proposal was rejected in favor of the increased use of collective action clauses. Hagan, *supra* note 66, at 335–36.

206. See, e.g., Bratton & Gulati, *supra* note 93, at 3–4, 6, 20–21.

207. See Hagan, *supra* note 66, at 319–20.

208. See, e.g., Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1321; Hagan, *supra* note 66, at 317–18.

complete participation in restructuring Ukraine's sovereign debt in 2000 and Uruguay's debt in 2003.<sup>209</sup>

Contrast collective action clauses with coercive exit consents—the other tool that sovereign debtors use to avoid holdouts in restructuring.<sup>210</sup> Unlike exit consents, which discourage holdouts by destroying the liquidity and value of bonds outside of the restructuring, collective action clauses allow bondholders to express opposition to the terms of the restructuring by voting against it, while still sharing in the collective benefits of the restructuring if they are outvoted.<sup>211</sup> Thus, with collective action clauses, bondholders can vote their true preferences, providing an important voice-based check on inadequate restructuring terms.<sup>212</sup> Because of this feature, collective action clauses—unlike coercive exit consents—do not result in haircuts that leave the creditors worse off collectively than if no restructuring had occurred (assuming no collusion or side payments).<sup>213</sup> The supermajority-voting rules of collective action clauses, again unlike exit consents, do not shift leverage from the creditors to the sovereign debtor, but only from individual creditors to the group.<sup>214</sup>

Although collective action clauses have great potential to allow bondholders to maximize their collective benefit at the first stage, by shifting from a unanimity rule to a supermajority rule they create the risks that conflicts of interest may arise among groups of creditors and that the majority may collude with the debtor to take advantage of the minority at the allocation stage.<sup>215</sup> Indeed, in the 1930s, equity holders frequently took advantage of collective action clauses in *domestic* corporate bonds to buy up controlling positions in their own distressed debt and then vote to amend the bond contracts to cancel the debt over the objection of the minority.<sup>216</sup> It was this practice that led to the Trust Indenture Act of 1939's prohibition on modifying a domestic corporate bond's payment terms with less than unanimous consent

209. Hagan, *supra* note 66, at 319; see also INT'L MONETARY FUND, INVOLVING THE PRIVATE SECTOR IN THE RESOLUTION OF FINANCIAL CRISES—RESTRUCTURING INTERNATIONAL SOVEREIGN BONDS 6, Box 2.3 (2001) (discussing Ukraine's 2000 restructuring); Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1346 (same).

210. See *supra* notes 93–102 and accompanying text.

211. See Bi, Chamon & Zettelmeyer, *supra* note 99, at 16–17.

212. See generally HIRSCHMAN, *supra* note 103.

213. Bi, Chamon & Zettelmeyer, *supra* note 99, at 4, 16–17.

214. See *id.* at 17; cf. Hagan, *supra* note 66, at 343–44 (explaining how the majority voting rules of the IMF's proposed international bankruptcy scheme would shift leverage from individual creditors to the group, not to the sovereign debtor).

215. See Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1336.

216. See Buchheit & Gulati, *Exit Consents*, *supra* note 97, at 66–67.

outside the protections of formal bankruptcy proceedings.<sup>217</sup> And part of some private creditors' skepticism toward the push to adopt collective action clauses in sovereign bonds (which are not subject to the Trust Indenture Act) in the early 2000s may have stemmed from the lack of any explicit good-faith requirement that would prevent majorities from cutting side deals with sovereign debtors to exploit minorities.<sup>218</sup> The ability to hold out is the individual's weapon against exploitation, though it also makes it difficult to maximize collective value. Individuals thus need assurances that they will not be exploited before they can be expected to surrender their autonomy.

Sovereign issuers and bondholders have responded to these concerns by incorporating structural protections into their bond contracts to ensure a fair allocation. Uruguay's sovereign bond contracts, for example, contain several antimanipulation features, such as disclosure requirements, prohibitions on exit consents, and disenfranchisement of bonds controlled by the sovereign debtor, to prevent the debtor from colluding with the majority to use collective action clauses to exploit the minority.<sup>219</sup> These contractual protections have helped reassure investors that the benefits and burdens of restructuring will be fairly allocated at stage two.<sup>220</sup> And, combined with each bondholder's consent at the outset, these governance features help legitimize the use of coercion to compel the minority to participate in a value-generating restructuring at stage one.

The major limitation of collective action clauses is that they only bind bondholders within the same bond issuance.<sup>221</sup> A supermajority vote in favor of restructuring by the bondholders in one

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217. 15 U.S.C. § 77ppp (2006); see Buchheit & Gulati, *Exit Consents*, *supra* note 97, at 67.

218. See Bratton & Gulati, *supra* note 93, at 7–8, 54, 60–62, 78–79. The market was initially slow to embrace collective action clauses, despite the potential for joint gains—a reluctance that has also been attributed by some to path dependence in the boilerplate language taken from domestic bonds. Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1328–29, 1335; see also Mark Gugliatti & Anthony Richards, *The Use of Collective Action Clauses in New York Law Bonds of Sovereign Borrowers*, 35 GEO. J. INT'L L. 815, 815 (2004) (finding that some issuers inadvertently departed from market convention and used collective action clauses in New York bond issues before 2003 when they relied on the London office of a U.S. law firm to draft the contracts); Stephen J. Choi, Mitu Gulati & Eric A. Posner, *The Dynamics of Contract Evolution* 3–4 (Chi. Inst. Law & Econ., Olin Research Paper No. 605), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2093598&download=yes](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2093598&download=yes) (tracing the shift in boilerplate language in sovereign bond contracts for issuances under New York law toward collective action clauses and away from unanimity action clauses). Others have attributed that reluctance to creditors' expectations that difficulties in restructuring caused by the need for unanimous consent would make unconditional IMF bailouts more likely. See Bratton & Gulati, *supra* note 93, at 4, 51–52.

219. Buchheit & Gulati, *Model CAC*, *supra* note 60, at 322–24; Lee C. Buchheit & Jeremiah S. Pam, *Uruguay's Innovations*, 19 J. INT'L BANKING L. & REG. 28, 30–31 (2004).

220. See Buchheit & Pam, *supra* note 219, at 30–31.

221. Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1344.

issuance cannot prevent creditors with other bonds issued by the sovereign from holding out. Thus a “second-order anticommons” dynamic can exist across bond issuances. To successfully restructure, the sovereign debtor must separately secure the agreement of a supermajority in each series of bonds.<sup>222</sup> This creates the potential for opportunistic vulture funds to buy up a blocking position in a single bond issuance and hold out for a side payment or other favorable treatment.<sup>223</sup>

While collective action clauses are vulnerable to a second-order anticommons problem, by allowing group decisionmaking within each bond issuance they at least reduce the number of players who must coordinate in order to achieve a successful restructuring.<sup>224</sup> A more comprehensive solution would apply a supermajority-voting rule across bond issuances.<sup>225</sup> Along these lines, some countries, such as Uruguay, have adopted “aggregated collective action clauses,” which allow modification of bond contracts with the approval of 85% of *all* outstanding bonds together with approval by two-thirds of the bonds in each series.<sup>226</sup>

### 3. Pre-Bankruptcy Era Corporate Reorganizations

The anticommons and governance concerns in sovereign debt restructuring mirror earlier concerns present in domestic corporate restructurings in the late nineteenth and early twentieth centuries. Before the Bankruptcy Code’s corporate-reorganization provisions (Chapter 11 and its predecessors) were adopted, many corporate bonds included collective action clauses for the same reasons that sovereign bonds do today—to mitigate the collective action problems that faced creditors and debtors in restructuring outside of a regulatory framework.<sup>227</sup>

222. See *id.*

223. See Hagan, *supra* note 66, at 320–22.

224. See Robert C. Ellickson, *Property in Land*, 102 YALE L.J. 1315, 1330 (1993) (“[T]ransaction costs tend to increase with the number of individuals involved.”).

