

7-2017

# Empowering Individual Plaintiffs

Alex Stein

*alex.stein@brooklaw.edu*

Gideon Parchomovsky

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## Recommended Citation

102 Cornell L. Rev. 1319 (2016-2017)

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# EMPOWERING INDIVIDUAL PLAINTIFFS

Gideon Parchomovsky<sup>†</sup> & Alex Stein<sup>‡</sup>

*The individual plaintiff plays a critical—yet underappreciated—role in our legal system. Only lawsuits that are brought by individual plaintiffs allow the law to achieve the twin goals of efficiency and fairness. The ability of individual plaintiffs to seek justice against those who wronged them deters wrongdoing, ex ante, and in those cases in which a wrong has been committed nevertheless, it guarantees the payment of compensation, ex post. No other form of litigation, including class actions and criminal prosecutions, or even compensation funds, can accomplish the same result. Yet, as we show in this Essay, in many key sectors of our economy, suits by individual plaintiffs have become a rare phenomenon, if not a virtual impossibility. The architecture of liability, by making causes of action more complex and difficult to prove, while equipping defendants with multiple defenses, coupled with the fact that large corporate defendants enjoy a vast cost advantage over individual plaintiffs on account of superior legal expertise and economies of scale and scope, make it nearly impossible for individual plaintiffs to prevail in court, or even get there. This problem pervades many industries, but, for the reasons we detail, it is particularly acute in the insurance, healthcare, medical, and consumer finance sectors.*

*To address this growing problem, we propose a full-fledged legal reform that encompasses substantive, procedural, evidentiary, and remedial measures. Substantively, we explain how civil liability should be redesigned to give a fairer chance to individual plaintiffs. Specifically, we call for the simplification of causes of action and the elimination of cumbersome elements that doom many individual lawsuits. Procedurally, we propose a fast-track litigation course that would enable courts to resolve disputes expeditiously. As we show, the introduction of this new procedure would deprive corporate defendants of one of their most critical advantages: the*

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<sup>†</sup> Robert G. Fuller, Jr. Professor of Law, University of Pennsylvania Law School, and Professor of Law, Bar Ilan University School of Law, Israel.

<sup>‡</sup> Professor of Law, Brooklyn Law School. Visiting Professor of Law, Harvard Law School (Fall 2016/17). We thank the American Association for Justice Robert L. Habush Endowment for supporting our research. We also thank Avi Bell, Alexi Lahav, Alex Reinert, and Peter Siegelman for useful comments and suggestions. Finally, we are grateful to Ananth Padmanabhan for outstanding research assistance.

ability to extend litigation over long periods of time and make it more costly than it should. Evidentially, we recommend that lawmakers shift the burden of proof of certain disputed elements from plaintiffs to defendants and explain how this could be done. Finally, as far as remedies are concerned, we make a case for a new preliminary remedy—a partial payment order—define the conditions under which it should be awarded, and argue for a more extensive use of statutory damages and damage multipliers. Implementing our proposed reform will go a long way toward restoring the pride of place individual plaintiffs traditionally held in our legal system.

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## INTRODUCTION

Our legal system is organized around the concepts of rights and duties.<sup>1</sup> Freedom, autonomy, bodily integrity, property, and other interests and values that receive legal recognition are typically protected by rights that impose duties on third parties to respect them.<sup>2</sup> In the theoretical literature, rights are often idealized as "trumps," whose mere invocation suffices to afford them.<sup>3</sup> Rights, however, are not self-enforcing. They must be vindicated via our legal system or, more precisely, through litigation. Actual litigation is not always necessary. Oftentimes,

<sup>1</sup> For a classic account of this organization, see Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 28 (1913).

<sup>2</sup> *Id.* at 20–25, 28–32 (distinguishing between legal and non-legal interests and explaining how interests that receive legal recognition fall into different categories of rights).

<sup>3</sup> See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY*, at xi (2d ed. 1977).

the threat of commencing litigation will suffice to protect rights. But the threat must be credible: a rightholder must be able to commence a case in court in order to deter violations of her right. As a legal matter, a rightholder is at liberty to take her plight to court. As an economic matter, things are dramatically different. From an economic perspective, if rightholders are rational self-interest maximizers, they will litigate if and only if litigation dominates the alternatives of settling or doing nothing.

Critically, the attractiveness of the alternatives, and hence the ultimate decision as to how to proceed, depends in large part on a single variable: the relative litigation costs of the parties involved.<sup>4</sup> To see this, imagine a world without litigation costs, a conceptual parallel universe of the Coasean world in which there are no transaction costs.<sup>5</sup> In this imaginary world, suits can be filed at no cost and by hypothesis court decisions are rendered instantaneously and correctly. In this imaginary world, rightholders would always choose to litigate and more importantly they will always be made whole. All wrongs will be righted immediately either by damages or by injunctive relief, and rights will reign supreme.

The analysis dramatically changes when one moves to the real world in which litigation costs are positive. Consider the following stylized example. Imagine that Sam encroached upon Ann's property. Assume, first, that as a result Ann suffered a harm of \$2,000. However, in order to vindicate her claim in court, Ann would have to spend \$6,000 on court and attorney fees. Sam, on the other hand, can defend himself at an estimated cost of \$1,000. Unless Ann is a very principled person and is willing to pay for her principles, she will choose not to sue. For her, the suit has a net negative value of \$4,000 (\$6,000-\$2,000). Therefore, from a purely economic perspective, Ann's best option is either to settle the case out of court or do nothing. Doing nothing represents a loss of \$2,000 for Ann, but litigating implies an even greater loss of \$4,000. Ann may also attempt to settle the case with Sam, but since Ann's litigation threat is not credible in this case, her settlement offer will fall on deaf ears. The upshot of our analysis is strikingly sim-

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<sup>4</sup> See Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1314-15 (2012) (showing that a right's realization depends on the rightholder's cost of vindicating it and the challenger's cost of attacking it in court).

<sup>5</sup> Cf. R.H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1 (1960) (proving famously that, in a transaction-cost-free world, assets and entitlements will always navigate to their most efficient users).

ple: asymmetrical litigation costs render rights ineffective in practice.<sup>6</sup>

Importantly, our hypothetical is highly representative. In the real world, litigation costs are almost never symmetrical and affect the parties unevenly. To be sure, in many cases the asymmetry in litigation costs would lead rightholders to settle. As we will show, the actual settlement amount is a function of many variables, but the relative bargaining power of the parties is determined by their respective litigation costs. At the end of the day, therefore, a rightholder's ability to obtain justice critically depends on the asymmetry between her litigation costs and those of her adversary.<sup>7</sup>

Some of the factors that determine a rightholder's willingness to litigate are highly subjective. For example, risk aversion, liquidity constraints, and pessimism may prompt rightholders to settle rather than litigate. Such rightholders harbor a preference for a certain and quick resolution of their disputes. Hence, they will be predisposed to accept a low settlement offer from the other party. But many other factors that slant the legal playing field are objective; in fact, they are borne from the design of our legal system. At times, the statutory definition of certain causes of action is so complex and multifaceted that plaintiffs find themselves at an inherent disadvantage when they try to enforce their rights.<sup>8</sup> Naturally, as the number of elements the plaintiff needs to prove increases, so does the cost of the lawsuit. Since the burden of proof falls on the plaintiff, she must successfully prove each element of her cause of action. When the elements are complex, it may become a Herculean task. To make matters worse, the law usually provides multiple defenses to a particular cause of action, which once again disadvantages plaintiffs.<sup>9</sup> In such cases, the defendant only needs to succeed on one defense claim to prevail, while the plaintiff needs to negate *all* defense claims to win in court. The multifaceted structure of legal entitlements and the availability of multiple defenses thus uniformly benefit defendants over plaintiffs.<sup>10</sup>

Finally, even when a plaintiff is able to surmount all these obstacles, she must still prove her harm and causally attribute

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<sup>6</sup> See Parchomovsky & Stein, *supra* note 4, at 1341–45.

<sup>7</sup> *Id.*

<sup>8</sup> See Jef De Mot & Alex Stein, *Talking Points*, 2015 U. ILL. L. REV. 1259, 1260–62 (2015) (showing how conceptual complexity of entitlements skews adjudicative errors against plaintiffs).

<sup>9</sup> *Id.* at 1264–67.

<sup>10</sup> *Id.*

it to the defendant's wrongdoing in order to be made whole. Doing so, however, is often impossible. Causal uncertainty does not allow the legal system to offer adequate compensation for pain, suffering, and other kinds of emotional and psychological harm.<sup>11</sup> But even in the case of economic losses, plaintiffs often face a tough dilemma. In order to prove their losses with sufficient accuracy, they must expend considerable resources. This, in turn, dramatically reduces their net compensation and sometimes makes the lawsuit unattractive from a cost-benefit perspective. For example, in securities litigation, the need to show market harm and causation nips many potential suits in the bud.<sup>12</sup>

Most importantly, though, litigation is characterized by economies of scope of scale. Repeat defendants, such as insurance companies, financial institutions, and health care providers (to name just a few), enjoy an inherent advantage over individual plaintiffs. Repeat players typically retain attorneys on a fixed basis, which lowers the marginal cost of legal representation for them. Furthermore, since there are typically many commonalities in the cases brought against them, they can often reuse documents, briefs, research, and legal expertise from past cases. Consider, for example, an insurance company that is sued by an insured. In the typical case, the suit will be based on the contract between the parties. Not only was that contract drafted by the legal department of the insurance company, which gives it a critical informational advantage, but also, chances are, that the insurance company handled multiple similar lawsuits in the past and can therefore readily respond to the present suit. The individual insured, by contrast, will need to hire an attorney especially for this suit, pay her to learn the case and draft the briefs, as well as for every court appearance. In light of the systemic asymmetry in litigation costs, it is not surprising that the vast majority of lawsuits brought against insurance companies by individuals settle below their expected value.

Consider now a suit for medical malpractice. Contrary to some populist claims, proving medical malpractice allegations

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<sup>11</sup> See ARIEL PORAT & ALEX STEIN, *TORT LIABILITY UNDER UNCERTAINTY* 57–83 (2001) (identifying five paradigmatic cases in which causal uncertainty coupled with the conventional proof burden prevents victims from recovering compensation for their damages).

<sup>12</sup> See generally Jill E. Fisch, *Cause for Concern: Causation and Federal Securities Fraud*, 94 IOWA L. REV. 811, 840–44 (2009) (specifying and analyzing the complexities of the causation requirements in securities fraud actions).

against doctors and hospitals is extremely difficult.<sup>13</sup> Doctors, hospitals, and their insurers have accumulated nearly all information pertaining to the medical standards and experts, which makes it cheaper for them to defend against malpractice suits than for individual plaintiffs to prosecute those suits. Arguably, because plaintiffs pay their attorneys only after recovering compensation, the defendants' superior expertise does not foil their access to justice. This argument, however, is wrong because it pays no attention to the estimation of expected recovery amounts by plaintiffs' attorneys and to the attorney's opportunity costs. The defendants' advantage affects both of those factors in that it reduces the expected recovery amounts for plaintiffs' attorneys and requires them to expend more efforts on the litigation. As a result, attorneys working on a contingent fee basis tend to take up easy medical malpractice cases only while steering away from the difficult ones. Many victims of medical malpractice are consequently being denied their rights.

While lawmakers cannot easily change the market conditions that favor large defendants, they can change the design of the law to offset the inherent economic advantage of such defendants over individual plaintiffs.<sup>14</sup> In this Essay, we propose a blueprint for legal reform that would alleviate the plight of multiple individual plaintiffs who cannot at present enforce their rights. We would like to emphasize at the outset that our proposal is limited to those legal settings in which defendants

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<sup>13</sup> See *supra* subpart III.A.

<sup>14</sup> By setting up a restrictive "plausibility pleading" standard for determining whether a complaint's allegations justify moving to discovery and trial, the Supreme Court's decisions, *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), took the law in the opposite direction. As Professor Arthur Miller observes, these decisions were

the latest steps in a long-term trend that has favored increasingly early case disposition in the name of efficiency, economy, and avoidance of abusive and meritless lawsuits. It also marks a continued retreat from the principles of citizen access, private enforcement of public policies, and equality of litigant treatment in favor of corporate interests and concentrated wealth.

Arthur R. Miller, *From Conley to Twombly to Iqbal: A Double Play on the Federal Rules of Civil Procedure*, 60 DUKE L.J. 1, 10 (2010); cf. Adam N. Steinman, *The Pleading Problem*, 62 STAN. L. REV. 1293, 1298 (2010) (arguing that the "plausibility pleading" standard preserves old law and its liberal approach to pleadings while preventing plaintiffs from relying on unspecified conclusory allegations). A recent empirical study confirms Professor Miller's assessment. See Alexander A. Reinert, *Measuring the Impact of Plausibility Pleading*, 101 VA. L. REV. 2117, 2122 (2015) (showing that the "plausibility pleading" standard led to an increase in the rate of direct dismissals, with civil rights and employment discrimination suits taking the hardest hit, and that the standard's repercussions for individual plaintiffs were far more profound than for corporations).

enjoy a sizable and consistent cost advantage over plaintiffs. Our proposal consists of three interlocking components. First, we recommend setting up special procedures for fast-track litigation. Our second recommendation identifies a new remedial mechanism: advanced payment orders issued by courts. Third, we call on lawmakers to reformulate causes of action in order to reduce the number and complexity of the substantive requirements the plaintiffs have to prove. As part of that proposal, we posit that our evidentiary rules should be altered in order to make it easier for plaintiffs to substantiate their claims. In this respect, lawmakers can adopt a range of strategies, from shifting the burden of proof, to lowering or increasing it in appropriate cases, to setting up evidentiary presumptions that favor plaintiffs. Finally, we call for the adoption of enhanced statutory damages as an alternative to actual damages.

