

ARTICLE

“WE’RE SCARED TO DEATH”: CLASS CERTIFICATION AND BLACKMAIL

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This Article discusses the charge that class actions subject defendants to excessive settlement pressure, so that defendants effectively are blackmailed. Prominent federal judges, including Frank Easterbrook, Henry Friendly, and Richard Posner, have endorsed this proposition, which is drawn from a famous law review article by Professor Milton Handler.

The Article begins by describing the blackmail charge in detail. A close reading reveals four different accounts, some of which are incompatible with others. Proponents have missed these important differences. The Article then assesses the soundness of each version of the blackmail charge. None survives scrutiny. All (except possibly Handler’s) use an analogy to blackmail that is faulty and unhelpful. All make factual assertions that are questionable or unproven, such as the claim that class actions always settle or that risk aversion drives the decision to settle on the defense side. All also need, but lack, a persuasive normative account of settlement pressure, without which it is impossible to show that class action defendants wrongly are coerced.

INTRODUCTION

In a famous lecture given in 1972, Henry Friendly, the revered Second Circuit jurist, said that class actions force defendants into “blackmail settlements.”¹ Richard Posner, the renowned Chief Judge of the Seventh Circuit, renewed the charge in 1995.² After finding that a class action enabled plaintiffs with weak claims to threaten an entire industry with bankruptcy, Judge Posner decertified the class to protect the defendants from blackmail.³ Many judges agree with

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¹ The lecture, part of a series, became a celebrated book on the federal courts. See Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

² *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

³ *Id.* at 1304.

Friendly and Posner, including Frank Easterbrook, Posner's Seventh Circuit colleague.⁴ "Hydraulic pressure . . . to settle" is now a recognized objection to class certification.⁵

Strong support for the blackmail charge has also led the Committee on Rules of Practice and Procedure to authorize interlocutory appellate review of certification orders.⁶ Believing that certification "may force a defendant to settle," the Committee created a pressure relief valve.⁷ Circuit courts began protecting defendants as soon as the amendment took effect. A plaintiff who prevails on a certification motion in a trial court must expect to lose on appeal.⁸

The authors of the blackmail charge have drawn support from academic works. Judge Friendly borrowed from a famous law review article by Professor Milton Handler.⁹ When claiming that class action defendants face "intense pressure to settle," Judge Posner cited a raft

⁴ In re Bridgestone/Firestone, Inc., 288 F.3d 1012 (7th Cir. 2002); see also West v. Prudential Sec., Inc., 282 F.3d 935, 937 (7th Cir. 2002) (Easterbrook, J.). A number of other federal cases have endorsed the blackmail thesis. E.g., Parker v. Time Warner Entm't Co., 331 F.3d 13 (2d Cir. 2003); id. at 26 (Newman, J., concurring); In re Visa Check/MasterMoney Antitrust Litig., 280 F.3d 124, 148 (2d Cir. 2001) (Jacobs, J., dissenting); Newton v. Merrill Lynch, 259 F.3d 154, 164 (3d Cir. 2001); Castano v. Am. Tobacco Co., 84 F.3d 734, 746 (5th Cir. 1996); In re Gen. Motors Corp. Pick-Up Truck Fuel Tanks Prods. Liab. Litig., 55 F.3d 768, 784-85, 789 (3d Cir. 1995); Griffin v. GK Intelligent Sys., Inc., 196 F.R.D. 298, 305 (S.D. Tex. 2000); Marascalco v. Int'l Computerized Orthokeratology Soc., Inc., 181 F.R.D. 331, 339 n.19 (N.D. Miss. 1998). Some state court judges also subscribe to the excessive pressure thesis. See, e.g., Mitchell v. H&R Block, Inc., 783 So. 2d 812, 820 n.6 (Ala. 2000) (Hooper, C.J., dissenting); Ex Parte Masonite Corp., 681 So. 2d 1068, 1086 (Ala. 1996) (Maddox, J., concurring in part and dissenting in part); Philip Morris, Inc. v. Angeletti, 752 A.2d 200, 217 (Md. 2000).

⁵ *Newton*, 259 F.3d at 164.

⁶ Fed. R. Civ. P. 23(f). I argued against the interlocutory appeal amendment when the Rules Committee met in Dallas, Texas in 1996. For a defense of interlocutory review, see generally Linda S. Mullenix, *Some Joy in Whoville: Rule 23(f), A Good Rulemaking*, 69 *Tenn. L. Rev.* 97 (2001).

⁷ Fed. R. Civ. P. 23(f) advisory committee's note.

⁸ Rule 23(f) is a one-way ratchet for defendants. Although early evidence was ambiguous, see Mullenix, *supra* note 6, at 105-07, a clear pattern of antiplaintiff decisions has emerged. See Jennifer K. Fardy, *Disciplining the Class: Interlocutory Review of Class Action Certification Decisions Under Rule 23(f), 13 Class Actions & Derivative Suits* 3, 9 (2003) (reporting that federal circuit courts have granted thirty-two petitions for interlocutory review, that "the vast majority of the decisions . . . have resulted in elimination of class status," and that no federal circuit has used 23(f) appeal to reverse denial of class certification), available at <http://www.seyfarth.com/db30/cgi-bin/pubs/fardy.PDF>. The first case reversing a trial court ruling against a class action plaintiff came in *Parker v. Time Warner Entertainment Co.*, 331 F.3d 13 (2d Cir. 2003). The facts are highly unusual, however. Before the plaintiffs filed a certification motion or took related discovery, the defendant moved for an order denying certification as a matter of law.

⁹ Friendly, *supra* note 1, at 120 (citing Milton Handler, *The Shift from Substantive to Procedural Innovations in Antitrust Suits—The Twenty-Third Annual Antitrust Review*, 71 *Colum. L. Rev.* 1, 9 (1971)).

of scholarly works.¹⁰ Judge Easterbrook offered “[e]mpirical studies” of securities cases in support of his allegation that plaintiffs and trial judges use class actions to “wring settlements from defendants whose legal positions are justified but unpopular.”¹¹

Yet, many academics deny that class actions give claimants excessive leverage over defendants. Professor John C. Coffee, Jr. contends that class actions often settle too cheaply.¹² Noting the conflict between the blackmail charge and the abundance of cheap settlements, Professors Bruce Hay and David Rosenberg conclude, “[T]he risks of . . . blackmail settlements have been overstated.”¹³ Professor Warren Schwartz, a senior law and economics scholar, writes that the blackmail charge is “unsupported on any basis currently articulated in judicial opinions or legal scholarship.”¹⁴

Empirical researchers also dispute the blackmail claim. The authors of a Federal Judicial Center study doubt that “the certification decision itself, as opposed to the merits of the underlying claims, coerce[s] settlements with any frequency.”¹⁵ They argue that precertification “rulings on motions and [established] case management practices limit[] the ability of a party to coerce a settlement without regard to the merits of the case.”¹⁶

The claim that class action settlements are merits-driven shows that the blackmail charge faces a normative hurdle as well as a factual one. Nothing is self-evidently wrong with a settlement that occurs because a defendant fears losing at trial. Settlements occur every day for this reason, and no one questions their desirability. Even accepting the proposition that class actions generate enormous pres-

¹⁰ *In re Rhone Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

¹¹ *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 834 (7th Cir. 1999).

¹² John C. Coffee, Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter Is Not Working*, 42 *Md. L. Rev.* 215, 226 (1983); see also Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 *Colum. L. Rev.* 149, 163 (2003) (“A staple of the class action literature is the recognition that class counsel might embrace a settlement inadequate for all, many, or some class members.”).

¹³ Bruce Hay & David Rosenberg, “Sweetheart” and “Blackmail” Settlements in Class Actions: Reality and Remedy, 75 *Notre Dame L. Rev.* 1377, 1378 (2000); see also David Rosenberg, *Mass Tort Class Actions: What Defendants Have and Plaintiffs Don’t*, 37 *Harv. J. on Legis.* 393, 430 (2000) (expressing “doubt that litigation class actions . . . exert systematic blackmail pressure against defendants”) [hereinafter *Rosenberg, Mass Tort Class Actions*].

¹⁴ Warren F. Schwartz, *Long-Shot Class Actions: Toward a Normative Theory of Uncertainty*, 8 *Legal Theory* 297, 298 (2002).

¹⁵ Thomas E. Willging et al., *Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 61* (1996) (on file with *New York University Law Review*).

¹⁶ *Id.*

sure to settle, one must still ask whether the pressure is too great. To show that it is, proponents of the blackmail charge must offer a normative account of settlement pressure, that is, a standard to which pressure in class actions can be compared.

This Article examines the factual and normative components of the blackmail charge in detail. Part I reviews the charge itself. Careful parsing distinguishes four versions. The differences among them relate to the triability of class actions, claim size, and payment amounts. These differences are important, but judges making the blackmail charge have not noticed them. Part II assesses the accuracy of each version's descriptive claims and the persuasiveness of each version's normative claims. Although Professor Handler's version fares best overall, each version contains important factual and normative deficiencies. Some versions rest on factual premises that are doubtful or unproven. Some rest on normative accounts of settlement pressure that are undeveloped or unpersuasive. Even the use of the "blackmail" analogy is inapt. Part III briefly concludes that judges should stop making blackmail claims.

I

THE BLACKMAIL CHARGE: FOUR VERSIONS PRESENTED AS ONE

Tort reformers frequently describe class action lawsuits as legalized extortion.¹⁷ There is, however, a significant difference in stature and ability between the pundits and partisans who propagandize for tort reform and the jurists who make the blackmail claim.¹⁸ Judges

¹⁷ A search of the Wall Street Journal database on Westlaw for "'class action' and (blackmail or extortion)" produced 49 "hits," many of which were editorials, op-eds, and letters from persons with ties to tort reform groups attacking class actions. See, e.g., Another Pound of Microsoft, 2002 WL-WSJ 3383034 (describing proposed settlement of antitrust class actions against Microsoft and stating that "[s]ooner or later the U.S. political system has to come to grips with this kind of legal extortion"); How Lawyers Work Overtime, 2003 WL-WSJ 3973983 (asserting that trial lawyers use class action suits over overtime pay to "extort millions in back pay and other damages from companies for huge groups of worker-plaintiffs"); Letter from Andy Kotner, Executive Director, Citizens Against Lawsuit Abuse, San Diego, 1999 WL-WSJ 5444104 (describing jury verdict against Daimler Chrysler as "another example of class-action extortion"); Smoke Screen, 2001 WL-WSJ 2854746 (stating that "legal system" in U.S. is "rapidly being corrupted into a legal extortion racket" and offering class actions against "HMOs, paint makers, [and] drug companies" as examples); see also Lawrence W. Schonbrun, The Class Action Con Game, <http://www.cato.org/pubs/regulation/reg20n4j.html> (last visited May 13, 2003) (arguing that ability to sue on behalf of persons who have not opted into class actions creates appearance of extortion).

¹⁸ Lawrence Schonbrun, a darling of the tort reform movement whose article is cited *supra* note 17, travels the country attacking fee awards in class actions. One federal judge admonished him "for inappropriate litigation conduct designed to either bolster or manu-

Friendly, Posner, and Easterbrook are towering figures in American jurisprudence and cannot be dismissed as ideologues. One must tackle their charges on the merits.

In doing so, one discovers four versions of the blackmail thesis, the first set out by Professor Milton Handler.¹⁹ The versions differ systematically:

- One contends that blackmail occurs because class actions are *not* triable.²⁰ Three contend that blackmail occurs because class actions *are* triable.²¹
- The three triability-based theories treat claim size differently: One says blackmail occurs when claims are small;²² one says that it occurs when claims are large;²³ and one says that it occurs regardless of claim size.²⁴
- Different versions also treat the relationship between settlement payments and claim values differently. Two triability-based versions limit blackmail to cases in which settlement payments exceed claim values, somehow defined. Two versions eschew this limitation, arguing that blackmail occurs even when defendants underpay, that is, even when claims values exceed settlement amounts.²⁵

These differences matter enormously, as shown below. Yet judges have not noticed them. One can therefore raise important questions about the blackmail charge just by describing the charge with care.

A. *Henry Friendly and Milton Handler: Versions One and Two*

Henry Friendly's complaint about "blackmail settlements" is part of a larger lamentation of the use of Rule 23(b)(3) class actions²⁶ to vindicate losses that are "too small to warrant individual litiga-

facture standing through the manipulation of documents." *Shaw v. Toshiba Am. Info. Sys., Inc.*, 91 F. Supp. 2d 942, 975 (E.D. Tex. 2000). Another enjoined him from filing objections. The appeals court overturned the injunction on due process grounds, but acknowledged Schonbrun's status as a "class action settlement gadfly." *Weisman v. Quail Lodge, Inc.*, 179 F.3d 1194, 1196 n.2 (9th Cir. 1999); see also *In re Oracle Sec. Litig.*, 852 F. Supp. 1437, 1458 (N.D. Cal. 1994) (referring to Schonbrun as "a class action gadfly").

¹⁹ Handler, *supra* note 9, at 9.

²⁰ *Id.* (assessing unlikelihood of large-scale class of small claimants ever getting to trial).

²¹ See *Bridgestone/Firestone*, 288 F.3d at 1016; *Rhone-Poulenc*, 51 F.3d at 1298; Friendly, *supra* note 1, at 119-20.

²² Friendly, *supra* note 1, at 120.

²³ See *infra* notes 70-71 and accompanying text.

²⁴ *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

²⁵ See *infra* Part B.2.

²⁶ See Fed. R. Civ. P. 23(b)(3) (authorizing class actions when common questions of law or fact of class predominate over questions affecting individual members and when class action is superior method for fair and efficient adjudication of controversy).

tion.”²⁷ Using the facts of *Eisen v. Carlisle & Jacquelin*²⁸ as an example, he argued that when claims are small, “the important thing is to stop the evil conduct”²⁹ because most class members receive tiny amounts after litigation costs are defrayed. Friendly believed that “the federal judicial system is not adapted to affording compensation to classes of hundreds of people with \$10 or even \$50 claims.”³⁰

Although absent plaintiffs derived “minuscule” benefits from small-claim class actions, Judge Friendly thought that these lawsuits oppressed defendants severely. “The possible consequences of a judgment to the defendant are so horrendous,” he argued, “that these actions are almost always settled.”³¹ Usually, the settlements were “a small fraction of the amount claimed,” but the fees were large enough to compensate the plaintiffs’ lawyers lavishly.³²

Judge Friendly would have solved the problems of minuscule benefits, excessive fees, and unfairness to defendants by replacing small-claim class actions with injunctive lawsuits. What of the possibility that wrongdoers would retain ill-gotten gains? Friendly would have addressed this problem with “civil fines . . . sufficiently substantial to discourage engaging in such conduct but not so colossal as to produce recoveries that would ruin innocent stockholders or, what is more likely, produce blackmail settlements.”³³

Judge Friendly’s words convey a simple argument: By aggregating small claims, a class action exposes a corporate defendant to an enormous loss at trial, producing a situation in which the defendant settles to preserve economic value for “innocent stockholders.”³⁴ The settlements are “blackmail” because the demand is to settle or die and because the settlement does no real good for claimants, whose individual recoveries are small.

Although Judge Friendly contended that class action judgments were too large for defendants to bear, he did not suggest that judgments or settlements in class actions were too large relative to the merits of class members’ claims. To the contrary, he appears to have thought that plaintiffs’ attorneys frequently shortchanged class members by trading low relief for high fees. Friendly may even have

²⁷ Friendly, *supra* note 1, at 119-20 (quoting *Eisen v. Carlisle & Jacquelin*, 391 F.2d 555, 560 (2d Cir. 1968)). Judge Friendly’s views influenced other judges immediately. See *Eisen v. Carlisle & Jacquelin*, 479 F.2d 1005, 1020 n.28 (2d Cir. 1973) (quoting Friendly).

²⁸ 391 F.2d 555 (2d Cir. 1968).

²⁹ Friendly, *supra* note 1, at 120.

³⁰ *Id.*

³¹ *Id.* at 119-20.

³² *Id.* at 120.

³³ *Id.*

³⁴ *Id.*

viewed sell-out settlements favorably, given his desire to protect defendants from ruin.

Judge Friendly cites Professor Milton Handler in support of his blackmail charge;³⁵ yet Handler's analysis differs from Friendly's in a crucial respect. Friendly argues that corporations settle class actions to avoid horrendous judgments at trial. Handler thinks that class action trials are impossible. In his view, class settlements are "legalized blackmail" because judges enmesh innocent defendants in endless and expensive litigation.³⁶ The burdens of litigation, especially those relating to discovery and hearings on damages, are unmanageably great. A defendant's choice is therefore to settle or bear high litigation costs indefinitely.

Anyone who reads Handler's article will see that his concern is endless litigation, not ruinous judgments. He talks of "the burden imposed upon a court by a massive class suit," including the need to notify millions of absent plaintiffs, to process responses, and to "oversee discovery on a gargantuan scale."³⁷ He gauges "[t]he time and effort" required to handle antitrust claims en masse by discussing certain "electrical equipment cases" in which "25,600 separate claims were asserted" and thirty-five district courts coordinated discovery.³⁸ He then poses a question: What would happen if a single district court undertook an antitrust class action involving millions of claims and the defendant insisted on going to trial?

The easy answer that is often suggested is that defendants, faced with massive class actions, will invariably choose to settle rather than to litigate. . . . But this rationalization suffers from a fundamental flaw. Any device which is workable only because it utilizes the threat of unmanageable and expensive litigation to compel settlement is not a rule of procedure—it is a form of legalized blackmail. If defendants who maintain their innocence have no practical alternative but to settle, they have been de facto deprived of their constitutional right to a trial on the merits.³⁹

³⁵ Id. at 120 n.57.

³⁶ Handler, *supra* note 9, at 7-10.

³⁷ Id. at 7.

³⁸ Id. at 8. The electrical equipment cases were mass actions, not class actions. Because Handler ignored this procedural difference when analogizing from the former to the latter, he made several mistakes. For example, defendants can take extensive discovery of persons involved in mass actions because all such persons are parties. See, e.g., Fed. R. Civ. P. 33(a) ("[A]ny party may serve upon any other party written interrogatories."); Fed. R. Civ. P. 34(a) ("Any party may serve on any other party a request" to produce documents). Absent class members are not parties, however, and the ability to take discovery from them is much more limited. See, e.g., *Transamerican Ref. Corp. v. Dravo Corp.*, 139 F.R.D. 619, 621 (S.D. Tex. 1991).

³⁹ Handler, *supra* note 9, at 9.

The point is not that class actions expose defendants to ruinous judgments at trial; it is that defendants cannot get to trial, probably at all and certainly not at an acceptable cost, even when their defenses are good.⁴⁰

Handler thus offers no support for Friendly's claim that defendants pay blackmail to avoid horrendous judgments at trial. Paging through Handler's article, one finds no mention of trial judgments and no suggestion that class action defendants fear them. By identifying large class action judgments as the culprits, Friendly created a new blackmail claim.

Because Friendly and Handler disagree over the triability of class actions, their blackmail claims are incompatible. To see this, imagine that all class actions could be tried quickly and affordably. Handler's fear of blackmail would disappear because innocent defendants would have their day in court. Friendly's fear of blackmail would worsen. In a world of fast and inexpensive trials, the risk of enormous judgments would skyrocket.

In fact, class action jurisprudence has evolved so greatly over the past twenty years that untriability is no longer a problem. When asked to certify classes today, judges require plaintiffs to submit detailed plans showing how discovery and trial will proceed.⁴¹ Defendants then have the opportunity to object to these plans, challenging their workability—often raising complaints like those that troubled

⁴⁰ An implication of Handler's view would appear to be that settlements of untriable class actions should always be at nuisance value. Because these cases cannot be tried, claimants cannot use the threat of large judgments to extract dollars from defendants. They can use only the threat to keep litigating unless defendants pay them to stop. Settlements should therefore reflect defendants' expected litigation costs rather than the value of class members' claims.

⁴¹ In Texas, trial plans are required. *Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 689 (Tex. 2002) (requiring "a specific explanation of how class claims are to proceed to trial"). Plaintiffs seeking class certification in federal courts also file trial plans. See, e.g., *In re Methyl Tertiary Butyl Ether Prods. Liab. Litig.*, 209 F.R.D. 323, 334-35 (S.D.N.Y. 2002) (describing plaintiffs' trial plan, which provides examples of how plaintiffs may present and prove their case); *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 503, 532-33 (S.D. Ind. 2001) (describing plaintiffs' trial plan as "painting a picture of the proposed trial"); *Sandwich Chef of Texas, Inc. v. Reliance Nat'l Indem. Ins. Co.*, 202 F.R.D. 484, 489 (S.D. Tex. 2001) (identifying three phases of trial management established in plaintiffs' trial plan). The committee note to the recently approved amendments to the federal class action rule indicates that trial plans will soon be mandatory at the federal level. See Report of the Civil Rules Advisory Committee 98, in Report to the Judicial Conference, app. B (May 20, 2002), <http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf> ("A critical need is to determine how the case will be tried. An increasing number of courts require a party requesting class certification to present a 'trial plan' that describes the issues likely to be presented at trial and tests whether they are susceptible of class-wide proof.").

Handler.⁴² Judges frequently agree with defendants and deny certification.⁴³ When they do certify untriable class actions, appellate courts review their decisions eagerly and reverse them freely.⁴⁴ Today, untriable class actions are highly unlikely to be certified.

By and large, then, federal judges have addressed Handler's manageability concerns. By doing so, however, they have brought Friendly's fear of enormous trial judgments to life. Today, a class action defendant is guaranteed a day in court, possibly opposite a well-financed plaintiffs' attorney who wants the earliest possible trial date and the largest possible damage award. Few things unsettle a defendant like the knowledge that a jury soon will decide the outcome of a lawsuit involving thousands of claims and millions of dollars in liability.

Because Handler and Friendly stand on opposite sides of the triability divide, their blackmail claims differ normatively. Handler's normative premise is that due process entitles defendants to have plaintiffs' claims decided in court quickly and at acceptable cost. By using the class action rule to enmesh defendants in interminable litigation, judges violate defendants' due process rights.⁴⁵ Friendly has no due process complaint.⁴⁶ He asserts that defendants settle class

⁴² See *supra* notes 37-40 and accompanying text.

⁴³ For a description of the anticertification evolution of federal class action jurisprudence, see Linda S. Mullenix, *Abandoning the Federal Class Action Ship: Is There Smoother Sailing For Class Actions in Gulf Waters?*, 74 *Tul. L. Rev.* 1709 (2000).

⁴⁴ See Fardy, *supra* note 8, at 9 (describing high rates of review of certification decisions in federal appellate courts). The Texas Supreme Court has also demonstrated extreme activism, rewriting its jurisdiction over interlocutory appeals to reach more class actions. See *Stromboe*, 102 S.W.3d at 686-87 (stating that any error of law relating to certification suffices to establish jurisdiction).

⁴⁵ Richard Epstein shares a similar view. He contends that judges attempt to make untriable class actions triable by constraining defendants' ability to litigate. Richard Epstein, *Class Actions: Aggregation, Amplification and Distortion* 42 (Berkeley Olin Program in L. & Econ., Working Paper No. 76, 2003), at <http://repositories.cdlib.org/blewp/art76>.

⁴⁶ The Supreme Court has said, however, that the Due Process Clause does prohibit states from imposing grossly excessive punitive damage awards. See, e.g., *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1519-20 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion). There is no textual evidence that Friendly or Handler's arguments against settlement relied on this due process theory, nor should it be available to them. First, whether accomplished by class certification or other means, claim aggregation does not change the character of damages from compensatory or statutory to punitive. Rather, it merely increases the number of claims and, therefore, the stakes. Second, the possibility of distributing punitive damages equitably may actually support the class certification. See, e.g., *In re Simon II Litig.*, 211 F.R.D. 86 (E.D.N.Y. 2002) (certifying mandatory class of smokers for purpose of allocating punitive damages on pro rata basis). Third, in some statutes Congress has capped the liquidated damages that are available in class actions. See, e.g., 15 U.S.C. § 1640(a)(2)(B) (2000) (limiting damages in Truth In Lending Act class

actions to avoid company-threatening trial verdicts.⁴⁷ On this account, class action defendants can have their day in court but do not want it. No due process violation occurs in this situation. Millions of settlements occur every year wholly or partly because parties fear losing at trial.⁴⁸ In these instances, the settling parties, who waive the right to trial voluntarily, receive all the process they are due.

