When Peace Is Not the Goal of a Class Action Settlement

D. Theodore Rave
**When Peace Is Not the Goal of a Class Action Settlement**

*D. Theodore Rave*

---

Word Count: 18,357 (text only)
25,041 (including footnotes)

* Assistant Professor, University of Houston Law Center. Thanks to Emily Berman, Andrew Bradt, Zachary Bray, Aaron Bruhl, Johnny Buckles, Darren Bush, Sergio Campos, Oscar Chase, Jaime Dodge, David Fagundes, Myriam Gilles, Russell Gold, Jim Hawkins, Lonny Hoffman, Samuel Issacharoff, David Kwok, Peter Linzer, Jessica Mantel, Troy McKenzie, David Noll, Andrew Pincus, Robert Ragazzo, Jessica Roberts, Joseph Sanders, Alan Trammell, Steven Vladeck, and Ryan Williams, as well as participants in the Seventh Annual Junior Faculty Federal Courts Workshop, the NYU School of Law Center on Civil Justice Conference on the Future of Class Action Litigation, and the University of Houston Faculty Workshop for helpful comments. Diane Myers provided excellent research assistance.
WHEN PEACE IS NOT THE GOAL OF A CLASS ACTION SETTLEMENT

On the conventional account, a class action settlement is a vehicle through which the defendant buys peace from the class action lawyer. That single transaction will preclude future litigation by all class members. But peace, at least through preclusion, may not always be the goal. In a recent Fair Credit Reporting Action (FCRA) case, In re Trans Union Privacy Litigation, the parties agreed to a class action settlement that did not preclude individual claims. The 190 million class members surrendered only their rights to participate in a future class or aggregate action; they remained free to march right back into court and sue, as long as they did so individually. Why would the defendant shell out tens of millions of dollars in a settlement without getting peace in return? This Article argues that the parties essentially crafted an ex post version of the class action waivers that have become ubiquitous in consumer arbitration clauses since the Supreme Court’s controversial decisions in AT&T Mobility v. Concepcion and American Express Co. v. Italian Colors. Defendants like this sort of settlement structure for the same reason they like arbitration clauses with class action waivers: purchasing the class’s aggregation rights allows the defendant to buy off the risk of firm-threatening liability without paying for total peace. Even though individual claimants remain free to go it alone in litigation if they so choose—and the FCRA’s statutory damages and attorneys’ fees provisions make this a realistic option—the defendant is betting that most claimants won’t bother. This Article addresses why class counsel would be willing to go along with such a settlement structure and the conditions under which a reviewing court would be willing to approve it under Rule 23. It then uses the ex post class action waiver as a lens to critique the more familiar ex ante version in consumer arbitration clauses. It argues that, even though claimants have an empowered agent—class counsel—bargaining on their collective behalf, courts would unlikely to accept a class action settlement that bars aggregation, but does not resolve the underlying claims, if those claims are so small that individual litigation would be unrealistic. Yet that is exactly what the Supreme Court allowed in the ex ante context in Italian Colors when it enforced a class action waiver found in the defendant’s contract of adhesion to bar class claims that were not viable in individual litigation.

INTRODUCTION...........................................................................................................2
I. SETTLEMENT IN PURSUIT OF PEACE? .............................................................6
   A. The Conventional Account.................................................................................6
   B. Settlement Without Peace ..............................................................................10
INTRODUCTION

On the conventional account, peace is the whole point of a class action settlement.\footnote{E.g., Richard A. Nagareda, Mass Torts in a World of Settlement (2007).} By settling, the defendant buys preclusion from the class action lawyer. The defendant hands out compensation or submits to a consent decree and, in exchange, all class members (who don’t opt out) are precluded from subsequently litigating their individual claims against the defendant.

But peace—at least in the form of preclusion—may not always be the goal of a class action settlement. In some cases, preclusion may not be worth the price. The defendant may find itself paying to settle claims that would never have been brought, were they required to be brought on an individual basis. An ultimately cheaper route to resolving its liability might be to purchase the class members’ rights to proceed on an aggregate basis, allowing individual plaintiffs to go it alone if they so choose, but knowing full well that most plaintiffs won’t bother. Indeed, this is what companies have in mind when they place arbitration clauses with class action waivers in their form contracts, a practice recently blessed by the Supreme Court in
AT&T Mobility LLC v. Concepcion.\textsuperscript{2} What if a class action settlement could achieve ex post what a class action waiver achieves ex ante? A defendant could potentially resolve its liability at much lower cost than by buying peace through preclusion.

A recent class action settlement in a Fair Credit Reporting Act (FCRA) case accomplished exactly this goal. The parties in In In re Trans Union Corporation Privacy Litigation agreed to settle the class action without precluding individual claims.\textsuperscript{3} Trans Union faced up to $190 billion in liability—many times its net worth—if it had to pay statutory damages to a class of 190 million consumers. But Trans Union did not enter a global settlement of all these claims. Instead, the settlement precluded class members only from litigating on a class or aggregate basis and left them with the option to either take a payment from a $75 million settlement fund or pursue their claims for statutory damages individually in court.\textsuperscript{4} And though over 100,000 plaintiffs marched right back into court and filed individual suits, the overwhelming majority did not.