Individual plaintiffs are of vital importance to our legal system.<sup>15</sup> Lawsuits by individual victims are unique in that they constitute the only litigation form that simultaneously advances the twin goals of deterring wrongdoers and compensating victims. Neither class actions (or other types of collective suits) nor the use of governmental compensation funds can accomplish these twin goals. Class actions, when available, can deter wrongdoing, but their ability to secure proper compensation for the wrongdoings' victims is limited at best.<sup>16</sup> Compensation funds, as their name suggests, provide recompense to victims, but do little by way of deterring future wrongdoings. The best way to realize the goals of compensation and deterrence is to enable victims to pursue individual justice against those who wronged them. We therefore chose to focus solely on how to enable individual plaintiffs to vindicate their entitlements in the courts of law.

This Essay will unfold in four parts. In Part I, we analyze the defendants' structural advantage: their ability to exploit multiple defenses and the multifaceted structure of legal rights. In Part II, we analyze the causes and consequences of

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<sup>15</sup> See, e.g., David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1918–20 (2014) (underscoring individual plaintiffs' important role in civil litigation); Michael Selmi, *Public vs. Private Enforcement of Civil Rights: The Case of Housing and Employment*, 45 UCLA L. REV. 1401, 1404 (1998) (highlighting the role of private plaintiffs in developing housing and job discrimination law through the assertion of "cutting edge" claims).

<sup>16</sup> For a recent comprehensive examination of class actions' pros and cons, see JOHN C. COFFEE, JR., *ENTREPRENEURIAL LITIGATION: ITS RISE, FALL, AND FUTURE* (2015).



the defendants' cost advantage: their ability to litigate at a much lower cost than plaintiffs on account of economies of scale and scope. In Part III, we identify legal areas in which defendants systematically enjoy structural and cost advantages. These areas include healthcare, medical malpractice, insurance, and consumer finance. In Part IV, we specify and evaluate our proposals to empower individual plaintiffs. A short Conclusion follows.

## I

### THE ARCHITECTURE OF LIABILITY

For reasons that are far from clear, the architecture of civil liability inherently favors defendants. As Jef de Mot and one of us recently demonstrated, plaintiffs face an uphill battle when they litigate.<sup>17</sup> The cause of the plaintiffs' disadvantage goes to the very core of our justice system. In order to prevail, plaintiffs must establish all the elements of their case. Failure to prove a single element would result in the loss of the entire case. Defendants, by contrast, need only succeed on a single defense, out of many possible ones, in order to win in court.<sup>18</sup>

As an illustration, consider a suit for a breach of contract. To secure a remedy in court, a plaintiff must prove the following elements by preponderance of the evidence: (1) the parties consummated a valid contract; (2) the contract imposed a duty on the defendant to perform a certain act or refrain from a certain undertaking; (3) the defendant breached her contractual duty; and (4) the plaintiff suffered a harm as a result of the breach.<sup>19</sup> The plaintiff must prove all these elements cumulatively; there can be no gap in the plaintiff's case. This means that if the defendant manages to prevail on a single element, the plaintiff's entire case collapses.

Critically, defendants have multiple ways to rebut each of the elements in the plaintiff's case—a fact that compounds the plaintiff's disadvantage. For example, the defendant can argue that there was no contract between the parties either because

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<sup>17</sup> De Mot & Stein, *supra* note 8, at 1264–69. Indeed, in a recent empirical study, Alexandra Lahav and Peter Siegelman report that plaintiffs' win rate has fallen to about 35%. See Alexandra D. Lahav & Peter Siegelman, The Curious Incident of the Falling Win Rate 1 (July 7, 2017) (available at SSRN: <https://ssrn.com/abstract=2993423> [<https://perma.cc/UUL4-X99E>]).

<sup>18</sup> *Id.* at 1266–67.

<sup>19</sup> See, e.g., *Oasis West Realty, LLC v. Goldman*, 250 P.3d 1115, 1121 (Cal. 2011) (“[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff.” (citing *Reichert v. General Ins. Co.*, 442 P.2d 377, 381 (Cal. 1968))).

there was no meeting of the minds between the parties or because the parties failed to satisfy certain formalities. If the defendant is a corporation, it may also claim that the contract was signed *ultra vires* and is therefore null and void. In the alternative, the defendant may argue that there were fatal defects in the formation of the contract, as a result of which the court should release it from the contract. Concretely, the defendant can claim that the contract should be rescinded on grounds of mistake,<sup>20</sup> impossibility,<sup>21</sup> frustration of purpose,<sup>22</sup> unconscionability,<sup>23</sup> fraud,<sup>24</sup> conditions,<sup>25</sup> undue influence,<sup>26</sup> and duress.<sup>27</sup> Next, the defendant can challenge the plaintiff's interpretation of the contract and advance a different reading under which there was no breach. Finally, the defendant can contend that the plaintiff suffered no harm from the breach, or that even if she did, the court should not award her a remedy because she failed to mitigate her harm or because the limitation period has run out.

The same pattern characterizes tort litigation. In order to prevail in a negligence suit, a plaintiff must prove that: (1) the defendant owed her a duty of care; (2) the defendant breached her duty; and (3) the plaintiff suffered harm from the breach.<sup>28</sup> Once again, the plaintiff must prove *all* of the aforementioned elements. The defendant, for his part, can cause the suit to unravel by raising a single successful defense. For example, he can show that he owed no duty of care to the plaintiff. In the alternative, he can prove that he has not breached the duty of care. Furthermore, he can demonstrate that the plaintiff suffered no loss or that even if there was a loss it is not causally related to the breach of duty. Finally, the defendant can argue that the plaintiff should not receive a remedy on grounds of contributory negligence or laches.<sup>29</sup>

The asymmetry between the plaintiff's case and the defendant's case translates into a cost asymmetry. While the plaintiff must expend resources to establish each of the elements of

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<sup>20</sup> See E. ALLAN FARNSWORTH, *CONTRACTS* §§ 9.2–9.4, at 619–37 (3d ed. 1999) (outlining the defense of mistake).

<sup>21</sup> See *id.* §§ 9.5–9.6, at 637–52 (outlining the impossibility defense).

<sup>22</sup> See *id.* §§ 9.7–9.9, at 652–67 (outlining the defense of frustration).

<sup>23</sup> See *id.* § 4.28, at 307–16 (outlining the unconscionability defense).

<sup>24</sup> See *id.* § 4.12, at 250–55 (outlining the fraud defense).

<sup>25</sup> See *id.* § 8.2, at 519–25 (outlining the “conditions” defense).

<sup>26</sup> See *id.* § 4.20, at 273–76 (outlining the undue influence defense).

<sup>27</sup> See *id.* §§ 4.16, at 265–66, § 4.18 at 270–73 (outlining the economic duress defense).

<sup>28</sup> See *RESTATEMENT (SECOND) OF TORTS* § 281 (AM. LAW INST. 2016).

<sup>29</sup> See *De Mot & Stein*, *supra* note 8, at 1264–66.

her cause of action, the defendant can concentrate on a single defense. Worse yet, plaintiffs are subject to a first-mover disadvantage. Under our system of civil procedure, it is the plaintiff who initiates the litigation process; the defendant must only respond after a suit is filed. Consequently, a plaintiff cannot know in advance which defense claim the defendant will choose to emphasize. This implies that a plaintiff must cover all her bases prior to filing a suit. The defendant, for his part, can expend resources selectively by focusing only on promising defenses.

It bears emphasis that the plight of plaintiffs grows worse as causes of action become complex and the number of relevant defenses grows bigger. As an illustration of the former point, consider the cause of action of fraud on the market under federal securities law. To succeed on a fraud on the market claim, a plaintiff must prove scienter, i.e., "intent to deceive," in addition to the standard elements of fraud.<sup>30</sup> The introduction of a scienter requirement is not just another technical hurdle that plaintiffs must overcome; rather, it is a very significant obstacle that the law puts in the way of plaintiffs. Proof of intent is typically not required in civil actions as it is very difficult to make.<sup>31</sup> Plaintiffs do not have information about defendants' state of mind, let alone their intent. Unsurprisingly, the need to prove scienter deters plaintiffs from bringing actions for fraud on the market.<sup>32</sup>

The same effect can be seen in cases in which the law provides defendants with multiple defenses. Once again, actions for securities regulations violations provide a powerful example. Defendants can respond to an action for a violation of

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<sup>30</sup> See *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 318–24 (2007) (explaining "scienter" element of securities fraud and accompanying pleading and evidentiary requirements).

<sup>31</sup> See Alex Stein, *The Domain of Torts*, 117 COLUM. L. REV. (forthcoming 2017) (explaining that tort law is primarily concerned with accidents, i.e., mutually unwanted interactions that result in a damage to one of the parties); PORAT & STEIN, *supra* note 11, at 7–8 (discussing modern tort liability, which does not require proof of intent to receive damages).

<sup>32</sup> See generally Stephen J. Choi, *Do the Merits Matter Less After the Private Securities Litigation Reform Act?*, 23 J.L. ECON. & ORG. 598, 604–23 (2007) (demonstrating empirically that "scienter" and other legal requirements made it hard for plaintiffs to prosecute securities fraud suits); see also A.C. Pritchard, *Securities Law in the Roberts Court: Agenda or Indifference?*, 37 J. CORP. L. 105, 109 (2011) (observing that "scienter" requirement made it hard for plaintiffs to prosecute securities fraud suits); see also, e.g., *Cozzarelli v. Inspire Pharmaceuticals Inc.*, 549 F.3d 618, 626 (4th Cir. 2008) (explaining that although *Tellabs* does not require a "smoking-gun" allegation for scienter, "plaintiffs do have the difficult task of establishing a . . . cogent inference of scienter through indirect and circumstantial allegations").

securities law by raising one or more of seventy-five different defenses.<sup>33</sup> The longer the list of defenses, the easier it is for defendants to defend against a suit. Each defense represents a potential way of prevailing on a lawsuit for the defendant. And the more options the defendant has at his disposal, the more likely he is to win. Correspondingly, from the plaintiff's vantage point, an expansive menu of defenses implies a lower probability of success on the merits, which reduces the plaintiff's motivation to file a suit.

Worse yet, the fact that courts occasionally make mistakes compounds the plaintiffs' disadvantage. The intuition behind this assertion is the following: recall that every time a court mistakenly decides that the plaintiff failed to prove one of the elements of her case, it dooms her case, as she must prove all the elements cumulatively. Hence, an error against the plaintiff invariably leads to a loss of the entire case. An error against the defendant, on the other hand, does not necessarily carry the same devastating result. The defendant can survive an error relating to any given defense if he successfully proves another defense. Hence, assuming that the risk of error is randomly distributed along all the claims (or elements) in any given case and that the rate of false positives and false negatives is roughly the same, errors in adjudication exacerbate the plight of plaintiffs.<sup>34</sup>

To illustrate, consider a \$1,000,000 suit that faces two independent defenses. Assume that this suit is meritorious, but the court might still mistakenly uphold one of those defenses, which happens approximately twenty percent of the time with each defense. For the plaintiff, the expected judgment consequently equals \$640,000 ( $80\% \times 80\% \times \$1,000,000$ ). Hence, if the plaintiff is rational, she would settle her completely meritorious suit for \$640,000.<sup>35</sup> Assume now that the defendant's attorney knows about the court's occasional errors (because attorneys generally have such knowledge). Based on that knowledge, the attorney decides to raise two additional and equally unmeritorious defenses. Because the defendant needs to succeed with only one defense in order to prevail in the case, this addition of defenses reduces the plaintiff's expected judgment to \$409,600 ( $80\%^4 \times \$1,000,000$ ).

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<sup>33</sup> See Jonathan Eisenberg, *Beyond the Basics: Seventy-Five Defenses Securities Litigators Need to Know*, 62 BUS. L. 1281 (2007) (discussing seventy-five defenses that courts have used to dismiss securities suits).

<sup>34</sup> De Mot & Stein, *supra* note 8, at 1264–69.

<sup>35</sup> *Id.* at 1261–62.

## II

## ECONOMIES OF VOLUME, SCOPE AND SCALE

The cost of law has preoccupied scholars and policymakers for years.<sup>36</sup> Surprisingly, the distribution of legal costs among litigants drew very little attention.<sup>37</sup> This factor is important because litigation costs vary dramatically among litigants: some litigants can litigate more cheaply than others. Litigation costs determine one's access to the legal system, which in turn affects one's ability to vindicate one's rights.<sup>38</sup> Rights, after all, are not self-enforcing—a fact that legal theorists, who tend to refer to rights as conceptual categories or ideal types with an independent legal existence, often ignore.<sup>39</sup> Rights, as well as all entitlements, must be vindicated in litigation in order to afford their holders the protection they were designed to confer upon them. For example, a property right is of very little value to its holder if she cannot enforce it against trespassers. Similarly, a right arising from a contract is of no use to a contracting party if she cannot afford to file a suit in the case of a breach. Hence, legal rights are of practical value only when their holders can enforce them cost-effectively. Litigation is the mechanism that vests rights with meaning.

Some of the factors that affect one's litigation costs are highly idiosyncratic. Some litigants are highly risk-averse and would prefer to overlook certain infringements of their rights in order to avoid going to court. Others may harbor an ideological predisposition against litigating even at the cost of seeing their rights eroded. When litigation asymmetries arise from such individual preferences, there is nothing that law can or should do about it. First, individuals who prefer to avoid litigation are neither wrong nor irrational. Hence, absent evidence that litigants are not acting in their own best interest, there is no cause for legal intervention. Second, reluctance to litigate characterizes both potential plaintiffs and potential defendants. Accordingly, there is no reason to suspect that it disparately affects one of the groups and hence it causes no systemic problems for

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<sup>36</sup> See, e.g., STEPHEN HOLMES & CASS R. SUNSTEIN, *THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES* 43 (1999) (demonstrating that enforcement costs crucially affect legal entitlements and integrating them into general philosophy of rights).