Because Judge Friendly borrows Professor Handler's morally laden "blackmail" label but not Handler's normative base, Friendly's need for a new normative theory is clear. Consent provides the standard normative foundation for settlements, including class action settlements on the defense side. Handler challenges the normativity of consent by arguing that in class actions, plaintiffs extract consent under conditions that violate defendants' legal rights.⁴⁹ Friendly shows only that defendants settle because they fear losing at trial.⁵⁰ Ordinarily, this fear poses no challenge to consent. It is a reason for thinking that a defendant is right to settle, not for thinking that a defendant is coerced.⁵¹

This point is fundamental. All American civil justice systems generate settlement pressure by forcing parties to risk losing at trial.⁵²

actions to lesser of \$500,000 or one percent of defendant's net worth). Given Congress's decision to limit damages in some situations but not others, the obvious inference is that Congress meant what it said. But cf. *Parker v. Time Warner Entm't Co.*, 331 F.3d 13 (2d Cir. 2003) (recognizing due process issue may arise when class action makes possible enormous award based on technical violation of statute that bears no relation to harm incurred); see also *State Farm*, 123 S.Ct. at 1519-20 ("The Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor.").

⁴⁷ Friendly, *supra* note 1, at 119-20.

⁴⁸ More than ninety million lawsuits are filed in state courts every year. Examining the Work of State Courts (Brian J. Ostrom et al., eds., Nat'l Center for State Courts) (reporting that about 93 million new cases were filed in 2001 and 2000). Empirical studies show that, depending on the kind of case, 50% to 75% of the cases settle. See Charles Silver, *Does Civil Justice Cost Too Much?*, 80 *Tex. L. Rev.* 2073, 2107-08 (2002) (reviewing empirical studies of settlement rates).

⁴⁹ Handler, *supra* note 9, at 9.

⁵⁰ See text accompanying *supra* note 47.

⁵¹ See, e.g., Frank H. Easterbrook, William M. Landes & Richard A. Posner, *Contribution Among Antitrust Defendants: A Legal and Economic Analysis*, 23 *J.L. & Econ.* 331, 355 (1980) (modeling settlement decision and concluding that "settlement will result . . . [when] both parties can be made better off ex ante from an out-of-court settlement compared to their expected outcomes of a trial").

⁵² Janet Cooper Alexander, *Do the Merits Matter? A Study of Settlements in Securities Class Actions*, 43 *Stan. L. Rev.* 497, 498 (1991) ("[F]ederal policy (and probably that of most states) favors settlement over trial, to such an extent that it is a 'familiar axiom that a bad settlement is almost always better than a good trial.'" (quoting *In re Warner Communications Sec. Litig.*, 618 F. Supp. 735, 740 (S.D.N.Y. 1985))); Robert G. Bone & David S. Evans, *Class Certification and the Substantive Merits*, 51 *Duke L.J.* 1251, 1257-58 (2002) ("Over the past three decades, settlement has emerged as a central goal of the federal

Few judges complain about this, even though fear of losing at trial typically generates cheap settlements because plaintiffs and their lawyers are more risk averse than defendants.⁵³ Many advocates of tort reform want to turn up the pressure to settle by making trials even riskier and more expensive than they already are.⁵⁴

Ordinarily, then, the fear of losing at trial (whether coupled with risk aversion or not) does not justify a blackmail claim. Nor does the fear of losing normally have this effect when the amount at stake in a lawsuit is exceptionally great. If it did, all large lawsuits would be suspect, not just class actions, because all may generate extreme pressure to settle.⁵⁵ For an obvious reason, however, a blackmail charge leveled against all large lawsuits cannot persuade. A civil justice system is supposed to enforce valid payment obligations, including (perhaps even especially) obligations that are large.⁵⁶ Companies that break billion-dollar promises should face billion-dollar losses at trial, as should companies that commit billion-dollar torts. A civil justice system in proper working order should therefore always cause a person with an enormous legal obligation to fear losing an enormous sum at trial. When such a person settles instead of going to trial, a persuasive case of wrongful coercion cannot be made.

To the contrary, when claims are both enormous and valid, the time to worry is when a defendant faces insufficient judgment-induced

courts: judges encourage it, procedural rules facilitate it, and scholars write about it extensively.”).

⁵³ See *infra* notes 218-219 and accompanying text.

⁵⁴ For example, tort reform groups support loser-pays requirements, and certain early-settlement-offer rules would make trials more expensive for losing parties. See, e.g., Hearing on Issues Related to the Legal Reform Issues in the Contract with America Before the House Comm. on the Judiciary Subcomm. on Courts and Intellectual Property, 102d Cong. (1995) (statement of Walter K. Olson, Senior Fellow, Manhattan Institute) (endorsing loser-pays system); Lester Brickman et al., *Rethinking Contingency Fees: A Proposal to Align the Contingency Fee System with Its Policy Roots and Ethical Mandates* (1994) (outlining proposal for payment of contingency fees for early settlement offers).

⁵⁵ Many large lawsuits are not class actions. In the 1980s, Pennzoil won an \$11 billion trial judgment against Texaco, which eventually declared bankruptcy and settled for \$3 million. See Michael Ansaldi, *Texaco, Pennzoil and the Revolt of the Masses: A Contracts Postmortem*, 27 *Hous. L. Rev.* 733, 735-36 (1990). In the 1990s, tobacco companies settled suits brought by each of the fifty states to recover Medicaid funds for over \$200 billion. See W. Kip Viscusi, *Smoke-Filled Rooms: A Postmortem on the Tobacco Deal* 33-59 (2002). In 2002, Larry Silverstein sought \$7 billion from various property insurers after terrorists destroyed the World Trade Center, a claim that generated a suit by his biggest insurer to limit their liability. See Stephen Labaton, *Insurer Sues to Limit Its Payout for World Trade Center*, *N.Y. Times*, Oct. 23, 2001, at B5. Also in 2003, ExxonMobil Corp. won \$416.8 million in the jury trial of a breach of contract action against Saudi Basic Industries Corp. See Steve Seidenberg, *Exxon Mobil Wins \$416.8 Million Jury Verdict*, *Nat'l L.J.*, Mar. 31, 2003, at A15.

⁵⁶ See generally Silver, *supra* note 48, at 2075 (“Civil justice consists of the satisfaction of valid civil claims and the discharge of valid civil obligations.”).

pressure to settle, not when this form of pressure reflects the expected value of the claim. The Supreme Court made this point in *Amchem Products, Inc. v. Windsor*,⁵⁷ stating that the threat of winning at trial is the “hammer” that enables class representatives to bargain for fair value in settlement negotiations. When the threat is absent, as it is in untriable settlement classes, the pressure on the defendant is unacceptably low and absent plaintiffs receive inadequate representation. In class actions, then, deficient settlement pressure raises due process concerns.⁵⁸ Maximum pressure does not.

Judge Friendly did not offer any other serious reason to question the normativity of defendants’ consent to class action settlements. His contention that federal courts are not adapted to handling small claims is unpersuasive.⁵⁹ Judge Friendly may have wanted Congress to authorize only injunctions and civil fines, but Congress disagreed.⁶⁰ Given Congress’s decision, federal courts must attempt to compensate victims of wrongful conduct whose losses are small, even when doing so forces corporate defendants into insolvency. The purpose of the procedural system is to enforce valid laws, including civil statutes, not to let wrongdoers pay less than they owe.⁶¹

Judge Friendly’s observation that little relief reaches class members with small claims adds nothing to the mix.⁶² It is true that their claims are small to begin with and that litigation costs further reduce their recoveries. These are good reasons for quarrelling with Congress’s decision to provide compensatory remedies, but not for describing class actions as judicial blackmail. Small claims and high transaction costs on the plaintiffs’ side neither signal nor create undue pressure on defendants. The pressure flows entirely from the possibility of taking an enormous hit at trial, a possibility that derives from

⁵⁷ 521 U.S. 591, 621 (1997) (“Class counsel confined to settlement negotiations could not use the threat of litigation to press for a better offer, and the court would face a bargain proffered for its approval without benefit of adversarial investigation.” (citations omitted)). The author contributed an amicus brief in *Amchem* arguing against certification for settlement purposes of class actions that could not be tried.

⁵⁸ See *id.* at 619-21.

⁵⁹ Friendly, *supra* note 1, at 120.

⁶⁰ See Kenneth W. Dam, *Class Actions: Efficiency, Compensation, Deterrence, and Conflict of Interest*, 4 J. Legal Stud. 47, 55 (1975) (stating that whether remedy is “treble or single damages or, in cases where only equitable relief is possible, no damages at all[,] [t]he judge may properly take those legislative judgments as binding on him as to the optimal amount of deterrence”).

⁶¹ *Id.* at 60-61 (defending class actions on deterrence grounds even when claims are so small that “compensation can never be paid” to absent claimants).

⁶² Handler also had a negative view of small-claim class actions. He had “little doubt that massive class actions constitute a net liability for antitrust, for federal courts, and for society generally.” Handler, *supra* note 9, at 10. While he would not have abolished class actions entirely, he would have cut back small-claim suits significantly.

the availability of efficacious procedures for enforcing valid substantive laws.

Friendly thus leaves one wondering about the central issue: Even assuming that defendants settle class actions to avoid the risk of sustaining enormous losses at trial, why is this bad? Why is it an indictment of the class action instead of a sign that class actions are working as they should? Where Handler used a due process notion to undermine the traditional consent-based justification for settlements, Friendly offered only his personal conviction that class actions wrongly threaten corporations with ruin.

B. Richard Posner: Version Three of the Blackmail Charge

Judge Posner cried “blackmail” in *In re Rhone-Poulenc Rorer, Inc.*, a case in which the class consisted of persons who contracted the Human Immunodeficiency Virus (HIV) as a result of exposure to tainted blood products manufactured by the defendants.⁶³ Posner cited both Judge Friendly and Professor Handler in support, giving no indication that their arguments differed.

Judge Posner used the blackmail thesis twice in *Rhone-Poulenc*, first when deciding that the risk of irreparable harm justified mandamus review,⁶⁴ and second when addressing certification proper.⁶⁵ Posner thought review was warranted because he feared the defendants would capitulate rather than risk losing billions at trial.

[I]f the class had not been certified . . . [t]he defendants would be facing 300 suits.

. . . The potential damages in each one are great. But the defendants have won twelve of the first thirteen [trials in the individual cases], and, if this is a representative sample, they are likely to win most of the remaining ones as well. Perhaps in the end . . . they will be compelled to pay damages in only 25 cases, involving a potential liability of perhaps no more than \$125 million altogether. . . . [I]f the class certification stands[, however,] . . . [a]ll of a sudden [the defendants] will face thousands of plaintiffs. . . .

Suppose that 5,000 of the potential class members are not yet barred by the statute of limitations. . . . [The defendants] might, therefore, easily be facing \$25 billion in potential liability (conceivably more), and with it bankruptcy. They may not wish to roll these dice. That is putting it mildly. They will be under intense pressure to settle. Judge Friendly, who was not given to hyperbole, called settlements induced

⁶³ 51 F.3d 1293, 1294 (7th Cir. 1995).

⁶⁴ *Id.* at 1297.

⁶⁵ *Id.* at 1299-1300.

by a small probability of an immense judgment in a class action “blackmail settlements.”⁶⁶

This argument entwines several ideas. First, a class action reaches more claimants than a conventional lawsuit because it makes relief available to persons with live claims who have not sued. In *Rhone-Poulenc*, certification put 4600 more people into the pool.⁶⁷ This caused the defendants’ expected loss at trial to grow significantly and sent their maximum possible loss through the roof.

Second, certification increases the variance associated with the expected trial outcome. To see this, compare a single coin toss where the stakes are win \$1 million or lose \$1 million with one thousand coin tosses worth +/- \$1000 each. The two sets of gambles have the same expected value: $(.5)(\$1 \text{ million}) + (.5)(-\$1 \text{ million}) = \$0$; and $(1000)((.5)(\$1000) + (.5)(-\$1000)) = \$0$. Yet, in the single large gamble, the only possible outcomes are +\$1 million and -\$1 million. To achieve either extreme result in the series of smaller gambles one would have to call or miscall the coin toss all 1000 times, a practical impossibility. The actual result should approximate closely the expected result when the coin is tossed 1000 times.

By certifying a class in *Rhone-Poulenc*, the trial judge chose the single enormous gamble over the series of smaller ones. Following Posner, the only outcomes possible in the large trial were “liable” and “not liable,” i.e. “lose \$0” or “lose \$25 billion.” The latter result, although unlikely to occur, was a serious financial threat to the defendants. The choice of procedures therefore had the potential to activate the defendants’ risk aversion. Individual trials posed no solvency threat, so defendants could react to them rationally. The class action posed a remote, but real, risk of catastrophe, so risk aversion would color defendants’ reaction to it.

⁶⁶ Id. at 1298 (citations omitted). Because Judge Posner described the impact of class certification in such negative terms, it is surprising that he softened his condemnation of the procedure later in the opinion:

We do not want to be misunderstood as saying that class actions are bad because they place pressure on defendants to settle. That pressure is a reality, but it must be balanced against the undoubted benefits of the class action that have made it an authorized procedure for employment by federal courts.

Id. at 1299. Apparently, a procedure that enables one side to blackmail the other can be good on the whole; it can generate benefits that exceed its detriments. Yet, if the downside of certification is blackmail, the upside needed to justify it must be extraordinary. Rule 1 of the Federal Rules of Civil Procedure states that all rules must “be . . . administered to secure the just . . . determination of every action.” Fed. R. Civ. P. 1. In order for it to be “just” to subject a defendant to a blackmail threat, an enormous offsetting advantage would seem to be required.

⁶⁷ The 300 lawsuits Posner concluded would result from a decision not to certify contained 400 plaintiffs. *Rhone-Poulenc*, 51 F.3d at 1296.

Third, the plaintiffs' claims were weak. The plaintiffs lost twelve of thirteen cases that went to trial before the class was certified. Judge Posner reiterated this statistic later in the opinion, writing that "[a] notable feature of this case . . . is the demonstrated great likelihood that the plaintiffs' claims . . . lack legal merit."⁶⁸ Combining this point with certification's potential to increase claim numbers and trigger defendants' risk aversion yields a palpable conclusion: Class actions generate blackmail settlements by altering bargaining environments in ways that motivate defendants to pay more than claims are worth.

Judge Posner's three-piece argument resembles Judge Friendly's in a key respect. Both judges contend that corporate defendants settle class actions to avoid enormous judgments.⁶⁹ But Posner's argument differs from Friendly's in other ways that are worth exploring.

1. *Claim Size and Claim Strength*

Posner compared the maximum amount the *Rhone-Poulenc* defendants stood to lose in a class action (\$25 billion) with the expected loss in a series of conventional lawsuits (\$125 million). Judge Friendly made no similar comparison when discussing *Eisen* for an obvious reason: *Eisen* contained millions of small, negative expected value (NEV) claims that were not individually viable. Posner thus made the blackmail charge in a context that Friendly did not address—namely, class litigation involving larger claims with positive expected values (PEV) in conventional trials. One therefore must ask whether the shift from NEV claims to PEV claims matters for the purpose of deciding whether class actions blackmail defendants.

The shift matters to Judge Posner. His second application of the blackmail charge makes this clear. Posner thinks it wrong to saddle defendants with a single class-based trial

when it is entirely feasible to allow a final, authoritative determination of their liability . . . to emerge from a decentralized process of multiple trials. . . . In most class actions—and those the ones in

⁶⁸ Id. at 1299. Posner continues:

This is the inference from the defendants' having won 92.3 percent (12/13) of the cases to have gone to judgment. Granted, thirteen is a small sample and further trials, if they are held, may alter the pattern that the sample reveals. But whether they do or not, the result will be robust if these further trials are permitted to go forward, because the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals.

Id. at 1299-1300.

⁶⁹ The Supreme Court gave this view some support in *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 476 (1978) ("Certification of a large class may so increase the defendant's potential damages liability and litigation costs that he may find it economically prudent to settle and to abandon a meritorious defense.").

which the rationale for the procedure is most compelling—individual suits are infeasible because the claim of each class member is tiny relative to the expense of litigation. That plainly is not the situation here.⁷⁰

Posner and Friendly thus differ over small-claim class actions. Posner thinks the case for certification is “most compelling” when claims are NEV.⁷¹ Friendly thinks class actions containing NEV claims are detrimental because they threaten defendants with financial ruin while doing little to help claimants.

Posner’s support for small-claim class actions requires one to question his negative comments on the propensity of the *Rhone-Poulenc* class to increase the size of the claimant pool.⁷² When claims are NEV, a class action makes the difference between recovering and not recovering for everyone. Certification increases the number of potential beneficiaries from 0 to n , where n equals all persons with live claims. Because Posner views small-claim cases favorably, he must see value in bringing relief to persons with NEV claims who would not otherwise receive it.

Posner may have viewed the pool-expanding power of the class action negatively in *Rhone-Poulenc* because the victims’ claims were demonstrably weak.⁷³ All NEV claims involve expected recoveries that are small relative to expected litigation costs. However, some NEV claims combine small damages with strong legal theories, while others combine large damages with weak theories. A case with \$500 in damages and a 90% chance of success has the same expected value at trial ($\$500 \times .9 = \450) as one with \$4500 in damages and a 10% chance of success ($\$4500 \times .1 = \450). Both will qualify as NEV claims if expected litigation costs exceed the expected recovery, but it is appropriate to distinguish between them even so. The high probability claim is a meritorious NEV claim; the low probability claim is an unmeritorious or long-shot NEV claim.⁷⁴

Judge Posner appears to reserve the blackmail charge for class actions like *Rhone-Poulenc*, which aggregate long-shot NEV or PEV

⁷⁰ *Rhone-Poulenc*, 51 F.3d at 1299.

⁷¹ By describing small claim lawsuits this way, Posner also deviated from Handler, who shared Friendly’s antipathy for these cases.

⁷² Schwartz criticizes Posner for commenting negatively on the tendency of class actions to bring relief to victims with large claims who would not otherwise receive it. Schwartz, *supra* note 14, at 304.

⁷³ See *supra* note 68 and accompanying text.

⁷⁴ One can distinguish frivolous claims from long-shot claims in terms of probability of success. See Charles M. Yablon, A Dangerous Supplement? Longshot Claims and Private Securities Litigation, 94 Nw. U. L. Rev. 567, 568 (2000) (describing long-shot claims as having “relatively low probabilities of success (say, between ten and thirty percent),” and frivolous claims as having “no chance of success”).

claims. He endorses class actions that combine meritorious NEV claims because these lawsuits bring relief to deserving claimants who would not otherwise receive it. He opposes class actions that combine long-shot NEV or PEV claims because these lawsuits increase defendants' exposure to weak claims, increase the variance associated with aggregate expected losses, and generate remote but real and serious threats to defendants' finances. Rather than make long-shot NEV or PEV claims more viable by trying them in large groups, Posner would deny certification and let individual trials (should there be any) determine their value.⁷⁵

Judges Posner and Friendly thus target the blackmail charge at different subsets of the class action universe. Friendly indicts class actions that generate company-busting judgments by combining claims involving small damages. Posner attacks class actions that combine long-shot NEV or PEV claims.

2. *Attitudes Towards Risk and Overpayments*

Judge Posner also uses a different normative premise than either Judge Friendly or Professor Handler. Posner's fear is not just that defendants will pay real dollars to settle long-shot claims; it is that risk aversion will cause defendants to pay more than victims' claims are worth. Posner emphasizes two things. First, the right settlement payment for the *Rhone-Poulenc* class was probably \$0 because the plaintiffs had lost twelve of thirteen trials and the lone victory was a fluke.⁷⁶ Second, the defendants would nonetheless have paid a substantial amount to settle because the class action created a remote risk of financial ruin that they could not ignore. The class action was undesirable, then, because it created pressure to overpay.

⁷⁵ Posner expressly stated a preference for conventional trials when damages are large: That kind of thing [a single jury hurling an industry into bankruptcy with an enormous verdict in a class action] can happen in our system of civil justice . . . without violating anyone's legal rights. But it need not be tolerated when the alternative exists of submitting an issue to multiple juries constituting in the aggregate a much larger and more diverse sample of decision-makers. That would not be a feasible option if the stakes to each class member were too slight to repay the costs of suit, even though the aggregate stakes were very large and would repay the costs of a consolidated proceeding. But this is not the case with regard to the HIV-hemophilia litigation. Each plaintiff if successful is apt to receive a judgment in the millions.

Rhone-Poulenc, 51 F.3d at 1300.

⁷⁶ Posner's critique of the plaintiff's novel liability theories strengthens this impression. *Id.*; see also *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910, 912 (7th Cir. 2003) (Posner, J.) ("When enormous consequences turn on the correct resolution of a complex factual question, the risk of error in having it decided once and for all by one trier of fact rather than letting a consensus emerge from several trials may be undue.").

The overpayment argument asserts that defendants facing class actions are risk averse. Ignoring litigation costs and other complicating factors, a risk-neutral defendant will pay no more than the expected value of a claim at trial. Thus, when the expected judgment is \$0, a risk-neutral defendant will pay nothing. This is true whether the variance associated with the expected outcome is small or great. In the coin toss example, a risk-neutral person would pay \$0 to avoid the single (win \$1 million, lose \$1 million) gamble. A risk-neutral person would also pay \$0 to avoid the series of one thousand +/- \$1000 gambles. The expected loss is \$0 in both situations.

Variance matters to risk-averse decisionmakers, however, because they give a gamble's downside potential disproportionate weight. A risk-averse person would fear a \$1 million loss more than he would value an equally likely \$1 million gain. Such a person therefore would pay something to avoid the gamble, even though its expected value is \$0.

Generally, risk aversion is thought to intensify as variance increases. A risk-averse person would therefore pay more to avoid the single +/- \$1 million gamble than to escape the series of one thousand +/- \$1000 gambles. Posner's point appears to be that substituting a single class action trial for a series of individual trials increases variance and magnifies defendants' aversion to risk, causing them to overpay.

There is only weak evidence that Posner actually regards risk aversion as the force behind overpayments. He does not expressly say that the defendants are risk averse in *Rhone-Poulenc*. However, he emphasizes "the sheer *magnitude* of the risk"⁷⁷ defendants face in class actions and writes of defendants "forced by fear of the risk of bankruptcy to settle even if they have no legal liability."⁷⁸ Posner's decision to emphasize these considerations and to downplay the expected loss has led others to identify risk aversion as his concern, and this seems right.⁷⁹

⁷⁷ *Rhone-Poulenc*, 51 F.3d at 1297.

⁷⁸ *Id.* at 1299.

⁷⁹ Schwartz argues that

[a]s a positive matter, the worse the negative outcome is, the greater will be the premium that a [risk-averse] party will pay [to avoid a gamble]. For the defendant, this depends on the magnitude of the liability to which she will be subjected if she loses the case. I interpret the characterization of the magnitude of liability as "immense" to mean so great that defendant will pay a "large" premium to avoid being subjected to even a small risk that liability will be imposed. The implicit normative basis for disapproving an outcome of this kind must be that a point is reached where risk aversion plays "too large" a role in determining how much the defendant will pay in settlement. As a

Other judges also focus on the worst possible outcome (e.g., bankruptcy) instead of the expected loss. Therefore, they too seem to embrace risk aversion without expressly saying so. Judge Friendly says the judgments possible in class actions are “horrendous.” Judge Frank Easterbrook, whose views are described in more detail below, writes of settlements “that reflect[] the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.”⁸⁰ Judge Jerry Smith says that “[t]he risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.”⁸¹ Risk aversion is a common theme.

Risk aversion provides a crucial predicate for overpayment, but the predicate is factual, not normative. Seeing this, one cannot help but wonder about Posner’s normative view. Why are overpayments induced by risk aversion bad? Clearly, Posner cannot draw on Handler’s untriability-based due process argument. Only triable lawsuits threaten defendants with outsized verdicts, and triable class actions do not raise Handler’s due process concern. Posner also needs a different normative argument than Friendly. Friendly’s blackmail charge is compatible with underpayment, as previously explained.⁸² Posner limits blackmail to cases in which defendants overpay.

Posner’s normative contention appears to be that overpayments are bad because they are inefficient, unjust, or undesirable for other reasons. Posner does not say which, but given his views, efficiency is the most likely concern. A plausible efficiency-based argument can also easily be traced. By comparison to a series of small trials, a class action that plays on a defendant’s risk aversion is likely to overdeter. Because the purpose of litigation is to encourage efficient conduct

result, recovery for the plaintiff is “too large” because of the extent to which the plaintiff has exploited the defendant’s risk aversion.

Schwartz, *supra* note 14, at 299.

⁸⁰ *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1016 (7th Cir. 2002).

⁸¹ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996). Twenty years before *Castano*, the Fifth Circuit rejected a claim of undue pressure:

We do not agree . . . that there is a serious possibility that the defendant, “faced with the enormous task of defending these thousands of claims, might be pressured into a compromise settlement.” . . . [T]he specter of large cost will materialize only if, after a preliminary hearing, it appears likely that damages are actually due a large number of class members.