225. See Hagan, *supra* note 66, at 322 & n.67.

226. Buchheit & Gulati, *Model CAC*, *supra* note 60, at 319; see also Buchheit & Pam, *supra* note 219. The Dominican Republic in 2004 and Argentina in 2005 followed suit, and all new Eurozone bond contracts will include similar clauses. Buchheit & Gulati, *Model CAC*, *supra* note 60, at 317–19; see also Treaty Establishing the European Stability Mechanism ch. 4, art. 12, ¶ 3, Feb. 2, 2012, available at <http://www.european-council.europa.eu/media/582311/05-tesm2.en12.pdf> (“Collective action clauses shall be included, as of 1 January 2013, in all new euro area government securities, with maturity above one year, in a way which ensures that their legal impact is identical.”).

227. See Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1327–28 (discussing history and use of collective action clauses up through creation of Securities and Exchange Commission);

Courts, however, recognized the risk of strategic action. Because it can be difficult to specify in advance, and therefore contractually prohibit, all of the potential ways that a debtor might collude with the majority to exploit the minority, contractual protections negotiated by bondholders are not always sufficient to legitimize compelled participation in a restructuring. Pre-bankruptcy era case law therefore imposed implied fiduciary or good-faith duties on creditors in the majority who sought to use collective action clauses to impose restructuring on a dissenting minority.<sup>228</sup> Such transactions were thus subject to judicial scrutiny for the two governance concerns: self-dealing by insiders and unfair treatment of minority creditors.<sup>229</sup> Importantly, these intercreditor duties derived from equitable principles, not from any concern about the lack of sophistication on the part of bondholders.<sup>230</sup>

As early as 1879, the Supreme Court in *Sage v. Central Railroad Co.* conditioned enforcement of a collective action clause on fair treatment of the minority bondholders.<sup>231</sup> The Court upheld restructuring by majority vote as “reasonable” only because the majority did not attempt to convey benefits to itself at the minority’s expense; rather, the restructuring plan, which distributed shares in the reorganized company to all bondholders pro rata, “inure[d] equally to the benefit alike of the majority and minority.”<sup>232</sup>

Likewise, in 1896, the Second Circuit invalidated an attempt to use a collective action clause to postpone payments on corporate bonds in *Hackettstown National Bank v. D.G. Yuengling Brewing Co.*<sup>233</sup> There, David Yuengling, principal shareholder in the eponymous brewery, enlisted his brother-in-law, John Betz, to buy up enough of the brewery’s bonds that together with the Yuengling family they would control 75% of the outstanding bonds—enough to make use of

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see also Randall Klein & Danielle Juhle, *Majority Rules: Non-Cash Bids and the Reorganization Sale*, 84 AM. BANKR. L.J. 297, 310–11, 313 (2010) (discussing historical use of majority rule in bond workouts).

228. See Bratton & Gulati, *supra* note 93, at 70–71; Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1336–37; cf. Frank H. Easterbrook & Daniel B. Fischel, *Contract and Fiduciary Duty*, 36 J.L. & ECON. 425, 437 (1993) (arguing that fiduciary duties are implied when costs of specifying contractual terms are prohibitively high).

229. Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1337–38.

230. Klein & Juhle, *supra* note 227, at 305–07 & n.37 (citing cases).

231. 99 U.S. 334, 340 (1879).

232. *Id.* at 341; see also Klein & Juhle, *supra* note 227, at 300–04 (interpreting *Sage*’s holding and subsequent application).

233. 74 F. 110, 114 (2d Cir. 1896).

the collective action clause.<sup>234</sup> Although the company had defaulted on interest payments to the bondholders, Yuengling agreed to personally pay the coupon rate on Betz's bonds and held an option to purchase them.<sup>235</sup> Betz called a meeting, and the majority voted to postpone all interest payments on the bonds for five years.<sup>236</sup> The Second Circuit, however, held that the majority could not collusively bind the minority to terms that are "not in the common interest of all."<sup>237</sup> The court explained:

Agreements between bondholders lodging in the majority in interest the power of control over the common fund contemplate that those having the largest interest in its conservation will be the most zealous. They are intended to minimize the power of the factious minority to thwart the general good. But every delegation of power implies that it will be honestly exercised.<sup>238</sup>

In other words, bondholders could agree in advance to group decisionmaking in order to advance their collective welfare, but the majority would bear a duty of "utmost good faith" toward the minority, and courts would supervise the majority's use of its power to ensure that it did not exploit the minority or collude with insiders.<sup>239</sup>

Development of the law of intercreditor duties in the United States atrophied in the late 1930s when the Trust Indenture Act ended the use of collective action clauses in corporate bonds and restructuring shifted to the bankruptcy system, with its own tools for protecting the minority.<sup>240</sup> But English law, which has remained more open to collective action clauses, continues to recognize the duty of the majority to deal fairly with the minority.<sup>241</sup> And Professors William Bratton and Mitu Gulati have argued that the shift in the sovereign bond market from unanimous consent to collective action clauses

234. *Id.* at 111; see Klein & Juhle, *supra* note 227, at 306–07 (discussing and interpreting *Hackettstown* and its attempt to preserve commercial expectations).

235. *Hackettstown*, 74 F. at 111.

236. *Id.* at 112.

237. *Id.* at 112–14.

238. *Id.* at 113.

239. *Id.* at 112.

240. See Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1338–39.

241. E.g., Redwood Master Fund Ltd. v. TD Bank Eur. Ltd., [2002] EWHC (Ch) 2703; see also Bratton & Gulati, *supra* note 93, at 72–74 (noting English courts' recognition of the obligation of the majority to "exercise its amendment power in good faith"); Klein & Juhle, *supra* note 227, at 325 & n.104 ("[P]recedent generally held that the majority rule would be enforced so long as the underlying instrument authorized such action and the majority exercised its power in good faith.").

should be accompanied by increased judicial scrutiny of their use to ensure fair treatment of the minority.<sup>242</sup>

As these cases demonstrate, judicial review for good faith and fair treatment of the minority can be an important supplement to contractual governance structures in legitimizing compelled participation in a value-generating aggregation of rights. And, just as they do in constitutional law, courts can serve as a backstop against minority exploitation and agent self-dealing when individuals cede their autonomy to the group in search of joint gains.<sup>243</sup>

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This range of examples shows that using coercion to bundle rights is a common and legitimate strategy for defeating an anticommons. While the problems in different contexts call for different governance approaches at stage two, all share a common concern for protecting the minority and preventing agent opportunism. Attacking the anticommons in mass litigation may require specifically tailored governance strategies, but two fundamental insights remain the same: that slavish devotion to individual autonomy can frustrate joint gains and that governance can legitimize coercive aggregation.

#### IV. OVERCOMING THE ANICOMMONS IN AGGREGATE LITIGATION

Recognizing the anticommons dynamic in aggregate litigation and the two-stage problem that it poses for plaintiffs can help us understand and critique features of the law governing aggregate litigation and settlements. In the first stage, the negotiation phase, where cooperation may lead to joint gains, the goal should be to maximize aggregate value. This may require that some party—most likely a lawyer—bundle the disparate rights together for sale to the defendant as a unit, which typically will require the rights assembler to acquire coercive power over the rights holders to reduce transaction costs and prevent holdouts. In the second stage, the allocation phase, the plaintiffs must divide up the resulting proceeds—from their perspective a limited fund—in what is now a zero-sum game.

Where individual plaintiffs surrender their autonomy at stage one in pursuit of the peace premium, they can no longer ensure for

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242. Bratton & Gulati, *supra* note 93, at 76–79. Modern U.S. courts have neither embraced nor foreclosed intercreditor duties for sovereign bonds. See Buchheit & Gulati, *Collective Will*, *supra* note 205, at 1340–41.

243. *Cf.* United States v. Carolene Prods. Co. 304 U.S. 144, 152 n.4 (1938) (“[P]rejudice against discrete and insular minorities may be a special condition . . . which may call for a correspondingly more searching judicial inquiry.”); ELY, *supra* note 131.

themselves that the settlement allocation will be to their benefit. But, as approaches to similar problems in other areas of law demonstrate, an arrangement that compels participation at stage one to defeat an anticommons problem can be legitimized by the presence of governance structures that ensure that the gains from cooperation are equitably distributed at stage two. The law governing aggregate litigation should thus be structured to allow for value-generating aggregation at stage one and to require procedures for equitable allocation at stage two.