<sup>37</sup> We initiated a conversation on this subject in Parchomovsky & Stein, *supra* note 4, at 1314–21.

<sup>38</sup> See *id.* at 1341–59 (discussing how litigation costs affect parties' ability to vindicate their rights).

<sup>39</sup> For survey and criticism of these theorists' works, see *id.* at 1328–35.

the legal system. Indeed, policymakers should generally allow people to do with their entitlements as they please.<sup>40</sup>

But the relative cost of litigation is not determined solely by people's idiosyncratic tastes and preferences. Repeat litigators, such as insurance companies, financial institutions, hospitals, healthcare providers, and corporations more generally, can litigate more cheaply than individuals.<sup>41</sup> Individuals who wish to litigate must incur substantial search costs and negotiation costs. An individual seeking to file a lawsuit must gather information about suitable attorneys, meet with them, and then negotiate the terms of their engagement. Furthermore, attorneys typically bill one-time clients on a fixed hourly basis.<sup>42</sup> Repeat litigators, by contrast, have ready access to legal advice and representation. They need not incur search and negotiation costs every time they go to court. Repeat litigators are typically represented by in house counsel or outside firms that receive retainer fees.<sup>43</sup> Either way, their total cost is lower than that of individual litigators. Volume in litigation, as in many other contexts, translates into a cost advantage.<sup>44</sup>

The use of contingency fees does not change the analysis. Contingency fees address two very different problems: liquidity and risk. Specifically, the use of contingency fees appeals to two prototypes of litigants: (a) litigants who are extremely risk-averse; and (b) litigants who do not have the means to pay their lawyers upfront. Such litigants are willing to pay a premium in order to be charged based on the outcome of the case. Contingency fees allow them to share their recovery with their attorney in the event of victory and pay nothing in the event of a loss. Contingency fees thus shift the cost and risk from the client to the attorney. Naturally, attorneys would agree to work on a contingency basis only for much higher compensation and only in cases with a high probability of success. The greater the cost and the risk, the higher will be the contingency fee. And the higher the fee that an attorney charges, the less motivated a plaintiff will be to sue. Similarly, from the vantage point of the attorney, if the amount of work she will need to invest in a case is very significant, she will not take the case unless the expected payoff is high enough to offset the cost.

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<sup>40</sup> See Gerald Dworkin, *Paternalism*, 56 *MONIST* 64, 80 (1972) (arguing that state paternalism can only be justified as a means against "far-reaching, potentially dangerous and irreversible" decisions).

<sup>41</sup> See Parchomovsky & Stein, *supra* note 4, at 1344–45.

<sup>42</sup> See *id.* at 1344.

<sup>43</sup> See *id.*

<sup>44</sup> *Id.* at 1344–45.

Contingency fees therefore do not alleviate the problem of cost asymmetry. Moreover, the contingency fee structure motivates attorneys to maximize their business income by striking cheap settlements with defendants early in the litigation process.<sup>45</sup> Such settlements once again come at the plaintiffs' expense.

Another important factor that slants the litigation playfield is the presence of economies of scale and scope. A cost structure displays economy of scale when the average total cost of production or provision declines with each additional unit.<sup>46</sup> A cost function exhibits economies of scope when the marginal cost of production or provision declines when two or more goods or services are provided together.<sup>47</sup> Litigation is often characterized by economies of scale and sometimes also by economies of scope. Attorneys, legal departments, and firms that specialize in certain types of cases become highly specialized in their craft. To begin with, they can use the same legal research and training in multiple cases. Then, they can use, with minor adjustments, the same letters, briefs, and contract drafts in a large number of cases. Finally, they can engage the same experts, document reviewers, paralegals, and support staff in all the similar cases they handle. As a result, the marginal cost of handling every individual case will steadily decline. These economies widen the gap between large corporate litigants, who enjoy them, and the rest of the public, who does not.<sup>48</sup>

Although economies of scope in litigation are rarer than economies of scale, they, too, arise in certain cases. At times,

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<sup>45</sup> This problem is particularly acute in class actions. See, e.g., Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004) ("The class attorney's egoistic incentive is to maximize his or her fees—awarded by the court if the action succeeds—with a minimized time-and-effort investment. This objective does not align with a both zealous and time-consuming prosecution of the class action, aimed at maximizing the amount of recovery for the class members."); *In re Activision Blizzard, Inc. Stockholder Litig.*, 124 A.3d 1025, 1070 n.28 (Del. Ch. 2015) (citing the above-mentioned excerpt with approval). See generally COFFEE, *supra* note 16, at 2 (explaining that a class action attorney is "a private actor, wielding a degree of public power, but motivated by powerful economic incentives, and yet subject to only limited accountability" and observing that "this combination of profit motive and public purpose has made the class action plaintiff's attorney increasingly controversial").

<sup>46</sup> See N. GREGORY MANKIW, *PRINCIPLES OF MICROECONOMICS* 272–73 (6th ed. 2009).

<sup>47</sup> DAVID BESANKO & RONALD BRAEUTIGAM, *MICROECONOMICS* 311 (4th ed. 2011) (defining economies of scope as a "production characteristic in which the total cost of producing given quantities of two goods in the same firm is less than the total cost of producing those quantities in two single-product firms").

<sup>48</sup> See Parchomovsky & Stein, *supra* note 4, at 1338–40.

lawsuits require expertise in more than one field. Consider, for example, a suit for breach of contract against a financial institution or a healthcare provider. Filing such suits requires knowledge not only of contract law but also of the relevant regulatory framework that applies to the defendant institution. Furthermore, it necessitates in-depth familiarity with court practices and the relevant rules of civil procedure. Individual litigants may need to hire several attorneys to cover the relevant legal areas. Large corporations that are routinely involved in such cases as defendants will employ a versatile group of attorneys—a large law firm—who are steeped in all the relevant areas. As the number of legal areas in a case increases, the cost asymmetry between specialized defendants and unspecialized plaintiffs will grow as well.

The cost asymmetries that arise from specialization, volume, and economies of scale and scope are a cause for concern. A party who can litigate more cost-effectively can use her advantage to force her adversary into an unfavorable out-of-court settlement. Consider the following example: the expected value of a plaintiff's suit is \$50,000 and her expected litigation cost is \$40,000. The expected cost for the defendant is only \$20,000 on account of the various economies we discussed. The defendant can offer the plaintiff to settle the case for \$20,000, and if the plaintiff is a rational self-interest maximizer, she will accept that offer.

Such settlements are undesirable from a societal standpoint. They are unjust, inefficient, and they stunt the development of the law. Consider justice first. Society recognizes legal rights (and entitlements) for a reason. They are designed to protect important values, such as freedom, autonomy, or property.<sup>49</sup> Whenever a rightholder cannot fully enforce her right, the value underlying the right is undermined to the detriment of society at large. Violations of rights that are not addressed in full impair the jurisprudential scheme envisioned by the legislature and the courts. They disrupt the balance of rights, duties, privileges, and powers in our society and erode people's trust in the legal system.

Asymmetric litigation costs pose a problem for efficiency-based theories as well. Efficiency-based theories are concerned

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<sup>49</sup> For a classic account of rights as protectors of fundamental values, see generally DWORKIN, *supra* note 3.



with the maximization of social welfare.<sup>50</sup> The role of the law, on this view, is to provide actors with an incentive to act in ways that are welfare enhancing and refrain from acting in ways that are welfare diminishing.<sup>51</sup> To perform this role, the law should penalize behaviors that cause more harm than good.<sup>52</sup> When an actor enjoys a litigation-cost advantage, she can engage in behaviors that violate the dictates of economic efficiency and do so with impunity.

To see this, imagine two actors, Renee and Sue, who own adjacent lots. Assume that Renee is an expert litigator and as a result can litigate at a very low cost, say, \$1,000. Sue, on the other hand, has never been to court and for her the cost of taking a case to court is relatively high, say, \$6,000. Assume further that Sue values the right to exclude uninvited visitors at \$5,000. Renee, by contrast, derives a small benefit of \$100 from trespassing on Sue's lot. It is clear that the right to exclude is far more valuable to Sue than the ability to trespass to Renee. Nonetheless, given the asymmetry between the neighbors' litigation expenses, Renee can trespass on Sue's lot even though doing so results in a net social loss of \$4,900. Indeed, given that it would cost Sue \$6,000 to enforce a right that she values only at \$5,000, Sue's right to exclude is practically worthless.

Settlements driven by asymmetric litigation costs are likewise problematic. The amount the aggrieved party agrees to accept in a settlement falls short of the amount she would have accepted in a voluntary market transaction—the benchmark of efficiency.<sup>53</sup> Instead of settling her suit for its expected value, she receives a suboptimal compensation award while her opponent realizes his cost advantage in litigation after violating her rights. Asymmetries in litigation costs thus cause stronger parties to bypass market transactions and disregard legal

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<sup>50</sup> See STEVEN SHAVELL, *FOUNDATIONS OF ECONOMIC ANALYSIS OF LAW* 2–3 (2004) (singling out social welfare as the sole criterion for evaluating social policies and legal rules).

<sup>51</sup> See Louis Kaplow, *Information and the Aim of Adjudication: Truth or Consequences?*, 67 STAN. L. REV. 1303, 1306–07 (2015) (adopting a standard assumption that adjudication and rule-making must be geared toward inducing welfare-enhancing behavior).

<sup>52</sup> See *id.* at 1308.

<sup>53</sup> See Melvin Aron Eisenberg, *The Bargain Principle and Its Limits*, 95 HARV. L. REV. 741, 746 (1982) (“The contract price is normally the most efficient price, in the economist’s sense of that term, because permitting the price of a commodity to be determined by the interaction of buyers and sellers will normally move the commodity to its highest-valued uses, as expressed by the amounts competing buyers are willing to pay, and will best allocate the factors necessary for the commodity’s production.”).

rights, as they know that they can do better by first violating others' rights and then settling the case.<sup>54</sup>

The legal dynamic that grows out of asymmetric litigation costs—namely, disregard for weak parties' rights followed by a low offer to settle out of court—generates another negative result: it impedes the development of the law in certain areas. Settlements extracted by strong corporate defendants are different from the standard settlements discussed in the literature. They are not randomly distributed among litigants; nor are they randomly distributed among all legal domains. Rather, they arise from a systemic advantage of certain classes of litigants over others. Furthermore, they are concentrated in certain areas of the law, such as healthcare, insurance, and financial services. Hence, settlements arising from systemic litigation cost advantages distort the path of law.

In the following part, we identify core litigation areas in which the problem of asymmetric costs is particularly acute and explain how it affects plaintiffs in those areas. As we just noted, those areas include healthcare, insurance, and financial services. Their centrality stems from the fact that virtually every American family is bound to encounter legal problems with healthcare, financial services, and insurance. Furthermore, as we will now demonstrate, those problems oftentimes force an ordinary citizen to wage an uphill battle as a plaintiff in a suit against a powerful corporate provider of healthcare, financial services, or insurance.

### III

#### PLAINTIFFS' SYSTEMIC DISADVANTAGE ILLUSTRATED

In this part, we discuss several litigation settings in which the odds are overwhelmingly stacked against individual plaintiffs. We show that the plight of plaintiffs is especially acute when they face litigation against healthcare providers, medical and financial institutions, and insurance companies. The examples we offer in this part are merely illustrative. Clearly, there are many other litigation areas in which individual plaintiffs are inherently disadvantaged. We have chosen the specific examples discussed below for several reasons. First, they involve a very large number of Americans. Second, plaintiffs in those areas typically suffer serious harms that call for remediation. Third, and finally, our chosen examples illuminate the

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<sup>54</sup> See Parchomovsky & Stein, *supra* note 4, at 1326.

defining characteristics of litigation settings in which individual plaintiffs will have a hard time vindicating their rights.

As the preceding discussion demonstrates, individual plaintiffs will find it hard to litigate when they are faced with: (1) a complex liability design that combines multi-faceted causes of action and a myriad of defenses; (2) defendants who are better financed and can realize various economies of scope and scale in litigation; and (3) serious time constraints that necessitate quick resolution of the dispute. Hence, the discussion in this part provides a blueprint for identifying other litigation areas that call for legislative intervention.

### A. Healthcare Litigation

Americans who receive health benefits as part of their employment package assume that they will get any medical treatment covered by their plan, when they need it. Unfortunately, this assumption often does not hold when put to the test.

Under a standard provision of most health benefits plans, a patient's physician must apply to the plan's provider and ask it to approve the sought after treatment in a procedure known as precertification or utilization review.<sup>55</sup> Oftentimes, providers refuse to grant approval, a refusal that marks the beginning of the patient's tribulations as a potential plaintiff in a suit for health benefits.<sup>56</sup>

A provider must provide reasons for its refusal to pay for a treatment covered under the health benefits plan.<sup>57</sup> A common reason is that the requested treatment was not included in the coverage or was excluded from it under the patient's circumstances. Alternatively, a provider may contend that the treatment has cheaper, but equally effective, alternatives, which it is ready to approve.<sup>58</sup> Under either scenario, if the patient still wants the treatment she must file an internal appeal with the provider's office and ask it to reconsider its decision.<sup>59</sup>

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<sup>55</sup> DARLENE BRILL, UNDERSTANDING HEALTH INSURANCE 42 (1999).

<sup>56</sup> *Id.*

<sup>57</sup> *Retirement Plans and ERISA FAQs*, UNITED STATES DEPARTMENT OF LABOR, <https://www.dol.gov/agencies/ebsa/about-ebsa/our-activities/resource-center/faqs/retirement-plans-and-erisa-consumer> [<https://perma.cc/FQG7-DR4N>].

<sup>58</sup> See MICHAEL A. MORRISEY, HEALTH INSURANCE 118–19 (2008) (explaining the difference between utilization management strategies and claims adjudication efforts undertaken by insurers).