Roper v. Consurve, Inc., 578 F.2d 1106, 1116 (5th Cir. 1976), *aff’d sub nom. Deposit Guar. Nat’l Bank v. Roper*, 445 U.S. 326 (1980). In *Castano*, Judge Smith neither noted the departure from *Roper* nor explained why *Roper* was wrong.

⁸² See *supra* text accompanying notes 34-35. Professors Hay and Rosenberg write that Friendly and Handler were concerned about overpayments. Hay & Rosenberg, *supra* note 13, at 1378 & n.3 (citing Friendly and Handler for proposition that “‘blackmail’ settlements” are those “in which the defendant is bludgeoned into settling cases for more than they are worth”). I do not think that the texts support this attribution.

outside of the courthouse, a class action is undesirable when claims practicably can be tried individually.

3. *Blackmail and the Facts of Rhone-Poulenc*

Posner's blackmail thesis appears to require a triable class action that, by aggregating long-shot claims, creates a potential damages award large enough to trigger risk aversion and cause a defendant to overpay. Assuming this is right, an interesting question is whether this combination of conditions existed in *Rhone-Poulenc*. The proposed class action trial may have threatened the defendants with less risk than Posner asserted, and the plaintiffs' claims may have been worth more than he believed.

Posner contended that the class action exposed the defendants to a \$25 billion loss. It is not clear that the defendants actually faced this extreme risk. The trial judge certified a special kind of class, in which the jury would render a special verdict limited to negligence. Had the jury found for the defendants on this issue, its verdict would probably have ended all the cases and the defendant would have lost \$0. Had the jury found for the class, however, individual lawsuits would have proceeded. The trial plan called for individual victims to prosecute tort suits in which the jury's finding on negligence would bind the defendants.⁸³

Given the anticipated manner of proceeding, the jury's verdict in the class action could not have required the defendants to pay absent class members \$25 billion or, indeed, anything. It could only have established (a) that all plaintiffs' negligence claims were worthless because the defendants had exercised reasonable care, or (b) that the defendants were negligent, in which event individual trials on causation, damages, and other issues would have taken place in other venues. These follow-up trials would have liquidated the defendants' liability.⁸⁴

⁸³ *Rhone-Poulenc*, 51 F.3d at 1297.

⁸⁴ Judge Posner recently recognized the importance of follow-up trials in *Mejdrech v. Met-Coil Sys. Corp.*, 319 F.3d 910 (7th Cir. 2003):

First, the two questions that the judge has set for class treatment—whether there was unlawful contamination and what the geographical scope of the contamination was—are not especially complex. Second, even if these questions are answered against Met-Coil, the consequences for it will not be catastrophic. The individual class members will still have to prove the fact and extent of their individual injuries. The need for such proof will act as a backstop to the class-wide determinations. If the judge erroneously finds that the class members' homes were in the area of contamination, none of the class members will be able to prove any damages and as a result the cost of this lawsuit to Met-Coil, though not trivial, will be limited to the cost of defending the suit.

If the jury in the class action could not have ordered the defendants to pay absent class members anything, Posner's assertion that certification "forc[ed]" the defendants "to stake their companies on the outcome of a single jury trial"⁸⁵ was hyperbolic. Certainly, the defendants would have feared an adverse finding on negligence and might have paid all persons with hemophilia something to avoid it. But the factors bearing on this decision were more complicated and subtle than Posner's bold use of the \$25 billion figure suggests.

When assessing the value of a negligence finding in the class action, the defendants would have had to estimate the number of victims with live claims who would have taken advantage of the finding by suing individually. Posner hypothesized that the class action increased the number of claims from 400 to 5000.⁸⁶ This too seems exaggerated. For Posner's math to work, 4600 more persons with hemophilia would have had to sue after the class action jury came back. Even if this many people had live claims—something Judge Posner assumed but did not demonstrate—some important facts suggest that few would have sued. Despite having a terrible disease, enormous damages, good knowledge of the facts,⁸⁷ a high degree of group organization, and ready access to counsel, most of these potential plaintiffs had slept on their rights for about a decade.⁸⁸ Given their demonstrated torpidity, there is no obvious reason to predict that a plaintiff victory in the class action would have induced so many victims to sue.⁸⁹

To this point, I have suggested that the *Rhone-Poulenc* defendants faced less risk in the class action trial than Judge Posner asserted. The trial therefore may have been less likely to trigger risk aversion than Posner claimed. The likelihood of risk aversion is, however, only half of the equation. Posner's version of the blackmail charge asserts that risk aversion causes defendants to overpay. One

Id. at 912.

⁸⁵ *Rhone-Poulenc*, 51 F.3d at 1299.

⁸⁶ Id. at 1298.

⁸⁷ See id. ("The risk to hemophiliacs of having become infected with HIV ha[d] been widely publicized [so that] it [was] unlikely that many hemophiliacs [were] unaware of it.")

⁸⁸ See id. at 1296 ("Probably most of the hemophiliacs . . . were infected in the early 1980s . . ."). One could contend that victims failed to sue because lawyers told them negligence could not be proven. Yet, because underclaiming is common, it is a safe bet that many would not have sued in any event. Some studies of underclaiming are discussed in Silver, *supra* note 48, at 2076.

⁸⁹ Many empirical studies show that tort victims are slow to sue. For example, victims of medical malpractice seek compensation ten percent of the time or less. See Michelle M. Mello & Troyen A. Brennan, Deterrence of Medical Errors: Theory and Evidence for Malpractice Reform, 80 *Tex. L. Rev.* 1595, 1618-20 (2002) (describing empirical studies showing low claiming rates by malpractice victims).

therefore must also ask whether the victims' claims were worth as little as Posner believed.

Posner used the plaintiffs' dismal record in tried cases to show that the claims were valueless, thereby creating the impression that any positive settlement payment would have been too great. His focus on trials can be questioned.⁹⁰ In most litigation contexts, settlements vastly outnumber trials. One therefore might view settlements as sources of information about claim values. Settlements may even indicate values more accurately and robustly than trials.⁹¹ They occur in larger numbers, and settlement negotiators have more freedom to fine-tune payments than jurors, who work with the stark extremes of "liability" and "no liability." Settlement values can also change quickly in response to new information. After years of trial victories, plaintiffs may change a 1-in-13 win rate to a 14-of-26 record. Even then, the trial record would show only that plaintiffs were slightly more likely to win than lose. By contrast, settlement values may shift markedly in response to a single trial victory (or loss), especially when the result is thought to reflect newly available evidence.⁹²

The desirability of reviewing settlements increases when one considers that tried cases are unlikely to be representative of the larger universe of disputes.⁹³ Settlement negotiations have a sorting effect, as parties resolve those cases upon which they agree and jockey over the order in which the remainder will be adjudicated. This sorting effect can cause tried cases to be unusual, especially in contexts like defective-products litigation where defendants have more at stake in particular cases than individual plaintiffs. By settling good cases for large amounts and defending bad ones aggressively, defendants can

⁹⁰ For a discussion of the difficulty of interpreting win-rate data, see Kevin M. Clermont & Theodore Eisenberg, *Do Case Outcomes Really Reveal Anything About the Legal System? Win Rates and Removal Jurisdiction*, 83 *Cornell L. Rev.* 581, 589 (1998) (noting that set of claims adjudicated may not represent broader class of similar claims).

⁹¹ In *Bridgestone/Firestone*, Judge Easterbrook agreed that settlements can value claims accurately: "Once a series of decisions or settlements has produced an accurate evaluation of a subset of the claims (say, 1995 Explorers in Arizona equipped with a particular tire specification) the others in that subset can be settled or resolved at an established price." *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002). Hay and Rosenberg suggest that the victims' record of losses may have reflected the defendants' spending advantage on common questions. Hay & Rosenberg, *supra* note 13, at 1392 n.30. I do not contend that individual settlements of related claims accurately indicate what victims ought to receive; I only identify the possibility that this is so.

⁹² See Joseph Sanders, *The Bendectin Litigation: A Case Study in the Life Cycle of Mass Torts*, 43 *Hastings L.J.* 301, 357-58 (1992) (discussing significant impact of late plaintiff victories on settlement prices in Bendectin cases, where defendant won most early trials).

⁹³ See Clermont & Eisenberg, *supra* note 90, at 589 (discussing possible impact of asymmetric stakes on plaintiff win rates).

manipulate the trial record to their advantage and drive down settlement values in pending cases. Although “win rates for settlements correlate with those of judgments,” it must be noted that “it is normally dangerous to work only with trial data.”⁹⁴

Posner did not say whether the twelve plaintiffs with hemophilia who lost at trial had typical claims. For aught one can tell, all may have shared needles with illegal drug users, visited prostitutes, contracted AIDS from their spouses, or engaged in unprotected intercourse. Posner recognized the possibility that the losing plaintiffs were idiosyncratic. He allowed that “further trials . . . may alter the pattern that the sample [of tried cases] reveal[ed].”⁹⁵ Even so, he took no account of settled claims.

Apparently, a market in settlements did exist. According to Professor Jay Tidmarsh, between 100 and 150 settlements had occurred in hemophilia-HIV cases as of August 1996.⁹⁶ Because *Rhone-Poulenc* was argued in early 1995, the number of settlements was likely far smaller then, but even a few settlements can make a big difference when the number of trials is only thirteen. Suppose that there were twenty settlements involving payments. Combining them with the tried cases, one would find that plaintiffs recovered something 65% of the time (21/33). Thirty settlements would yield a recovery rate of 72% (31/43). With forty settlements, the rate would be 77% (41/53). At fifty settlements, the 80% level would be reached (51/63).

According to Tidmarsh, there were fifteen trials, of which the plaintiffs appeared to have won two, and 100 to 150 settlements as of August 1996.⁹⁷ This works out to a recovery rate of 89% (102/115) on the low end and 92% (152/165) on the high end.⁹⁸ The possibility of

⁹⁴ *Id.* at 590-91.

⁹⁵ *Rhone-Poulenc*, 51 F.3d at 1299. On the unrepresentativeness of tried cases, see, for example, Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 *RAND J. Econ.* S92, S92 (1997) (“[T]he process through which cases are selected for litigation . . . yields a set of lawsuits and plaintiffs that is far from a random selection either of potential claims or . . . of potential claimants.”).

⁹⁶ Jay Tidmarsh, *Mass Tort Settlement Class Actions: Five Case Studies* 92 (1998). Professor Tidmarsh did not describe the terms of these settlements, but in commenting to me on an early draft of this Article, he recollected that the settlements were fairly cheap, but he did not cast doubt on my assumption that each settlement involved a positive payment of some amount. The draft, along with Professor Tidmarsh’s handwritten notes, is on file with the *New York University Law Review*.

⁹⁷ See Tidmarsh, *supra* note 96, at 92 (describing fifteen verdicts and 100 to 150 settlements); *id.* at 99 (discussing recent state court verdict for \$2 million).

⁹⁸ Obviously, the reasoning in this paragraph and the preceding one ignores cases that were dismissed on the merits short of trial, for example, because the statute of limitations expired. Willging et al., *supra* note 15, at 34, suggests that some cases are dismissed on summary judgment but does not say how many. The inclusion of dismissed cases would cause the rate of recovery to fall.

the defendants paying something to everyone to avoid a class-based trial on negligence looks a lot less like blackmail when one considers settlements.

The subsequent history of the hemophiliac-AIDS litigation also suggests that individual claims had positive value. A year and a half after Posner decertified the *Rhone-Poulenc* class and seemingly in deliberate defiance of his opinion, the parties negotiated a class-based settlement that paid \$100,000 per “case” of HIV infection, exclusive of attorneys’ fees and costs, which were provided for separately.⁹⁹ The defendants offered this substantial sum to every person harmed by tainted blood products even though they no longer faced the threat of a class-based trial. A plausible explanation, though not the only one, is that all claims had positive value in conventional trials.

Real questions thus exist regarding Posner’s decision to level the blackmail charge in *Rhone-Poulenc*. The trial plan appears to have exposed the defendants to less risk than he contended, and settlement-related evidence suggests the plaintiffs’ claims were worth more than he thought.

C. Frank Easterbrook: Version Four of the Blackmail Charge

Judge Easterbrook expresses concerns about blackmail in three cases,¹⁰⁰ always citing Posner’s *Rhone-Poulenc* opinion in support. He neither cites Friendly or Handler nor claims to follow them. Given this, it is natural to locate Easterbrook in Posner’s camp. Yet when one examines Easterbrook’s argument and considers the facts of the cases in which he makes it, important differences between his version and Posner’s emerge.

Start with *West v. Prudential Securities, Inc.*, a securities case alleging that a broker either lied or improperly used nonpublic information.¹⁰¹ Judge Easterbrook rationalized the decision to hear a Rule 23(f) appeal of a certification decision on the ground that

very few securities class actions are litigated to conclusion

What is more, some scholars believe that the settlements in securities cases reflect [a] high risk of catastrophic loss, which together with imperfect alignment of managers’ and investors’ interests leads defendants to pay substantial sums even when the plaintiffs have

⁹⁹ Tidmarsh, *supra* note 96, at 93. A “case” consisted of the infected individual plus all persons with derivative claims. *Id.* at 94.

¹⁰⁰ In addition to the two cases discussed at length in this Section, Judge Easterbrook invoked excessive settlement pressure when decertifying a class in *Szabo v. Bridgeport Machs., Inc.*, 249 F.3d 672, 675 (7th Cir. 2001), a case in which Judge Posner also participated.

¹⁰¹ 282 F.3d 935 (7th Cir. 2002).

weak positions. The strength of this effect has been debated, but its existence is established. The effect of a class certification in inducing settlement to curtail the risk of large awards provides a powerful reason to take an interlocutory appeal.¹⁰²

On the surface, Easterbrook's analysis closely resembles that of Posner. Posner claims that the risk-averse *Rhone-Poulenc* defendants would have overpaid claimants with losing cases when threatened with a class action. Easterbrook says "defendants . . . pay substantial sums" to settle class actions "even when plaintiffs have weak positions" because of the "high risk of catastrophic loss."¹⁰³

Yet while Posner uses trial outcomes in conventional lawsuits to benchmark claim values, Easterbrook does not indicate how to establish the weakness of plaintiffs' position. He does not rely on trial outcomes in conventional lawsuits, and doing so in securities lawsuits would raise questions. Securities class actions mix small numbers of large investors together with large numbers of small investors, as Professor Janet Cooper Alexander pointed out in an article Judge Easterbrook cited in *West*.¹⁰⁴ Because small securities claims are not viable individually, using conventional trials as benchmarks would mean that blackmail occurs whenever small shareholders receive more than \$0, no matter how meritorious their claims.

West and other securities class actions thus differ from *Rhone-Poulenc* in a respect that mattered to Judge Posner. As we saw, Posner identified meritorious NEV lawsuits as the "most compelling" candidates for class certification.¹⁰⁵ By choosing the values of claims in conventional trials as his benchmark, Posner also put small-claim class actions beyond the reach of his blackmail charge. NEV claims are unlikely to generate conventional lawsuits or trials.¹⁰⁶

Evidently, Judge Easterbrook thinks blackmail occurs regularly in class actions that aggregate small claims. His version of the blackmail thesis thus resembles Judge Friendly's as much as Judge Posner's.

¹⁰² Id. at 937 (citations omitted).

¹⁰³ Id. He makes the same point in *Szabo*, writing that "class certification turns a \$200,000 dispute (the amount that Szabo claims as damages) into a \$200 million dispute. Such a claim puts a bet-your-company decision to Bridgeport's managers and may induce a substantial settlement even if the customers' position is weak." 249 F.3d at 675.

¹⁰⁴ *West*, 282 F.3d at 937 (citing Alexander, *supra* note 52, at 574-76 (describing breakdown of settlement payments between institutions with large holdings and individuals with small holdings in two securities cases)); see also Elliott J. Weiss & John S. Beckerman, Let the Money Do the Monitoring: How Institutional Investors Can Reduce Agency Costs in Securities Class Actions, 104 Yale L.J. 2053, 2088-94 (1995) (noting that "institutional investors account for a substantial portion of interests represented by plaintiffs' counsel in most class actions").

¹⁰⁵ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).

¹⁰⁶ See *infra* text accompanying note 281.

Both Easterbrook and Friendly offered securities class actions as prime examples of lawsuits in which blackmail settlements occur. In truth, though, the difference between Posner, on the one hand, and Friendly and Easterbrook, on the other, is not clear-cut. Although Posner sang the praises of small-claim class actions in *Rhone-Poulenc*, he cited an article on securities cases when asserting that class actions facilitate blackmail.¹⁰⁷ Because securities cases generally contain many small claims, one fairly can accuse Judge Posner of being inconsistent.

Given the facts in *West*, one might reasonably locate Easterbrook between Posner and Friendly. Like Friendly, he thinks blackmail occurs in small-claim class actions because aggregation subjects defendants to intolerable pressure. Like Posner, he thinks the hallmark of blackmail is that defendants pay more in settlement than claims are worth. Friendly did not impose the second condition. However, Easterbrook is not committed to using the results of conventional trials as benchmarks. He could not be, given the nonviability of small claims. In this respect, he seems to differ from Posner as well.

Easterbrook also says that the “imperfect alignment of managers’ and investors’ interests leads” defendants to pay large amounts to settle class actions containing weak claims.¹⁰⁸ His point appears to be that managers have incentives to entrench themselves by avoiding insolvency risks even when this works to shareholders’ disadvantage. “Financial distress often results in managers losing their jobs. Managers thus prefer decisions that protect them from the consequences of such distress, even though such decisions may not increase the value of the firm.”¹⁰⁹

Easterbrook’s argument does not attribute risk aversion to managers. Risk avoidance is rational from their perspective because it makes them better off. The problem, as Easterbrook says, is that interests misalign: A strategy that helps managers makes shareholders worse off.¹¹⁰ The difficulty lies in seeing what follows from

¹⁰⁷ See *Rhone-Poulenc*, 51 F.3d at 1298 (citing Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission’s Authority*, 107 *Harv. L. Rev.* 963, 973 n.38 (1994)).

¹⁰⁸ *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

¹⁰⁹ Robert K. Rasmussen, *The Ex Ante Effects of Bankruptcy Reform on Investment Incentives*, 72 *Wash. U. L.Q.* 1159, 1173 (1994). On the tendency of managers to lose their jobs when their employers become insolvent, see Lynn M. LoPucki & William C. Whitford, *Corporate Governance in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 141 *U. Pa. L. Rev.* 669, 723 (1993) (“In the period starting eighteen months before filing and ending six months after confirmation, there was at least one change in CEO in thirty-nine of forty-three cases (91% of the total number of cases).”).

¹¹⁰ *West*, 282 F.3d at 936.

this. Easterbrook does not draw any express implications, but he seems to imply that judges should refrain from certifying class actions because managers' incentives are deficient.¹¹¹ To state this point explicitly is to raise a serious question about it. When class actions are procedurally proper, why should judges deny certification to protect shareholders from opportunistic conduct by their own agents? The wisdom of allowing defects in business arrangements to dictate the choice of litigation procedures is not self-evident.

On the heels of *West*, Judge Easterbrook made the blackmail charge again in *In re Bridgestone/Firestone, Inc.*¹¹² The plaintiffs there were owners and lessees of Ford Explorers equipped with Firestone tires. They complained that defective tires diminished the value of their vehicles.¹¹³ After the judge presiding over the multidistrict litigation certified a nationwide class, Bridgestone/Firestone and Ford Motor Company appealed the certification.¹¹⁴

Again, Easterbrook cited excessive settlement pressure in support of his decision to review the certification order under Rule 23(f):

[A]s in *Rhone-Poulenc* and other cases the suit is exceedingly unlikely to be tried. Aggregating millions of claims on account of multiple products manufactured and sold across more than ten years makes the case so unwieldy, and the stakes so large, that settlement becomes almost inevitable—and at a price that reflects the risk of a catastrophic judgment as much as, if not more than, the actual merit of the claims.¹¹⁵

In this passage, Easterbrook combines the versions of the blackmail thesis espoused by Handler, Friendly, and Posner. First, the Bridgestone/Firestone class action was “so unwieldy” that it was “exceedingly unlikely to be tried,” making settlement “almost inevitable.”¹¹⁶ This sounds like Handler decrying the use of class action procedures that enmesh defendants in litigation without end while denying them their day in court.¹¹⁷ Second, he writes that the settlement “price” was likely to “reflect[] the risk of a catastrophic judgment.”¹¹⁸ This sounds like Friendly’s complaint about small-claim aggregation, and the resemblance seems even stronger when one con-

¹¹¹ See *id.* (noting “imperfect alignment of managers’ and investors’ interests,” along with “effect of class certification of inducing settlement” as “powerful reason[s] to take an interlocutory appeal” on certification order).

¹¹² 288 F.3d 1012 (7th Cir. 2002).

¹¹³ *Id.* at 1015.

¹¹⁴ *Id.*

¹¹⁵ *Id.* at 1015-16 (citations omitted).

¹¹⁶ *Id.* at 1016.

¹¹⁷ See *supra* notes 36-40 and accompanying text.

¹¹⁸ *Bridgestone/Firestone*, 288 F.3d at 1016.

siders that the loss alleged per vehicle was small.¹¹⁹ Third, Easterbrook says “the risk of a catastrophic judgment” would have more impact on the settlement price than “the actual merit of the claims.”¹²⁰ This sounds like Posner’s argument that blackmail occurs when risk aversion causes defendants to overpay.¹²¹

The different strands of argument hang together poorly. If the *Bridgestone/Firestone* class action was untriable, the defendants faced no likelihood of suffering a “catastrophic judgment” because a trial could not have occurred. For the same reason, any threat the plaintiffs might have used to blackmail the defendants into an outsized settlement would not have been credible. By contrast, if the case was triable, the catastrophic judgment and overpayment charges become plausible, but the unwieldiness objection fails. Easterbrook did not notice this tension.

The *Bridgestone/Firestone* opinion makes Judge Easterbrook’s version of the blackmail thesis hard to discern. One could fairly identify him as a supporter of all three versions previously identified. Following *West*, one could also tag him with a fourth version: Blackmail occurs when the risk of losing a class action at trial causes a defendant to pay more than claims are worth, including small claims that are not individually viable. Elements of the above passage from *Bridgestone/Firestone* support this attribution, as do the facts of that case.

D. Summary: Four Versions of the Blackmail Charge

The following table summarizes the versions of the blackmail charge described above:

¹¹⁹ See *In re Bridgestone/Firestone, Inc. Tires Prods. Liab. Litig.*, 205 F.R.D. 503, 532 n.44 (S.D. Ind. 2001) (stating that unless class action is certified, “most Plaintiffs would drop their claims,” and citing *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), on desirability of certifying classes when claims are small); see also Petition for Writ of Certiorari, *Gustafson v. Bridgestone/Firestone, Inc.*, No. 3:00-612, at 4 (on file with *New York University Law Review*) (“[T]hese consumer transaction claims each have such small value that they would likely not be brought as individual actions because the costs of litigation would exceed the expected recovery. Individually, they are what courts have termed ‘negative value’ claims.”).

¹²⁰ *Bridgestone/Firestone, Inc.*, 288 F.3d at 1016.

¹²¹ See *supra* Part I.B.2.

TABLE 1: DEFECTIVE PRODUCTS MASS TORTS

	Blackmail Occurs When Class Actions Are:	Blackmail Occurs When Claims Are:	Are Defendants Risk Averse?	Does Blackmail Require Overpayment?	To prove overpayment:
Handler	Untriable	N/A	N/A	N/A	N/A
Friendly	Triable	Small	Yes	No	N/A
Posner	Triable	Large	Yes	Yes	Compare payments to trial values
Easterbrook	Triable or Untriable	Small or Large	Yes	Yes	Compare payments to trial values and other evidence

II

EVALUATING THE BLACKMAIL CHARGE

Part I described four versions of the blackmail charge. This Part will ask whether any version makes a persuasive case against the use of class actions. A persuasive critique requires a normative standard and a factual argument showing impropriety. Both are examined here.

A. Normative Issue One: Blackmail Is Not the Problem

When assessing the four versions from a normative perspective, one first must ask whether the authors used the word “blackmail” literally. Blackmail is a felony punishable by imprisonment and fines.¹²² An implication of the blackmail charge therefore might be that named plaintiffs and class counsel should go to jail. Because some have described class actions as “judicial blackmail,” judges might be sent off in shackles, too. If the blackmail charge is meant literally, the normative case against the class action is straightforward.

No proponent of the blackmail thesis has suggested criminal prosecutions. Judges have reviewed and reversed certification orders to prevent blackmail, but have not imposed prison terms. To my knowledge, judges have not sanctioned litigants or lawyers for filing class actions, nor trial judges for certifying them. Finally, on certain standard definitions of blackmail, requesting or ordering class certification simply does not qualify.¹²³

¹²² See, e.g., 18 U.S.C. § 873 (2000) (“Whoever, under a threat of informing, or as a consideration for not informing, against any violation of any law of the United States, demands or receives any money or other valuable thing, shall be fined under this title or imprisoned not more than one year, or both.”).