Potential solutions to the anticommons in aggregate litigation range from regulatory approaches (like class actions) to contractual approaches (like precommitment to group decisions on settlement) to coercive Vioxx-type threats of lawyer withdrawal. The legitimacy of any of these approaches depends on the presence of governance procedures to ensure that the gains from aggregation are joint gains.

#### *A. Class Actions*

Class actions are a regulatory response to the anticommons problem in mass litigation. Much like eminent domain, class actions reduce transaction costs by using state power to transfer rights from low-value users (i.e., individual plaintiffs with small claims) to high-value users (i.e., class counsel on behalf of the class as a whole). Indeed, with small claims, individual prosecution or voluntary aggregation may present insurmountable transaction costs.<sup>244</sup> Although their aggregate value may be considerable, without a regulatory method of low-cost aggregation, plaintiffs may not be able to extract any value from their claims.<sup>245</sup> Therefore, the task of class action law should be to facilitate value-generating aggregation that could not otherwise occur while at the same time ensuring that the resulting surplus is fairly allocated among the class members, not simply appropriated by a subset of the class or its agents (i.e., class counsel).

Recognizing the anticommons in aggregate litigation can help explain at least three features of class action law: the functional inquiry that courts use for class certification, the differences in

244. The Supreme Court recognized this dynamic in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). Due process requires only that plaintiffs be given an opportunity to opt out of a class action because the additional transaction costs of requiring plaintiffs to affirmatively opt in would swamp the surplus created by aggregation.

245. See, e.g., Resnik, *supra* note 64, at 2145–46, 2162–63 (describing the class action rule as the state's mechanism to get lawyers to subsidize access to courts for small claimants by providing a low-cost method of assembling claims).

treatment of mandatory and opt-out classes, and the differences in treatment of settlement and litigation classes.

### 1. Functional Inquiry for Class Certification

The two-stage anticommons inquiry essentially tracks the functional inquiry that courts undertake in deciding whether to certify a class, that is: (1) whether the proposed class will create a surplus, and (2) whether there are governance mechanisms in place to ensure that all of the plaintiffs share in that surplus. The “commonality,” “typicality,” and “adequacy of representation” requirements for class certification are laid out in separate subsections of Rule 23(a). But, as the Supreme Court observed in *General Telephone Co. v. Falcon*, these formal requirements “tend to merge” into a more functional two-stage inquiry: “whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff’s claim and the class claims are so interrelated that the interests of the class will be fairly and adequately protected in their absence.”<sup>246</sup> The Rule 23(b)(3) requirements of “predominance” and “superiority” often collapse into this functional inquiry as well.<sup>247</sup>

While there has been extensive academic focus on the second stage—the governance structures necessary to ensure that absent class members are protected—this commentary often overlooks the antecedent question of whether the aggregation generates value.<sup>248</sup> The central inquiry at the first stage is whether class certification will create a litigation unit at the appropriate scale—that is, the scale at which there are efficiencies to be gained by litigating as a group and the defendant might pay a peace premium for a complete settlement. Thus appropriate class certification will create a genuine surplus over disaggregated litigation, not merely shift leverage from the defendant to the plaintiff class.<sup>249</sup>

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246. 457 U.S. 147, 157 n.13 (1982).

247. Cf. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2561–62 (2011) (Ginsburg, J., dissenting) (accusing the majority of collapsing Rule 23(a) and (b) inquiries); *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623 n.18 (1997) (citing *Diamond v. Charles*, 476 U.S. 54, 76–77 (1986) (O’Connor, J., concurring in part and concurring in the judgment)) (noting that the requirements of Rule 23(b)(3) are similar to the requirements of Rule 23(a)(3) in some respects).

248. See, e.g., NAGAREDA, *supra* note 34, at 220–23 (explaining the “governance problem” of getting mass tort lawyers to faithfully represent the interests of the claimants whose rights they seek to reform); Coffee, *supra* note 30 (describing “exit” and “voice” levers of litigation governance by which class members can control their agents); Issacharoff, *supra* note 123, at 366–70 (discussing governance strategies to ensure faithful representation of absent class members).

249. Sometimes certification can destroy value if it results in a coerced settlement. If the defendant succumbs to unfair settlement pressure to avoid a small chance of a catastrophic loss (a possibility in some statutory-damages class actions, see Richard A. Nagareda, *Aggregation and*

The Court's recent denial of class certification in *Wal-Mart Stores, Inc. v. Dukes*<sup>250</sup> demonstrates the functional inquiry into the appropriate scale of the litigation unit at the first stage. The problem there was that the plaintiffs sought to certify a class of *all* female employees in *all* of Wal-Mart's stores nationwide to litigate a claim that Wal-Mart's policy of leaving pay and promotion decisions up to the discretion of individual local managers resulted in unlawful gender-based discrimination. Defined at such a large scale the class was not a sensible litigation unit because dissimilarities among the plaintiffs' claims meant that they could not "productively be litigated at once."<sup>251</sup> There may have been efficiency gains for smaller groupings of similar claims.<sup>252</sup> And the defendant might have been willing to pay a peace premium to completely resolve a smaller subset of claims. But by lumping together so many dissimilar claims, the proposed litigation unit was not framed at a scale for which the defendant was likely to pay a peace premium. When litigating or negotiating claims in bulk does not produce significant savings because the claims are too dissimilar, a defendant does not face disproportionate costs or risks from claims outside the aggregation and consequently will not pay a premium for their inclusion.

Class certification might have benefited the plaintiffs by shifting leverage in their favor, but it would not have driven the litigation to a more efficient resolution. Thus, aggregate treatment of all of Wal-Mart's female employees nationwide would be unlikely to generate a surplus. The plaintiffs might even have been better off bringing a series of similar claims in smaller-scale groupings—for which they could capture a series of peace premiums—but their lawyers sought the leverage and monopoly control that being class counsel for a large-scale class action affords.

*its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872, 1885–85 (2006)) instead of paying a premium for peace, then certification is not efficient (even if it benefits the class). The flip side of this scenario could also destroy value if class counsel, seeking the monopoly control over all claims that class certification provides, defines a class at too large a scale when plaintiffs would be better off pursuing a lower-risk strategy of disaggregation.

250. 131 S. Ct. 2541 (2011).

251. *Id.* at 2551.

252. Cf. *McReynolds v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 672 F.3d 482, 490–91 (7th Cir. 2012), *cert. denied*, 133 S. Ct. 338 (2012) (acknowledging the possibility that the accuracy of the resolution might be enhanced through individual proceedings); Plaintiffs' Opposition to Wal-Mart's Motion to Dismiss the Fourth Amended Complaint at 27, *Dukes v. Wal-Mart Stores, Inc.*, No. C-01-2252-CRB (N.D. Cal. Mar. 30, 2012) (recognizing that partial class certification may achieve greater judicial efficiencies than would broad class certification); Plaintiffs' First Amended Complaint and Jury Demand at 7, *Odle v. Wal-Mart Stores, Inc.*, No. 3:11-cv-2954-O (N.D. Tex. Jan. 19, 2012) (noting similar efficiency gains).