<sup>59</sup> See Jennifer Rudenick Ecklund & Andrew Cookingham, *Strategies for Responding Effectively to a Denial of Treatment as Experimental or Investigational*, 8 J. HEALTH & LIFE SCI. L. 8, 14 (2015) ("All (or nearly all) managed care agreements and health benefit plans require a health care provider or the patient to exhaust

At this point, the patient can challenge the provider's determination. For example, she can show that the treatment she requested is actually covered by the plan or that there are no equally effective alternatives to that treatment. In many real world cases, however, the provider refuses to reverse its decision.<sup>60</sup>

Given the high cost of many medical procedures, most patients cannot afford to pay out-of-pocket for the treatment and seek reimbursement later. Financing one's medical treatment with one's own money is not a viable option for many patients. Therefore, instead of going to a hospital to receive a much-needed treatment, many patients have no choice but to take their case to court and become plaintiffs.

One option a plaintiff has at this stage is to request a court order that will force the provider to pay for the treatment.<sup>61</sup> To this end, the plaintiff must sue the provider for breach of contract and request specific performance. Practically, however, this option is highly unlikely to prove fruitful on account of a virtually insurmountable time problem. For specific performance to be meaningful, the plaintiff must obtain it quickly when the treatment she needs can still be effective. Yet, under the applicable statute, the Employee Retirement Income Security Act of 1974 (ERISA), the suit must be filed in a federal court, where there are no fast tracks for plaintiffs who sue health benefit providers.<sup>62</sup>

Worse yet, the plaintiff may not even be able to file that suit because her health benefits plan, similarly to many others, may contain a compulsory arbitration requirement. Bypassing this requirement is well-nigh impossible given the mandate of

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all internal appeals of a plan's denial of benefits. This is true for all benefit denials, and applies whether the denial was prospective (e.g., the plan denied the patient or provider's request for precertification) or retrospective (most commonly, the plan denied the provider's claim for reimbursement).").

<sup>60</sup> See, e.g., Dustin D. Berger, *The Management of Health Care Costs: Independent Medical Review After "Obamacare"*, 42 U. MEM. L. REV. 255, 275 (2011) (citing studies and describing managed care organizations' internal appeal procedures as ineffective, slow, and biased).

<sup>61</sup> Ecklund & Cookingham, *supra* note 59, at 16 ("If the plan does not reverse its denial of benefits following an internal appeal, the provider can file a lawsuit or proceed to arbitration against the plan . . .").

<sup>62</sup> See, e.g., LARRY L. TEPLY & RALPH U. WHITTEN, CIVIL PROCEDURE 624 (4th ed. 2009) (attesting that provisional remedies can only be granted "to preserve the status quo pending the court's determination of the parties' rights or to insure that sufficient resources will be available to satisfy the plaintiff's claim if the plaintiff ultimately prevails" and that the available provisional remedies include "attachment, garnishment, sequestration, replevin, temporary restraining orders, preliminary injunctions, [and] civil arrest").

Section 2 of the Federal Arbitration Act,<sup>63</sup> as interpreted by the United States Supreme Court.<sup>64</sup> Arbitration may proceed faster than a court proceeding, but it will pose another serious problem for the plaintiff: the arbitrator's incentives are inimical to her plight. To compete with courts that enjoy public subsidization and need not attract paying customers, arbitrators must deliver decisions that will be agreeable to the parties to arbitration. This incentive drives arbitrators towards striking a compromise that splits the disputed amount between the parties, while avoiding making decisions that constitute a complete victory for one party and an unmitigated defeat for her opponent.<sup>65</sup> To make matters worse, arbitrators who seek to maximize their revenues may try to appease the repeat player in the arbitration, namely, the health plan provider.

Even if a plaintiff can somehow overcome these hurdles, her day in court would be anything but easy. The provider's legal representatives will take advantage of their familiarity with every fine detail of the health benefits plan to reject the plaintiff's claims. The plaintiff, for her part, can also hire an attorney specializing in ERISA, but her attorney may not possess the same level of familiarity with the plan's specific provisions, which will inevitably raise the plaintiff's legal costs. Furthermore, the plaintiff's attorney would not offer her fee discounts, as such discounts are offered only to clients whose representation is characterized by economies of volume, scope, and scale.

Owing to these factors, the provider will be able to force the plaintiff to accept an unfavorable settlement, which she would pass up if the balance of power between the parties were fairer. For example, the provider may offer the plaintiff to cover only eighty percent of the cost of the treatment, leaving her to pay

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<sup>63</sup> Pub. L. No. 68-401, 43 Stat. 883 (1925) (codified as amended at 9 U.S.C. §1 *et seq.* (2012)).

<sup>64</sup> See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 342–44 (2011) (holding that Federal Arbitration Act makes arbitration clauses broadly enforceable and puts an end to “the judicial hostility towards arbitration that . . . had manifested itself in ‘a great variety’ of ‘devices and formulas’ declaring arbitration against public policy” (quoting *Robert Lawrence Co. v. Devonshire Fabrics, Inc.*, 271 F.2d 402, 406 (2d Cir. 1959))); Myriam Gilles & Gary Friedman, *After Class: Aggregate Litigation in the Wake of AT&T Mobility v. Concepcion*, 79 U. CHI. L. REV. 623 (2012) (criticizing Supreme Court for broadly validating arbitration provisions, including those that contain class action waivers).

<sup>65</sup> See William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 238 (1979); Alex Stein, *The Incentives to Arbitrate Medical Malpractice Disputes*, BILL OF HEALTH (Aug. 29, 2013), <http://blogs.law.harvard.edu/billofhealth/2013/08/29/the-incentives-to-arbitrate-medical-malpractice-disputes/> [<https://perma.cc/JG8H-FYTX>].

the remaining twenty percent. Even though paying the outstanding amount is both unfair and onerous, many plaintiffs would choose to do so in order to reduce legal costs and avoid the uncertainty of the litigation process. Furthermore, since expeditious resolution of the conflict is critical for most patients, they would likely agree to settle for a fraction of the amount they are owed in order to start receiving treatment. Waiting for the conclusion of the lawsuit may not be a viable option in many cases.

The fact that ERISA entitles successful plaintiffs to recover their attorney's fees from the plan's provider after winning the case<sup>66</sup> does not materially affect our analysis. Belated reimbursement of attorney fees would not provide the plaintiff the requisite medical treatment when she needs it. Furthermore, the prospect of reimbursing the plaintiff for her attorney's fees would only motivate the plan's provider to slightly improve its settlement offer. For example, instead of offering the plaintiff eighty percent of the treatment's cost, the provider may offer her a ninety percent payment. Under that scenario as well, the plaintiff would have no choice but to accept the provider's offer and pay her own \$10,000 for the treatment. For her, this course of action is rationally superior to paying her attorney \$10,000 and litigating the case to judgment.

Importantly, ERISA remedies do not include consequential damages that courts routinely award in tort cases.<sup>67</sup> For that reason, the plan's provider would not feel intimidated by the plaintiff's prospect of becoming seriously ill on account of her inability to get the treatment she needs.<sup>68</sup> Providers of health

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<sup>66</sup> See 29 U.S.C. § 1132(g)(1) (2012) ("In any action under this subchapter . . . by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.").

<sup>67</sup> See 29 U.S.C. § 1132(a)(3) (2012) ("A civil action may be brought . . . by a participant, beneficiary, or fiduciary . . . to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or . . . to obtain other appropriate equitable relief . . . to redress such violations or . . . to enforce any provisions of this subchapter or the terms of the plan . . ."); *Cicio v. Does*, 321 F.3d 83, 106 (2d Cir. 2003) (Calabresi, J., dissenting in part) (explaining that 29 U.S.C. § 1132(a)(3) does not authorize courts to award deserving plaintiffs consequential damages because these are not considered "equitable relief"); John H. Langbein, *What ERISA Means by 'Equitable': The Supreme Court's Trail of Error* in Russell, Mertens, and Great-West, 103 COLUM. L. REV. 1317, 1336–42 (2003) (criticizing the Supreme Court's exclusion of consequential damages from its definition of "equitable relief" in 29 U.S.C. § 1132(a)(3)).

<sup>68</sup> When the plaintiff's plan is privately-purchased, rather than employment-related, and consequently exempted from ERISA's limitations, the provider would be able to offer the plaintiff a settlement amount that covers 90% of the treatment's cost. This offer would require the plaintiff to think hard whether she is willing to go to court and forego the needed treatment due to the \$10,000

benefit plans thus always have the upper hand in actions filed against them by the plan members. They would always be able to force the plan member into a cheap settlement that will deny the member her rights. The current framework of health benefit litigation makes it virtually impossible for plaintiffs to realize these rights and obtain timely medical care.

### B. Medical Malpractice Disputes

Contrary to the popular urban legend—aptly named by Professor Tom Baker a “medical malpractice myth”<sup>69</sup>—suing doctors for malpractice is anything but easy. To succeed in a malpractice suit, a plaintiff must prove by a preponderance of the evidence that the defendant-physician treated her in a way that deviated from customary standards in the medical profession and that she incurred a harm as a result.<sup>70</sup> Proving deviation from accepted standards is an uphill battle. Medicine is not a precise science. There is usually more than one acceptable way to treat a patient. Different schools of thought offer a plurality of acceptable treatments for medical problems.<sup>71</sup> From that plurality, physicians are free to choose any treatment, provided that they explain their choice to the patient and obtain her consent.

These rules require a plaintiff who sues her physician to rely on the testimony of an expert witness to establish that treatment she received was substandard.<sup>72</sup> The defendant, on the other hand, only needs to show the conformity of the disputed treatment with one specialty or school of thought. If he makes this showing, the jurors (or the judge in a bench trial) must dismiss the suit against him. Moreover, in appropriate circumstances, the defendant-physician might also be entitled to the so-called “error in judgment” instruction that directs jurors to dismiss the suit even in the case of a substandard treatment. Such dismissal might occur if the judge is of the opinion that it was within the defendant’s discretion to deliver any treatment approved by his profession or school of thought, provided that he believed—correctly or incorrectly—that the

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shortfall. If the plaintiff is rational, she would accept the provider’s settlement offer and participate in the cost of the treatment in the amount of \$10,000.

<sup>69</sup> TOM BAKER, *THE MEDICAL MALPRACTICE MYTH* 1 (2005).

<sup>70</sup> *Id.*

<sup>71</sup> *Id.* at 16 (“To a greater extent than many people are aware, medicine is an art rather than a science.”).

<sup>72</sup> *Id.*

chosen treatment promised the patient the best prospect of success.<sup>73</sup>

To make things even harder for plaintiffs, many jurisdictions require them to append to their suits an affidavit or certificate of merit from an expert who practices medicine in the same specialty as the defendant. The requisite affidavit or certificate of merit must verify the plaintiff's malpractice allegations against the defendant.<sup>74</sup> This requirement imposes on plaintiffs a substantial pretrial expenditure. Worse, yet, plaintiffs are allowed a limited period for filing a properly verified suit for medical malpractice. Under a typical limitations statute, a plaintiff must file her suit within two years from the accrual of the cause of action against the physician. The limitation period starts running from the point in time at which the plaintiff knew or had reason to believe that her physician may have mistreated her and thereby worsened her condition.<sup>75</sup> Moreover, many states have adopted statutes of repose that bar patients from suing physicians after three years from the day of the alleged malpractice.<sup>76</sup> Courts have no power to extend this period even when the effect of the physician's malpractice on the patient remains latent for more than three years.<sup>77</sup>

Plaintiffs who manage to satisfy these prerequisites must move to the next step and prove causation. More often than not, making that step is as difficult as establishing that the doctor committed malpractice. The difficulty here arises from the fact that most patients start receiving treatment when they already suffer from some preexisting medical condition.<sup>78</sup> This fact enables a negligent doctor to develop a viable claim that the patient's illness (or injury) resulted from her preexisting medical condition and that the patient would have been as ill (or as injured) even if she received flawless treatment. What makes such claims viable is the fact that it is the aggrieved patient, not the doctor, who bears the burden of proving causation.<sup>79</sup> For patients who suffered from a serious preexisting

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<sup>73</sup> See Alex Stein, *Toward a Theory of Medical Malpractice*, 97 IOWA L. REV. 1201, 1215–16 (2012).

<sup>74</sup> See Benjamin Grossberg, Comment, *Uniformity, Federalism, and Tort Reform: The Erie Implications of Medical Malpractice Certificate of Merit Statutes*, 159 U. PA. L. REV. 217, 218 (2010).

<sup>75</sup> Stein, *supra* note 73, at 1254–55.

<sup>76</sup> *Id.* at 1255.

<sup>77</sup> *Id.* at 1254–55.

<sup>78</sup> *Id.* at 1217.

<sup>79</sup> *Id.*



condition, the causation requirement may present an insurmountable obstacle.

Aware of that obstacle and the consequent injustice to the patient, a number of state courts have relaxed the causation requirement in medical malpractice cases, settling for a showing that the alleged malpractice was a "substantial factor" in causing the patient's injury or illness. Under the "relaxed causation" doctrine,<sup>80</sup> the fact that a patient's preexisting condition also contributed to her illness or injury does not prevent the patient from recovering full compensation from the negligent doctor. The "relaxed causation" doctrine also includes the "differential etiology" method,<sup>81</sup> which allows the plaintiff to recover full compensation upon showing that her doctor's malpractice was the most probable among the injury's *known* causes. Contrary to the general "preponderance" requirement, the probability of this comparatively strongest cause need not exceed fifty percent in absolute terms.<sup>82</sup> Finally, some courts also have allowed patients with serious preexisting conditions to recover compensation for their lost chances to recover from illness.<sup>83</sup> For example, when a doctor's malpractice reduces her patient's chances to recover by twenty percent (from 30% to 10%), the doctor must pay the patient twenty percent of the patient's damage. She cannot benefit from the patient's inherent inability to prove causation by a preponderance of the evidence.<sup>84</sup>

Many states, however, still reject some or all of the components of the relaxed causation doctrine.<sup>85</sup> In those states, a patient must prove causation by a preponderance of the evidence. If she fails to provide the requisite proof, the court must dismiss her suit and let the negligent physician go scot-free.<sup>86</sup>

When it comes to proving the severity of a patient's harm, the legal system gives plaintiffs no concessions whatsoever. A patient must prove the actual extent of her physical harm, pain and suffering, and emotional distress. There are no automatic statutory damages a plaintiff can recover without proof of ac-

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<sup>80</sup> *Id.* at 1218-26 (explaining the "relaxed causation" doctrine and its adoption by different states).