¹²³ For example, Section 223.4 of the Model Penal Code defines theft by extortion as obtain[ing] property of another by threatening to (1) inflict bodily injury on anyone or commit any other criminal offense; or (2) accuse anyone of a crim-

It seems safe to conclude that proponents are using the word “blackmail” metaphorically. They do not think blackmail really occurs in class actions, but they believe something is gained by using the blackmail label. Unfortunately, they have not said what this is, and there are strong reasons to reject the analogy.

Blackmail is a curious offense.¹²⁴ A person commits it by threatening to take a lawful act that would harm another and by offering to forbear if given a benefit.¹²⁵ For example, I might know that you were unfaithful to your spouse. This information would harm you if revealed, but the law allows me to reveal it without penalty. The law also allows me to keep the information to myself. However, were I to threaten to reveal the information unless paid to keep quiet, I would commit blackmail. Therein lies the conundrum: By demanding cash for keeping a secret—something I legally can do for free—I subject myself to criminal penalties.

According to Professor Mitchell Berman, the decision to criminalize blackmail is justified on a general moral ground. Like other crimes, blackmail causes harm to another or threatens another with harm and, under the circumstances in which it is committed, one can be reasonably certain that the blackmailer has bad motives.¹²⁶ In

inal offense; or (3) expose any secret tending to subject any person to hatred, contempt, or ridicule, or to impair his credit or business repute; or (4) take or withhold action as official, or cause official to take or withhold action; or (5) bring about or continue a strike, boycott, or other collective unofficial action, if the property is not demanded or received for the benefit of the group in whose interest the actor purports to act; or (6) testify or provide information or withhold testimony or information with respect to another's legal claim or defense; or (7) inflict any other harm which would not benefit actor.

Model Penal Code § 223.4 (1985).

¹²⁴ For this reason, blackmail has spawned an enormous literature. For an excellent analysis of the crime and a careful discussion of the literature, see Mitchell N. Berman, *The Evidentiary Theory of Blackmail: Taking Motives Seriously*, 65 *U. Chi. L. Rev.* 795 (1998) [hereinafter Berman, *Evidentiary Theory*]. On coercion more generally, see Mitchell N. Berman, *The Normative Functions of Coercion Claims*, 8 *Legal Theory* 45 (2002).

¹²⁵ Berman, *Evidentiary Theory*, *supra* note 124, at 796.

¹²⁶ *Id.* at 797. Berman's analysis of blackmail seems accurate and persuasive to me, but many other accounts exist. For a range of views, see, for example, Symposium, *Blackmail*, 141 *U. Pa. L. Rev.* 1565 (1993). When writing about class actions, no proponent of the blackmail charge expresses a preference for one account of blackmail over another.

Judge Posner has written about blackmail specifically, however. Richard A. Posner, *Blackmail, Privacy, and Freedom of Contract*, 141 *U. Pa. L. Rev.* 1817 (1993). For a description of, and comments on, his views, see Berman, *Evidentiary Theory*, *supra* note 124, at 808-12. On Posner's account, the decision to certify a class cannot constitute blackmail because, for Posner, blackmail always involves a threat to disclose information. See, e.g., Posner, *supra*, at 1820 (setting out taxonomy of acts “a blackmailer might threaten to reveal”); *id.* at 1821 (“Blackmail is payment for secrecy.”); *id.* at 1822 (“[B]lackmail does not actually increase the stock of information in a socially useful way.”). Class certification could be an instance of the broader category of extortion, which Posner also mentions.

the infidelity example, my threat to reveal your adultery is wrong partly because it is a threat to harm you and partly because, were I to carry out the threat after being rebuffed, my prior demand for money would be *prima facie* evidence that, when revealing the information, I was knowingly engaging in conduct harmful to you without good motives.¹²⁷ My demand for money is not part of the blackmail *per se* but is reliable evidence that my reasons for performing the threatened act are bad. Had my reasons for wanting to reveal your infidelity been praiseworthy, such as a desire to help your spouse, I probably would not have offered you the chance to buy my silence. For this reason, the policy decision to prosecute only persons who demand payoffs can be defended.

Berman's account explains why settlement demands ordinarily constitute neither blackmail nor extortion. A settlement demand is a threat to continue pressing a lawsuit—an action that harms another—unless paid to forbear. But the threat is made for a good reason, namely, to obtain compensation on a legal claim asserted in good faith; the demand for payment does not provide an empirical basis for concluding otherwise. The payment demand is consistent with the desire for compensation and therefore is not a sign of bad intent. As Berman explains,

[V]ictim compensation is the chief purpose of tort law. The evidentiary test reinforces the intuition that *B* [the victim of tortious conduct] may threaten to sue *A* [the tortfeasor] unless *A* compensates *B* for the injuries and losses that *A* has caused to *B*. Assume *B* files suit against *A*. This action is moral and lawful on the presumption . . . that *B* is motivated by a good faith belief that he has a legally enforceable claim for damages against *A*. Now consider the fact that *B* had offered not to sue if *A* paid *B*'s damages. This evidence is consistent with the motivation we previously ascribed to *B*: either way, *B*'s (morally acceptable) objective is to be made whole.¹²⁸

Neither law nor conventional morality treats settlement demands in conventional lawsuits as blackmail attempts.¹²⁹ Nor do those who

However, this does not seem likely. Posner expressly recognizes that settlements of civil suits, including settlements that contain "confidentiality clauses . . . are not classified as blackmail." *Id.* at 1828. For him, then, settlement pressure alone seems not to convert the threat of a lawsuit into an instance of extortion. Some passages in Posner's article even suggest that, as a conceptual matter, tort victims seeking compensation cannot commit blackmail by threatening to sue. See *id.* at 1827-28.

¹²⁷ For a full explanation of the evidentiary issue, see Berman, *Evidentiary Theory*, *supra* note 124, at 844-45.

¹²⁸ *Id.* at 863.

¹²⁹ If it did, it logically would have to treat settlement offers made by defendants as blackmail as well. An offer to settle is a threat to continue litigating—an action that would

assert that blackmail occurs in class actions. They have praised settlements as alternatives to trials,¹³⁰ and with but one exception, they have served for years as judges in a civil justice system that strongly encourages parties to settle. They reserve their ridicule for class action settlements.

The proponents of the blackmail thesis thus think class actions are special.¹³¹ Yet no version of the blackmail thesis, with the possible exception of Handler's, identifies bad motives for waging or certifying class actions as a central cause of concern. The use of the word "blackmail" is therefore improper. The concept logically implies bad motivations.¹³² For defendants to be blackmailees, plaintiffs, their lawyers, or trial judges must be blackmailers and must reasonably be thought to have bad motives for carrying out threatened acts.

Even though his version of the blackmail thesis does not require bad motives, Judge Easterbrook seems to think they abound in class litigation. In *Blair v. Equifax Check Services, Inc.*, he wrote that plaintiffs and trial judges use class actions to "wring settlements from defendants whose legal positions are justified but unpopular."¹³³ Little evidence supports this assertion. Even *Rhone-Poulenc*, the case upon which Judge Easterbrook relied as an example, undercuts it. Despite leveling the blackmail charge in *Rhone-Poulenc*, Judge Posner praised the "district judge's commendable desire to experiment with an innovative procedure for streamlining the adjudication of this 'mass tort.'"¹³⁴ He did not accuse the trial judge of attempting to "shake down" the defendants.

Unlike a demand for money in a standard blackmail scenario, neither a motion for class certification, a decision to certify a class, nor judicial efforts to promote settlement provide consistent or reliable evidence of bad motives. The class action has been available for cen-

harm a plaintiff—unless released from liability on a civil claim. If made with bad intentions, a settlement offer could satisfy the conditions for a blackmail threat.

¹³⁰ See, e.g., Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 *Stan. L. Rev.* 1477, 1529 (1999) (defending evidence rule excluding settlement offers on ground that "allowing this type of evidence to be presented at trial would increase the cost of settling cases and so reduce the number of settlements").

¹³¹ See *supra* Part I.

¹³² Berman, *Evidentiary Theory*, *supra* note 124, at 798.

¹³³ 181 F.3d 832, 834 (citing *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293 (7th Cir. 1995)); see also *In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85 (3d Cir. 1995) (observing that "a greedy and unscrupulous plaintiff might use the *threat* of a large class action, which can be costly to the defendant, to extract a settlement far in excess of the individual claims' actual worth").

¹³⁴ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d. 1293, 1297 (7th Cir. 1995).

turies as vehicle for processing claims.¹³⁵ The propriety and efficiency of requesting certification and granting it are clear when the requirements for class-based litigation are met. Judges also have good reasons for urging parties to settle. They want to free space on their dockets; they want parties to resolve disagreements amicably; and they want justice. Judges do not profit personally when cases settle, and the Federal Rules of Civil Procedure encourage them to investigate opportunities for settlement.¹³⁶ Easterbrook's broadside contention that plaintiffs' attorneys and trial judges certify classes to "wring settlements" from innocent but unpopular defendants must be rejected.

No triability-based version of the blackmail charge depends on bad motives in any event. All contend that class actions subject defendants to excessive settlement pressure. Some named plaintiffs, lawyers, and judges may take advantage of the situation for bad reasons, but if the pressure is objectionable, it would be so even if their motives were good. A class action settlement can be subject to criticism on pressure-related grounds even when, for example, a plaintiffs' lawyer is an idealistic attorney working pro bono on behalf of former slave laborers with life-threatening injuries. One need not even use one's imagination to find a case where good motives and undue pressure may have gone together. One need only remember the terrible plight of the victims in *Rhone-Poulenc*.¹³⁷

In sum, as used by Judges Easterbrook, Friendly, and Posner, the blackmail analogy is poor. It suggests a problem of bad motivations that probably does not exist and that has nothing to do with coercion, the judges' core concern. The analogy also needlessly impugns the character of class representatives, their lawyers, and trial judges.

Professor Handler's use of the blackmail analogy is sounder than the others'. In Handler's view, by certifying an untriable class action for further litigation, a judge forces a defendant to make a stark choice: become enmeshed in endless litigation or settle.¹³⁸ If the judge knows or should know that class certification would deny a defendant due process, then arguably the judge coerces the defendant improperly by putting the defendant to the choice.

¹³⁵ The canonical source on the history of the class action is Stephen C. Yeazell, *From Medieval Group Litigation to the Modern Class Action* (1987).

¹³⁶ See Fed. R. Civ. P. 16(a) (permitting court in its discretion to call pretrial conferences for purposes including "expediting the disposition of the action" and "facilitating the settlement of the case").

¹³⁷ See *supra* notes 87-88 and accompanying text.

¹³⁸ Handler, *supra* note 9, at 9.

Handler's argument is more appropriately structured than the others'. It pairs a threat to violate a defendant's rights with an offer to refrain from doing so if the defendant settles with the plaintiff. Assuming a due process violation sufficiently obvious that a judge must know about it, one might reasonably infer that a judge would have bad reasons for carrying out the threat.

Even so, Handler's use of the blackmail analogy is no longer persuasive. Changes in the management of class actions, discussed above and below, make his form of blackmail exceedingly unlikely. Most trial judges apply the certification requirements scrupulously, and appellate judges eagerly correct their mistakes on interlocutory review.¹³⁹

On all theories, then, the blackmail analogy is not only unhelpful but deleterious. By equating judges and trial lawyers with criminals, the analogy advances the cause of political partisans in the tort reform debate. Claiming the support of Easterbrook, Friendly, Posner, and other judges, tort reform groups use loaded phrases like "judicial blackmail" and "legalized extortion" to demonize opponents.¹⁴⁰ At a time when they increasingly seem to be pawns in a mean-spirited political battle for control of the courts, it is reasonable to ask judges to use a less tendentious and inflammatory label.

B. *Do Class Action Defendants Suffer Duress?*

When discussing settlement dynamics in class actions, judges might talk of "duress." Like blackmail, duress is part of the coercion

¹³⁹ See *supra* notes 6-8 and accompanying text.

¹⁴⁰ See Leo Linbeck, Jr., *Lawsuit Reform is Good for Texas Consumers*, *Houston Chron.*, Jan. 23, 2003, http://www.tortreform.com/show_article.asp?articleID=161 ("Virtually every lawsuit that a judge allows to be certified as a class action is settled because the defendant cannot afford the risk of trying such a lawsuit, even if the defendant is totally innocent. . . . Outrageous settlement costs are often nothing more than legalized extortion . . ."); see also Brief of Amici Curiae for the Chamber of Commerce of the United States of America at 7, *Ford Motor Co. v. McCauley*, 534 U.S. 156 (2002) (No. 01-896) (citing *Blair* and *Castano* and asserting that federal courts have recognized danger that class action will be used "as a weapon of extortion"); Brief of Amici Curiae Equal Employment Advisory Council and the Chamber of Commerce of the United States of America at 6-7, *Beck v. Boeing Co.*, 320 F.3d 1021 (9th Cir. 2002) (No. 02-35140) (asserting blackmail threat from class certification and citing *Castano*); Brief of Amici Curiae Washington Legal Foundation at 13, *Bell v. Monsanto Corp.*, 579 S.E.2d 325 (S.C. 2003) (No. 99-CP-25-424) (on file with *New York University Law Review*) (mentioning "intense pressure to settle" and "blackmail settlements" and citing *Rhone-Poulenc*, 51 F.3d at 1298, *Castano*, 84 F.3d at 746, and Friendly, *supra* note 1, at 120); Garth W. Aubert, *With Class or Without: The Emerging Trend Against Certification of Class Actions in Product Liability Cases*, at <http://www.aircraftbuilders.com/lawreport/1997/lr1997d.htm> (last visited Apr. 14, 2003) ("The impact of class actions . . . cannot be ignored by manufacturers who, in many such cases are thereafter subjected to what has often been referred to as 'blackmail settlements.'" (citing *Rhone-Poulenc* and *Castano*)).

language game. However, unlike blackmail, duress can be, and normally is, an excuse rather than a form of wrongful behavior. A person acts under duress when his freedom of choice is significantly constrained, with the result that he bears less responsibility for a decision than he normally would.¹⁴¹ Duress also differs from blackmail in that its existence implies neither that others had bad reasons for acting nor even that others did anything wrong. There must be a blackmailer for there to be a blackmailee, but innocent forces and events can cause duress.¹⁴²

One can easily imagine a class action defendant offering duress as an excuse. In *West*, Judge Easterbrook contends that defendants in securities cases part with money too easily because of the “imperfect alignment of managers’ and investors’ interests.”¹⁴³ Suppose an investor who agrees with Easterbrook sues in the wake of a class action settlement, claiming that the company’s managers breached their fiduciary duties by settling for too large a sum. The managers might defend themselves by claiming duress. Invoking Easterbrook’s version of the blackmail charge, they might argue that the “high risk of [a] catastrophic loss” subjected them to unbearable settlement pressure.¹⁴⁴

To say that a person was subject to duress, however, is to draw a conclusion—one that rests upon both a normative account of the environment in which a choice should be made and a factual account showing that an actual choice environment was marred by an important defect. These normative and factual accounts are what the different versions of the blackmail thesis seek to provide. They attempt to show that defendants are less responsible for decisions to settle class actions than for other settlement decisions because class actions subject them to excessive pressure.¹⁴⁵ The question at hand is whether any version of the blackmail thesis combines a normatively persuasive account of choice with a factually accurate story showing a defect.

¹⁴¹ Berman, *Evidentiary Theory*, supra note 124, at 852 & n.197.

¹⁴² See Berman, *The Normative Functions of Coercion Claims*, supra note 124, at 62-63 (arguing for moral equivalency between various forms of coercion).

¹⁴³ *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

¹⁴⁴ *Id.*

¹⁴⁵ Insofar as I am aware, no proponent of the blackmail thesis contends that coercion excuses defendants from performing class action settlement agreements. Because coercion is an excuse from contractual obligation, it is not clear why proponents of the blackmail thesis have failed to take this step.

1. *Due Process and Duress*

As explained, Professor Handler's version of the blackmail charge draws its normative force from due process. By certifying untriable class actions, judges deny defendants their day in court.¹⁴⁶ A defendant's choice to settle an untriable class suit therefore is marred by an unconstitutional condition that entails exposure to significant costs.

I agree that judges should not certify untriable class actions. However, I also think Handler's criticism of untriable class actions stands apart from his complaint about judicial blackmail. The objection that defendants lose their day in court when judges certify untriable classes truly reflects a due process imperative. The claim that the threat of litigation cost blackmails defendants into settling untriable class actions does not. The latter claim is contingent and sometimes false.

An untriable class action can end any number of ways. Instead of settling, it may be abandoned. High litigation costs on the plaintiffs' side combined with a defensive strategy of refusing to settle can quickly discourage class counsel. When facing the prospect of litigating for years without being paid, a contingent-fee lawyer's interest in a case will predictably diminish. For this reason, defendants often prefer protracted litigation even when prompt trials are possible. By hiring hourly-rate lawyers and threatening plaintiffs' attorneys with high costs and late paydays, defendants can use delay to their advantage. Professor Handler's justified concern about due process denials should not obscure the reality that defendants often like delay and use it strategically to discourage plaintiffs' attorneys.¹⁴⁷

Defendants can also end untriable class actions by seeking dismissals. They can argue that allegations are inadequately pled, rest on invalid legal theories, have too little evidentiary support to warrant jury trials, or suffer from other shortcomings. In practice, such dispositive motions are exceedingly common. A study by the Federal Judicial Center (FJC Study) found that "[t]he vast majority of cases that were certified as class actions were also the subject of rulings on

¹⁴⁶ Handler, *supra* note 9, at 9.

¹⁴⁷ Monroe Freedman quotes the famous statement of Bruce Bromley, "I was born, I think, to be a protractor . . . I quickly realized in my early days at the bar that I could take the simplest antitrust case . . . and protract it for the defense almost to infinity." Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 Hofstra L. Rev. 641, 647 (1998) (quoting Bruce Bromley, *Judicial Control of Antitrust Cases*, 23 F.R.D. 417, 417 (1959)). Freedman also observes that, to maximize pressure on plaintiffs, "defendants commonly make minimal offers of settlement while causing extensive delays." *Id.*

motions to dismiss, motions for summary judgment, or the setting of a trial date.”¹⁴⁸ In securities cases filed after the enactment of the Private Securities Litigation Reform Act, motions to dismiss for inadequate pleading are routine and often succeed.¹⁴⁹ Dispositive motions also work in complex antitrust cases like those Handler discussed. In *Illinois Brick Co. v. Illinois*, the defendants defeated the State of Illinois and 700 local governmental entities by establishing that indirect purchasers lacked standing to sue.¹⁵⁰

Dispositive motions make it hard for plaintiffs to use the threat of endless litigation to obtain payments on unmeritorious claims. Handler did not accuse plaintiffs of misusing class actions in this way. He complained only that class action defendants were denied their day in court. Others have made this combined allegation, however, referring to class actions that use the threat of expensive and lengthy litigation to force defendants to satisfy frivolous claims as “strike suits.”¹⁵¹

The authors of the FJC Study tested the strike suit allegation against data on dispositive motions. Their operating premise was that claims that survive these motions are “probably not frivolous.”¹⁵² They also measured the duration between filings of dispositive motions and rulings so as to assess the amount of time in which defendants caught up in frivolous class actions could not get free. “If rulings [could] be obtained promptly, whether before or after class

¹⁴⁸ Willging et al., *supra* note 15, at 60. The Federal Judicial Center Study (FJC Study) presents empirical data on all class actions of all types terminated between July 1, 1992, and June 30, 1994, in four federal district courts: the Eastern District of Pennsylvania (E.D. Pa., headquartered in Philadelphia), the Southern District of Florida (S.D. Fla., headquartered in Miami), the Northern District of Illinois (N.D. Ill., headquartered in Chicago), and the Northern District of California (N.D. Cal., headquartered in San Francisco).

¹⁴⁹ See Todd S. Foster et al., *Nat’l Econ. Research Assocs., Inc., Recent Trends VI: Trends in Securities Litigation and the Impact of PSLRA 6 (1999)* (studying cases both filed and resolved since passage of Reform Act and reporting that “[d]ismissals as a percent of dispositions have more than doubled from 12% to 25%, with PSLRA’s heightened requirement to plead with particularity a likely contributing factor”). Different studies report different dismissal rates for securities class actions. See Yablon, *supra* note 74, at 575 (summarizing studies).

¹⁵⁰ *Ill. Brick Co. v. Illinois*, 431 U.S. 720 (1977).

¹⁵¹ Defining frivolous lawsuits is both difficult and beyond the scope of this article. For guidance, see Willging et al., *supra* note 15, at 32 (“While it is difficult to find a definition of a strike suit that crisply distinguishes it from most other types of litigation . . . [t]he ultimate test . . . seems to be whether settlements are seen as being coerced because the defendants do not have a cost effective opportunity to litigate the merits.”); see also Chris Guthrie, *Framing Frivolous Litigation: A Psychological Theory*, 67 *U. Chi. L. Rev.* 163 (2000).

¹⁵² Willging et al., *supra* note 15, at 32.

certification, parties opposing the class [would] have an opportunity to resolve the claims on their merits without being forced to settle.”¹⁵³

The results are striking. First, as mentioned above, the data show an enormous amount of merits-related activity. Dispositive motions are common. Second, judges often grant these motions, to the detriment of plaintiffs with weak claims. “Overall, about half of the cases in each district included rulings dismissing all or part of the complaint. . . . Approximately three out of ten cases in each district were terminated as the direct result of a ruling on a motion to dismiss or for summary judgment.”¹⁵⁴ Third, federal judges decide the merits in class actions as often as they rule on dispositive motions in conventional cases, with similar results.¹⁵⁵ Fourth, judges decide dispositive motions quickly. “Looking at the time from the filing of the first motion to dismiss to the first ruling on dismissal, the median time for rulings . . . ranged from 2.6 months to 7.4 months. Three of the four courts had a median response time of less than four months.”¹⁵⁶

Defendants facing class actions do incur costs and experience delays. But these defendants also use dispositive motions to test the strength of plaintiffs’ claims and to obtain quick dismissals. The motions relieve much of the pressure to settle strike suits. “For at least one-third of the cases in [the FJC Study], judicial rulings on motions terminated the litigation without a settlement, coerced or otherwise.”¹⁵⁷

¹⁵³ *Id.*

¹⁵⁴ *Id.* at 33. The FJC Study specifically found as follows:

Of the cases in which a motion to dismiss was filed, rulings were issued in from 73% to 81% of the cases depending on the district. . . . Rulings in which all or part of the complaint was dismissed amounted to 47%, 49%, 76%, and 77% of the rulings in E.D. Pa., S.D. Fla., N.D. Ill., and N.D. Cal., respectively.

Id.; see also James Bohn & Stephen Choi, *Fraud in the New-Issues Market: Empirical Evidence on Securities Class Actions*, 144 U. Pa. L. Rev. 903, 930-31 (1996) (stating that “[s]even [of 123 IPO] class-action suits resulted in a pretrial resolution in favor of the IPO defendants (dismissal, denial of class certification, or summary judgment for the defendant)”; Denise N. Martin et al., *Nat’l Econ. Research Assocs., Inc., Recent Trends IV: What Explains Filings and Settlements in Shareholder Class Actions?*, at ii (Nov. 1996) (on file with *New York University Law Review*) (“Dismissals as a percentage of case dispositions have ranged between 14 and 21 percent over the past five and a half years. In the first half of 1996, 20 percent of dispositions were dismissals, as they were in 1995, up from 16 percent in 1994.”).

¹⁵⁵ Willging et al., *supra* note 15, at 33 (finding that of four districts studied, rulings on summary judgment motions were issued in approximately 85% of cases in two districts, and 60% of cases in two districts, “data . . . comparable to and, overall, somewhat higher than the rate of rulings in a study of general civil litigation” and finding that in three of four districts, motions were granted in whole or in part in 54% to 68% of cases, and 39% of cases in fourth district).

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* at 34.

The FJC Study conveys a picture of the law in action that diverges markedly from the law on the books. Formally, judges are supposed to decide certification motions “[a]s soon as practicable” after the start of litigation¹⁵⁸ without peeking at the merits.¹⁵⁹ In fact, judges usually decide dispositive motions *before* certification.¹⁶⁰ They refuse to certify until they are persuaded that plaintiff’s allegations have merit.¹⁶¹ Precertification rulings are common even in the Northern District of Illinois,¹⁶² which operates under case law disapproving the practice.¹⁶³

The practice of assessing the merits before certifying class actions provides significant protection against strike suits.¹⁶⁴ Wanting to moderate innocent defendants’ litigation costs, federal judges quickly dis-

¹⁵⁸ Fed. R. Civ. P. 23(c)(1). An amendment to Rule 23 will change this language to read as follows: “When a person sues or is sued as a representative of a class, the court must—at an early practicable time—determine by order whether to certify the action as a class action.” Report to the Judicial Conference, Appendix B—Proposed Amendments to the Federal Rules of Civil Procedure and Forms, Amendment to Rule 23(c), Committee Note (Sept. 2002), <http://www.uscourts.gov/rules/jc09-2002/CVRulesJC.pdf>.