Even if aggregate treatment will generate a surplus for the relevant litigation unit, the use of a regulatory solution, like the class action, to overcome the anticommons requires procedures at the second stage to ensure that all class members will share in the joint gains. Accordingly, as others have explained in detail, courts make a functional inquiry at certification into the governance of the proposed class to limit both agent opportunism and minority exploitation.<sup>253</sup>

## 2. Mandatory Versus Opt-Out Classes

The anticommons also sheds light on the differential treatment of mandatory and opt-out classes. Due process requires that plaintiffs be given notice and an opportunity to opt out of classes seeking money damages.<sup>254</sup> But groups of plaintiffs seeking injunctive relief can be certified as mandatory classes with no opt-out rights.<sup>255</sup> This difference is traditionally viewed from the perspective of the absent plaintiffs; the lack of an opt-out right for injunctive relief is justified by the homogeneity of the class and the identity of interests of the class representative and absent class members.<sup>256</sup> But this view can break down when class members' interests are not identical.<sup>257</sup>

Viewed through the anticommons lens, however, mandatory class treatment for injunctive relief makes perfect sense. An injunction is a step good.<sup>258</sup> There is little value to the defendant in resolving injunctive claims with part of the group because the last plaintiff can obtain the same relief as the class as a whole. Thus for true step goods, like injunctions, there is no use for opt-outs. All opt-outs can do is create the potential for intractable holdout problems. An incomplete aggregation destroys the settlement value of the plaintiffs' claims, as the defendant will pay next to nothing to settle for anything

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253. *E.g.*, Issacharoff, *supra* note 123, at 341–42, 381–85.

254. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 812 (1985).

255. FED. R. CIV. P. 23(b)(2).

256. See *Allison v. Citgo Petroleum Corp.*, 151 F.3d 402, 413 (5th Cir. 1998) (“[B]ecause of the group nature of the harm alleged and the broad character of the relief sought, the (b)(2) class is, by its very nature, assumed to be a homogenous and cohesive group with few conflicting interests among its members.”).

257. See, e.g., *Waters v. Barry*, 711 F. Supp. 1125 (D.D.C. 1989) (certifying 23(b)(2) class challenging juvenile curfew despite divergent views on whether curfew should be retained); George Rutherglen, *Better Late Than Never: Notice and Opt Out at the Settlement Stage of Class Actions*, 71 N.Y.U. L. REV. 258, 272–73 (1996) (noting that whether a class is cohesive depends upon the interests of the class members); Mark C. Weber, *Preclusion and Procedural Due Process in Rule 23(b)(2) Class Actions*, 21 U. MICH. J.L. REFORM 347, 388 (1988) (noting that the absence of an opt-out provision results in the trading away of “legitimate, enforceable interests of class members”).

258. See *supra* note 42 and accompanying text.

less than total peace. Where a holdout's power is absolute, overriding individual consent can be justified—just as eminent domain would be justified to take a unique parcel of land needed to build a highway.<sup>259</sup> The focus thus shifts to the second-stage concerns of governance structures necessary to ensure fair treatment of all class members and to limit agent opportunism.

Recognizing the anticommons dynamic thus helps explain why the Supreme Court in *Wal-Mart* adopted a functional distinction between divisible and indivisible remedies in determining when a Rule 23(b)(2) mandatory class is appropriate instead of the traditional distinction between legal and equitable relief.<sup>260</sup> And it is easy to see why the plaintiffs' monetary claims for back pay in *Wal-Mart* did not justify mandatory class treatment despite their traditional classification as an equitable remedy.<sup>261</sup> If one, or even a handful, of the plaintiffs had opted out, it would not have destroyed the value of settlement for the defendant. The defendant might have been willing to pay an additional premium for total peace (if the plaintiffs had proposed a litigation unit at an appropriate scale), but settlement of an incomplete aggregation could still generate some surplus.

### 3. Settlement Versus Litigation Classes

Finally, the anticommons can help explain the differential treatment of settlement classes and litigation classes. When a class is proposed for settlement purposes only, the functional inquiry into certification can be quite different than for a litigation class (that is, any class certified before settlement is reached, not just ones that actually go to trial). Whereas the functional inquiry for a litigation class asks first whether the aggregation will generate a surplus (as opposed to merely shifting leverage) and second whether there are governance procedures in place to ensure a fair allocation, when a class is certified for settlement purposes only, the second-stage inquiry becomes the primary focus. Because the parties have *agreed* that class certification would be in the interests of both the plaintiffs and the defendant, it can be presumed at the first stage that the aggregation

259. See Heller & Hills, *supra* note 136, at 1492–93 (asserting that eminent domain could be used to seize land “where acquisition of the site is impeded by target uniqueness”).

260. *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2557 (2011) (citing Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)); *see also* AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.04, 2.07 (2010) (discussing indivisible remedies versus divisible remedies).

261. 131 S. Ct. at 2557. The Court was unanimous in finding mandatory class treatment inappropriate. *Id.* at 2561 (Ginsburg, J., concurring in part and dissenting in part).

generates value, unless—and this is a big unless—there is reason to suspect collusion among the defendant and class counsel or certain subgroups within the class. Thus for settlement classes, all the action is in the second-stage governance inquiry.

In *Amchem Products, Inc. v. Windsor*, for example, the Supreme Court explained that in deciding whether to certify a settlement class, a court need not consider whether the class would “present intractable management problems.”<sup>262</sup> The Rule 23 requirements “designed to protect absentees,” on the other hand, demand “undiluted, even heightened, attention in the settlement context.”<sup>263</sup> The Court’s inquiry accordingly focused on the stage-two concern that the settlement class lacked “structural assurance[s]” that absent class members would be fairly treated in the allocation.<sup>264</sup>

For litigation classes, by contrast, there is a risk that certification will do more to shift leverage in favor of the plaintiffs than to generate a surplus over individual litigation or voluntary aggregation. Just as using eminent domain to defeat the anticommons in land assembly can sometimes lead to inefficient takings, using a regulatory solution like a class action can sometimes lead to inefficient aggregation in litigation. Developers may use eminent domain even where holdouts would not prevent land assembly because the constitutional measure of just compensation does not require them to pay the land owners any part of the assembly surplus. Lawyers, likewise, might use class certification even where it will not induce the defendant to pay a peace premium because it gives them a monopoly over all of the plaintiffs’ claims and shifts settlement leverage in their favor. Where settlement leverage, not a peace premium, is the goal, aggregation might not create a surplus over individual litigation (or smaller aggregation).

In a settlement class, because the parties have agreed on the class definition, the risk that the plaintiffs’ lawyers are seeking leverage through certification of a large and potentially overbroad class, instead of identifying a unit of claims at the appropriate scale for efficient resolution, is greatly reduced. The Third Circuit’s recent decision in *Sullivan v. DB Investments, Inc.* is illustrative.<sup>265</sup> There the court certified a nationwide antitrust class for settlement purposes only, despite arguments that variations in the state laws applicable to

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262. 521 U.S. 591, 620 (1997).

263. *Id.*

264. *Id.* at 627.

265. 667 F.3d 273 (3d Cir. 2011), cert. denied sub nom. Murray v. Sullivan, 132 S. Ct. 1876 (2012).

different plaintiffs would have made a litigation class unmanageable and that some of the plaintiffs lacked colorable claims under the relevant state law.<sup>266</sup> The court took a functional approach to certification, holding that a “global settlement”—even one including claims that did not appear colorable and that could never be certified for litigation purposes—would generate value.<sup>267</sup> The court explained: “From a practical standpoint, . . . achieving global peace is a valid, and valuable, incentive to class action settlements. Settlements avoid future litigation with all potential plaintiffs—meritorious or not.”<sup>268</sup> In other words, it was evident from the fact of settlement before certification that the defendant was willing to pay a peace premium. The court’s inquiry thus turned to the second-stage considerations of ensuring that the settlement was free of collusion and lawyer opportunism and that the surplus it generated would be fairly allocated among the plaintiffs.<sup>269</sup> Because it found that the settlement class provided adequate structural protections for the interests of differently situated plaintiffs and that the pro rata distribution ensured that all class members fairly shared in the surplus, the court found certification appropriate.<sup>270</sup>

### *B. Nonclass Aggregate Settlements*

Nonclass aggregate settlements are playing an increasingly important role in mass litigation as class actions have become more difficult to certify, especially in areas where plaintiffs have high-value claims, such as mass torts. Recognizing the anticommons in aggregate litigation sheds light on how attempts to facilitate nonclass aggregate settlements should be evaluated. The same two-stage framework applies to attempts to overcome the anticommons problem in nonclass aggregate settlements. And just as governance is key to the legitimacy of class actions and other anticommons solutions, governance plays an important role in legitimizing nonclass aggregate settlements that require plaintiffs to surrender some autonomy to achieve collective gain.