<sup>81</sup> *Id.* at 1221-23.

<sup>82</sup> *Id.* at 1222.

<sup>83</sup> *Id.* at 1225-26.

<sup>84</sup> *Id.* at 1225-26 (explaining "lost chance" doctrine).

<sup>85</sup> See *id.* at 1225 nn.121-22 and accompanying text.

<sup>86</sup> See *id.* at 1218 n.66 and sources cited therein.

tual harm.<sup>87</sup> Conversely, many states have enacted statutes that cap the amount that jurors (and judges in bench trials) can give plaintiffs for pain and suffering, emotional distress, lost consortium, and other noneconomic damages.<sup>88</sup> For the vast majority of middle and working class plaintiffs—whose wages are relatively low—noneconomic damages make up the largest part of the compensation award.<sup>89</sup> By substantially eroding plaintiffs' ability to recover for the aforementioned harms, statutory caps diminish the incentive for attorneys to take on medical malpractice suits by middle and working class plaintiffs on a contingent fee basis. As a result, many economically disadvantaged victims of medical malpractice cannot secure adequate representation unless they fork over a substantial fraction of their recovery to their lawyers. Caps on noneconomic damages thus have a distinctly regressive effect on the dispensation of justice in our society.<sup>90</sup>

To sum up, our medical malpractice laws put plaintiffs on a racetrack with multiple hurdles that include expert-affidavit requirements, proof of malpractice, causation, and damage, and time-bars for filing suit. If a plaintiff fails to clear one of these hurdles, her suit will dead-end. The defendant needs to make the plaintiff fail only once.

Defendants in medical malpractice suits also enjoy economies of scale that are not available to plaintiffs. They can use the same medical expertise in multiple cases. They can also hire specialized attorneys to represent them in multiple cases in exchange for a discounted fee. Plaintiffs, on the other hand, can only hire attorneys for a contingent fee, customarily set at one-third of their total compensation amount.<sup>91</sup> This fee struc-

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<sup>87</sup> See, e.g., *Spokeo Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (holding that actual harm is a prerequisite for filing a suit in federal courts and that statutes allowing unharmed plaintiffs to recover fixed damages violate Article III of the U.S. Constitution).

<sup>88</sup> See Stein, *supra* note 73, at 1253–54.

<sup>89</sup> See Richard L. Abel, *A Critique of Torts*, 37 UCLA L. REV. 785, 799 (1990) (criticizing economic tort damages for being inequitable because they “deliberately reproduce the existing distribution of wealth and income”).

<sup>90</sup> See Stein, *supra* note 73, at 1256–57 (criticizing damage caps for weakening incentives against medical malpractice and failing to provide adequate relief to seriously injured victims); see also *Estate of McCall v. United States*, 134 So. 3d 894 (Fla. 2014) (voiding Florida’s statutory cap on noneconomic damage awards in cases of wrongful death caused by medical malpractice for violating the equal protection clause of the Florida Constitution while rejecting the cap proponents’ claim that it was necessitated by the high cost of medical liability insurance).

<sup>91</sup> See LESTER BRICKMAN, *LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA* 4–5 (2011) (attesting that lawyers routinely charge one-third or more from the plaintiff’s personal injury compensation).

ture motivates the attorneys to screen away cases with a low expected recovery amount and concentrate their effort on suits that carry the promise of high compensation.<sup>92</sup> Even in those cases, it must be borne in mind that an attorney who operates on a contingency basis has a strong motivation to settle the case early and move to another case.<sup>93</sup> Hospitals, doctors, and their insurers can exploit this motivation by securing a cheap settlement that conveniently eliminates the threat of being defeated in court.<sup>94</sup>

### C. Insurance Litigation

Insurance companies enjoy substantial economies of scale and scope in litigation. They collect and pool together information concerning the probability and the magnitude of the damages against which they insure. Insurance companies also elicit relevant personal data from their clients and develop standardized ways of juxtaposing the two sets of information—statistical and personal—against each other.<sup>95</sup> Doing so enables them to formulate and price the different policies they offer, as well as to assess the validity of policyholders' indemnification claims.<sup>96</sup>

Insurance companies also collect and catalog information about meritorious, unmeritorious, and downright fraudulent claims. Their datasets allow them to identify the pattern for each type of claim along with the "red flags" that call for thorough investigation.<sup>97</sup> Based on this information, they can streamline their processing of claims and investigate suspicious ones.

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<sup>92</sup> *Id.* at 5 (noting that attorneys carefully preselect cases they take on a contingency basis).

<sup>93</sup> See Geoffrey P. Miller, *Some Agency Problems in Settlement*, 16 J. LEGAL STUD. 189, 198–202 (1987).

<sup>94</sup> *Id.*; see also Harel & Stein, *supra* note 45, at 87–88 (formalizing and illustrating the "conflict-of-interests differential" inherent in the contingent fee structure).

<sup>95</sup> See, e.g., Peter Siegelman, *Adverse Selection in Insurance Markets: An Exaggerated Threat*, 113 YALE L.J. 1223, 1261–68 (2004) (explaining how insurance companies gather and organize data to assess risk).

<sup>96</sup> See EMMETT J. VAUGHAN & THERESE VAUGHAN, *FUNDAMENTALS OF RISK AND INSURANCE* 35–40, 87–90, 130–38 (10th ed. 2008) (explaining how insurance companies gather, pool, and evaluate information pertaining to risks they insure against).

<sup>97</sup> John J. Ensminger, *Insurance Company Anti-Money Laundering Compliance A to Z: A Complete Guide to Designing, Implementing, and Enforcing an Insurance Company AML Program*, 20 J. TAX'N & REG. FIN. INSTS. 26, 28 fig.1 (2007).

Insurance companies' litigation setup is standardized, as well. By and large, suits involve policyholders who sue the company in court for failure to indemnify.<sup>98</sup> In defending against those suits, the company can use the information from its dataset to cross-examine the plaintiffs and discredit their claims. More importantly, because insurance suits have a similar pattern, insurance companies retain (or employ in-house) attorneys specializing in insurance law.<sup>99</sup> Those attorneys need to make a one-time investment in acquainting themselves with their client's business and acquiring specialized knowledge in insurance law. Specifically, the attorneys need to educate themselves about the standard terms of the company's insurance policies and the information already assembled by the company. They also need to set up routine methods and protocols for working with actuaries, private investigators, and other specialists.<sup>100</sup> The resulting economies of scale and scope are enormous. They allow the company not only to take advantage of being a coveted client on an intensely competitive market for attorney services, but also to spread the cost of its representation and all other expenses across multiple cases.

On account of these cost savings, insurance companies have litigation capacities that most of their policyholders cannot match. An insured wishing to sue under the policy terms will have to locate an attorney and pay her considerably more than what the company will expend on defending against the suit. The vast cost differential separating the two parties gives insurance companies the power to force policyholders into unfavorable settlements and cede their rights under the policy. Consequently, insurance companies can systematically underpay their insureds.<sup>101</sup>

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<sup>98</sup> See VAUGHAN & VAUGHAN, *supra* note 97, at 169 (explaining how "many forms of insurance" deal with indemnity contracts).

<sup>99</sup> See generally *Gen. Dynamics Corp. v. Superior Court*, 876 P.2d 487, 491 (Cal. 1994) (explaining proliferation of in-house counsel and their economic attractiveness to corporations).

<sup>100</sup> See, e.g., Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions*, 40 J. LEGAL STUD. 205, 221 (2011) (noting that "the very largest attorney firms . . . enjoy the greatest expertise and economies of scale in bringing a securities class action"); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 494 (2007) (specifying economies of scale and scope of transactional lawyers).

<sup>101</sup> Note that many policyholders falsely exaggerate their losses. Economists consequently claim that insurance companies will do well to underpay all of the claims that they process. See Keith J. Crocker & Sharon Tennyson, *Insurance Fraud and Optimal Claims Settlement Strategies*, 45 J.L. & ECON. 469, 469 (2002) (identifying optimality conditions for insurers' underpayments and furnishing em-

The New Mexico Supreme Court's decision in *Truong v. Allstate Insurance Company*<sup>102</sup> vividly illustrates this unscrupulous practice. This decision reveals that Allstate systematically used a special claim-processing software program, "Colossus," programmed to undervalue and underpay policyholders' claims.<sup>103</sup> The court found this conduct to be in violation of the state's prohibition of "[u]nfair or deceptive and unconscionable trade practices."<sup>104</sup>

Empirical studies support the predictions of our analysis.<sup>105</sup> For example, a recent study carried out by the American Association for Justice (the AAJ)<sup>106</sup> has revealed that a number of big insurance companies use the "deny, delay, defend" strat-

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pirical proof of systematic underpayments of injury claims arising from car accidents).

<sup>102</sup> 227 P.3d 73 (N.M. 2010).

<sup>103</sup> *Id.* at 76.

<sup>104</sup> See N.M. Stat. Ann. § 57-12-3 to 57-12-10 (West 2011) (prohibiting and making actionable "[u]nfair or deceptive trade practices and unconscionable trade practices in the conduct of any trade or commerce"). Another good example is Louisiana's *parens patriae* action against Allstate, its provider of statistical, actuarial, and underwriting information, and the manufacturers of computer software programmed to undervalue policyholders' claims. *Louisiana ex rel. Caldwell v. Allstate Ins. Co.*, 536 F.3d 418, 421-23, 430 (5th Cir. 2008). The United States Court of Appeals for the Fifth Circuit categorized this action as an equivalent of a "class" or "mass" action for purposes of the Class Action Fairness Act of 2005. Pub. L. No. 109-2, 119 Stat. 4 (codified at 28 U.S.C. § 1332(d) (2012)). Based on this categorization, the court found "minimal diversity" between Allstate and the individuals represented by Louisiana's Attorney General and removed the action to federal court pursuant to the Act's provisions. *Caldwell*, 536 F.3d at 423. For an insightful discussion of this case, see Dwight R. Carswell, Comment, *CAFA and Parens Patriae Actions*, 78 U. CHI. L. REV. 345, 353-57 (2011).

<sup>105</sup> See, e.g., Tom Baker, *Constructing the Insurance Relationship: Sales Stories, Claims Stories, and Insurance Contract Damages*, 72 TEX. L. REV. 1395, 1430-31 (1994) (arguing on empirical grounds that "insurance companies . . . engage in strategic behavior with third-party claimants" and systematically underpay claims); Leon E. Trakman, *David Meets Goliath: Consumers Unite Against Big Business*, 25 SETON HALL L. REV. 617, 623 (1994) ("Insurance companies consistently underpay valid insurance claims to horde the difference between the amount due to each insured and the amount actually paid."); David Dietz & Darrell Preston, *Home Insurers' Secret Tactics Cheat Victims, Hike Profits*, BLOOMBERG (Oct. 14, 2007), <http://www.bloomberg.com/apps/news?pid=21070001&sid=aOpZROwhvNI> [<https://perma.cc/FU9Q-294R>] (observing that insurance companies systematically underpay claims and providing examples). For additional examples, see Kelsey D. Dulin, Comment, *The Disaster After the Disaster: Insurance Companies' Post-Catastrophe Claims Handling Practices*, 61 OKLA. L. REV. 189, 191-92, 196-206 (2008) (explaining and illustrating how insurance companies take advantage of catastrophe victims and underpay claims); see also *Bradshaw v. State Farm Mut. Auto. Ins. Co.*, 758 P.2d 1313, 1322-23 (Ariz. 1988) (admitting into evidence an insurer's statements in settlement negotiations to show that it attempted to strong-arm the policyholder into a cheap settlement).

<sup>106</sup> See AMERICAN ASSOCIATION FOR JUSTICE, *THE TEN WORST INSURANCE COMPANIES IN AMERICA: HOW THEY RAISE PREMIUMS, DENY CLAIMS, AND REFUSE INSURANCE TO THOSE WHO NEED IT MOST* (2008).

egy in handling claims.<sup>107</sup> Industry insiders commonly refer to this strategy as the “three Ds.”<sup>108</sup> This tripartite approach begins with a simple “sit and wait” reaction to an insured’s claim that leads many policyholders to give up their claims, while prompting others to hire an attorney to represent them.<sup>109</sup> Another strategy is to give awards to adjusters who deny most claims regardless of the claims’ merit.<sup>110</sup> As we noted, some companies also employ the claim depreciation software<sup>111</sup> and “corporate training” manuals that teach employees different payment avoiding techniques.<sup>112</sup> These strategies enable the companies to have their insureds choose between lowball offers and expensive litigation.<sup>113</sup> As the AAJ reports, insureds “that accept the lowballed settlements are treated with ‘good hands’ [while those] that do not settle, frequently get the ‘boxing gloves’: an aggressive litigation strategy that aims to deny the claim at any cost.”<sup>114</sup> Facing this pressure, most insureds have no choice but to accept the company’s cheap offer.