¹⁵⁹ Manual for Complex Litigation (Third) § 30.11 (1995) (“[T]he court should not at [the certification] stage assess the merits of the underlying claim(s).” (citing Eisen v. Carlisle & Jacquelin, 417 U.S. 156 (1974))).

¹⁶⁰ A study on class actions states:

In three districts . . . the rate of precertification rulings on motions to dismiss exceeded 70%. In cases in which there were rulings on both motions to dismiss and motions to certify, approximately 80% of the motions to dismiss were decided before the motions to certify. . . . In all courts, more than 20% of the rulings on summary judgment preceded the class certification ruling, and in N.D. Cal., 67% (ten of fifteen) of the summary judgment rulings preceded the class certification ruling.

Willging et al., *supra* note 15, at 30

¹⁶¹ Bone and Evans argue that judges should make “a preliminary inquiry into the merits in *every* case, regardless of whether merits-related factors are directly relevant to a specific requirement [for class certification].” Bone & Evans, *supra* note 52, at 1254-55. The FJC Study shows that trial judges have already blazed this trail. See *supra* note 160.

¹⁶² Willging et al., *supra* note 15, at 30 (stating that Northern District of Illinois decided precertification motions to dismiss in twenty-eight of forty-six class actions (61%) and had “the second highest rate of precertification rulings on motions for summary judgment (eleven of twenty-seven, or 41%).”).

¹⁶³ *Hudson v. Chicago Teachers Union*, 922 F.2d 1306, 1317 (7th Cir. 1991); see also *Peritz v. Liberty Loan Corp.*, 523 F.2d 349, 353-54 (7th Cir. 1975) (analyzing in detail meaning of each provision of Fed. R. Civ. P. 23(c) with regard to timing of certification of class).

¹⁶⁴ There is little empirical evidence supporting the theory that frivolous lawsuits are common, see Guthrie, *supra* note 151, at 163 n.2 (citing sources recognizing dearth of hard evidence showing that frivolous lawsuits are serious problem), but many authors contend that frivolous *securities class actions* are common, and the evidence supporting this position cannot simply be dismissed, see Bohn & Choi, *supra* note 154, at 935 (finding that many securities class actions meet test of frivolousness recommended by Professor Joseph Grundfest). But see Yablon, *supra* note 74, at 586-93 (arguing that many securities class actions thought to be frivolous actually involve nonfrivolous long-shot claims).

miss weak complaints. A strike suit does not guarantee a settlement. It often generates a dispositive motion followed in the space of months by an order dismissing the lawsuit without certifying a class.

Given the frequency with which judges grant dispositive motions today, one must wonder how often they did so when Handler wrote. Only anecdotal evidence supported Handler's assertion that innocent defendants could not obtain vindication. Even thirty years ago, dispositive motions may have provided an escape valve.

One must also wonder how often judges certified untriable class actions. The Federal Rules of Civil Procedure never formally allowed judges to do this. A practice of certifying untriable cases for settlement did arise, but litigation classes, not settlement classes, were Handler's target.¹⁶⁵ By certifying unmanageable litigation classes, judges departed from certification requirements that existed even in Handler's day.

Today, federal judges worry about manageability. State court judges do, too. Twenty years ago, only a maverick judge would have demanded that a motion to certify have a proposed trial plan attached. Today all judges are interested in trial plans, and all want to know how discovery and presentation of proof relating to major issues will proceed. To meet these demands, plaintiffs' lawyers may have to submit briefs and expert testimony on choice-of-law issues, propose jury instructions, and offer expert testimony on damages models at the certification stage. Significant discovery often precedes certification hearings, which regularly last for days. The project of demonstrating that a class action is manageable from start to finish can be an enormous and expensive one that only well-heeled lawyers with big cases can afford.

It is now very difficult for plaintiffs' attorneys to convince judges to certify classes when discovery from absent plaintiffs is needed or cases present complexities like those that bothered Handler. This slightest hint of an individual issue dissuades many judges from allowing class actions to proceed, and judges who oppose class actions go to extraordinary lengths to look for hints.

¹⁶⁵ The Supreme Court's decision in *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997), casts doubt on the propriety of certifying untriable settlement classes that endanger absent claimants' due process rights. When a class action is untriable, class representatives cannot threaten a defendant with a large verdict. Consequently, they cannot demand fair recoveries in settlement negotiations. Many defendants used settlement classes to resolve claims cheaply in sweetheart deals. See John C. Coffee, Jr., *Class Wars: The Dilemma of the Mass Tort Class Action*, 95 *Colum. L. Rev.* 1343 (1995) (describing variety of class action settlements involving strategic conduct that undercompensate class members).

Consider the actions of the Fifth Circuit in *Sandwich Chef of Texas, Inc. v. Reliance National Indemnity Insurance Co.*¹⁶⁶ *Sandwich Chef* is a RICO case involving allegations that insurance companies used their control of the National Council for Compensation Insurance to deceive state regulators and overcharge policyholders for workers' compensation insurance. In the two years that preceded the decision on class certification, the district court judge rejected a motion to dismiss and a motion for summary judgment. After holding a weeklong evidentiary hearing and pondering the parties' submissions for months, the district judge certified a class.

On interlocutory appeal, the defendants argued that individual issues predominated because some policyholders may have known that their bills contained illegal overcharges and paid anyway, a possibility only individualized evidence could address. The district court judge expressly rejected this contention, finding that the defendants introduced "no evidence" at the certification hearing that any plaintiff cooperated in the defendants' scheme in any way, such as by knowingly paying an illegal charge.¹⁶⁷ The Fifth Circuit left this finding intact, but it decertified the class even so. It side-stepped the dearth of admitted evidence supporting the defendants' position by relying on non-evidence, i.e., items that were filed with the district court but that were not admitted into evidence because the defendants did not offer them or obtain rulings on their admissibility.¹⁶⁸ The Fifth Circuit relied on these unadmitted items without identifying them, without holding that the trial judge wrongly excluded them (an impossibility), and without showing that the district court considered or relied on the same items it did. The due process violation is patent.¹⁶⁹ Plainly,

¹⁶⁶ 319 F.3d 205 (5th Cir. 2003). The trial judge's decision certifying the class can be found at 202 F.R.D. 484 (S.D. Tex. 2001). The author is cocounsel for the plaintiff. The arguments criticizing the Fifth Circuit's decision are made at greater length in various pleadings filed in the case, on file with the author.

¹⁶⁷ *Id.* at 503 (rejecting defendants' use of in pari delicto defense based on knowledge of illegal conduct).

¹⁶⁸ The items described as "non-evidence" included thousands of pages of filings the defendants never offered as evidence at the certification hearing and hundreds of exhibits on which the defendants failed to obtain evidentiary rulings. The Petition for Certiorari filed with the Supreme Court describes the materials more fully and explains why the Fifth Circuit's reliance on them was improper.

¹⁶⁹ The Supreme Court held long ago that "[n]othing can be treated as evidence which is not introduced as such. . . . [O]ne who decides shall . . . consider the evidence, [and] be guided by that alone" *Morgan v. United States*, 298 U.S. 468, 480 (1936) (emphasis added); see also *United States v. Abilene & S. Ry. Co.*, 265 U.S. 274, 288 (1924); *Chicago Junction Case*, 264 U.S. 258, 265 (1924). Due process prohibits judges from basing fact findings on materials that were filed with a court but not put in evidence. See, e.g., *In re Aughenbaugh*, 125 F.2d 887, 888 (3d Cir. 1942) ("We may not consider other evidence which may have been in the files of the referee in the bankruptcy administration pro-

some appellate judges will go to great lengths to frustrate class actions.

Logic cannot rule out the possibility that someone knew something. Only evidence and argument can make the fact of knowledge more or less likely. In *Sandwich Chef*, the defendants defeated a class action by manufacturing an individual issue that no evidence supported. Other defendants will play the same game. It costs nothing to assert that someone may have known something, and it costs class counsel plenty to rebut the assertion. If other courts follow *Sandwich Chef*, hypothetical problems will frustrate many class actions.

When a class is certified, no one can foresee how a lawsuit will move ahead in every detail. Neither side will have finished preparing its case, and surprises are possible. For this reason, a risk always exists that a case that seems manageable will turn out not to be.¹⁷⁰ This admitted, the risk of certifying an untriable class is now exceedingly low, and the option of decertifying is always available in cases where it materializes. Rarely will a defendant facing a certified class be able cogently to assert Handler's complaint of being denied a fair opportunity to vindicate itself at trial.

ceeding. . . . [T]he fundamental concept of procedural due process [is] that a party to litigation is entitled to have the evidence relied on by his opponent presented at the hearing of his case"); *Chicago Ridge Theatre Ltd. v. M&R Amusement Corp.*, 855 F.2d 465 (7th Cir. 1988) (holding that due process forbade district court from relying on expert report that was filed but not placed in evidence).

¹⁷⁰ Of course, a risk of error arises every time a judge denies certification as well. Moreover, the two errors—mistaken grants and mistaken denials of certification—are connected. It is a familiar observation that efforts to avoid false positives (here, erroneous determinations that a class action should proceed) often increase the likelihood of false negatives (here, erroneous determinations that a class should *not* proceed). See, e.g., Bone & Evans, *supra* note 52, at 1287.

Judges currently are striving for a zero rate of false positives. My fear is that the rate of false negatives is skyrocketing as a result. Bone and Evans contend that a high rate of false negatives is preferable to a low one because a large percentage of class actions are frivolous, meaning that the substantive claims lack merit. *Id.* at 1291-1302. Although they cite the FJC Study repeatedly, they say nothing about the portion of it that documents the frequency with which judges decide dispositive motions before and after certifying classes. See text accompanying note 148. The omission undermines their assertion that frivolous cases are widespread. Such cases may occur frequently in the securities area, but it is too soon to generalize. I also question Bone and Evans' claim that "[t]he main reason" for the dearth of empirical evidence quantifying the severity of the problem of frivolous class actions is "the high rate of settlement—settlement conceals evidence of frivolousness." Bone & Evans, *supra* note 52, at 1293-94. First, decisions on dismissal motions provide evidence of merit, and these decisions are common. Second, empirical researchers have used settlement amounts to *establish* the frequency of frivolous securities lawsuits. Bohn & Choi, *supra* note 154, at 934-35 (applying hypothesis that securities class actions that settle for less than \$2 million are frivolous, and finding that more than half of IPO settlements fit this description).

2. *Excessive Pressure and Duress*

Judges Easterbrook, Friendly, and Posner argue that class actions generate blackmail settlements by exposing defendants to the risk of company-killing judgments at trial.¹⁷¹ They support this assertion by emphasizing that “[class] actions are almost always settled.”¹⁷²

Do class actions always settle? If one considers all lawsuits that start out as class actions, the answer is no. Many of these lawsuits end in dismissals, not settlements.¹⁷³ When one narrows the focus to certified classes, one finds that “a substantial majority . . . [are] terminated by class-wide settlements,” but not all.¹⁷⁴ In the four districts studied by the Federal Judicial Center, “the percentage of certified class actions terminated by a class settlement ranged from 62% to 100%. . . . Combining the motion and trial categories . . . yields a range of nonsettlement dispositions from 13% to 37% for certified class actions.”¹⁷⁵ Certification increases the likelihood of settlement, but it does not ensure it. Only one federal district experienced a 100% settlement rate for certified classes, and it had only six certified class actions during the study period.¹⁷⁶ The other districts had far more—36, 35, and 16 certified classes—and experienced lower settlement rates—respectively, 62%, 71%, and 88%.¹⁷⁷ The findings in these districts are probably more representative and more robust. Aggregating across the districts, the settlement rate for certified class actions was 73%.¹⁷⁸

¹⁷¹ See *supra* notes 9-11 and accompanying text.

¹⁷² Friendly, *supra* note 1, at 119-20; see also *Blair v. Equifax Check Servs., Inc.*, 181 F.3d 832, 835 (7th Cir. 1999) (“[A] large proportion of class actions settle . . .”). Many others make this claim. See, e.g., *Bone & Evans*, *supra* note 52, at 1292 (“[A]lmost all class actions settle . . .”); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. Legal Stud. 521, 521 (1997) (“[U]niform settlement and zero litigation is an extraordinary empirical fact, neither predicted by nor consistent with *any* current economic model of litigation and settlement. It is reflective of the huge uncertainty and, therefore, the risk that attends judgment of a mass tort claim by a lay jury.”).

¹⁷³ See Willging et al., *supra* note 15, at 60 & n.213 (citing Bryant G. Garth, *Studying Civil Litigation Through the Class Action*, 62 Ind. L.J. 497, 501 (1987), which reported that cases in which certification was denied ended in settlement only 15 % of time).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.* (footnotes and references to tables omitted).

¹⁷⁶ *Id.* at 179 tbl.39.

¹⁷⁷ *Id.* These numbers exclude cases in which class certification and settlement occurred at the same time.

¹⁷⁸ *Id.* Bryant Garth’s study supports the accuracy of the aggregated figure. Examining 119 class actions in the Northern District of California, he found that 36 of 46 certified class actions settled, a rate of 78%. Garth, *supra* note 173, at 501. Studying class actions relating to initial public offerings, Bohn and Choi found that 96 of 123 settled, a rate of 78%. Bohn & Choi, *supra* note 154, at 930.

Bone and Evans draw different conclusions from these numbers than I do. They offer both the FJC Study and Garth’s study as showing that “almost all class actions settle.”

Evidently, some plucky defendants can withstand the “insurmountable pressure . . . to settle” that class certification is said to generate.¹⁷⁹ Many have enough backbone to file dispositive motions. In the FJC Study, nine certified class actions were dismissed on motions, and twelve more were defeated on summary judgment. Some defendants even have enough grit to take class actions to trial. Although the conventional wisdom is that class actions are never tried, the FJC Study reports that five trials occurred across the districts during the two-year study period.¹⁸⁰

Still, the trial rate for certified class actions is low. In the four districts covered by the FJC Study, trial rates were 8% in one district, 6% in another, and 0% in the other two.¹⁸¹ The question is whether these numbers give one cause to suspect that class actions are coercive.

There are three reasons for believing they do not. First, as shown above, judges typically decide dispositive motions before certifying plaintiff classes, and certification is much more likely when these motions fail than when they succeed. High settlement rates in certified class actions therefore may reflect the merits of claims, rather than, or in addition to, the fact of certification. Because judges certify mainly class actions containing demonstrably strong claims, one naturally would expect few trials and many settlements.

Second, the FJC Study found that the time between certification and settlement was often great and varied widely, making claims of causality difficult to sustain.¹⁸² “[A]t least a quarter of the cases in all

Bone & Evans, *supra* note 52, at 1292. I infer that about three-fourths of certified class actions settle, a rate similar to that for conventional lawsuits. See *supra* text accompanying notes 176-178; *infra* text accompanying notes 180-181. Bone and Evans admit that the rates are comparable, pointing out that “by most estimates, approximately seventy percent of all cases filed in federal court end in pretrial settlement.” Bone & Evans, *supra* note 52, at 1285-86 n.129. Nonetheless, they remain suspicious, noting that settlements occur in certified class actions more often than in cases in which certification is denied. *Id.* Unfortunately, they say nothing about the frequency with which judges decide dispositive motions in defendants’ favor in noncertified cases. Low settlement rates are predictable, not surprising, when plaintiffs lose on the merits.

¹⁷⁹ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

¹⁸⁰ Willging et al., *supra* note 15, at 179 tbl.39 (reporting four jury trials and one bench trial); see also Bohn & Choi, *supra* note 154, at 930-31 (reporting that of 123 securities class actions studied, three ended in trial verdict for defendant and one ended in trial verdict for plaintiff, for overall trial rate of three percent).

¹⁸¹ Willging et al., *supra* note 15, at 179 tbl.39.

¹⁸² The recent settlement of the antitrust class action against MasterCard and Visa demonstrates the difficulty of determining causation. After the Second Circuit upheld the trial judge’s order certifying a merchant class, the case proceeded toward trial for about two years. It then settled on the courthouse steps as the parties prepared to make opening arguments to the jury, with MasterCard and Visa agreeing to pay a total of \$3 billion and to reduce transaction fees in the future. See Jennifer Bayot, *MasterCard Settles Case With*

four districts took more than a year after certification to settle. In three districts, this quarter of the cases took approximately two to three and one-half years or more.”¹⁸³ In the words of the authors, “[t]he data on timing of settlements did not support any inference of a relationship between certification and settlement.”¹⁸⁴

Third, in having low trial rates and high settlement rates, class actions are comparable to conventional lawsuits.¹⁸⁵ When the Bureau of Justice Statistics (BJS) examined a representative sample of 18,000 tort cases disposed of in state courts, it found that settlements

Retailers Ahead of Trial, *N.Y. Times*, Apr. 29, 2003, at C1; Caroline E. Mayer, *Visa Settles Suit Over Debit Cards*, *Wash. Post*, May 1, 2003, at E1. Professor George Priest attributed the settlement to excessive pressure stemming from the certification decision, writing that “MasterCard and Visa had no choice but to settle” and that Judge Jacobs rightly predicted in dissent on appeal “that certification . . . would ‘coerce settlement.’” George L. Priest, *Class Warfare*, *Wall St. J.*, May 5, 2003, at A14. In response, Lloyd Constantine, counsel for the class, pointed out that an extensive summary judgment trial preceded the settlement and that the trial judge “denied all 14 of defendants’ summary judgment motions and granted the [class] summary judgment on five elements” of its case. Lloyd Constantine, *The Antitrust Claims Against Visa/MasterCard*, *Wall St. J.*, May 13, 2003, at A19. Given the amount of merits-related activity that occurred between certification and settlement, any assertion that the settlement occurred solely because of the certification decision is debatable.

¹⁸³ Willging et al., *supra* note 15, at 62. Because the FJC Study combined settlement classes with litigation classes when examining the separation of certification and settlement in time, the figures suggest a stronger connection between certification for trial and settlement than actually exists.

¹⁸⁴ *Id.* Bone and Evans cite a version of the FJC Study in support of the assertion that “most class actions settle, often soon after certification.” Bone & Evans, *supra* note 52, at 1290 n.141. This suggests that certification causes quick settlements, a conclusion the authors of the study rejected. Bone and Evans appear to have been misled by the authors’ decision to include both litigation classes and settlement classes when discussing timing. See *id.* at 1292 n.148 (stating that FJC Study “almost certainly understates the actual frequency of class action settlement because . . . the settlement rate statistics excluded class actions filed only for settlement purposes”). This is not true of the timing statistics. “In three districts, at least a quarter of the certified class actions settled within two months after certification. A large number of these cases were settlement classes which were certified simultaneously with the preliminary approval of a proposed settlement.” Willging et al., *supra* note 15, at 62. Insofar as the time between certification and settlement is concerned, the FJC Study thus overestimates the impact of the former on the latter. In settlement classes, certification and settlement occur concurrently, and certification cannot cause settlement in the sense at issue here.

¹⁸⁵ Willging et al., *supra* note 15, at 66 (“The trial rate in class actions in each of the four districts was not notably different from the 3% to 6% trial rate for nonprisoner nonclass civil actions.”); see also Hay & Rosenberg, *supra* note 13, at 1377 (“Class actions, like ordinary lawsuits between individuals, settle most of the time.”); Paul W. Mollica, *Federal Summary Judgment at High Tide*, 84 *Marq. L. Rev.* 141, 141 (2000) (observing that “[t]he percentage of civil cases proceeding to trial in the federal courts plunged from 8.5% of all pending civil cases in FY1973 to just 2.3% in FY1999”); Hope Viner Samborn, *The Vanishing Trial*, 88 *A.B.A. J.* 24, 26 (2002) (noting that “[t]he percentage of jury and bench trials in civil cases has declined from 10 percent of cases resolved in 1970 to 2.2 percent in 2001” and that “[t]he Administrative Office of the U.S. Court found that civil trial rates declined in 16 of 22 states that submitted data”).

occurred 73% of the time and that only 3% of the cases were tried to verdicts.¹⁸⁶ A BJS study of 11,000 contract cases turned up similar results. Agreements ended about half the cases and trials resolved less than three percent of them.¹⁸⁷ Across the waterfront of litigation, settlements are common and trials are rare. When compared to conventional lawsuits, class actions do not seem exceptionally coercive. Settlement pressure is everywhere.¹⁸⁸

The assertion, common to all of the judges, that defendants risk enormous trial verdicts in certified class actions also raises factual questions.¹⁸⁹ The contention is that certification aggregates hundreds, thousands, or even millions of claims, producing potentially enormous judgments. Certification alone does not do this. It merely recognizes a court's power to enter a judgment that binds all similarly situated persons, including those not parties to the litigation. This does not imply that a defendant faces any risk of suffering an enormous judgment at trial, even when, in principle, a class action is triable. Both the existence of the risk and its magnitude depend on class counsel's ability to try a lawsuit to completion.

Plaintiffs' attorneys often find class actions difficult to maintain. First, they rationally expect to be outgunned. Their own incentives to invest are controlled by judges, who regulate class action fee awards.

¹⁸⁶ Steven K. Smith et al., Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1992: Tort Cases in Large Counties 1-2* (1995), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/tclic.pdf>. A study of tort cases processed in federal courts found similar trial frequencies. Marika F.X. Litras & Carol J. DeFrances, Bureau of Justice Statistics, *Federal Justice Statistics Program: Federal Tort Trials and Verdicts, 1996-97, at 2* (1999), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/fttv97.pdf> (reporting that "[t]ort cases terminated by a trial verdict as a percentage of all tort cases also have declined slightly from 5% in 1990 to 3% in 1997").

¹⁸⁷ Carol J. DeFrances & Steven K. Smith, Bureau of Justice Statistics, *Civil Justice Survey of State Courts, 1992: Contract Cases in Large Counties 1, 6* (1996), available at <http://www.ojp.usdoj.gov/bjs/pub/pdf/ccilc.pdf>.

¹⁸⁸ Plaintiffs weather challenges on the merits more often in certified class actions than in conventional lawsuits. That certified class actions and conventional lawsuits settle at similar rates is therefore remarkable. If the stakes increase linearly with the number of claims but litigation costs rise more slowly, the standard economic model might predict a lower settlement rate for class actions than conventional lawsuits. A possible explanation for the similarity in settlement rates is that the high frequency of merits decisions in certified class actions causes parties' estimates of trial outcomes to converge, creating favorable settlement conditions.

¹⁸⁹ If the claim were that the logical possibility of an enormous judgment, rather than the practical possibility of one, drives risk-averse defendants to settle, then the decision to certify a class would be unimportant. A company-killing judgment becomes logically possible the moment a plaintiff files a class action complaint. It even exists when a plaintiff files a conventional lawsuit that could be amended up to a class action later. Because everyone thinks the certification decision is the critical act that brings risk aversion into play, the claim of the blackmail theorists must be that certification converts the risk of an enormous judgment from a logical possibility into a practical one.

Typically, these awards consume 20% to 40% of the recovery, but in large cases they are often smaller.¹⁹⁰ Many judges perversely employ fee formulas that strongly discourage class counsel from maximizing the value of absent plaintiffs' claims.¹⁹¹ A rational plaintiff's attorney therefore will expend resources worth only a small fraction of the stakes when litigating a case.

By contrast, a defendant can spend as much as it wants. A defendant can also make a credible threat to mount a lavish defense that a plaintiff's attorney cannot credibly counter. Consequently, even when a class action is triable in theory, a defendant with a decided spending advantage may know that it cannot be tried in fact.

Second, risk aversion may discourage plaintiff's counsel from investing heavily in any given lawsuit. Rather than focus resources into a single case headed for trial, an attorney may spread time and money across a portfolio of cases so that no single loss is devastating. A defendant facing a single large class action is likely to have a stronger incentive to concentrate resources.