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266. *Id.* at 313.

267. *Id.* at 311.

268. *Id.*

269. *Cf. id.* at 313 n.44 (noting that settlement of invalid claims does not come at expense of valid claims because total settlement fund is larger with peace premium).

270. *Id.* at 316, 327.

### 1. ALI Proposal To Modify the Aggregate Settlement Rule

As discussed above, contractual efforts to overcome the anticommons in aggregate litigation through precommitment to group decisionmaking have run up against the aggregate settlement rule.<sup>271</sup> By insisting on a particular view of litigant autonomy in which plaintiffs must retain the individual ability to opt out of a group settlement at the back end, the aggregate settlement rule limits plaintiffs' opportunities to realize gains from cooperation. In other words, it operates as a state-imposed transaction cost on market-based attempts to facilitate value-generating aggregation.

As approaches taken in intellectual property and sovereign debt demonstrate, there is nothing inherently suspect about contractual precommitment strategies, so long as there are adequate protections to ensure a fair allocation at the second stage. The ALI's controversial proposal to modify the aggregate settlement rule can thus be understood as an attempt to create a governance framework to legitimize contractual efforts to defeat the anticommons in aggregate litigation.

The ALI proposal would allow claimants sharing a common lawyer in mass litigation to agree in advance to be bound by a "substantial-majority vote" on whether to accept or reject a proposed aggregate settlement.<sup>272</sup> Plaintiffs could thus precommit to a representational structure that increases collective value at the first stage by bundling their claims into a more valuable unit for sale to the defendant. Much like collective action clauses in sovereign bonds, the shift from the unanimity effectively required by the aggregate settlement rule's *ex post* individual-consent provisions to a supermajority-voting rule can generate value by allowing plaintiffs to credibly offer the defendant finality and capture the resulting peace premium.

But, as with the examples from other areas of law, the key to any contractual solution's legitimacy in aggregate litigation is the presence of adequate procedural protections to ensure fair allocation at stage two. The ALI proposal would allow plaintiffs and their lawyers the freedom, within certain limits, to contractually craft private governance structures for making group decisions on settlement and allocation, much like the plaintiffs in *Abbot and Tax Authority* attempted to do. But, unlike previously attempted

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271. See *supra* notes 70–84 and accompanying text.

272. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 3.17(b) (2010). The ALI does not define "substantial majority," but suggests that the 75% required by Section 524(g) of the Bankruptcy Code for asbestos creditors may serve as a model. *Id.* at cmt. c(2).

contractual solutions and academic calls to allow waiver of the aggregate settlement rule, the ALI proposal incorporates disclosure requirements to ensure that precommitment is the product of informed consent, and it explicitly builds in a backstop of judicial review for both procedural and substantive fairness.<sup>273</sup>

Despite the fact that it applies only to plaintiffs who voluntarily opt in at the outset, the ALI proposal has engendered fierce resistance.<sup>274</sup> Critics raise three primary objections: that allowing plaintiffs to precommit to group decisionmaking will lead to inadequate total settlements amounts, that it will result in unfair allocations, and that clients cannot genuinely consent to such an arrangement in advance. I will address these objections in turn.

*First*, critics argue that the need to obtain back-end settlement approval from each client under the traditional aggregate settlement rule constrains lawyers from settling the group's claims for an inadequate total amount.<sup>275</sup> Viewed through the lens of the anticommons, however, this objection largely falls away. Rather than ensuring that lawyers bargain for an adequate overall amount, the traditional aggregate settlement rule actually prevents lawyers from maximizing the collective recovery for their clients because they cannot capture the peace premium.

Just as collective action clauses in sovereign bonds do not result in haircuts that leave the creditors worse off collectively (assuming no collusion or side payments),<sup>276</sup> allowing group decisionmaking on settlement offers should not result in lower total settlement amounts at the first stage. Without collusion or side payments, the supermajority of plaintiffs will have the same incentive

273. See *id.* §§ 3.17(a)–(b), 3.18. In explicitly providing for judicial review, the ALI proposal is superior to an earlier proposal by Charles Silver (one of the ALI Reporters) and Lynn Baker to allow waiver of the aggregate settlement rule. Silver & Baker, *supra* note 21, at 766–67; Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1469 (1998). While their proposal would allow plaintiffs to precommit to group decisionmaking, it relies solely on the plaintiffs to contract for governance structures to ensure fair allocation. But, as the pre-bankruptcy era case law on private restructuring demonstrates, because it is difficult to specify and contractually prohibit every variety of opportunistic behavior, purely contractual protections may be insufficient without some judicial backstop.

274. See *supra* note 9 (listing works critical of the ALI proposal).

275. E.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 571 (stating that the client's right to reject a settlement provides an important incentive to lawyers to negotiate adequate settlements); Moore, *Group Decisionmaking*, *supra* note 9, at 406–07 (arguing that the aggregate settlement rule serves as a necessary restraint on both inadequate settlements and unfair allocations).

276. Bi, Chamon & Zettelmeyer, *supra* note 99, at 4, 16–17.

to maximize the total recovery at the first stage as each individual plaintiff.

This is not to say that the ALI proposal eliminates the agency problem inherent in all legal representation. Lawyers may still be tempted to act opportunistically and settle too cheaply under the ALI proposal, just as in any contingent-fee arrangement where the lawyer bears the full cost of further litigation but captures only part of the expected benefit.<sup>277</sup> But invalidating contractual precommitments is counterproductive to maximizing aggregate recovery at stage one. The supermajority has the same incentive to check lawyer opportunism as the individual plaintiffs do. And other monitoring and bonding devices, such as well-structured contingency fees and the threat of ex post malpractice or breach-of-fiduciary-duty liability, can check lawyer self-dealing without impeding the group's ability to maximize aggregate recovery.

Contrasted with other strategies by which parties have attempted to capture the peace premium, such as the lawyer-withdrawal features of the Vioxx settlement, the ALI proposal is more likely to allow plaintiffs to maximize their aggregate recovery. Strategies that deter opt-outs by destroying the value of claims outside the aggregation—as the lawyer-withdrawal features of the Vioxx settlement and their sovereign-debt analog, exit consents, attempt to do—may succeed in obtaining complete participation, but they shift leverage from the plaintiffs to the defendant and are likely to result in a smaller total recovery (though often still better than a deal that does not result in closure).<sup>278</sup> Plaintiffs who believe a settlement offer is inadequate under a Vioxx-type framework can choose to either accept the inadequate amount or opt out and have their claims' value severely impaired. In other words, exit is exceedingly unattractive and there is no opportunity for voice.

The supermajority-voting rules of the ALI proposal, on the other hand, merely shift power from individual plaintiffs to the group—not to the defendant or the lawyers.<sup>279</sup> Under the ALI proposal, plaintiffs who believe an offer is inadequate can vote their

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277. Additionally, with more at stake in the litigation than any individual client, the lawyer may be more risk averse than the clients.

278. See *supra* notes 210–14 and accompanying text (contrasting collective action clauses and exit consents); see also Bi, Chamon & Zettelmeyer, *supra* note 99, at 4, 17 (noting that while both can achieve full participation that leaves the parties better off, collective action clauses cannot sustain a haircut that leaves creditors worse off, while exit consents that are strongly destructive of litigation prospects can coerce creditors into accepting a haircut higher than necessary to restore solvency).