As Professor Jay Feinman observes in his important book, *Delay, Deny, Defend*,<sup>115</sup> beginning in the 1990s, many major insurance companies turned their claims departments into profit centers.<sup>116</sup> Instead of profiting from their superior expertise in pricing and spreading the risks of accidents, those companies generate most of their profit from breaking the insurer’s fundamental promise to indemnify the insured for losses covered by the policy. The companies’ inherent cost advantage as defendants unquestionably facilitates this unsavory strategy.<sup>117</sup>

#### D. Suits against Banks

Banks and other financial institutions provide a myriad of services to tens of millions of Americans. Those services include investments, savings, lending, credit, and account management. When acting professionally and in good faith, banks benefit their clients in a variety of ways. They protect their

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<sup>107</sup> *Id.* at 2.

<sup>108</sup> *Id.* at 3.

<sup>109</sup> *Id.*

<sup>110</sup> *Id.* at 2–3.

<sup>111</sup> *Id.* at 3, 17.

<sup>112</sup> *Id.* at 2.

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.*

<sup>115</sup> JAY FEINMAN, *DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON’T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT* (2010).

<sup>116</sup> *Id.* at 5.

<sup>117</sup> See Parchomovsky & Stein, *supra* note 4, at 1339–41.

clients' money from being lost and enable clients to save money while earning interest. Banks also allow individuals to spread the high purchasing costs of goods and services over a long period of time, which helps individuals stay liquid and pay for their purchases as they earn income. Finally, banks provide their clients with dependable accounting documentation.

Unfortunately, banks, on account of the many powers they wield, may also hurt clients by misappropriating deposits or taking advantage of their vastly superior accounting capacity and control of information. For example, a bank may betray its client's trust by clandestinely increasing the interest rate on a loan, or, conversely, by privately lowering the interest rate on savings. Alternatively, a bank may increase clients' fees by artificially expanding or rebranding its services. In order to implement these unsavory schemes, banks often have their clients sign long authorization forms with small-print provisions that clients have no ability to understand and do not bother to read.<sup>118</sup> Often, the aggrieved client has no choice but to take the bank to court. For the vast majority of clients, however, litigating against a bank is a Herculean task.

The law of consumer finance is very complex. Substantively, it prohibits unsavory banking practices and protects consumers against mistreatment by financial institutions. Yet, it is anything but consumer friendly: its general prohibitions are riddled with exceptions that allow banks to raise a host of affirmative defenses. As per our explanation in Part I, it is enough for a bank to succeed on one such defense to defeat a client's suit. The client, on the other hand, must refute each and every defense asserted by the bank in order to prevail. As a result, a bank can drive up clients' litigation costs simply by raising as many defenses as it can. Moreover, the bank's ability to raise many alternative defenses also allows it to take full advantage of courts' errors. If a court erroneously accepts one of the defenses raised by the bank, the bank will win the case.

Worse yet, the cost of hiring a financial expert to prove the bank's misconduct is prohibitive for most clients. And without such an expert, the client's suit will likely fail. Banks, on the other hand, often employ financial specialists in house. As for

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<sup>118</sup> See Jim Rendon, *The Fine Print: 10 Secrets Your Bank Keeps*, TODAY (July 18, 2008, 12:19 PM), <http://www.today.com/news/fine-print-10-secrets-your-bank-keeps-wbna25736566> [<https://perma.cc/XTT6-7LM6>]; *Study: Credit Card Agreements Unreadable to Most Americans*, CREDITCARDS.COM (Sept. 16, 2016), <http://www.creditcards.com/credit-card-news/unreadable-card-agreements-study.php> [<https://perma.cc/S78V-4KXZ>].

those that do not, as repeat players, they can hire financial experts at a discounted rate by promising them future work.

Even a client who can hire a financial expert will have to travel a treacherous road. To prove wrongdoing by a bank, a client would have to go over thousands of documents and records, a labor intensive and time-consuming task. Furthermore, the agreements used by banks contain exemption clauses, releasing the bank from liability for various harmful acts and omissions.<sup>119</sup> In principle, clients can challenge such clauses as illegal,<sup>120</sup> but this, too, requires expenditure of substantial resources.

For the reasons stated in the preceding paragraphs, one can rarely find a successful suit prosecuted by an individual client against her bank. This type of lawsuit is exceedingly expensive and too complicated for the average client to prosecute successfully. Aggrieved clients therefore must pool their resources and file a class action against their bank. Unfortunately, a class action or any other collective proceeding is unlikely to undo the wrongs suffered by aggrieved clients at the hands of the bank.

In a recent decision, *Jenkins v. Trustmark*,<sup>121</sup> a federal court approved a settlement of a class action for debit-sequencing—an accounting manipulation with a client's debit card transactions that depleted her account balance faster than it should have in order to allow the bank to charge higher fees.<sup>122</sup> After denying the alleged wrongdoing and raising multiple af-

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<sup>119</sup> See, e.g., William W. Bratton & Michael L. Wachter, *Bankers and Chancellors*, 93 TEX. L. REV. 1, 39–43 (2014) (observing that investment banks routinely include liability disclaimers and limitations in engagement letters and providing examples); David Lazarus, *Does Your Credit Card Contract Contain a Hidden Surprise?*, L.A. TIMES (Apr. 15, 2016) <http://www.latimes.com/business/la-fi-lazarus-20160415-column.html> [<https://perma.cc/ND3M-M5AV>] (reporting that hidden clauses in credit card agreements are widespread and that these clauses give lenders an unfair advantage); Deon Roberts, *Feds Target Arbitration Clauses in Banks' Fine Print*, THE CHARLOTTE OBSERVER (Mar. 14, 2016, 7:10 PM) <http://www.charlotteobserver.com/news/business/article66047507.html> [<https://perma.cc/CJ47-LRSZ>] (noting that banks take advantage of small-print compulsory arbitration clauses to avoid liability for mistreating consumers). See generally Arin H. Smith, *Durbin's Defect: The Impact of Post-Recession Legislation on Low-Income Consumers*, 89 N.Y.U. L. REV. 363, 386–87 (2014) (noting lack of transparency in bank-consumer agreements and making a call to fix this problem).

<sup>120</sup> See Rebecca Schonberg, Comment, *Introducing "Abusive": A New and Improved Standard for Consumer Protection*, 100 CAL. L. REV. 1401, 1415–19 (2012) (explaining unconscionability doctrine and other rules that enable bank clients to invalidate contractual terms that produce extreme unfairness).

<sup>121</sup> 300 F.R.D. 291 (S.D. Miss. 2014).

<sup>122</sup> *Id.* at 297.



firmative defenses,<sup>123</sup> the bank "produced several thousand pages of documents that would allow Plaintiffs to better understand the claims and defenses in the Action."<sup>124</sup> Subsequently, the parties reached a settlement obligating the bank to pay 141,237 class members<sup>125</sup> compensation in the amount of \$4,000,000,<sup>126</sup> from which their attorneys were allowed to deduct one-third (\$1,333,333) as a fee.<sup>127</sup> The remaining sum, net of the attorneys' expenses in the amount of \$181,213<sup>128</sup> (that included a \$168,600 payment to financial experts),<sup>129</sup> went to the bank's clients. Those clients included seven named plaintiffs for whom the court approved a special award in the amount of \$35,000 (\$5,000 for each plaintiff) for representing the class.<sup>130</sup>

The court decided to approve this settlement after finding that the plaintiffs and their attorneys faced a myriad of significant risks of losing the case. Those risks had to do with the multiple defenses raised by the bank and other complexities of the case.<sup>131</sup> The court also noted that the settlement averted years of highly expensive litigation and provides "immediate and tangible benefits to nearly 150,000 Settlement Class Members."<sup>132</sup> The court's decision also made it abundantly clear that none of the plaintiffs could successfully file and prosecute her individual suit against the defaulting bank.<sup>133</sup>

Remarkably, the individual compensation amount recovered by the average plaintiff in this case was \$17.44.<sup>134</sup> This result is by no means unique. An earlier class action that complained about the same debit-sequencing manipulation ended up in a settlement agreement that obligated the defendant, Bank of America, to pay a record amount of \$410,000,000 to compensate over 13,000,000 account holders and their attor-

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<sup>123</sup> *Id.* at 298.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* at 303.

<sup>126</sup> *Id.* at 305.

<sup>127</sup> *Id.* at 306.

<sup>128</sup> *Id.* at 310.

<sup>129</sup> *Id.*

<sup>130</sup> *Id.* at 306, 311.

<sup>131</sup> *Id.* at 303-04.

<sup>132</sup> *Id.* at 303.

<sup>133</sup> *Id.* at 305 ("[A] class action is superior to other available methods for the fair and efficient adjudication of the present controversy.").

<sup>134</sup> We calculated this sum by subtracting from the plaintiffs' \$4,000,000 fund their attorneys' and experts' fees and expenses and the \$35,000 award bestowed on the seven class representatives:  $(\$4,000,000 - \$1,333,333 - \$168,600 - \$35,000) / 141,230 = \$17.44$ .

neys.<sup>135</sup> From this amount, the plaintiffs' attorneys were awarded thirty percent, net of expenses,<sup>136</sup> and twenty-seven class representatives have been approved to receive \$5,000 each.<sup>137</sup> The average plaintiff consequently recovered \$22.<sup>138</sup>

The court approved the settlement after determining that the plaintiffs faced a considerable risk of losing the case and that prosecuting their claims "was daunting."<sup>139</sup> The court mentioned in that connection that the bank asserted thirty-seven affirmative defenses<sup>140</sup> and that the settlement agreement has averted "highly complex and expensive litigation,"<sup>141</sup> given that "high-to-low posting of debit card transactions is 'by no means clearly unlawful.'"<sup>142</sup> The court also estimated that "prosecuting and settling the [plaintiffs'] claims . . . demanded considerable time and labor"<sup>143</sup> and that "the issues involved were novel and difficult and required the exceptional skill of a highly talented group of attorneys."<sup>144</sup>

By the same token, the federal district court that presided over the massive *Checking Account Overdraft Litigation* ruled that a settlement yielding plaintiffs between forty-five percent and nine percent of their anticipated recovery "provides substantial value to the Settlement Class, and is well within the range of reasonableness."<sup>145</sup>

These findings unequivocally demonstrate that suing the bank for its accounting manipulation was far beyond the capacity of individual plaintiffs. Plaintiffs need special empowerment to be able to prosecute such suits individually. Absent special rules that make it easy for a deserving plaintiff to sue the bank, class action will remain the only viable mechanism for enforcing the law and vindicating the account-holders'

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<sup>135</sup> *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d 1330, 1341–42 (S.D. Fla. 2011).

<sup>136</sup> *Id.* at 1359, 1368.

<sup>137</sup> *Id.* at 1367.

<sup>138</sup> We calculated this sum by subtracting from the plaintiffs' \$410,000,000 fund their attorneys' fees in the amount of \$123,000,000 and the \$135,000 award bestowed on the twenty seven class representatives:  $(\$410,000,000 - \$123,000,000 - \$135,000) / 13,000,000 = \$22.07$ . This calculation does not include the class attorneys' reimbursement for expenses as the court did not mention the requisite sum.

<sup>139</sup> *In re Checking Acct. Overdraft Litig.*, 830 F. Supp. 2d at 1363.

<sup>140</sup> *Id.* at 1339.

<sup>141</sup> *Id.* at 1345.

<sup>142</sup> *Id.* at 1347 (quoting Declaration of Professor Samuel Issacharoff in Support of Settlement).

<sup>143</sup> *Id.* at 1359–60.

<sup>144</sup> *Id.* at 1363.

<sup>145</sup> *Id.* at 1350.

rights. Yet, class actions systematically fail to compensate individual plaintiffs for their losses.

#### IV

##### REFORM PROPOSALS

In this part, we examine how the law can be reformed to yield a more level litigation playing field. Consistent with the focal point of this Essay, the measures we propose aim at empowering individual plaintiffs. For this reason, we shy away from class actions and other aggregative solutions that group plaintiffs together.<sup>146</sup> We would like to note, though, that there exists a heated scholarly debate about the desirability of the use of aggregation mechanisms.<sup>147</sup> The only point about which there is unanimous agreement among scholars is that collective mechanisms do not adequately recompense the average individual plaintiff for the harm she suffered.<sup>148</sup>

Our proposal for legal reform spans the domains of procedure, evidence, and remedies. It consists of the following measures: (1) institution of fast-track litigation procedure for qualifying suits; (2) simplification of causes of action coupled with changes in the burden of proof; (3) introduction of “expedited payment orders”—a new remedy that presently does not exist; and (4) use of enhanced damages in appropriate cases. As we explain, the proposed measures may be employed on a standalone basis or together.

##### A. Fast-Track Litigation

Our first reform proposal consists of the introduction of fast-track proceedings for insurance suits. Per our discussion in Part III, one of the chief weapons of insurance companies is delay. In as far as insurance litigation is concerned, time is clearly on the side of insurance providers. Consider, for example, an insured who suffered property damage. Oftentimes, the insured and her family face an exigent need to take swift action to repair the damage. Waiting out a long litigation process is not an option for many property owners. Recall that owners of

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<sup>146</sup> For analysis of these solutions, see COFFEE, *supra* note 16.

<sup>147</sup> See generally COFFEE, *supra* note 16; Gilles & Friedman, *supra* note 64; Harel & Stein, *supra* note 45. See also Stephen B. Burbank, *The Class Action Fairness Act of 2005 in Historical Context: A Preliminary View*, 156 U. PA. L. REV. 1439 (2008); Stephen B. Burbank, *Aggregation on the Couch: The Strategic Uses of Ambiguity and Hypocrisy*, 106 COLUM. L. REV. 1924 (2006); Richard A. Nagareda, *Aggregation and Its Discontents: Class Settlement Pressure, Class-Wide Arbitration, and CAFA*, 106 COLUM. L. REV. 1872 (2006).