Third, defendants can avoid trials by colluding with class counsel or settling parallel cases that moot class members' claims. Judges Easterbrook and Posner witnessed the second strategy in recent cases. To their credit, both tried to stop it. Judge Easterbrook encountered it in *Blair v. Equifax Check Services, Inc.*¹⁹² There, on the same day that the trial judge certified the *Blair* class, the defendant settled another case, *Crawford v. Equifax Payment Services, Inc.*¹⁹³ *Crawford*, also a class action, was "a superset of the class certified in *Blair*."¹⁹⁴ The *Crawford* settlement was a patent sellout intended to moot the claims asserted in *Blair*. Judge Posner spotted the strategy in *Reynolds v. Beneficial National Bank*.¹⁹⁵ Taxpayers who received refund anticipation loans had filed "more than twenty class actions"

¹⁹⁰ *Vizcaino v. Microsoft Corp.*, 290 F.3d 1043, 1047 (9th Cir. 2002) (discussing increase/decrease rule); *In re Synthroid Mktg. Litig.*, 264 F.3d 712 (7th Cir. 2001) (rejecting increase/decrease rule in favor of market-based determination of fees); see also *In re Synthroid Mktg. Litig.*, 325 F.3d 974 (7th Cir. 2003) (discussing need to relate percentage fee to risks incurred and using market-based evidence to justify increasing fee). I do not mean to endorse the practice of reducing the fee award percentage as the recovery rises. To the contrary, I abhor the rule and believe that judges deny class members due process of law by using it. See generally Charles Silver, *Due Process and the Lodestar Method: You Can't Get There From Here*, 74 Tul. L. Rev. 1809 (2000) (arguing on due process grounds against fee award formulas that create unnecessary conflicts between class members and class counsel).

¹⁹¹ For an excellent critique of these practices, see Judge Easterbrook's opinion in *In re Synthroid Mktg. Litig.*, 264 F.3d at 718.

¹⁹² 181 F.3d 832, 836 (7th Cir. 1999).

¹⁹³ 201 F.3d 877 (7th Cir. 2000).

¹⁹⁴ *Blair*, 181 F.3d at 836.

¹⁹⁵ 288 F.3d 277 (7th Cir. 2002).

against H&R Block.¹⁹⁶ One of these lawsuits, a class action certified in Texas, was set for trial. A loss in Texas could have cost Block \$2 billion and, as Judge Posner observed, “the theory of liability and damages” asserted in the Texas case “could not be dismissed as frivolous.”¹⁹⁷ To avoid the trial, Block approached two lawyers it previously defeated in litigation and negotiated a \$25 million nationwide sellout settlement that, if approved, would have gutted the Texas case.¹⁹⁸

Blair and *Reynolds* are exceptions to the rule. They are cases in which sellouts were prevented. In practice, sellouts often succeed,¹⁹⁹ and the threat of settling a parallel case is often sufficient to create a “reverse auction,” i.e., a bidding war in which competing plaintiffs’ attorneys attempt to undercut each other.²⁰⁰ The winner, chosen by the defendant, is the attorney willing to support a global resolution at the lowest price.

Problems that discourage class counsel from maximizing claim values and that allow defendants to resolve class actions cheaply challenge versions of the blackmail charge that link coercion to excessive judgment-induced pressure. For pressure to be excessive, defendants must feel it. They do not feel it when they know that they have the upper hand in litigation because agency failures plague their opponents. Defendants know better than to estimate judgments in class actions by summing across individual claims.

Putting agency problems aside, one must still ask whether class actions threaten defendants with company-killing verdicts. The judges offer little evidence for this proposition. They cite no empirical studies comparing the size of actual or potential class action judgments to defendants’ assets. They do not even compare defendants’ exposure to defendants’ assets in all cases where they voice blackmail concerns.²⁰¹ Except for Posner’s effort to do so in *Rhone-Poulenc*,

¹⁹⁶ *Id.* at 280.

¹⁹⁷ *Id.* at 283. The Texas case recently settled.

¹⁹⁸ The author testified as an expert witness on class certification and agency issues in the Texas case.

¹⁹⁹ Christopher R. Leslie, A Market-Based Approach to Coupon Settlements in Antitrust and Consumer Class Action Litigation, 49 *UCLA L. Rev.* 991, 995 (2002) (“In many cases, the class counsel appear to sell out the interests of the class in exchange for relatively generous attorneys’ fees.”).

²⁰⁰ Professor Coffee coined the phrase “reverse auction” as applied to litigation. See, e.g., John C. Coffee, Jr., Class Wars: The Dilemma of the Mass Tort Class Action, 95 *Colum. L. Rev.* 1343, 1354 (1995).

²⁰¹ For example, Judge Easterbrook made no such comparison in *Bridgestone/Firestone* or *West*. In *Rhone-Poulenc*, Judge Posner said the defendants faced \$25 billion in exposure in the class action but did not quantify their assets. In *re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995).

they do not quantify the likelihood of proplaintiff verdicts. They say that class actions threaten defendants' solvency, but they do not show this to be true.

The truth may well be that few class actions expose corporate defendants to such dire consequences. Professors Hay and Rosenberg assert this directly, stating that "[g]enerally, class actions do not involve aggregate damages of high magnitude relative to the wealth of defendant firms."²⁰² They offer no empirical support for this assertion, but a case can be made.

First, insofar as bankruptcy is concerned, the class action is more nearly a shield than a sword. It has protected companies from bankruptcy,²⁰³ but it appears to have rendered few companies insolvent, if any.²⁰⁴ The judges thus assert that class action defendants live in

²⁰² See Hay & Rosenberg, *supra* note 13, at 1403 n.51.

²⁰³ Defendants frequently use (or attempt to use) class actions to *avoid* bankruptcies that mass actions can cause. Fibreboard Corporation negotiated a class-based settlement of all present and future asbestos claims for insurance dollars, keeping the company's assets intact. (A nominal, \$500,000 contribution to the multi-billion dollar settlement deal was to come from the company.) The Supreme Court scotched the deal. *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 824-25, 864 (1999). An effort by twenty asbestos manufacturers to use a class action to avoid bankruptcy also failed in the Supreme Court three years earlier. *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 597 (1997). Dow Corning negotiated a class settlement of breast implant claims because it faced thousands of lawsuits and a serious risk of insolvency. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, No. CV 92-P-10000-S, 1994 WL 578353, at *1-*2 (N.D. Ala. Sept. 1, 1994). After 6000 claimants opted out of the class action, the company filed for bankruptcy because of the continuing onslaught of nonclass suits. *In re Dow Corning Corp.*, 95-20512, 1995 WL 495978, at *1-*2 (Bankr. E.D. Mich. Aug. 9, 1995). When Mentor Corporation, a smaller producer of breast implants, sought to resolve its liabilities via a class-based settlement, the trial judge approved the deal because the nonclass lawsuits threatened to deplete the company's assets. *In re Silicone Gel Breast Implant Prods. Liab. Litig.*, Nos. CV 93-P-11433-S, CV 92-P-10000-S, 1993 WL 795477 (N.D. Ala. June 2, 1993). In a litigation involving hip implants, the initial class-based settlement enabled the defendant to resolve its liabilities for about \$630 million. This was far less than the defendant was willing to pay. Challenges to the initial deal caused the defendant to sweeten the pot by almost \$400 million. *In re Sulzer Hip Prosthesis and Knee Prosthesis Liab. Litig.*, No. 1:01CV9000, 2002 WL 553728, at *1 (N.D. Ohio Mar. 14, 2002). Keene Corporation once filed a defendant class action expressly for the purpose of aggregating outstanding and future asbestos claims and obtaining the trial judge's assistance in negotiating a global settlement. See *In re Joint E. and S. Dists. Asbestos Litig.*, No. CV 93-2129, 1993 WL 604077, at *1 (E.D.N.Y. & S.D.N.Y. July 1, 1993). A major attraction (for defendants) of the class action is that it provides a means of bargaining for global peace. Neither mass actions nor conventional lawsuits provide this opportunity when harms are spread across large populations.

²⁰⁴ Using WebBRD, a bankruptcy research database created by Lynn M. LoPucki containing data on 569 large public company bankruptcy reorganization cases filed from October 1980 through June 2002, at <http://lopucki.lawlib.ucla.edu>, I identified all corporate bankruptcies plausibly caused by litigation, including asbestos cases, environmental cases, other products, other tort, patent, and pension. Twenty-five cases fit this description. I then had a research assistant conduct Westlaw and Internet searches to determine whether any of these twenty-five bankruptcies occurred as a result of the threat or fact of a class

dread of something that has rarely, if ever, occurred.²⁰⁵ This seems implausible.²⁰⁶

Second, even when the damages theoretically available in class actions are large, reactions in financial markets do not suggest that these lawsuits threaten defendants' solvency. Studies of securities cases find that share prices, which fall significantly when bad news is disclosed, fall further when issuers are hit with class action complaints. However, the second effect is fairly small, usually a few percent of the postdisclosure stock price.²⁰⁷ When disclosures reduce share prices to

action judgment. None did. The materials supporting this conclusion are on file with the author. I also asked Professor LoPucki whether he knew of any bankruptcies induced by class actions. He did not. However, at a continuing education program on class actions where I presented a draft of this article, a lawyer claimed to know of a case in which a defendant filed for bankruptcy protection after losing at a class action trial. I was unable to verify the example independently.

²⁰⁵ Bohn & Choi, *supra* note 154, at 931 (reporting that “[f]ive of the class-action IPOs” in their sample “resulted in bankruptcy”). They do not say that the lawsuits caused the bankruptcies, which may have occurred for other reasons. Because Bohn and Choi categorized judgments separately from bankruptcies, the inference that judgments drove the companies under seems unwarranted. For the same reason, bankruptcies appear not to have occurred in any of the four cases in their sample that went to trial, three of the trials having yielded defense verdicts. *Id.*

²⁰⁶ It also is implausible, I believe, to explain the dearth of bankruptcies by arguing that fear of insolvency led defendants to settle all class actions in which bankruptcy might have occurred. First, defendants have tried some bet-the-company class actions. Masonite Corporation lost the first phase of a jury trial in a nationwide class action alleging that its hardboard siding products were defective. The class sought \$40 billion in damages. See *Int'l Paper Co. v. Agric. Excess & Surplus Ins. Co.*, No. A089102, 2001 WL 641781, *1-*2 (Cal. Ct. App. Apr. 12, 2001) (describing trial in *Naef v. Masonite Corp.*, No. CV-94-4033 (Ala. Cir. Ct. Jan. 15, 1998)). Masonite then settled the case, agreeing to pay homeowners up to \$197.5 million. See Thomas Willging et al., *Individual Characteristics of Mass Torts Case Congregations*, in *Advisory Comm. on Civil Rules & Working Group on Mass Torts, Report on Mass Tort Litigation* app. D 104-05 (1999) (on file with *New York University Law Review*). Tobacco manufacturers tried a class action for punitive damages brought by smokers in Florida. After the jury ordered the defendants to pay \$145 billion, the court of appeals decertified the class and threw out the judgment. *Florida Appeals Court Throws Out \$145 Billion Tobacco Verdict*, CNN, May 21, 2003, at <http://www.cnn.com/2003/LAW/05/21/tobacco.ruling.overtured/index.html>. State Farm tried and lost a massive class action alleging that it defrauded automobile policyholders when repairing vehicles damaged in accidents. The trial court awarded judgment to the class in the amount of \$1.2 billion. See *Ass'n of Trial Lawyers of Am., The Truth Behind Avery v. State Farm*, at <http://www.atla.org/homepage/stat1124.aspx> (describing litigation). Some defendants are willing to gamble over enormous stakes.

Second, there are known instances in which defendants declared bankruptcy *after* trying and losing conventional bet-the-company lawsuits. The most famous example is Texaco, which suffered an \$11 billion loss at trial to Pennzoil. Because companies sometimes try conventional lawsuits that have the potential to yield company-killing judgments, the suggestion that they settle all large class actions to avoid bankruptcy is unconvincing.

²⁰⁷ See, e.g., Bohn & Choi, *supra* note 154, at 977-79 (1996) (reporting abnormal return of negative 3.33 percent associated with filing of class action securities complaint); Paul A. Griffin et al., *Stock Price Response to News of Securities Fraud Litigation: Market Efficiency and the Slow Diffusion of Costly Information* 4-5, John M. Olin Program in Law and

zero, this typically occurs via market reactions to bad news (including market anticipation of class action lawsuits) that occur before complaints are filed. The lawyers show up too late to threaten issuers with insolvency because the market has already precipitated financial collapse.

Third, even when fraud damages theoretically are high, most securities class actions settle, and most settle for less than \$10 million.²⁰⁸ Many settle for \$2 million or less, an amount thought by some to be nuisance value.²⁰⁹ Typically, settlement discounts increase as incurred losses grow, so that cases involving enormous declines in market value recover three to four cents on the dollar. Given the frequency of settlements, their size, and discount trends, a defendant facing a securities class action rationally would predict a modest settlement as the ultimate outcome of litigation, not a company-killing judgment rendered at trial. Enormous trial verdicts in securities class actions are exceedingly rare.²¹⁰

Defendants rationally would have the same expectation outside the securities realm, I believe, although the data are sketchier. Only nine certified class actions included in the FJC Study went to trial, and none of these ended in a proplaintiff final judgment.²¹¹ Class action trials are uncommon regardless of subject matter, and defense verdicts appear to predominate. The FJC Study encountered settlements far more often, with settlements in securities and nonsecurities cases

Economics, Working Paper No. 208, (Nov. 2000), at http://papers.ssrn.com/paper.taf?abstract_id=251766 (reporting small abnormal negative returns associated with complaint filing); Stephen P. Ferris & A.C. Pritchard, *Stock Price Reactions to Securities Fraud Class Actions Under the Private Securities Litigation Reform Act*, 6-8, John M. Olin Center for Law & Economics, Paper #01-009, at 6-8 (Oct. 2001), http://papers.ssrn.com/sol3/papers.cfm?abstract_id=288216 (same).

²⁰⁸ Mukesh Bajaj et al., *Securities Class Action Settlements: An Empirical Analysis 7* (2000) (finding that 80% of 807 cases settled for less than \$10 million), available at http://securities.stanford.edu/research/studies/20001116_SSRN_Bajaj.pdf.

²⁰⁹ Bohn & Choi, *supra* note 154, at 935 (reporting that more than half of IPO class actions settled for \$2 million or less).

²¹⁰ For this reason, I disagree with Professor Yablon's contention that securities class actions "are simply 'too big to lose'" because "[t]he potential exposure of defendants . . . is huge." Yablon, *supra* note 74, at 588 (quoting Alexander, *supra* note 52, at 530-31). No history of huge verdicts supports this contention, and securities settlements typically discount losses severely.

²¹¹ Willging et al., *supra* note 15, at 181-82 tbls. 43 & 44. The tables identify nine certified class actions that were tried to a jury or judge. Of these, one ended in a default judgment for the plaintiff, five produced defense verdicts, one yielded a verdict for the named plaintiff that was reversed on appeal, one settled after the court found for the plaintiff on liability, and one settled after a jury found for one subclass. *Id.*

yielding similar individual recoveries.²¹² The FJC Study did not report the average settlement size for the sample as a whole, but one confidently may estimate that number to be below \$10 million. A \$4 million average for all settled cases would be a defensible guess.²¹³

Given the evidence that many class actions are paper tigers, why do Judges Easterbrook, Friendly, and Posner think that class actions frequently threaten defendants' solvency? They may be confusing class actions with other multclaimant proceedings, such as consolidations, joinders, and informal collaborations. Mass asbestos lawsuits (whether formally combined or not) have demonstrated company-killing potential, but these lawsuits are not class actions.²¹⁴ Nor are most other high profile products liability cases—such as those relating to breast implants, hip implants, or pharmaceuticals—that have recently raised solvency fears.²¹⁵ The states' Medicaid recovery lawsuits against the tobacco companies, which settled for hundreds of billions of dollars, were not class actions either.²¹⁶ Defendants should fear nonclass lawsuits far more than class actions.

3. *Risk Aversion and Duress*

The judges also support the undue-pressure thesis by citing corporate defendants' aversion to risk.²¹⁷ This assertion raises a question

²¹² *Id.* at 13 (reporting “median net settlement per class member” in securities cases ranging from \$337 to \$447, and “comparable medians for nonsecurities classes rang[ing] from \$275 to \$1,472”).

²¹³ I deduced the \$10 million figure as follows. The highest average attorneys' fee award found in any district was \$2.5 million (with most districts having averages in the \$1 million range). *Id.* at 69 n.246. The lowest average fee percentage in any district was 24% of the total recovery. *Id.* at 72. Dividing \$2.5 million by .24 yields the exceedingly conservative estimate of roughly \$10 million.

²¹⁴ Susan Warren, *High Court to Weigh Two Key Issues of Asbestos Litigation*, *Wall St. J.*, Nov. 6, 2002, at B1 (reporting that “[m]ore than 60 companies—mostly the original miners and sellers of the deadly mineral [asbestos]—have sought refuge from the litigation in bankruptcy courts in the past two decades”).

²¹⁵ See David Rosenberg, *Decoupling Deterrence and Compensation Functions in Mass Tort Class Actions for Future Loss*, 88 *Va. L. Rev.* 1871, 1871 (2002) (“Mass exposure cases concerning pollution from industrial activity, hazards in the workplace, or dangers from prescription drugs and other consumer products and services . . . are generally considered inappropriate for class action treatment, especially when type and degree of serious harm, governing law, and other determinants of individual recovery vary widely among class members.”). This observation applies to litigation classes, not settlement classes. Mass tort settlement classes have been certified. See, e.g., Nagareda, *supra* note 12, at 204 (discussing settlement of hip-implant mass tort litigation).

²¹⁶ New York State's lawsuit appears to be the lone exception to this generalization. Daniel Wise, *Judge Freezes \$625M Tobacco Award to Law Firms*, *N.Y. L.J.*, Oct. 23, 2002 (reporting that Manhattan Supreme Court Justice Charles E. Ramos claimed authority to regulate payment of fees in New York's settled tobacco case because underlying lawsuit was certified as class action).

²¹⁷ See *infra* notes 220-230 and accompanying text.

of fact. Does risk-averse decisionmaking prevail on the defense side? If not, an objection to class actions grounded in risk aversion cannot be persuasive.

Empirical and experimental studies suggest that *plaintiffs* are often risk averse. For example, studies of medical malpractice lawsuits identify plaintiffs' aversion to risk as the likely cause of settlement discounts.²¹⁸ According to Professor Christopher Guthrie, the Framing Theory of Litigation, an application of prospect theory, predicts this result. "[P]laintiffs are likely to prefer the risk-averse option—settlement," in ordinary litigation because persons facing "moderate-to-high probability gains" frequently make risk-averse decisions.²¹⁹

The question is whether defendants also are risk averse. The judges say that they are and this appears to be the conventional view, yet evidence of risk aversion on the defense side is thin.²²⁰ Experimental studies suggest that defendants are often risk *preferring*. Summarizing the literature, Professor Guthrie writes, "the legal system may wish to focus its efforts on encouraging defendants (rather than plaintiffs) to settle' because of defendants' risk-seeking tendencies in ordinary litigation."²²¹

Judges Easterbrook and Posner offer little evidence that class action defendants are risk averse. For example, both cite a famous article by Professor Janet Cooper Alexander. Alexander does not show that defendants typically named in securities class actions—issuers, underwriters, accountants, and directors and officers—are risk averse.²²² In some discussions, she assumes that they are. In others, she confuses risk aversion with opportunism.

²¹⁸ Henry S. Farber & Michelle J. White, *Medical Malpractice: An Empirical Examination of the Litigation Process*, 22 *RAND J. Econ.* 199, 208 (1991); Stephen J. Spurr & Walter O. Simmons, *Medical Malpractice in Michigan: An Economic Analysis*, 21 *J. Health Pol. Pol'y & L.* 315, 316 (1996).

²¹⁹ Guthrie, *supra* note 151, at 168 (emphases omitted). Other reasoning defects may also plague plaintiffs, explaining why settlements tend to undercompensate claimants with large losses. See Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System—And Why Not?* 140 *U. Pa. L. Rev.* 1147, 1218 (1992) (arguing that "[p]eople are poor at estimating amounts that require intuitive exponential adjustments").

²²⁰ Professor Schwartz identifies risk aversion as "one of the two factors that lead to settlement of litigation," the first being the desire to avoid litigation costs. Schwartz, *supra* note 14, at 306.

²²¹ Guthrie, *supra* note 151, at 169 (quoting Russell B. Korobkin & Thomas S. Ulen, *Law and Behavior Science: Removing the Rationality Assumption from Law and Economics*, 88 *Cal. L. Rev.* 1051, 1106 (2000)) (emphasis omitted).

²²² See Alexander, *supra* note 52. The assertion that corporate managers are risk averse must be distinguished from the assertion that they use company dollars to settle class actions to hold onto their jobs or to protect the value of their compensation packages,

Alexander contends that “[i]ndividuals are more likely to be risk-averse than corporations, largely because they have less ability to diversify their risk portfolios.”²²³ Inferior diversification does not make one risk averse. It causes one to face greater variance, which matters *if* one is risk averse. Alexander also writes, “[t]he large potential damages [in securities class actions] . . . intensify the individual defendants’ risk aversion.”²²⁴ Here, too, risk aversion is assumed. Now consider her observation that individual defendants want to settle within policy limits, even when their chances of winning are “excellent” to protect their personal assets.²²⁵ This shows that individual defendants are strategic. Rather than jeopardize their own dollars, they settle at the expense of insurers.²²⁶ “Settlements . . . rarely if ever involve significant contributions from individual defendants (and certainly not from the outside directors).”²²⁷

Alexander’s article is the strongest evidence Easterbrook and Posner offer in support of their risk-aversion claim.²²⁸ In fairness to

which often include options or stock. The latter assertion involves strategic conduct that is rational for managers because it avoids liquidation, but harmful to shareholders because it fails to maximize profits. This second claim also does not imply that managers always shy away from risk. See Susan Rose-Ackerman, *Risk Taking and Ruin: Bankruptcy and Investment Choice*, 20 *J. Legal Stud.* 277, 288-89 (1991) (showing that managers wishing to avoid liquidation find it rational to be risk-seeking in certain situations).

²²³ Alexander, *supra* note 52, at 530.

²²⁴ *Id.* at 531.

²²⁵ *Id.*

²²⁶ Alexander later stated this explicitly: “The individual defendants can settle the case with [insurance and company] money . . . but will have to pay any adverse judgment and all of their legal fees with their own money. Settlement is costless to the individual decisionmakers personally, but trial presents a risk of enormous personal liability.” *Id.* at 556. An economically rational person would always prefer to settle with other people’s money and save his own.

²²⁷ *Id.* at 531.

²²⁸ Easterbrook and Posner also cite other academic writings, none of which contains significant evidence of risk aversion. In *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002), Judge Easterbrook cited Roberta Romano, *The Shareholder Suit: Litigation Without Foundation?*, 7 *J. L. Econ. & Org.* 55 (1991), yet Romano attributes settlement pressures to “[t]he combination of differential indemnification rights, insurance policy exclusions, and plaintiffs’ counsel as the real party-in-interest,” *id.* at 57, and to litigation cost asymmetries that favor plaintiffs, *id.* at 69. In *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995), Judge Posner cited Joseph A. Grundfest, *Disimplying Private Rights of Action under the Federal Securities Laws: The Commission’s Authority*, 107 *Harv. L. Rev.* 961, 973 n.38 (1994). Reading the footnote, one discovers that the evidence of risk aversion consists of statements by interested persons, such as a defense lawyer who said that defendants are “under hydraulic pressure to settle” securities class actions. *Id.* Such evidence bears little weight. Posner also cited William Simon, *Class Actions—Useful Tool or Engine Of Destruction*, 55 *F.R.D.* 375 (1972). Simon’s article contains no evidence of risk aversion and worse (for Posner), the article is an extended argument against small-claim class actions. *Id.* at 377. Because Posner thinks small-claim cases are the best candidates for certification, he must disagree with Simon and cannot claim support from this

them, however, one must note that prospect theory does predict that defendants will act in a risk-averse manner when facing low-probability losses, that is, when there is little likelihood that a plaintiff will win.²²⁹ Might one therefore predict risk aversion on the defense side in cases like *Rhone-Poulenc* where plaintiffs' claims appear to be weak?

Not necessarily. Class action defendants are frequently corporations, and corporations cannot be risk averse. As Professor J.B. Heaton cogently states, "[R]isk aversion is a theoretical concept appropriate for individuals."²³⁰ Corporations may act "as if" they are risk averse, but as legal fictions, they cannot *be* risk averse.