279. But see Erichson & Zipursky, *supra* note 9, at 299 (“Ultimately, however, the ALI proposal . . . shifts too much settlement power from the claimants to their lawyers.”).

true preferences without forfeiting the benefits of the settlement if it is approved by the supermajority. While they may not exit the group once they have committed, they have an important opportunity to exercise voice to control their agents.<sup>280</sup>

*Second*, critics argue that plaintiffs need an individual opportunity to reject a settlement after learning all of its terms in order to ensure a fair allocation.<sup>281</sup> This objection is more substantial. At first blush, the aggregate settlement rule might seem like a good way to ensure equitable distribution. After all, the rights to accept or reject a settlement offer are equally distributed among the plaintiffs. Thus any plaintiff who believes the settlement is unfair may reject it. This type of litigant autonomy affords each individual a defense against exploitation because he or she can veto any settlement distribution that makes him or her worse off. But this emphasis on equity in the distribution of *rights* creates the transaction costs and strategic dynamics that are characteristic of the anticommons and destroys an opportunity for joint gain.<sup>282</sup> The more important consideration is whether the *gains* created by aggregation are fairly allocated at stage two; and there are likely better methods of allocating a limited fund in a zero-sum game than giving each player a veto over the whole deal.

This is where governance comes in. Just as governance can legitimize the use of coercion in other areas of law, so long as plaintiffs' precommitment is accompanied by a governance mechanism that will ensure that the gains from complete aggregation are fairly allocated, binding them to a group decision is unobjectionable.

The ALI proposal is largely silent on allocation, leaving choice of method up to the creativity of lawyers and their clients, subject to judicial review.<sup>283</sup> Plaintiffs and their lawyers might contractually

280. Cf. Burch, *supra* note 39, at 13–15, 24–25. Professor Burch argues that the opportunity to exit a litigation group serves procedural justice goals and can signal whether a proposed settlement is adequate and fair. But, as she acknowledges, Burch's form of "strategic disaggregation" destroys plaintiffs' opportunities to offer the defendant peace and capture the associated premium. *Id.* at 30. Further, because it would facilitate the formation of smaller, more cohesive groups, *id.* at 18–19, disaggregation empowers holdout blocs to effectively destroy even a deal that does not require complete participation. In the context of aggregate settlements, the opportunity for effective voice through a meaningful vote can be more important—and may do more to further procedural justice goals—than an opportunity for value-destroying or ineffective exit.

281. See, e.g., Moore, *Group Decisionmaking*, *supra* note 9, at 408–09. A lawyer might otherwise favor some clients, like those who retained him directly, over others, like those for whom he will have to pay another lawyer a referral fee. *See id.*

282. See Heller, *supra* note 4, at 649–50 (noting that equity in initial distribution of rights can lead to anticommons).

283. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 3.17(b)(3) (2010).

design a number of potential mechanisms ranging from *ex ante* agreement on allocation formulas or compensation grids to appointment of a neutral special master to allocate funds after the group accepts a settlement. The legitimacy of such private governance structures depends largely on plaintiffs' informed consent at the outset to be bound by them and the absence of structural deficiencies that may systematically bias their outcome.

Perfect accuracy is not the touchstone. The process of allocating an aggregate settlement will rarely be as straightforward as the elegant approach of admiralty's general average contribution.<sup>284</sup> Some degree of approximation will be inevitable in any settlement-allocation procedure. But perfect accuracy in valuation and allocation is not necessary for aggregation strategies to be acceptable, particularly where the gains from accuracy are outweighed by the transaction costs of achieving it. This can be seen in copyright collectives and patent pools, which resort to pricing grids or royalty arbitration procedures,<sup>285</sup> and in oil and gas unitization agreements, which base allocation formulas on approximations.<sup>286</sup> And it remains true in litigation, where the transaction-cost savings from approximation is the very reason why settlement (aggregate or otherwise) generates value over trial.

The key to ensuring a fair allocation process at stage two is attention to the two governance concerns: preventing the majority from exploiting the minority and limiting agent opportunism. Private parties voluntarily contracting in advance on an allocation procedure should have a great deal of flexibility in its design. And by designing a procedure before there is money on the table, plaintiffs may take advantage of a partial veil of ignorance in reaching agreement on what sort of allocation scheme would be fair, just as oil and gas companies find it easier to negotiate unitization agreements during the exploration phases.<sup>287</sup> Plaintiffs will rarely be totally ignorant of the relative strength of their claims, of course, but an *ex ante* agreement on allocation procedures is more likely to be fair than waiting until facts are developed, settlement offers have been made, and heterogeneities have emerged.<sup>288</sup> Indeed, plaintiffs may be able to

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284. See *supra* notes 145–51 and accompanying text.

285. See Merges, *supra* note 193, at 1328, 1342–43.

286. See *supra* notes 184–190 and accompanying text.

287. See *supra* notes 177–78 and accompanying text.

288. *Uhl v. Thoroughbred Technology and Telecommunications, Inc.*, 309 F.3d 978 (7th Cir. 2002), provides a rare example of an allocation procedure designed behind a true veil of ignorance. There, landowners sued a company that hoped to lay fiber-optic cable along a railroad right-of-way abutting their property, but at the time of the settlement, it was unclear on which.

agree on a governance structure that makes every individual better off from an *ex ante* perspective, given the expected surplus from aggregation and each individual's expected share in the allocation.

But the governance structures must account for heterogeneities among the plaintiffs. Voting procedures should be designed with the potential for minority exploitation in mind, and may require steps such as subclassing to account for significant differences among groups of plaintiffs that could create conflicts of interest. This point requires particular attention because the ALI proposal contemplates assigning voting power on a per-client basis, not in proportion to the value of plaintiffs' claims.<sup>289</sup> This per capita approach differs from the approaches taken in sovereign bond collective action clauses, which allocate both voting power and shares in the recovery *pro rata*,<sup>290</sup> and in bankruptcy, where votes are allocated on a hybrid *pro rata* and per capita basis.<sup>291</sup> The danger in allocating votes per capita is that plaintiffs with small claims might vastly outnumber those with large claims and might vote to accept a settlement that fully compensates small claimants, but leaves large claimants undercompensated.<sup>292</sup>

With sovereign bonds, the relative value of bondholders' claims is usually evident from the face of the instruments, and bankruptcy relies on a claims-allowance process to value claims and assign voting rights accordingly before any vote on the reorganization occurs.<sup>293</sup> In cases where clients are able to accurately estimate the relative value of their claims in advance (like investors suing for fraud), they should be permitted to depart from the ALI's default per capita voting rule and contractually assign voting power *pro rata* or in whatever manner is best suited for their particular situation.<sup>294</sup>

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side of the track the cable would be installed. Thus, without knowing which category any individual would fall into, the parties designed a settlement that gave greater compensation to landowners on the cable side. The court upheld the settlement as fair to all class members.

289. AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 3.17(b), cmt. (c)(2) (2010).

290. *See supra* notes 208–09 and accompanying text.

291. 11 U.S.C. § 1126(c) (2006) (specifying that approval of a reorganization plan by a creditor class requires an affirmative vote of creditors holding claims that in aggregate represent at least two-thirds in amount, and more than one-half in number, of the allowed claims held by creditors in that class). Additionally, for certain asbestos bankruptcies, section 524(g), which served as a model for the ALI proposal, requires the approval on a per capita basis of 75% of asbestos claimants. *Id.* § 524(g).

292. Even worse, a per capita voting rule might encourage referring lawyers to drum up junk claims to increase their inventories to the point where they can form a blocking position and hold out for a greater share of the allocation.

293. *See supra* notes 158–159 and accompanying text.

294. *See, e.g.*, Tax Auth., Inc. v. Jackson Hewitt, Inc., 898 A.2d 512, 515 (N.J. 2006) (describing one example of an agreement to distribute voting power *pro rata*).