<sup>148</sup> See COFFEE, *supra* note 16, at 92, 229.

severely damaged properties must often rent a different place and simultaneously litigate. Most ordinary owners can ill-afford to do that. Aware of this predicament, insurance companies have an incentive to drag their feet in processing property insurance claims and, then, settle claims for pennies on the dollar. The longer insurance companies can prolong the litigation process, the greater the leverage they have in settlement negotiations.

A fast-track litigation process can substantially improve this problem. The introduction of a swift, limited in time process would go a long way toward denying insurance companies one of their principal unfair advantages in their dealings with policyholders.

It is important to understand that many insurance disputes turn on contract interpretation. The primary task of courts in such cases is to decide whether the correct interpretation of the terms of the insurance contract entitles the plaintiff to recover from the insurance provider. Interpretation is a task with which courts are intimately familiar. Occasionally, insurance contracts may give rise to difficult interpretive challenges; for the most part, however, the interpretive challenges arising from insurance contracts are standard, straightforward, and repetitive. Accordingly, courts can quickly resolve a sizable percentage of property insurance disputes.<sup>149</sup>

Disputes over life insurance are also prone to quick resolution. The vast majority of those disputes turn on the truthfulness of the insured's pre-contractual disclosure statement. Other disputes are about the actual cause of the insured's death and whether it is covered by the policy. Both types of disputes involve claims that repeat themselves across multiple cases. Correspondingly, courts can and should develop standardized methods for resolving those claims without much cost and delay. Therefore, we call for the adoption of a fast-track proceeding that would allow property and life insurance cases to be decided within a period of nine months.

One can argue contra our proposal that implementation of such a system will negatively impact other cases. After all, judges are burdened by a heavy workload and court schedules are fully booked.<sup>150</sup> *Ceteris paribus*, the introduction of a fast

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<sup>149</sup> This proposal has been inspired by A. A. S. Zuckerman, *Quality and Economy in Civil Procedure: The Case for Commuting Correct Judgments for Timely Judgments*, 14 OXFORD J. LEGAL STUD. 353 (1994).

<sup>150</sup> See Toby J. Stern, *Federal Judges and Fearing the "Floodgates of Litigation"*, 6 U. PA. J. CONST. L. 377, 386-90 (2003) (noting that rising federal caseloads

track for insurance cases invariably means that other cases will take longer to resolve. Therefore, under present conditions, the prioritization of one category of cases implicates a longer wait for others.

We have a three-prong response to this concern. First, we would like to note that the delay resulting from the introduction of fast-track proceedings is not going to be as serious at it may first appear. The proceedings we envision would not involve long waits between hearings, and, hence, would proceed much more smoothly and efficiently than standard cases. Second, we would condition the use of fast track litigation on the plaintiff's payment of higher court fees. The higher fees would serve to compensate other types of litigants. Ideally, the additional proceeds from the higher fees paid by fast-track litigants would be used to hire more judges. An increase in the number of judges would allow courts to hear more cases, to reduce the individual judges' dockets, and push forward the court dates for other cases. Hence, the benefit from the introduction of fast-track proceedings and fees may well inure to all litigants.

The imposition of higher fees on fast-track plaintiffs would have another salutary effect: it would create a separating equilibrium among plaintiffs, allowing plaintiffs with especially strong cases to signal this fact to courts. Currently, strong plaintiffs (i.e., plaintiffs with strong claims) and weak plaintiffs (i.e., plaintiffs with weak claims) are grouped together in a pooling equilibrium. Strong plaintiffs have no way of signaling their type to the court before trial, as there is only one litigation path for both types of plaintiffs. The introduction of a fast track option for a higher fee would result in a two-option menu that would enable plaintiffs to signal their type. In particular, it would allow strong plaintiffs to separate themselves from weak ones by agreeing to pay a higher fee to have their case considered on an expedited basis. This fee payment would put the plaintiff's money where her mouth is and signal to the court that the plaintiff has a strong suit. This signal would be credible because plaintiffs with weak or speculative claims would generally be unwilling to pay an increased court fee.

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have resulted in "federal courts [being] heavily burdened with constantly full dockets" and examining the strain this places on judges); NAT'L CTR. FOR STATE COURTS, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2008 STATE COURT CASELOADS 24 (2010), <http://www.courtstatistics.org/~media/Microsites/Files/CSP/EWSC-2008-Online.ashx> [<https://perma.cc/U9CH-6URZ>] (positing that state civil cases "are increasing at a time when many courts are struggling due to diminished resources" and presenting data that state civil caseloads increased a total of 29% from 1999 to 2008).

Naturally, plaintiffs cannot accurately assess the strength of their suits on their own. They would have to consult attorneys in tackling this task. This is a good thing, however. Attorneys would strengthen the sorting mechanism that would divert appropriate suits to the fast track, leaving all others for standard proceedings. As legal experts whose remuneration (and reputation) hinges on dispensing accurate advice to their clients, attorneys would be wary to refer clients to fast track proceedings and have them pay a higher fee unless they believe in good faith that their clients have a good chance to succeed on the merits. Accordingly, attorneys would advise clients to use the fast track option only if they believe in the merit of the case. This, in turn, would allow courts to rely on the signal sent by a plaintiff's decision to use fast track proceedings.

Third, and equally important, the introduction of a fast track with heightened fees would trigger a suit-sorting dynamic that would encourage insurance companies to offer their insureds fairer early stage settlements, instead of strategically denying their claims in the hopes of dragging them into prolonged litigation proceedings. Insurance companies' infamous strategy of "delay, deny, and defend" critically depends on their ability to threaten rightful claimants with the prospect of expensive and protracted litigation. By lowering this threat, our proposed system would give insurers an incentive to avoid meritless litigation.

### B. Advanced Payment Orders

Our second, and arguably most innovative, reform proposal is to empower courts to order advanced payments to plaintiffs in appropriate healthcare cases brought under ERISA. We are well aware of the fact that the remedy we propose marks a clear deviation from current practices. Yet, we believe the change is warranted. At present, the only preliminary remedies courts are entitled to award are injunctions; monetary awards are handed out at the end of the trial. We believe that advanced payments should be added to the menu of preliminary remedies that courts would be allowed to award. In healthcare suits, ailing policyholders frequently cannot wait for the conclusion of their trial. For many of them, receiving treatment expeditiously is literally a matter of life and death. The final judgment may come too late for them. In the meantime, while the trial is in process, such plaintiffs do not have the financial resources to pay for the expensive treatments they

need. Advance payment of *some* of the money claimed under the healthcare insurance policy can help them a great deal.

We are fully cognizant of the fact that some may oppose the measure on grounds of unfairness to healthcare providers. After all, insureds may ultimately lose the case and, at that point, may not be able to return the money they received to healthcare providers. While we agree that this is a concern, we contend that it is not as serious as first meets the eye, and that it cannot carry the day. First, there is a vast disparity between the interests of the parties that hang in the balance here. The interest of the healthcare insurance provider is purely monetary; the interest of the patient is in her life or limb. Second, to limit the exposure of healthcare providers to the risk of non-repayment, we would place a cap of 20% on the amounts to be advanced to patients. Furthermore, under our proposal, courts would have discretion to condition payment on the performance of certain conditions, such as provision of payback guarantees. Third, and most importantly, advanced payment orders would be reserved to cases where a court was convinced that the plaintiff has no other viable option to pay for her treatment and that she has a high probability of succeeding on the merits. In other words, the substantive conditions for ordering the remedies would be very similar to those used by courts in awarding preliminary injunctions. This is important because courts have a lot of experience with preliminary injunctions and they would be able to harness that experience in adjudicating requests for advance payments.

Two final notes are in order. First, many insurance disputes do not revolve around the issue of liability, but rather around the amount owed to the insured. In these cases, the only question is how much the insurance provider will ultimately have to pay. Hence, an advanced payment of the type we propose would not harm the insurer at all, nor would it expose it to any risk. All it would do is force the insurer to pay a certain percentage of the amount owed to the plaintiff earlier. Second, the practical effect of preliminary injunctions that are routinely used by courts is typically far more extreme than the likely effect of our proposal. Orders of advanced payment are unlikely to have such a far-reaching effect.

### C. Redesigning Liability, Defenses, and Evidentiary Burdens

Another way to make litigation fairer to plaintiffs is by redesigning liability, defenses, and evidentiary burdens. Recall that

the more elements a plaintiff needs to prove, the more money she will be required to spend on litigation and less likely she will be to succeed on the merits. Contrariwise, the more defenses a defendant can raise, the more likely he will be to defeat the suit. Evidentiary burdens, too, play a critical part in shaping the power relations between plaintiffs and defendants. Requiring plaintiffs to prove certain elements, such as intent, or scienter, can go a long way toward dooming their suits, as these elements are notoriously difficult to prove. Critically, defendants do not suffer from the same problem. While it is true that some defenses may be difficult to prove, defendants can typically sidestep this problem by raising a different defense that may be proved more facily. After all, plaintiffs must prove all the elements of their lawsuit in order to win the case, while defendants can prevail by proving one defense out of many.

The foregoing analysis seems to present a *prima facie* case for simplifying causes of actions and reducing the number of defenses available to defendants. Yet, in proceeding along this path, one needs to tread with caution. Causes of action and defenses have not been designed on a whim. Each element in a cause of action, as well as each defense, was presumably adopted for a reason. Eliminating elements (or defenses) willy-nilly will therefore work to the detriment of our society. The approach we advocate is much more nuanced and circumspect. We argue that the option of simplifying causes of action and eliminating defenses should be reserved for those cases in which defendants enjoy a systematic advantage over plaintiffs on account of economies of scope and scale, per our discussion in Part II. In such cases, the combination of complexity and cost disadvantage often presents an insurmountable obstacle for plaintiffs, and, thus, justifies legislative intervention.

Return to our discussion of consumer finance litigation in Subpart III.C. in which we noted plaintiffs' cost-disadvantage vis-à-vis banks and financial institutions. To empower plaintiffs in this context, we recommend two complementary legal measures. First, we call on lawmakers to simplify the definition of individuals' entitlements in the area of consumer finance. Second, and equally important, lawmakers would do well to shift the burden of proof to the bank in all cases involving hidden interest and fees, so that the bank will lose the case when it fails to prove by a preponderance of the evidence that the disputed charges are reasonable and fair.



An important piece of federal legislation, known as *Dodd-Frank*,<sup>151</sup> made a desirable, albeit incomplete, move in that direction. The statute has created a special Consumer Financial Protection Bureau (CFPB) and authorized it to issue rules and individual declarations that prohibit financial institutions “from committing or engaging in an unfair, deceptive, or abusive act or practice under Federal law in connection with any transaction with a consumer for a consumer financial product or service.”<sup>152</sup> The prohibition of unfair and deceitful bank practices existed before *Dodd-Frank*. *Dodd-Frank* supplemented it by banning and penalizing “abusive” behavior on the part of a bank or another financial institution.<sup>153</sup>

In tune with existing law, the statute defines “unfairness” as an “act or practice [that] causes or is likely to cause substantial injury to consumers, which is not reasonably avoidable by consumers . . . [and] is not outweighed by countervailing benefits to consumers or to competition.”<sup>154</sup> The definition calls for a comprehensive, complicated, and costly economic analysis that would have to account for many “countervailing benefit” defenses asserted by the bank.<sup>155</sup> Proof of “unfairness” is beyond the ability of the ordinary consumer. Consequently, many consumers have no choice but to rely on the CFPB’s administrative action against the bank.

Deception is equally hard to establish. Deception requires proof that the bank purposefully misrepresented or concealed material information.<sup>156</sup> For obvious reasons, banks resorting to such practices would also do everything they can to avoid detection.<sup>157</sup> Evidence showing fraudulent intent on the part of the bank is therefore rarely available.<sup>158</sup>

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<sup>151</sup> Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified at 12 U.S.C. § 5531 (2012)).

<sup>152</sup> 12 U.S.C. § 5531(a) (2012).

<sup>153</sup> *Id.*

<sup>154</sup> 12 U.S.C. §§ 5531(c)(1)(A)–(B) (2012).

<sup>155</sup> 12 U.S.C. § 5531(c)(1)(B) (2012) (requiring the Bureau to weigh “countervailing benefits to consumers or to competition”).

<sup>156</sup> See Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 114 (2015) (“Deception is not defined in the Dodd-Frank Act, but the CFPB has issued guidance that an act or practice is deceptive when . . . [it] misleads or is likely to mislead the consumer . . .”).

<sup>157</sup> See generally Chris William Sanchirico, *Detection Avoidance*, 81 N.Y.U. L. REV. 1331, 1337–41, 1361–65 (2006) (explaining incentive to avoid detection).

<sup>158</sup> *Id.* at 1367 (“The investment bank Morgan Stanley was . . . sued for aiding and abetting fraud . . . . Ordered to produce relevant e-mail correspondence, it stonewalled. Ordered to produce documents relevant to the accusation that it was stonewalling, it stonewalled.”) (footnotes omitted).

The bank's hidden fees and interest, however, may also be categorized and penalized as "abusive" pursuant to *Dodd-Frank*. The statute defines as "abusive" an act or practice that "materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service" or "takes unreasonable advantage" of the consumer's inadequate information, inferior bargaining power, or reliance.<sup>159</sup> This definition is broad enough to outlaw hidden fees and interest, and it is also intuitive enough to be understood and expeditiously applied by courts.<sup>160</sup> Critically, any dispute over whether the bank abused the client would center on the single issue of "abuse," which implies no alternating defenses. This formulation denies banks the privilege of raising multiple overlaying defenses that they enjoy under the conventional architecture of liability.<sup>161</sup>

Unfortunately, the abuse doctrine only defines the CFPB's power to protect consumers against mistreatment by issuing cease-and-desist orders<sup>162</sup> and by commencing civil actions against the bank.<sup>163</sup> When the CFPB decides not to use this power, the abuse doctrine becomes inoperative. The aggrieved client cannot raise it in court and ask the judge to declare the bank's overcharges "abusive" and, consequently, unlawful.<sup>164</sup> Instead, she must lift the heavy burden of establishing an unfair practice, deceit, or a breach of contract.