One cannot automatically generalize from studies of human decisionmaking to corporations. One must ask why corporations would act "as if" they were risk averse given the pressure that they face to maximize profits.²³¹ Heaton offers two explanations. "First, corporate managers may hedge the survival of the firm to reduce expected

source. Posner also cites Lester Brickman, *On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyer's Rates of Return*, 15 *Cardozo L. Rev.* 1755 (1994); Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 *Law & Soc'y Rev.* 95 (1974); and Charles D. Schoor, *Class Actions: The Right to Solicit*, 16 *Santa Clara L. Rev.* 215 (1976), among others. Brickman does not mention risk aversion and focuses mainly on trial procedures in consolidations and mass joinder actions that he thinks are defective. Brickman, *supra*, at 1780-82. Galanter merely asserts that a class action can make a defendant's stakes "more than he can afford to play the odds on" and cites anecdotal evidence in support. Galanter, *supra*, at 143 & n.121. Schoor discusses "increased pressure to settle" without addressing risk aversion. Schoor, *supra*, at 239 n.82. Schoor also draws two conclusions that undercut Posner's larger thesis. First, "the class action rule . . . affords a kind of rough justice in that when a defendant is most probably legally liable, the pressure to settle is greatest." Schoor, *supra*, at 240. Second, the Supreme Court's decision in *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974), "considerably ameliorated" the likelihood of blackmail in small claim class actions by requiring individual notice. Schoor, *supra*, at 242.

²²⁹ Guthrie, *supra* note 151, at 187 ("Plaintiffs in frivolous suits . . . are inclined to prefer trial to an actuarially fair settlement, while defendants in frivolous suits . . . are inclined to prefer an actuarially fair settlement to trial."). Guthrie summarizes prior studies and offers findings of his own. The results show a tendency toward risk aversion in low-probability loss situations, but not universal risk aversion. *Id.* at 183-85, 187-91.

²³⁰ J.B. Heaton, *Settlement Pressure* 29 (Feb. 2002) (unpublished draft on file with *New York University Law Review*). This article gives content to the assertion that a risk-averse defendant may settle a class action (or, by implication, any other group lawsuit) containing claims 1 . . . *n* even when it would always go to trial if claims 1 . . . *n* were litigated separately.

²³¹ See Eisenberg & Farber, *supra* note 95, at S97 (adopting working assumption "that corporations face relatively more market discipline than do individuals in their decisions about litigation and are not able to deviate substantially from profit maximizing behavior"); see also Hay & Rosenberg, *supra* note 13, at 1403 n.51 (suggesting that class action critics may overstate extent and severity of risk aversion among defendants and offering reasons for believing that corporate defendants often act in risk-neutral manner).

costs of financial distress.”²³² By avoiding the enormous costs associated with bankruptcy, hedging against catastrophic losses may protect shareholders and facilitate borrowing, raising a firm’s economic value. “Second, . . . corporate managers may hedge the survival of the firm to shift risks of catastrophic failure away from those who cannot diversify it as well as corporate shareholders and bondholders.”²³³ The protected group includes a company’s managers, employees, suppliers, and customers, all of which are interested in the company’s prospects. By insulating them from a risk they cannot handle with equal efficiency on their own, a company can again improve its economic position.²³⁴

Before developing Heaton’s insights, it is important to note a limitation. Heaton addresses lawsuits that endanger defendants’ ability to stay in business, and his suggested reasons for “as if” risk-averse behavior have traction in this context.²³⁵ Yet, as argued above, many class actions pose no practical risk of catastrophic loss. That corporations may behave “as if” they are risk averse when their financial lives are threatened says nothing about their manner of defending cases that are less menacing.

When deciding whether class actions are life threatening or not, the odds of losing at trial must be considered as well as the possible damages. To ignore the odds would be to treat many risks as catastrophic without justification. Judge Easterbrook made this point in *Covey v. Commercial National Bank of Peoria*,²³⁶ a bankruptcy case in which the debtor’s solvency was at issue:

To disregard the probability that the firm will not be called on to pay is to regard all firms as insolvent all of the time, for all firms face some (remote) contingencies exceeding the value of their assets. A firm’s product might prove dangerous, maiming hundreds of customers; all of an air carrier’s planes might fall out of the sky, or one of an electric utility’s nuclear stations melt down, creating stupendous liabilities; all of an insurer’s policyholders might die in the same year, generating obligations that exceed its assets. The

²³² Heaton, *supra* note 230, at 32.

²³³ *Id.* at 34.

²³⁴ Managers do face a likelihood of losing their jobs when companies go bankrupt. See Lynn M. LoPucki & William C. Whitford, *Patterns in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 78 *Cornell L. Rev.* 597, 610 (1993) (reporting that change of CEO occurred during pendency of Chapter 11 proceedings in seventy percent of large reorganization cases studied).

²³⁵ Heaton focused on the *Rhone-Poulenc* case, which, according to Judge Posner, threatened the defendants with bankruptcy. This may not have been true, for reasons already explained. See *supra* Part I.B.3.

²³⁶ 960 F.2d 657 (7th Cir. 1992).

probability of such occurrences is low, however, and it therefore makes sense to treat the firms as solvent.²³⁷

If the probability of having to pay matters for solvency, it also matters for “as if” risk-averse behavior because fear of business failure drives this behavior.

In *Covey*, Judge Easterbrook pointed out that risk quantification is needed to distinguish solvent companies from insolvent companies.²³⁸ Risk quantification is therefore also needed to prevent corporate defendants from feigning risk aversion. Any defendant can assert that a class action scares it to death, and many have done so after Posner legitimated the tactic in *Rhone-Poulenc*.²³⁹ Yet the claim need not always be true, and it will not be true on Heaton’s theory unless the expected trial loss (meaning the potential damages discounted by the odds of losing at trial) is large enough to justify hedging.

Heaton’s discussion of hedging provides a credible basis for thinking that corporations sometimes make economically rational decisions that seem to be driven by risk aversion. For example, they may purchase insurance against the risk of catastrophic failure by settling class actions that threaten them with insolvency. Even so, Heaton does not endorse the excessive settlement pressure thesis without qualification.²⁴⁰ Settling a lawsuit is not the only way to buy insurance. One can purchase an insurance policy instead.

²³⁷ *Id.* at 659. Judge Easterbrook’s point that remote risks do not count for solvency purposes seems to undermine Judge Posner’s suggestion in *Rhone-Poulenc* that the defendants would have been motivated by risk aversion because they feared a \$25 billion loss. 51 F.3d at 1298. Accepting Posner’s account of the magnitude of the risk and the probability of losing (1/13), the defendants faced an expected loss of less than \$2 billion. Because this smaller figure did not threaten them with bankruptcy, it is not clear why the prospect of trying the class action should have motivated “as if” risk-averse behavior on the defendants’ part.

²³⁸ 960 F.2d at 660-61.

²³⁹ An interesting feature of *Rhone-Poulenc* is that the defendants did not assert that fear of insolvency would force them to settle when petitioning for mandamus review—they first raised the issue at oral argument. 51 F.3d at 1299. Judge Posner excused the omission, writing that “such an acknowledgment would [have] greatly weaken[ed] them in any settlement negotiations,” and emphasizing the need to “be realistic about what is feasible to put in a public brief.” *Id.* Why the defendants could safely admit in open court the truth of a proposition they could not put in writing Posner did not say. It is at least plausible that, at oral argument, the defendants saw an opportunity to use the fear of bankruptcy to gain favor with the court and seized it.

In post-*Rhone-Poulenc* cases, defendants have expressed the fear Posner said they must hide. For example, in *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124 (2d Cir. 2001), where “the aggregated and trebled claims of the four million class members [were] alleged to top \$100 billion,” the defendants said they would be forced to settle if the certification order was affirmed. *Id.* at 148 (Jacobs, J., dissenting).

²⁴⁰ Heaton, *supra* note 230, at 32. Heaton also explains that the decision to consider risk aversion when certifying class actions enables risk-neutral defendants to plead risk aversion strategically, creating a problem that judges cannot solve by observation. *Id.* at 28.

Class action defendants often have significant liability coverage. Professor Alexander reports that “[n]inety-four percent of public companies with more than 500 shareholders have directors’ and officers’ liability (D&O) insurance,” and that “insurance is present in approximately 80 percent of shareholder litigation, and provides approximately 50 to 80 percent of the settlement money in such cases.”²⁴¹ Citing evidence amassed by others, Professor Charles Yablon concludes that “defendants [in securities class actions] purchase sufficient—or more than sufficient—insurance to cover the expected value of most claims that are brought against them.”²⁴² According to Professor Lynn LoPucki, firms with revenues of \$100 million to \$500 million carried umbrella/excess liability policies with mode limits of \$31 million to \$50 million, enough to cover most class action settlements.²⁴³ An emerging market in “‘litigation loss mitigation’ coverage” may one day provide important supplemental protection against catastrophic losses.²⁴⁴

Because class action defendants often have insurance coverage—including comprehensive programs containing multiple primary and excess layers—the likelihood of their being forced into insolvency by plaintiff victories is reduced.²⁴⁵ The risk quantification needed to prevent defendants from feigning deathly fear of class actions must therefore take insurance into account. The well-known practice of settling at or within policy limits adds force to this imperative.²⁴⁶ Liability insurance both protects a defendant’s assets and fosters a climate in which a defendant’s uninsured assets are thought to be beyond claimants’ reach.²⁴⁷ Neither Posner nor Easterbrook accounts for insurance when discussing the insolvency risks associated with class actions. Consequently, their assertions are overstated.

²⁴¹ Alexander, *supra* note 52, at 550.

²⁴² Yablon, *supra* note 74, at 580.

²⁴³ Lynn M. LoPucki, *The Death of Liability*, 106 *Yale L.J.* 1, 46 n.202 (1996) (citing Tillinghast-Towers Perrin and the Risk Insurance Management Society, 1995 *Cost of Risk Survey* 1, 69 (1995)); see also James J. White, *Corporate Judgment Proofing: A Response to Lynn LoPucki’s The Death of Liability*, 107 *Yale L.J.* 1363, 1380-81 (1998) (presenting “liability insurance data for general liability of American commercial business, for medical malpractice liability, and for workers’ compensation liability”).

²⁴⁴ Heaton, *supra* note 230, at 37.

²⁴⁵ White, *supra* note 243, at 1381 (“[A] firm’s liability insurance stands in the place of and protects its business assets.”).

²⁴⁶ See Yablon, *supra* note 74, at 579 (“One of the clearest and most consistent findings is that the vast majority of securities class actions settle within the limits of the insurance policy carried by the defendants.”).

²⁴⁷ The Supreme Court confronted this phenomenon in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 859 (1999), where the parties sought to certify a mandatory limited-fund class action that made insurance proceeds available to claimants while “Fibreboard was allowed to retain virtually its entire net worth.”

Purchases of liability insurance may be the best example of “as if” risk-averse decisionmaking by corporations. Economically inclined corporate law scholars appear to agree that liability insurance purchases make sense because “managers are risk-averse,” not because it would be rational for companies to insure in an ideal world.²⁴⁸ Managers’ tolerance for risk may differ from their employers’ because managers are risk-averse human beings or because compensation packages encourage them to be more conservative than shareholders would want.

Insurance purchases may demonstrate that companies act “as if” they are risk averse when planning for litigation. However, they do not show that “as if” risk-averse decisions occur *in litigation*. Insurance companies control insurance dollars.²⁴⁹ Consequently, the unwillingness of policyholders’ officers and directors to bear risks should not automatically lead one to think that class action settlements systematically are too rich. One must consider how insurance companies behave.

Insurance companies “specialize in bearing risks that are too large for the insured to survive.”²⁵⁰ By developing risk pools and reinsuring, liability carriers can diversify and spread large risks better than policyholders. Liability insurers are also experienced and savvy litigants. They participate in large lawsuits regularly and are fully capable of defending class actions. The presence of liability insurance therefore is a good indicator that a lawsuit will be defended in a risk-neutral way.²⁵¹

²⁴⁸ Reinier Kraakman et al., *When Are Shareholder Suits in Shareholder Interests?*, 82 *Geo. L.J.* 1733, 1745-46 (1994); see also Henry Hansmann & Reinier Kraakman, *Towards Unlimited Shareholder Liability for Corporate Torts*, 100 *Yale L.J.* 1879, 1908 (1991) (offering managers’ risk aversion as explanation for corporate purchases of liability insurance); Peter H. Huang, *Teaching Corporate Law from an Option Perspective*, 34 *Ga. L. Rev.* 571, 591 (2000) (explaining why risk-averse managers using diverse means, including insurance purchases, may take less risk than shareholders want); cf. Richard A. Posner, *Economic Analysis of Law* 477-78 (5th ed. 1998) (offering three explanations for insurance purchases, only one of which is that “[m]anagers are risk averse”).

²⁴⁹ On insurer control of defense and settlement, see generally Ellen S. Pryor & Charles Silver, *Defense Lawyers’ Professional Responsibilities: Part I—Excess Exposure Cases*, 78 *Tex. L. Rev.* 599 (2000); Ellen S. Pryor and Charles Silver, *Defense Lawyers’ Professional Responsibilities: Part II—Contested Coverage Cases*, 15 *Geo. J. Legal Ethics* 29 (2001).

²⁵⁰ Heaton, *supra* note 230, at 37.

²⁵¹ Posner appears to agree. Posner, *supra* note 248, at 11 (“[I]nstitutional responses to risk aversion such as insurance and the corporation may make people effectively risk neutral in many situations.”); see also Alexander, *supra* note 52, at 561 (“[I]nsurance companies are repeat players whose business consists of calculating risks and acting on probabilities. Even if individual defendants worry excessively about the possibility of extremely adverse outcomes of low probability, insurers should be risk-neutral.”). Alexander does argue that insurers settle class actions because they fear being sued for bad faith after losing at trial and because they can recover their losses by raising premiums.

To this point, the question has been factual: Are class action defendants risk averse? The case that they are has not been made persuasively. A normative issue also arises. If they are risk averse, does their fear of losing class actions at trial provide a good reason for recognizing a claim of duress? In particular, is it a good reason to use litigation procedures that generate less fear rather than more?

Affirmative answers to these questions have radical potential. If litigants' risk tolerances should guide judges' choices among available procedures, *personal injury plaintiffs* may be entitled to many accommodations. First, these plaintiffs typically are human beings, not corporations, so evidence of risk aversion applies to them straightforwardly. Second, the worst-off of these plaintiffs have severe injuries and correspondingly large compensation claims. The latter represent sizeable fractions of their wealth—perhaps their largest assets—and entail nondiversifiable risks. Risk aversion is likely to have serious consequences in this setting. Third, empirical studies show that plaintiffs with large personal injury claims often settle cheaply and identify risk aversion as the likely cause.²⁵²

Judges could often help personal injury plaintiffs when choosing among available procedures. They could keep cases instead of transferring them to defendants' desired fora. They could allow one-sided discovery. They could carry defendants' dispositive motions forward instead of deciding them. They could deny defendants' requests to certify proplaintiff rulings for interlocutory review. They could extend or shrink time limits to plaintiffs' advantage. They could delay trial settings or advance them. In theory, judges could make all of these choices, and many others, in ways calculated to reduce personal injury plaintiffs' fear of losing at trial. If risk aversion is a good reason for choosing less coercive procedures, presumably they should.

Insofar as I am aware, no developed body of law requires or even allows trial judges to consider plaintiffs' risk tolerances when making procedural calls. Except when it comes to class actions, adjective law²⁵³ takes little notice of risk aversion. It focuses on getting cases tried and settled expeditiously, whether or not this is good for plaintiffs.

Adjective law may ignore plaintiffs' aversion to risk because subjective attitudes are hard to prove or because they are subject to strategic manipulation. It may also do so because litigants have incentives

Alexander, *supra* note 52, at 561-63. True or false, these explanations do not show "as if" risk-averse decisionmaking.

²⁵² See *supra* notes 218-219 and accompanying text.

²⁵³ "Adjective law" is "[a] somewhat outdated name for civil procedure." Epstein, *supra* note 45, at 5.

to address risk aversion on their own. They can hire agents, including lawyers, subrogated first-party insurers, and third-party liability carriers, that are risk neutral (or more nearly so).²⁵⁴ Because risk-neutral decisions are more profitable *ex ante* than risk-averse decisions, market forces should ameliorate many effects of risk aversion without judges' help.²⁵⁵

The possibility of discouraging risk aversion by rewarding risk neutrality raises an important question: Why do efficiency-minded jurists like Easterbrook and Posner want to insulate defendants from the consequences of risk aversion instead of punishing them for making economically irrational decisions? Markets promote efficiency by disciplining inefficient behavior. This is one reason why liability insurers collect billions of dollars in premiums every year: They can handle risks and claims better than policyholders. Discipline also should promote risk-neutral decisions in class action lawsuits, which in turn should promote efficient deterrence of wrongdoing and settlement of claims. By treating defendants' aversion to risk as a reason for altering procedures, Easterbrook and Posner discourage corporate defendants from acting "as if" they are risk neutral. They may even cause "as if" risk-averse behavior to spread by rewarding companies that demonstrate their susceptibility to threats.

Adjective law also may ignore attitudes toward risk because we would not know how to adjust procedures in light of these attitudes even if we could discern them with any reliability. Professor Warren Schwartz makes this point. Even conceding that certification increases claimants' leverage,²⁵⁶ he sees no "reason to believe that the

²⁵⁴ See, e.g., Russell Korobkin & Chris Guthrie, *Psychology, Economics, and Settlement: A New Look at the Role of the Lawyer*, 76 *Tex. L. Rev.* 77 (1997). Korobkin and Guthrie use controlled experiments to show that "lawyers are more likely than litigants to apply an expected financial value analysis to the settlement-versus-trial decision, whereas certain cognitive and social-psychological phenomena that can distract from expected value analysis are more likely to influence litigants." *Id.* at 82. Judge Posner has recognized the possibility of substituting risk-neutral decisionmakers for risk-averse litigants. See Posner, *supra* note 248, at 589 ("Even in personal litigation (e.g., most tort suits) [the] importance [of risk aversion] may be small, as the plaintiff's risk may be buffered by a contingent fee contract . . . and the defendant may be . . . insured.").

²⁵⁵ On this theory, the risk aversion observed in empirical studies of litigation outcomes is a residual that plaintiffs cannot efficiently reduce. In reality, other factors may contribute, including rules limiting contingent fees, case financing, and assignability of claims.

²⁵⁶ The assumption "that the greater stakes in a class action will . . . lead to a greater total recovery for plaintiffs than individual actions would, even if all members of the class were to sue individually," Schwartz, *supra* note 14, at 308, causes Professor Schwartz to miss the possibility that certification may cause the stakes to decline. Forced aggregation may saddle plaintiffs with severe agency problems that do not exist in conventional lawsuits or voluntary consolidations. It may also enable defendants to use strategies to weaken plaintiffs' claims that are not available in other contexts. See Charles Silver, *Com-*

lesser recovery through individual actions is the preferred outcome from the social perspective,” and “no alternative to being entirely agnostic with respect to this question.”²⁵⁷ “What is lacking,” he writes, “is a normative theory for determining whether one outcome reached through settlement is ‘better’ than another.”²⁵⁸

Schwartz depicts the choice between a conventional lawsuit and a class action as a choice between two bargaining environments, in both of which risk aversion plays a part. In a conventional lawsuit, the plaintiff “will be disadvantaged in settlement negotiations because of her risk aversion.”²⁵⁹ In a class action, Schwartz assumes, the balance shifts in the plaintiff’s favor.²⁶⁰ The plaintiff’s worst possible outcome—losing at trial—remains the same, but the defendant’s worst outcome is now the nightmare of an enormous class action judgment. The defendant is therefore more risk averse than before and is willing to pay a larger premium to avoid a trial.²⁶¹

The difficulty is in deciding which bargaining environment is better. From an economic perspective, there is no inherent reason for a preference. A move from one context to the other may change the size of the settlement payment, but the payment is a transfer made to satisfy a demand, and thus is not an economic loss. Otherwise, the choice depends on contingent matters, especially the impact on parties’ incentives when engaging in productive activities. This is an empirical matter that is difficult to resolve. Worse,

if there were a systematic relationship between the role of risk aversion in the settlement outcome and the correct recovery in terms of incentives for primary behavior, [knowing the relationship] would not help in choosing the better settlement environment. The magnitude of defendant’s possible liability is only one factor determining

paring Class Actions and Consolidations, 10 Rev. Litig. 495 (1991); Charles Silver & Lynn Baker, I Cut, You Choose: The Role of Plaintiffs’ Counsel in Allocating Settlement Proceeds, 84 Va. L. Rev. 1465 (1998); Charles Silver, Representative Lawsuit & Class Actions, Int’l Ency. Of L. & Econ. (Boudewijn Bouckaert & Gerrit De Geest eds., 1999) (on file with *New York University Law Review*) [hereinafter Silver, Representative Lawsuits & Class Actions].

²⁵⁷ Schwartz, *supra* note 14, at 308.

²⁵⁸ *Id.* at 297.

²⁵⁹ *Id.* at 308.

²⁶⁰ *Id.*

²⁶¹ Not everyone accepts this characterization of the balance of risk aversion in class actions. For example, Professors Hay and Rosenberg accuse class action critics of “ignor[ing] the danger of similar extortionate effects on class counsel and class members” flowing from aggregation. “The all-or-nothing gamble of a single, class-wide jury trial,” they contend, “exerts pressure on risk-averse class counsel and class members to settle for less than the value of the class claim.” Hay and Rosenberg, *supra* note 13, at 1403. I do not think the validity of Schwartz’s point depends on the precise characterization of the balance of risk aversion in class actions.

the role of risk aversion in the settlement process. If we knew what we wanted to accomplish, we would have to take account somehow of these other factors . . . [including] the role of risk aversion in the plaintiff's settlement decision All of this simply cannot be done.²⁶²

This critique is fundamental. Even if one knows that the balance of risk aversion differs from one litigation context to another, one may not know which balance is best. The normative point depends on how different bargaining environments connect up with a larger account of the goals of civil justice systems. When risk aversion affects decisions, the normative question cannot be resolved from the armchair. It may not even have a general answer, but may depend heavily on facts.

To put the point another way, the excessive pressure thesis depends on an account of optimal settlement pressure. The charge that class actions unduly coerce defendants is persuasive only when one knows how much pressure defendants should bear. Blackmail theorists have not presented an account of optimal settlement pressure in a world populated with risk-averse parties. Consequently, they have not shown that class actions generate too much pressure to settle.

Schwartz thus meets with real skepticism the judges' claim that class actions force defendants to overpay. This claim has two forms, as previously shown. For Judge Posner, the problem is that defendants pay more than the value of claims as demonstrated in prior trials.²⁶³ Judge Easterbrook takes a broader view of claim values, arguing that class actions generate undue pressure even when claims are small.²⁶⁴ The common allegation is that conventional lawsuits assign "better" values to claims than class actions. Schwartz replies by asking, Given that risk aversion taints all bargaining environments, how do you know?

One could also meet the overpayment objection by pointing out that class actions are *supposed* to increase claim values.²⁶⁵ This is clearest in the small-claim context, where aggregation enables plaintiffs to get dollars for claims that are worthless individually. It is also true generally. Even when claims are large, aggregation can enable plaintiffs to purchase higher quality services, to litigate more inten-

²⁶² Schwartz, *supra* note 14, at 309.

²⁶³ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

²⁶⁴ *West v. Prudential Sec., Inc.*, 282 F.3d 935, 937 (7th Cir. 2002).

²⁶⁵ For further discussion, see generally Silver, *Comparing Class Actions and Consolidations*, *supra* note 256. See also Hay & Rosenberg, *supra* note 13, at 1383 ("Put crudely, the class action is desirable because it enables plaintiffs as a group to recover more than they could get in separately-prosecuted actions.").

sively, to offer global peace when settling, and to make more credible threats of going to trial.²⁶⁶ The observation that defendants pay more to settle aggregated claims, if true, may show that class actions are working well.

The objection that class actions cause defendants to overpay thus assumes what must be proved, namely, that conventional lawsuits provide normative benchmarks for claim values. This is not self-evident. Conventional lawsuits may value some claims well and others poorly. Intuitively, they seem unlikely to yield good values when one side has more at stake than the other. Assume that a defendant knows that a loss to Plaintiff *A* will increase the value of related claims held by Plaintiffs *B* through *Z* and that a victory over *A* will drive values down. A rational defendant will take these external effects into account when deciding how actively to defend *A*'s case. Plaintiff *A* will ignore external effects, having no interest in other plaintiffs' claims. The defendant will therefore outspend Plaintiff *A*, increasing the likelihood that *A* will lose and driving down the settlement value of *A*'s claim.²⁶⁷ A class action could achieve a better balance of incentives by bringing Plaintiffs *B* through *Z* into *A*'s case.