But in many types of aggregate litigation, it may be impracticable to obtain precise valuations of individual plaintiffs' claims before settlement (and may undermine many of the efficiencies of settling in the first place). Still, some limited evaluation of claims in advance may be necessary to group truly dissimilar plaintiffs into subgroups for voting purposes. The key is to ensure that the voting process is free of the sorts of structural conflicts of interest that might allow a group of plaintiffs making up a majority to exploit some minority group.<sup>295</sup>

As the ALI anticipates, defendants may provide some guidance on proper subgroups by demanding certain thresholds of participation by certain sets of plaintiffs.<sup>296</sup> But this creates a risk that the defendant might try to gerrymander subgroups in its own favor by, for example, placing the plaintiffs with the strongest claims into classes where they are likely to be outvoted by plaintiffs with weaker claims.<sup>297</sup> Alternatively, plaintiffs could play an active role in forming their own subgroups, which, as Professor Elizabeth Chamblee Burch suggests, might further procedural justice goals.<sup>298</sup> Indeed, participation in the governance of group litigation—through deliberation, crafting an intragroup governance agreement, and voting—may even prove an important substitute for the increasingly unrealistic “day in court” in terms of plaintiffs’ satisfaction with the entire litigation process.<sup>299</sup>

The presence of a judicial backstop can also help legitimize enforcing plaintiffs’ precommitment to group decisionmaking by providing an independent check on majority exploitation and agent opportunism. The ALI proposal calls for judicial review of both the procedural and substantive fairness of a settlement approved by supermajority vote. But this marks a departure from normal practice, and the source of the court’s authority to engage in such review is not self-evident.<sup>300</sup> Courts generally lack the power to review private settlements outside of a formally certified class.<sup>301</sup> But courts

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295. See AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 2.07(a)(1), cmt. d & Reporters’ Note (2010) (explaining structural conflicts of interest).

296. *Id.* § 3.17(b).

297. Cf. Hagan, *supra* note 66, at 381–82 (discussing the risk of “gerrymandering” in the sovereign debt context).

298. Burch, *supra* note 5, at 525–27.

299. See Elizabeth Chamblee Burch, *Litigating Together: Social, Moral, and Legal Obligations*, 91 B.U. L. REV. 87, 132–34 (2011).

300. See, e.g., AM. LAW INST., PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION, § 3.01 cmt. a (discussing the limited or nonexistent role courts play in private nonclass settlements).

301. FED. R. CIV. P. 41(a)(1)(A); see also *Gardiner v. A.H. Robins Co.*, 747 F.2d 1180, 1189 (8th Cir. 1984) (“[C]ourts recognize that settlement of the dispute is solely in the hands of the

sometimes engage in such review anyway—ranging from scrutiny of settlements reached prior to class certification (despite an explicit amendment to Rule 23(e) to the contrary)<sup>302</sup> to the rejection of nonclass aggregate settlements “as not fair and adequate” under a “quasi-class action” theory.<sup>303</sup> These assertions of judicial authority have, understandably, been subject to criticism,<sup>304</sup> and a formal rule change explicitly authorizing judicial review may be desirable. In the context of contractual attempts to overcome an anticommons problem, however, the need to protect the minority, control agency costs, and ensure a fair allocation of the surplus may justify judicial intervention in private settlements as an exercise of the court’s equitable power, just as the need to prevent collusion and self-dealing by the majority justified judicial scrutiny of private bond workouts in the late nineteenth and early twentieth centuries.<sup>305</sup>

The contours of judicial review should follow the same functional two-stage inquiry that courts apply in reviewing other attempts to overcome anticommons problems, such as in oil and gas unitization and class actions.<sup>306</sup> But the primary focus of judicial review of aggregate settlements should be on procedural fairness. That is, courts should focus on the presence of informed consent and the absence of structural conflicts of interest, collusion, exploitation of minorities, and self-dealing by lawyers. Substantive review of the fairness of the settlement should be deferential, so long as the process

parties.”); 9 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE & PROCEDURE § 2363 (3d ed. 2008) (discussing voluntary dismissal).

302. *E.g.*, Elliot v. Allstate Investigators, Inc., No. 07 Civ. 6078 (DLC), 2008 WL 728648, at \*2 (S.D.N.Y. Mar. 19, 2008); Ramirez v. Cintas Corp., No. C 04-00281 JSW, 2007 WL 4410414, at \*1 (N.D. Cal. Dec. 14, 2007); Mansourian v. Bd. of Regents of Univ. of Cal. at Davis, No. Civ. S-03-2591 FCD EFB, 2007 WL 1722975, at \*1 (E.D. Cal. June 12, 2007). *But see* 7B WRIGHT & MILLER, *supra* note 301, § 1797 (“[S]ettlements or voluntary dismissals that occur before class certification are outside the scope of [Rule 23](e).”). Some courts have found authority under other provisions of Rule 23 to engage in limited review of precertification settlements for collusion or prejudice to absent parties. *See, e.g.*, Shelton v. Pargo, Inc., 582 F.2d 1298, 1314–15 (4th Cir. 1978) (relying on Rules 23(c)(1) and 23(d)); *see also* MANUAL FOR COMPLEX LITIGATION, FOURTH §§ 21.312, 21.61 (Stanley Marcus et al. eds., 2004).

303. *In re* World Trade Ctr. Disaster Site Litig., 834 F. Supp. 2d 184, 188 (S.D.N.Y. 2011) (citing Transcript of Status Conference of March 19, 2010 at 54–64, *In re* World Trade Ctr. Disaster Site Litig., 21 MC 100 (Doc. No. 2037) (S.D.N.Y. Mar. 19, 2010)).

304. *See, e.g.*, Alexandra N. Rothman, *Bringing an End to the Trend: Cutting Judicial Approval and “Rejection” Out of Non-Class Mass Settlements*, 80 FORDHAM L. REV. 319, 321 (2011) (noting that review of a mass settlement absent class certification “stretches the judiciary’s power and stifles litigants’ rights in mass 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, 173 (2010) (addressing concerns about the current regime of judicial discretion).

305. *See supra* notes 227–43 and accompanying text.

306. *See supra* notes 186–190, 246–49 and accompanying text.

was fair. Otherwise judicial review could turn into just another opportunity for holdouts to attempt to extract a larger share of the allocation.

*Third*, critics argue that the aggregate settlement rule is needed to protect client autonomy so that clients are free to decide for themselves whether a proposed settlement would maximize their own welfare. But the central insight from recognizing the anticommons in aggregate litigation is that sometimes a loss of autonomy can be welfare enhancing. By voluntarily surrendering their autonomy to the group, clients can enhance their own welfare.

Critics counter that clients are not capable of validly consenting to a waiver of the aggregate settlement rule at the outset of representation or, indeed, at any time prior to learning the terms of a settlement offer. They argue that, without knowing the actual terms of the settlement offer, plaintiffs cannot understand and consent to the conflicts of interest inherent in aggregate settlements and mass representation more generally. Plaintiffs, instead, think they are hiring (or being referred to) a lawyer who will represent them with undivided loyalty and avoid situations where tradeoffs must be made among clients (inevitable in any settlement allocation).<sup>307</sup> Further, critics argue that, if lawyers are allowed (as they would be under the ALI proposal) to insist on clients' advanced consent to be bound by a group decision on settlement as a condition of joining an aggregate representation, then all lawyers will do so, effectively leaving plaintiffs with no alternative.<sup>308</sup>

This objection, however, takes a very narrow view of litigant autonomy in insisting that plaintiffs can never be free to bind themselves to a group decision to defeat the anticommons but must, instead, always retain individual control over their claims.<sup>309</sup> While judicial review of the adequacy and fairness of an aggregate settlement alone may not be enough to lend it legitimacy absent consent, it is difficult to see why a client informed of the inherent conflicts of interest in group representation and its benefits and drawbacks could not validly consent to such an arrangement.

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307. See, e.g., Erichson & Zipursky, *supra* note 9, at 298–311.

308. *Id.* at 302–03. On this point, critics may be correct. Contingent-fee lawyers stand to gain the most from the ability to offer defendants finality because the lawyers' stake in most aggregate litigation (typically 30–40% of the total recovery) will dwarf that of any individual plaintiff. If there were real demand for representation under the traditional aggregate settlement rule, however, one would expect the market to make such representation available—perhaps at a different price.

309. Cf. Robert L. Scharff, *A Common Tragedy: Condemnation and the Anticommons*, 47 NAT. RESOURCES J. 165, 186–88 (2007) (showing that autonomy may still be respected when individuals opt into binding private governance regimes to solve anticommons problems).