We therefore propose to create an additional rule that will use the *Dodd-Frank*'s "abuse" prohibition and deem any facially abusive banking practice presumptively unlawful. The bank's inherent informational advantage and economies of scale would allow it to easily rebut this presumption and prove that its practice was benign. For that reason, the law should place the burden of proof on the bank notwithstanding its defendant status.<sup>165</sup> Under this regime, when the bank fails to

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<sup>159</sup> 12 U.S.C. § 5531(d) (2012).

<sup>160</sup> See generally Schonberg, *supra* note 120, at 1433–39 (explaining *Dodd-Frank*'s prohibition of abusive banking practices and its implications for consumer finance).

<sup>161</sup> *Id.* at 1432–33 (explaining that the "abusive" standard involves global assessment of whether the bank took unreasonable advantage of the consumer).

<sup>162</sup> 12 U.S.C. § 5563(b) (2012).

<sup>163</sup> 12 U.S.C. § 5564 (2012).

<sup>164</sup> Under 12 U.S.C. § 5531(a), only the CFPB has the authority to declare a banking practice "abusive" and act against that practice.

<sup>165</sup> See *Raleigh v. Illinois Dept. of Revenue*, 530 U.S. 15, 21 n.1 (2000) (confirming that "compelling justifications" for shifting the burden of persuasion to a party include the party's "readier access to the relevant information" and "the importance of encouraging voluntary compliance by giving [similarly situated actors] incentives to self-report and to keep adequate records in case of dispute")

prove by a preponderance of the evidence that its facially abusive practice was benign, it will lose the case. Shifting the burden of proof, per our suggestion, would give clients who were wronged a real chance at getting redress.<sup>166</sup>

The architecture of liability can also be modified in a less drastic fashion, namely, by altering the standard of proof. As a rule, the plaintiff must prove all the elements of her suit by the preponderance of the evidence, while the defendant is subject to the same evidentiary standard when raising an affirmative defense. Requiring a heightened standard of proof for affirmative defenses consequently has the potential for leveling the playing field. This measure should be used parsimoniously and only in appropriate cases. We believe it is particularly apposite in cases in which defendants have multiple defenses at their disposal. When the law endows defendants with multiple defenses to liability, they may be asked to prove certain defenses not by the preponderance of the evidence, but rather by "clear and convincing" evidence.<sup>167</sup>

Evidence law has a longstanding policy of attaching the "clear and convincing" proof requirement to socially disfavored defenses.<sup>168</sup> We propose to treat defenses that give defendants excessive power in the courtroom as socially disfavored. It is noteworthy that raising the proof standard would usually be preferable to burden shifting because it requires no concomitant changes in the architecture of liability.

To illustrate this point, consider again a consumer's suit that complains about her bank's manipulative debit-sequenc-

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(first citing *United States v. Rexach*, 482 F.2d 10, 16 (1st Cir. 1973), *cert. denied*, 414 U.S. 1039 (1973); and then citing *United States v. Bisceglia*, 420 U.S. 141, 145 (1975)).

<sup>166</sup> Our proposed regime also would not allow banks to hide behind small-print arbitration clauses in their agreements with clients. Forcing a client to arbitrate her suit against the bank pursuant to such a clause would be unconscionable. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011) (quoting *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 687 (1996)) (interpreting Section 2 of the Federal Arbitration Act as permitting courts to invalidate agreements to arbitrate by "generally applicable contract defenses, such as fraud, duress, or unconscionability"); see also *Franks v. Bowers*, 116 So.3d 1240, 1250-51 (Fla. 2013) (nullifying arbitration agreement that denied plaintiff remedies to which she was entitled under law); *Rodriguez v. Superior Court*, 176 Cal. App. 4th 1461, 1472 (Cal. Ct. App. 2009) (refusing to enforce a statutorily permitted agreement to arbitrate medical malpractice claims upon finding that the patient did not waive her right to a jury trial and voluntarily).

<sup>167</sup> See 2 MCCORMICK ON EVIDENCE § 340, at 487-89 (Kenneth S. Broun ed., 6th ed. 2006).

<sup>168</sup> *Id.* at 488.

ing practice.<sup>169</sup> If our proposal were adopted, the bank would be required to prove by a preponderance of the evidence that the challenged practice was benign. Alternatively—for those who believe that shifting the burden of proof is too drastic a measure—we recommend imposing a heightened proof standard for affirmative defenses that the bank might raise to defeat the consumer's suit. Concretely, if the bank argues that even if the consumer proves that its debit-sequencing practice was unfair or deceptive, her suit is still doomed to fail because of her waiver, ratification, voluntary payment, or failure to mitigate the loss,<sup>170</sup> it will have to prove each of those defenses by clear and convincing evidence, as opposed to mere preponderance. Each of these measures would make it easier for individual plaintiffs to bring suits against banks.

#### D. Enhanced Damages

Our fourth reform proposal focuses on damages. Specifically, we call for more extensive use of enhanced damages in all the legal contexts identified in Part III and in other industries in which litigation costs systematically favor defendants. The availability of enhanced damages would give plaintiffs a much needed threat point in their legal interactions with powerful defendants. The design of entitlements, defenses, and remedies determines not only what parties can achieve in court, but also their bargaining positions vis-à-vis each other outside of it.

The use of enhanced damages is not foreign to our legal system. At present, treble damages may be awarded to successful plaintiffs in antitrust and patent suits, as well as in various other contexts.<sup>171</sup> We are clearly not the first to call for more extensive use of enhanced damages; similar calls have been made in the past.<sup>172</sup> Importantly, though, we highlight a new reason for awarding enhanced damages, one that is very different from the conventional justification. Conventional wisdom suggests that enhanced damages ought to be awarded

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<sup>169</sup> See *Jenkins v. Trustmark Nat. Bank*, 300 F.R.D. 291, 299–300 (S.D. Miss. 2014); *In re Checking Account Overdraft Litig.*, 830 F. Supp. 2d 1330, 1341 (S.D. Fla. 2011).

<sup>170</sup> These defenses have been raised by the bank in a recent case *In re Checking Account Overdraft Litigation*, 307 F.R.D. 630, 650–52 (S.D. Fla. 2015).

<sup>171</sup> For discussion of treble damages under various statutory provisions, see Margaret H. Lemos & Alex Stein, *Strategic Enforcement*, 95 MINN. L. REV. 9, 15–16 (2010).

<sup>172</sup> See generally A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 HARV. L. REV. 869, 887–96 (1998) (identifying circumstances under which courts should obligate defendants to pay enhanced damages).

when a wrong was committed willfully or intentionally. That is, the increased damage award is supposed to reflect the moral culpability of the wrongdoer or, more precisely, our moral repugnance. Law and Economics scholars have advanced a different justification for the use of enhanced damages. By their lights, the role of damages is to achieve deterrence. On this view, enhanced damages should be awarded to compensate for the less than perfect detection rates that result in under-enforcement. We propose a different justification for the use of enhanced damages. In our view, they should be used to compensate for the disparity between plaintiffs and defendants. In other words, enhanced damage awards should be used to level the litigation playing field.<sup>173</sup>

Enhanced damages have their detractors. A well-known argument against enhanced damages is that they can sometimes lead to excessive compensation awards—especially when used by juries. This argument, if correct, primarily applies to punitive damages. Unlimited punitive damages give adjudicators unbridled discretion that may, at least in theory, be abused in certain cases. However, the problem is much less acute when reasonable damage multipliers, or damage caps, are used, as in the case of treble damages. Treble damages, for example, empower adjudicators to award plaintiffs up to three times their actual harm, but not more than this amount. Hence, treble damages appear to strike the right balance between compensation and deterrence.

Another argument against the use of enhanced damages is that the criteria for their award are too harsh. For example, commentators have argued that the need to prove willfulness in patent infringement suits as a precondition for collecting treble damages is too onerous on plaintiffs.<sup>174</sup> We agree. Yet, the fix is not to eliminate treble damages altogether, but rather to remove the onerous precondition of willfulness. Our proposal does exactly that.

As we explained, in our view, enhanced damages should not be conditioned on the elements of willfulness, intent, or malice; rather, they should be awarded whenever there are inherent cost asymmetries that favor defendants and the latter

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<sup>173</sup> Cf. De Mot & Stein, *supra* note 8, at 1279–82 (developing damage multiplier to offset defendants' structural advantage and analyzing its pros and cons).

<sup>174</sup> See Christopher B. Seaman, *Willful Patent Infringement and Enhanced Damages After In Re Seagate: An Empirical Study*, 97 IOWA L. REV. 417, 419 (2012) (noting that "knowledgeable observers asserted that . . . proving willful infringement . . . [is] difficult, ultimately resulting in far fewer willfulness findings and enhanced-damages awards" and citing sources).

have taken advantage of these asymmetries to force plaintiffs into unfair settlements. We would like to add that the elimination of qualifiers and conditions dovetails our plea for simplification of causes of action made in the previous section. In some types of suits—for instance, in those that involve oppressive treatment of a policyholder by an insurance company<sup>175</sup>—intentionality should be the touchstone of supracompensatory awards. In suits such as those that complain about hidden fees and interest charged by a bank on its client's account, there is no need to impose this requirement.

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The point and purpose of the preceding discussion was to bring to light the range of measures lawmakers can adopt in order to give individual plaintiffs meaningful access to the court system. Another goal of ours was to illustrate how the measures we discuss may be employed in different litigation contexts. We would like to make it clear that the examples we used are merely illustrative. Importantly, our proposed measures are not mutually exclusive and do not exhaust the options lawmakers have at their disposal. Nothing in our discussion should be read to bar lawmakers from combining the measures we discuss as they see fit. On the contrary, in certain litigation contexts it may be advisable to combine the substantive, procedural, evidentiary, and remedial measures we discuss, and, on top of it, allow successful plaintiffs to receive attorneys' fees.

We would also like to emphasize that the mirror image problem of strong plaintiff-predators, who take advantage of weak defendants, is as real, troubling, and prevalent as that of plaintiffs who must confront strong defendants. Let us be clear: defendants who are preyed on by strong plaintiffs are entitled to the protection of the law. In fact, we have written about this problem elsewhere.<sup>176</sup> However, it must be borne in mind that there are two critical differences between the plight of individual plaintiffs and that of individual defendants. First, in the case of individual plaintiffs, we deal with people whose rights under the law have been violated, breached, or compromised. Litigation is their only way to seek recourse. Individual defendants, by contrast, suffered no prior injustice out of court; their only harm or injury stems from the litigation pro-

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<sup>175</sup> For a famous example of such misconduct, see *State Farm Mut. Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

<sup>176</sup> See Parchomovsky & Stein, *supra* note 4, at 1135–40.

cess. There is no preexisting harm in this case for which defendants must obtain recourse. To follow the widely used distinction between “primary” activities and “secondary” litigation behavior,<sup>177</sup> when power disparities that exist in our legal system harm plaintiffs, those plaintiffs suffer primary or substantive injustice. Injustice suffered by weak defendants, on the other hand, is secondary or procedural, which, of course, does not make those defendants unworthy of redress.<sup>178</sup>

Second, the challenge of individual defendants calls for different solutions than that of individual plaintiffs.<sup>179</sup> In the case of individual defendants, the goal is prevention and it ought to be achieved via deterrence. Legal policy in this respect should provide defendants the tools to ward off frivolous, or extortionary, lawsuits by well-financed bodies. Hence, it is important to keep the two challenges distinct and devise a unique set of solutions for each of them. But there is a greater lesson here: in thinking about litigation reform, academics and lawmakers must adopt a highly contextualized and nuanced perspective that can do justice to the specific challenges that arise in different litigation settings.

#### CONCLUSION

Civil suits by individual plaintiffs are the only way by which the law can attain the goals of efficiency, in the form of deterrence against wrongdoings, and justice, in the form of just compensation to the wrongdoings’ victims. To be sure, each of those goals can be advanced on its own by other means. Deterrence can be attained, for example, via the criminal justice system or via regulation. Deterrence can also be brought about by class actions, when they are available, or by other means of aggregate litigation. None of those means, however, ensures justice in the form of compensation, or substantive redress, to individual plaintiffs. The justice objective that requires making deserving victims whole may be secured via special funds set up for this purpose. But the use of such funds produces no deterrent effects, which allows wrongdoings to persist. Individual private suits, by forcing wrongdoers to compensate their victims, are unique in that they correlate efficiency and justice. Unfortunately, individual plaintiffs are becoming an endangered species in many litigation contexts. The structure of lia-

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<sup>177</sup> See Gideon Parchomovsky & Alex Stein, *The Distortionary Effect of Evidence on Primary Behavior*, 124 HARV. L. REV. 518, 521–23 (2010).

<sup>178</sup> Parchomovsky & Stein, *supra* note 4, at 1161–69.

<sup>179</sup> *Id.*

bility and defenses, together with the economies of scale and scope enjoyed by corporate defendants, make individual pursuits of justice impractical, not to say impossible.

In this Essay, we highlighted the plight of individual plaintiffs, analyzed its causes, and proposed ways to attenuate the pro-defendant bias that pervades certain industries. Specifically, we proposed a series of reforms that included the restructuring of liability and defenses, changes in the burden of proof, and the addition of interim and permanent remedies, to make litigation more accessible for individual plaintiffs. Our proposed measures can be used on a standalone basis or in combination, depending on the specific circumstances of the case.

Individual plaintiffs are indispensable to our legal system. They play a pivotal role in exposing misconduct and illicit practices and are the driver of doctrinal progress. Their involvement in civil litigation is of great importance also because it helps preserve public trust in the law. Implementing our reform proposals will reinstate individual plaintiffs into the position they are supposed to hold in our legal system.