Conventional lawsuits also may value claims improperly when defendants enjoy economies of scale that are not (but could be) available to claimants. Professor David Rosenberg explains:

The standard case-by-case process for adjudicating mass tort claims generally denies class action efficiencies to plaintiffs but automatically affords precisely those litigation advantages to defendants. Faced with numerous actual and potential claims presenting common questions of liability and damages ("classable claims"), the defendant always, naturally and necessarily, prepares one defense for all of those claims, litigating from the posture of a *de facto* class action. Because it "owns" the defense interest in the classable claims that comprise a given mass tort case, the defendant litigates as if all the claims have been aggregated in a mandatory non-opt out class action. With class-wide aggregation of the defense interest, the

²⁶⁶ See Silver, Representative Lawsuits & Class Actions, *supra* note 256, at 201-06 (explaining economic advantages class actions can have for claimants); see also Rosenberg, Mass Tort Class Actions, *supra* note 13, at 401 (explaining that "[a] defendant will make investments in the litigation that no plaintiffs' attorney can match economically" when each plaintiffs' attorney handles "only a fraction of the classable claims").

²⁶⁷ See Rosenberg, *supra* note 13, at 401 ("In general, the unequal investment incentive for defendants and plaintiffs in mass tort cases translates into a much greater chance that the defendant, who aggregates all classable claims automatically, will prevail on the common questions over the plaintiffs' attorney who acquires fewer than all claims."); see also Hay & Rosenberg, *supra* note 13, at 1388-89 (arguing that conventional lawsuits provide inappropriate normative baseline when defendants face numerous related claims because defendants enjoy spending advantages on common questions).

defendant exploits economies of scale to invest far more cost-effectively in preparing its side of the case than plaintiffs can in preparing their side.²⁶⁸

According to Rosenberg, “differential access to the scale economies from class-wide aggregation undermines the primary goals of tort law: effective and administratively efficient deterrence and compensation.”²⁶⁹ Class actions may create better bargaining environments by leveling the playing field.

The contention that conventional lawsuits balance risk aversion in a normatively compelling way also has the problem of being too strong. Any joinder or consolidation that involves more than one claimant has the potential to alter the scales and to create a bargaining environment that is relatively favorable to plaintiffs.²⁷⁰ Consequently, every aggregation is subject to the blackmail charge, as defendants have begun to see.²⁷¹ Even the informal aggregations that plaintiffs’ attorneys achieve by developing client inventories may be suspect. It is one thing to bargain with a plaintiffs’ attorney who represents only one client. It is another thing to bargain over a claim when a lawyer has other clients waiting in the wings.

It is hard to see how Judges Easterbrook and Friendly can respond effectively to these points. Both judges argue that blackmail occurs in small-claim class actions.²⁷² Their preferred bargaining envi-

²⁶⁸ Rosenberg, *supra* note 13, at 393-94.

²⁶⁹ *Id.* at 395.

²⁷⁰ See Michelle J. White, *Explaining the Flood of Asbestos Litigation: Consolidation, Bifurcation, and Bouquet Trials* 8 (NBER Working Paper No. 9362, 2002), available at <http://www.nber.org/papers/w9362> (modeling defendants’ risk aversion in asbestos lawsuits and assuming that “[t]he risk premium,” i.e., “the amount the defendant is willing to pay to obtain the certainty of settlement,” “increases as the case poses a bigger threat to the defendant’s solvency”); *id.* at 17-18 (arguing that consolidation increases risk premiums by causing case outcomes to correlate more closely); *id.* at 19 (finding that “when two or three plaintiffs’ claims are consolidated for trial, plaintiffs’ probability of winning rises by 15 percentage points compared to single-plaintiff trials and, when four or five claims are consolidated, plaintiffs’ probability of winning rises by 11 percentage points”).

²⁷¹ In fact, the charge has been made outside the class action context. See Lisa Stansky, *Unusual Battle In W. Va. Asbestos Case*, *Nat’l L.J.*, Oct. 28, 2002, at A12 (describing Union Carbide’s effort to block mass asbestos trial involving thousands of plaintiffs, and quoting Walter Dellinger, Union Carbide’s attorney, that “[t]he sheer size of the litigation has an ‘in terrorem effect’ that forces defendants to settle”).

²⁷² Because the blackmail theorists emphasize risk aversion, the finding that many securities class actions are frivolous may not help their case. Several explanations have been offered to account for the decision to file frivolous lawsuits, including the desire to pressure defendants to settle by threatening them with litigation costs, information asymmetries favoring plaintiffs, information asymmetries favoring defendants, and a combination of attitudes toward risk that favor plaintiffs. See generally Guthrie, *supra* note 151. Frivolous lawsuits may thus have many causes, only one of which is risk aversion on the defense side. Moreover, cases brought to threaten litigation costs or because of informa-

ronment—single-plaintiff litigation—is thus one in which plaintiffs with meritorious NEV claims recover nothing because they cannot credibly threaten to go to trial.²⁷³ The desirability of allowing corporations to impose small losses with impunity is not self-evident.

Because Judge Posner focuses on lawsuits involving large claims, he avoids the complaint just leveled against Easterbrook and Friendly. He also gains another advantage. He can argue for allowing litigation (and claim values) to mature through individual trials instead of subjecting everyone to the risk and randomness inherent in a single large class.²⁷⁴ It is better, Posner says, to have lots of juries make small decisions than to have a single jury make an enormous one.²⁷⁵ Eschewing individual trials needlessly subjects a defendant to the risk of insolvency, needlessly places claimants at the mercy of a small number of jurors, and needlessly attaches large consequences to mistakes.

Judge Easterbrook expanded on this point in *Bridgestone/Firestone*, comparing individual trials to a decentralized market and a class action to a centralized pricing mechanism like the Soviet Union's Gosplan.²⁷⁶ The latter seems to save time and money, but the former prices things more accurately and is much more efficient:

Markets . . . use diversified decisionmaking to supply and evaluate information. Thousands of traders affect prices by their purchases and sales over the course of a crop year. This method looks "inefficient" from the planner's perspective, but it produces more information, more accurate prices, and a vibrant, growing economy. When courts think of efficiency, they should think of market models rather than central-planning models.²⁷⁷

Apparently, Easterbrook thinks that defenders of class actions have socialist proclivities.

In truth, the choice is not one between central planning and decentralized markets. To see why, remember two facts. First, trials

tion asymmetries favoring defendants seem unlikely to pose any danger of catastrophic losses. Consequently, they are unlikely to trigger hedging.

²⁷³ One school of thought contends that plaintiffs with negative expected value (NEV) claims can obtain settlement payments in some circumstances. See, e.g., Lucian Ayre Bebchuk, *Suits with Negative Expected Value*, 3 *The New Palgrave Dictionary of Economics and the Law* 551 (1998). No one has demonstrated empirically that meritorious NEV plaintiffs succeed with any frequency, however, and Professor Schwartz recently has challenged the soundness of the theory. See Warren F. Schwartz, *Can Suits With Negative Expected Value Really Be Profitable? Defendants Can Play Games Too*, *Legal Theory* (forthcoming) (on file with *New York University Law Review*).

²⁷⁴ See *supra* Parts I.B & I.D.

²⁷⁵ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995).

²⁷⁶ *In re Bridgestone/Firestone, Inc.*, 288 F.3d 1012, 1020 (7th Cir. 2002).

²⁷⁷ *Id.* (citations omitted).

“occur in about 3% of all litigated cases.”²⁷⁸ When decertifying the *Rhone-Poulenc* class, Judge Posner reported that 300 conventional lawsuits were pending.²⁷⁹ His “decentralized process of multiple trials” might therefore have consisted of nine more jury trials than had already occurred.²⁸⁰ In *Bridgestone/Firestone* the likelihood was that no conventional trials at all would occur because class members’ diminished value claims were small.²⁸¹ The “thousands of traders” who participate in the crop market had no counterparts in the trial market for diminished value claims.

Ordinarily, then, the choice is not between a big trial and hundreds or thousands of little ones; it is between a big trial and a few or no little ones.²⁸² Moreover, no matter which option one selects, a settlement market will arise, and it, not the trial process, will evaluate the bulk of the cases. This is the second crucial fact. By certifying a class action for trial, a judge does not prevent a defendant from settling with claimants individually (or en masse). The certification decision only changes the bargaining environment. One must therefore ask not whether one prefers markets to central planning—the settlement market will prevail in any event—but whether settlements should be struck in one bargaining environment or another. This is the question Professor Schwartz addressed.²⁸³

Judge Posner’s fear of error requires further consideration. The charge might be that aggregation magnifies the consequences of error or increases the error rate.²⁸⁴ Before addressing either possibility, it is

²⁷⁸ Silver, *supra* note 48, at 2112; see also Eisenberg & Farber, *supra* note 95, at S101 tbl.1 (reporting trial rates for sample of federal diversity cases in years 1986 through 1990 ranging from .0359 to .0454).

²⁷⁹ *Rhone-Poulenc*, 51 F.3d at 1296.

²⁸⁰ The thirteen trials that took place before certification were about as many as one would expect, given three hundred pending lawsuits and a handful of settlements. Because hemophiliac-AIDS cases involved unusually large damages, however, one might have predicted more trials than usual in these cases.

²⁸¹ See *supra* note 119 and accompanying text.

²⁸² Experience in many mass tort cases buttresses this claim. Consider *Bendectin*, an unusually active litigation. “[A]lmost 1700 suits” alleging Bendectin-related birth defects were filed against Merrell Dow Pharmaceuticals. Joseph Sanders, *From Science to Evidence: The Testimony on Causation in the Bendectin Cases*, 46 *Stan. L. Rev.* 1, 4-5 (1993). Thirty trials occurred, one of which was an Ohio matter that consolidated over 800 cases. *Id.* Conventional trials thus occurred in less than two percent (29/1700) of the cases. Excluding the cases in the consolidated proceeding from the denominator, the frequency of trials rises to just over three percent (29/900). Also worthy of note is Merrell’s willingness to try the consolidated case, which it won. This is anecdotal evidence that aggregation does not invariably cause defendant collapse.

²⁸³ Schwartz, *supra* note 14, at 309.

²⁸⁴ These contentions and others appear in Epstein, *supra* note 45, at 24 (stating that certification creates “[a] possibility of error . . . that an innocent defendant should greet with dread. After all, a ten percent exposure to a \$10 billion verdict counts as real money,

worth noting that neither charge makes a complete case against class actions. The likelihood of error and the consequences of error are two of many factors that one must consider when evaluating class actions. For example, when claims are not viable individually, one must make a hard choice: Forbid a class action and doom all plaintiffs to zero recoveries (even if their claims have merit), or allow a class action and tolerate any errors that result. Because both options generate benefits and costs, an error-based case against class actions cannot be made from the armchair. Empirical study is required.

One must also weigh competing concerns when deciding whether to allow large-claim class actions. In *Rhone-Poulenc*, Judge Posner noted that certification could bring relief to thousands of recipients of tainted blood products who had not sued.²⁸⁵ Even when claims are large, then, certification may offset underclaiming, creating more optimal incentives for potential tortfeasors to take care. Certification also may bring the risk aversion of plaintiffs and defendants into a better balance.²⁸⁶

With these preliminaries covered, the merits of Judge Posner's concerns about errors can be addressed. First, it is important to ask whether Posner has legal or factual errors in mind. Although he discusses both in *Rhone-Poulenc*, Posner seems mainly concerned about juries and, therefore, about facts. Second, Posner thinks that the number of jurors who review the facts correlates inversely with the likelihood of mistakes. The findings of a single jury may be idiosyncratic, he writes, but "the result will be robust if . . . further trials . . . go forward, because the pattern that results will reflect a consensus, or at least a pooling of judgment, of many different tribunals."²⁸⁷ In class action parlance, Posner argues for a maturity requirement.²⁸⁸

Having serious qualms about the abilities of jurors (and judges) to decide factual (and legal) issues correctly, I find Posner's view appealing. If jurors (or judges) are somewhat more likely than not to evaluate evidence (or legal arguments) correctly, the balance of opinion should more robustly favor the correct result as the number of

even today.")). More generally, Epstein contends that class actions distort the signals substantive laws are meant to send by eliding important differences between aggregated claims. *Id.* at 28-43.

²⁸⁵ See *supra* note 86 and accompanying text.

²⁸⁶ See *supra* text accompanying note 53.

²⁸⁷ *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299-1300 (7th Cir. 1995).

²⁸⁸ For an interesting critique of the development of the maturity requirement, see Thomas E. Willging, *Beyond Maturity: Mass Tort Case Management in the Manual for Complex Litigation*, 148 U. Pa. L. Rev. 2225 (2000).

evaluations increases.²⁸⁹ Even so, as an attack on the use of class actions, Posner's argument fails.

First, if litigants act in a risk-neutral manner, the possibility of getting an idiosyncratic jury in a class action will not influence settlement decisions, as Professor Schwartz explains.²⁹⁰ A claim with a five percent chance of success that will yield \$1 million in damages in the event of a win has an expected value ex ante of \$50,000 (.05 x \$1 million = \$50,000). Ceteris paribus, ten such claims lumped together are worth \$500,000 and one hundred such claims are worth \$5 million. These numbers would guide settlement negotiations between risk-neutral parties. Grouping claims should not benefit plaintiffs or defendants when parties are risk neutral, as expected values remain the same.

Second, although Posner's argument has considerable force in the asbestos context where hundreds or thousands of trials have occurred over dozens of years, few other species of litigation have generated robust juror output.²⁹¹ Tables 2A-2C, below, display information about jury verdicts drawn from a 1999 Federal Judicial Center report on mass tort litigation.²⁹² As the right-most columns show, jury verdicts are strikingly rare, even when mass torts expose thousands of persons to harm and produce hundreds of lawsuits. The thirteen verdicts that were on the books when Judge Posner decertified the *Rhone-Poulenc* class actually distinguished tainted blood products litigation as a "[r]elatively mature" mass tort.²⁹³

²⁸⁹ See Lewis A. Kornhauser & Lawrence G. Sager, Unpacking the Court, 96 Yale L.J. 82, 97-100 (1986) (showing that accuracy increases with number of judges if each judge is more likely than not to select right answer). Schwartz handles the aggregation-of-decisions point by rejecting the view that a single right answer exists to questions of fact that are properly put to jurors for resolution. Schwartz, *supra* note 14, at 302-04.

²⁹⁰ Schwartz, *supra* note 14, at 305-06.

²⁹¹ See, e.g., White, *supra* note 270, at 15 (assembling database of 5500 asbestos cases that were tried, singly or in groups, between 1987 and 2002).

²⁹² Thomas Willging et al., Individual Characteristics of Mass Torts Case Congregations, in Advisory Comm. on Civil Rules & Working Group on Mass Torts, Report on Mass Tort Litigation app. D (1999). The tables omit kinds of litigation for which the number of jury verdicts was not stated explicitly or could not easily be determined. Also omitted are species of litigation that experienced significant development after the publication of the report.

²⁹³ *Id.* at 34. There is no reason to predict that jury verdicts in related cases will become more common in the future. If anything, one should expect fewer of them, trial rates having declined steadily and significantly over the past thirty years. Samborn, *supra* note 185, at 26 ("Juries resolved 4.3 percent of [federal] civil cases in 1970 and only 1.5 percent—3,633 cases in raw numbers—in 2001.").

TABLE 2A: DEFECTIVE PRODUCTS MASS TORTS ²⁹⁴			
PRODUCT	PERSONS EXPOSED	LAWSUITS	JURY VERDICTS
Dalkon Shield	200,000+	15,000	50
Bendectin	2100	1100	26
Computer Keyboards (Repetitive Stress Injury)	180,000+	3000+	20
Penile Prostheses	15,000+	715+	20
Blood Products	10,000+	500+	16
MER/29	400,000	1500	11
Orthopedic Bone Screws	100,000+	4000+	4
Tampons	Unknown	100+	3
L-Tryptophan	5,000,000	3000+	2
DES	6000+	2000+	1
Norplant	800,000	4000+	1
Thalidomide	7000+	13+	1
Agent Orange	15,000	301	0
Albuterol	5600	115+	0
Heart Valves	12,000	35+	0
"J" Pacemaker Leads	3000+	456	0
TMJ Implants	25,000+	400	0

²⁹⁴ Willging et al., *supra* note 292, at app. D. For more information on the Dalkon Shield, see Francis E. McGovern, *Resolving Mature Mass Tort Litigation*, 69 B.U. L. Rev. 659, 675-76 (1989) (indicating that sixty trials occurred, with plaintiffs winning slightly more than half). For additional information on Bendectin litigation, see *In re Richardson-Merrell, Inc. Bendectin Products Liability Litigation*, 624 F. Supp. 1212 (S.D. Ohio 1985) (describing massive consolidated proceeding resolving 1200 claims pending in about 800 filed cases), and Sanders, *supra* note 282. The one trial noted in Willging et al., *supra* note 292, at app. D, involved eleven plaintiffs, but the authors indicate that more trials may have occurred but that verdicts were rare. The authors note that five Norplant claims grouped in a bellwether case were dismissed on summary judgment. *Id.* For more on the Norplant litigation, see Anna Birenbaum, *Shielding the Masses: How Litigation Changed the Face of Birth Control*, 10 S. Cal. Rev. L. & Women's Stud. 411, 436-37 (2001) (indicating that four Norplant trials occurred, even though more than 2600 federal cases with more than 31,000 plaintiffs were on file). One Agent Orange case was a class action involving 600 named plaintiffs. Three hundred plaintiffs opted out of the class action and filed individual lawsuits. Willging et al., *supra* note 292, at app. D.

TABLE 2B: ACCIDENT-RELATED MASS TORTS²⁹⁵

EVENT	PERSONS EXPOSED	LAWSUITS	JURY VERDICTS
1979 Chicago Air Crash	300	240+	22
Hyatt Skywalk	2000+	140+	2
Salmonella Contaminated Milk	120,000	2	1
San Juan Hotel Fire	1000	270+	1
1987 Detroit Air Crash	170	170	0
1972 Everglade Airline Crash	191	190	0
Kepone Pollution	55,000	Hundreds	0
L'Ambiance Building Collapse	44	10	0
MGM Grand Hotel Fire	3400+	1357+	0
Salmonella Contaminated Ice Cream	32,000+	25	0

TABLE 2C: PROPERTY DAMAGE MASS TORTS²⁹⁶

CAUSE	PERSONS EXPOSED	LAWSUITS	JURY VERDICTS
Polybutylene Pipe	7,000,000+	Thousands	Dozens
Synthetic Stucco	100,000+	800+	5
Audi 5000	350,000+	5	0
Bronco II	650,000	6	0
Masonite Siding	4,000,000+	10	0

Third, innovative trial management techniques may accommodate Judge Posner's professed desire for greater input from jurors. Professors Hay and Rosenberg make this point by offering an inventive suggestion: Replace the usual all-or-nothing class action trial with a series of trials or a single trial conducted before multiple juries. They would then have the trial judge enter a judgment reflecting the average verdict across the set of decisions. Hay and Rosenberg would address possible Seventh Amendment problems by offering parties a choice. A defendant could accept a single all-or-nothing trial or consent to a multiple-jury arrangement. A plaintiff could accept a multiple-jury arrangement or go to trial on only his or her individual claim.²⁹⁷

²⁹⁵ Thomas Willging et al., *Individual Characteristics of Mass Torts Case Congregations*, in Advisory Comm. on Civil Rules & Working Group on Mass Torts, Report on Mass Tort Litigation app. D (1999). Salmonella Contaminated Milk: There appear to have been one individual case and one class action including 15,800 claims. San Juan Hotel Fire: The lone verdict was returned in a consolidated proceeding. 1987 Detroit Air Crash: Apparently, one jury returned a finding of negligence. *Id.*

²⁹⁶ Audi 5000 and Bronco II: Claims were for economic loss stemming from diminished value. *Id.* Masonite Siding: In a class action certified in Alabama, the first phase of a trial resulted in a jury verdict that Masonite Siding is defective. The case then settled. See *Int'l Paper Co. v. Agric. Excess & Surplus Ins. Co.*, No. A089102, 2001 WL 641781, *1-*2 (Cal. Ct. App. Apr. 12, 2001) (describing proceedings in *Naef v. Masonite Corp.*).

²⁹⁷ Hay & Rosenberg, *supra* note 13, at 1406-07.

Given the low frequency of jury verdicts in conventional litigation, class actions may present opportunities for judges to generate more juror responses than usual. A trial plan, like Hay and Rosenberg's, that elicited verdicts from ten six-person juries would generate far more information about claim values than conventional trial processes normally do.

Class action critics also contend that lumping plaintiffs into common trials causes jurors to commit more errors than they would otherwise.²⁹⁸ In *Castano*, the case that decertified a class of smokers to protect cigarette companies from settlement pressure, Judge Jerry Smith wrote, "Aggregation of claims also makes it more likely that a defendant will be found liable and results in significantly higher damage awards."²⁹⁹

In a perceptive article, Thomas Willging, a researcher at the Federal Judicial Center, notes many problems with this assertion. Three bear repeating here: The evidence supporting Judge Smith is preliminary and slim;³⁰⁰ the evidence, which shows that aggregation may weaken the claims of plaintiffs with severe injuries and favor defendants in certain instances, is less one-sided than Judge Smith suggests;³⁰¹ and Judge Smith ignored evidence that was available at the time, apparently because the *Manual for Complex Litigation* did not cite it.³⁰²

Even if one concedes that the influence of aggregation on jurors works to defendants' disadvantage, one must still ask whether this constitutes deterioration or improvement in trial procedures. Aggregation may offset jury errors that favor defendants in conventional cases. When using single-plaintiff cases as a normative benchmark, Judge Smith should have shown that juries get things right in these cases. He did not. Because the truth of the proposition is not self-

²⁹⁸ Discussions of error in aggregated trials usually focus on consolidations and massive joinder actions, not class actions. See, e.g., Lester Brickman, On the Relevance of the Admissibility of Scientific Evidence: Tort System Outcomes are Principally Determined by Lawyer's Rates of Return, 15 *Cardozo L. Rev.* 1755, 1780-82 (1994).

²⁹⁹ *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996).

³⁰⁰ As Thomas Willging notes:

In the *Castano* ruling on maturity, the sources themselves may not be mature. Social science's study of the effects of aggregation remains quite young and active. Whether a single maturation cycle applies to all mass torts has not been determined. The *Castano* court relied on a single social science study for its empirical finding on the disadvantages of class actions for defendants. Further studies are in process that may or may not replicate the findings of that single study.

Willging, *supra* note 288, at 2240 (2000)

³⁰¹ *Id.* at 2237 n.59.

³⁰² *Id.* at 2237-38.

evident and because the study Judge Smith relied on did not demonstrate its truth, his observation that aggregation helps plaintiffs has little persuasive power.³⁰³

CONCLUSION

By aggregating hundreds, thousands, or even millions of claims, the class action can make small claims viable and empower claimants in other ways. Defendants dislike class actions for this reason. They prefer single-plaintiff lawsuits in which they possess significant advantages, including economies of scale and superior tolerance for risk. One must therefore expect repeat class action defendants—product manufacturers, financial institutions, insurance companies, directors and officers, etc.—to oppose the use of litigation classes and to enlist the help of tort reform groups and politicians when seeking to defeat them, just as one must expect repeat players on the side of claimants to exert countervailing pressure. The class action will always be a political football.

It is reasonable to ask judges to keep above the fray and to refrain from fanning the flames unnecessarily. Civil justice processes exist to enforce valid legal rights and obligations, and judges are committed to making these processes more equitable and efficient. Progress toward civil justice, which requires sustained reflection on legal rules and doctrines, economic incentives, and empirical studies, is more likely to be made in a calm environment than in a roiled one.

By describing class actions as legalized blackmail, judges have used inflammatory rhetoric that impugns the character of plaintiffs and trial lawyers who bring class actions, and of trial judges who certify them. They have done this needlessly and, I believe, wrongly. The problem in class actions is not blackmail and does not resemble blackmail in any interesting respect. The problem, assuming it exists, is excessive pressure resulting in decisions to settle made under duress.

When one describes the problem dispassionately, one can see its factual and normative components clearly. One can also see that the argument supporting the claim of duress has not been made persuasively. Some versions of the argument conflict with others. Some ver-

³⁰³ The proposition that juries get things right when plaintiffs with related claims go to trial separately may be wrong for several reasons. First, defendants are likely to make fuller evidentiary presentations in single-plaintiff cases than are plaintiffs, because defendants have more at stake. Second, defendants may litigate more intensively than plaintiffs because defendants enjoy naturally occurring economies of scale. Third, seeing an individual claim as part of a larger universe of claims may give jurors a better sense of the consequences of defendants' conduct and of the need for punitive damages.

sions rest on factual claims that are wrong, doubtful, unproven, or outdated. Some versions conflict with the due process imperative to maximize claim values. Some versions require an account of optimal settlement pressures in lawsuits involving risk-averse parties that has not been set out and that may never be.

Given the sad state of the duress theory, judges hardly are justified in using it at all, let alone in employing incendiary phrases like legalized blackmail. The hard work of thinking the theory through has not been done. Judges should focus on this aspect of the project and leave the task of demonizing plaintiffs, trial lawyers, and trial judges to others.