To the extent that critics contend that clients who consent in advance are not adequately informed,<sup>310</sup> the disclosure requirements of the ALI proposal and the prospect of judicial review should serve as an information-forcing mechanism. Clients are too often uninformed about the essentially collective nature of mass representation and the inevitable conflicts of interest it entails under current rules. With no prospect of judicial review lawyers often fail to explain, and obtain consent to, those conflicts despite existing ethical obligations to do so.<sup>311</sup> If, however, the enforceability of an aggregate settlement (and therefore the lawyer's entitlement to a contingency fee) is conditioned on a judicial determination that the lawyers' disclosures when obtaining the client's consent were adequate, the lawyer will have a powerful incentive to disabuse the client of any notion that the collective representation operates under the same presumptions of undivided lawyer loyalty as the individual-representation paradigm. Further, clients can take advantage of existing referral networks that channel similar claims to a handful of lead lawyers. Referring lawyers, who are typically the primary client contacts, are well positioned to advise individuals on whether to waive the protections of the traditional aggregate settlement rule in favor of joining a litigation group.

To the extent critics say that even informed consent should not be honored,<sup>312</sup> such paternalism is difficult to justify when it will prevent the very clients it is trying to protect from cooperating to maximize the value of their claims. Certainly it is true that a lawyer representing a group of clients that must allocate a limited fund among themselves in a zero-sum game cannot simultaneously zealously represent the interests of each individual.<sup>313</sup> But such a one-on-one model is not the only legitimate conception of representation. Corporate and political agents legitimately represent groups all the time. And the problem of equitably allocating a limited fund has been solved in many other contexts.<sup>314</sup> As examples from intellectual property and sovereign debt demonstrate, private parties often find it advantageous to voluntarily surrender their autonomy and join groups

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310. *E.g.*, Erichson & Zipursky, *supra* note 9, at 301–03.

311. See, e.g., Erichson, *Beyond the Class Action*, *supra* note 9, at 562 (“Rarely, however, do mass litigators seek their clients’ consent to the inherent client-client conflicts of interest in mass collective representation.”); Moore, *Absence of Legal Ethics*, *supra* note 9, at 731 (“Under rules of professional conduct, individual clients must be fully informed.”).

312. Erichson & Zipursky, *supra* note 9, at 304 (“[A]dvance consent should not be permitted because the conflicts inherent in most aggregate settlements are nonconsentable in advance.”).

313. *Id.* at 307–11.

314. See *supra* Part III.

as a way of overcoming collective action problems. The key is to ensure that those groups are governed by fair processes. Clients should be allowed to choose group representation and agree upon a fair allocation process, so long as there are protections in place to prevent minority exploitation and agent self-dealing.

## 2. Toward a More Comprehensive Contractual Solution to the Anticommons in Aggregate Litigation

While the ALI proposal to eliminate what is essentially a state-imposed transaction cost can help facilitate some market-driven attempts to overcome the anticommons in aggregate litigation, it is, at best, an incomplete solution.

Even without the restrictions of the aggregate settlement rule, plaintiffs cannot offer defendants complete peace when they are represented by more than one lawyer. Thus, a second-order anticommons dynamic may be replicated among lawyers representing groups of clients, much like the dynamic created by collective action clauses whose effect is limited to one of many series of a sovereign issuer's bonds. There is some hope that because those lawyers are likely to be a handful of repeat players, they may be able to find ways to overcome the second-order anticommons through negotiation or by creating structures like coalitions or ad hoc law firms to limit strategic behavior; indeed, they have successfully done so in several instances. But the risk of holdouts remains and could be exacerbated if some firms began to adopt a "vulture-fund model" of acquiring and coordinating an inventory of claims sufficient to form a blocking position in any global settlement for the purpose of holding out.<sup>315</sup>

A more comprehensive contractual approach might allow voting across plaintiff groups much like aggregated collective action clauses allow voting across series of bonds. For example, all of the plaintiffs (and their separate lawyers) with similar claims against a common defendant might agree to be bound by, say, an 85% vote in favor of a global settlement, so long as the settlement was also approved by a two-thirds vote of the plaintiffs represented by each

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315. The ALI proposal also does not solve the "temporal anticommons" presented by future claimants who have been exposed to a harm but have not manifested any injury at the time of an aggregate settlement. This temporal dimension creates new transaction costs: property rights are not only disaggregated across multiple claimants, but also across time. If future claimants cannot be identified, the costs of assembling all present and future claims into a collective that could credibly offer peace and thus be sold to the defendant at a premium would far exceed any premium the defendant would be willing to pay.

lawyer.<sup>316</sup> Such an approach may help resolve the second-order anticommons among groups of plaintiffs.

Negotiating the agreement to bind each lawyer's clients to a vote by the larger group could no doubt prove difficult. But the plaintiffs' bar already has some structures in place for coordination in mass litigation, such as informal coalitions of law firms, ad hoc law firm mergers, or more formal arrangements that automatically bring "super law firms" into existence when a member firm gets a case of a certain size.<sup>317</sup> And coordination within the framework of an MDL could help groups of plaintiffs reach an agreement to further aggregate their claims in order to maximize both their negotiating position with the defendant and their ability to offer extra value in the form of complete peace.

The legitimacy of attempts at such a comprehensive solution would, of course, turn on the fairness of the procedures for allocating the surplus at the second stage. For the most part, it is safe to assume that sophisticated parties like lawyers would contract for the protections they need when designing the structures that would govern their relationships within the larger litigation group. But governance would be complicated by the presence of intermediaries—the lawyers—whose interests may not always align with those of their clients, adding an additional layer of agency costs.<sup>318</sup> And obtaining the informed consent of all of the plaintiffs would be key to the legitimacy of any such arrangement. Therefore, judicial scrutiny would be necessary, both to ensure the informed consent of plaintiffs and to limit collusion and agent opportunism.

## CONCLUSION

Recognizing the anticommons dynamic can lend insight into some of the collective action problems that plaintiffs face in aggregate litigation, and can help identify areas where the law imposes artificial transaction costs that stand in the way of aggregation strategies that could leave everyone involved better off. But it is also important to recognize the two-stage dynamic characteristic of attempts to overcome anticommons problems, which can provide a framework for

316. This essentially tracks the structure of Uruguay's aggregated collective action clause. See Buchheit & Gulati, *Model CAC*, *supra* note 60, at 319.

317. See Erichson, *Beyond the Class Action*, *supra* note 9, at 536–39.

318. See Issacharoff & Witt, *supra* note 63, at 1590–96 (describing advantages and perils of claims brokers and interpreters who served as intermediaries in early employee injury cases). For discussion of a similar problem in a different context, see Samuel Issacharoff & Daniel R. Ortiz, *Governing Through Intermediaries*, 85 VA. L. REV. 1627 (1999).

evaluating both regulatory and contractual strategies for addressing collective action problems in aggregate litigation. On these metrics, the ALI proposal to allow waiver of the aggregate settlement rule appears to be a step in the right direction. But the anticommons framework may prove useful in broader applications.

Some of the more complicated problems facing parties and courts today are how to coordinate mass litigation in MDL proceedings, where formally separate claims are brought together in the same forum before the same judge, but with surprisingly little established law on how they should proceed. Courts have instinctively looked to class action procedures for guidance, but it is not at all clear that class actions are the appropriate model. Recognizing the anticommons in aggregate litigation, some of the pathologies it creates, and some of the solutions that have been attempted in other areas of law may help provide guidance. Looking first to whether aggregation will produce joint gains and second to whether governance structures are in place to ensure that all of the parties share in the resulting surplus and are not exploited by their agents or the majority may be potentially useful organizing principles for evaluating attempts at coordination among the various groups of plaintiffs and lawyers in an MDL. As the class action fades into the background, we should not be alarmed by innovations that emerge to deal with some of the problems that the class action addressed. With proper attention to problems of cooperation and governance, voluntary nonclass aggregation has the potential to lead to more efficient and fair results than individual litigation and perhaps even than regulatory aggregation through class actions.