As this Article will explain, the negotiating parties recognized that the truly valuable commodity in this settlement transaction was not peace, but aggregation. Indeed, aggregation may be the most valuable aspect of many class actions—particularly when individual claims are modest and fairly uniform. But in most class action settlements the defendant buys protection from aggregation by buying preclusion. The parties in the Trans Union settlement, however, stripped the transaction down to its essentials. They figured out how to transact in what is really valuable—aggregation—without all of the extraneous features necessary to preclude the claims of absent class members consistent with due process and the class action rules. In other words, they succeeded in unbundling aggregation from preclusion.

In essence, the parties in the Trans Union settlement crafted an ex post version of the types of class action waivers that have become ubiquitous in consumer arbitration clauses after the Supreme Court’s decisions in Concepcion and, more recently, American Express Co. v. Italian Colors Restaurant.\textsuperscript{5} Without purporting to affect any substantive rights, companies place class action waivers in their form contracts that require the parties to resolve any future disputes in individual arbitration. The arbitration requirement is not the important part; the individual requirement is what matters. The predictable effect of barring class actions in consumer cases is to drastically reduce the number of claims actually brought, even when the arbitration procedures are designed to make

\begin{itemize}
\item \textsuperscript{2} 131 S. Ct. 1740 (2011).
\item \textsuperscript{3} 741 F.3d 811 (7th Cir. 2014).
\item \textsuperscript{4} Id.
\item \textsuperscript{5} 133 S. Ct. 2304 (2013).
\end{itemize}
arbitrating small claims individually feasible. And the Supreme Court’s approval of this strategy in *Concepcion* and *Italian Colors* has raised a firestorm of controversy.⁶

In settling the right to aggregate, but not insisting on preclusion of individual claims, Trans Union made the same bet: that even though they remained free to do so, relatively few claimants would bother to sue individually. In other words, the defendant bought off the risk of firm threatening liability in a class action without having to pay for total peace through preclusion.

But this Article is about more than just a fascinating settlement structure. Looking at this transaction for aggregation rights in its pure form allows us to do several things. First it shows that the conventional account that defendants value class action settlements because of their preclusive effect is incomplete. What is valuable in a class action settlement depends on the nature of the underlying claims. Defendants place a premium on peace in cases where claims are large and incomplete settlements are vulnerable to adverse selection, such as mass torts. But in cases where claims are modest and fairly uniform, like many consumer claims, protection from aggregation can be almost as valuable as preclusion—and it may come at a much lower price. In those types of cases, a defendant that can block aggregation may be quite content to leave itself exposed to individual suits, knowing full well that few claimants will bother to bring them.

Second, it shows how parties to a legal dispute can peel off and settle pieces short of the plaintiff’s entire claim. Analyzing this strategy of unbundling—and selling the defendant only the commodity it values most—lets us reflect on the nature of the right to aggregate legal claims. And it exposes some of the tensions between the deterrence and compensation rationales for the class action mechanism.

And third, the creative ex post class action waiver in the *Trans Union* case provides a useful lens for analyzing the more familiar ex ante version that is becoming ubiquitous in consumer contracts. Examining the conditions under which courts would and would not approve of a class

---

action settlement of aggregation rights, allows for a more focused critique of ex ante class action waivers.

As I argue below, courts should not, and probably would not, approve this sort of class action settlement structure under Rule 23 in a case involving negative-value claims, where individual litigation is economically irrational. It was important to the court that approved the Trans Union settlement that claimants retained a realistic opportunity to bring their modest claims on an individual basis because the FCRA allows claimants to recovery statutory damages and attorneys’ fees.

But this highlights some of the problems with Italian Colors, where the Supreme Court enforced a class action waiver in an arbitration clause that left the claimants with no realistic opportunity to vindicate their rights on an individual basis. In other words, the Court allows in the ex ante context, based on a term in a contract of adhesion that claimants have no chance to bargain over, exactly what a reviewing court would not accept in an ex post class action waiver, where the claimants have an empowered agent who can bargain on an equal footing with the defendant.

Part I of this Article surveys some of the reasons why parties in mass litigation value peace and so often find the class action settlement a useful tool for obtaining it. It then turns to the structure of the class action settlement in the Trans Union litigation, where total peace was obviously not the goal. Part II explores the incentives of defendants, claimants, and class counsel in structuring a settlement to preclude future class action or aggregate litigation, but not actually resolve the claims of class members or preclude them from suing on an individual basis. It addresses why defendants might be willing to forgo peace and why class counsel would be willing to give up its biggest stick—the threat of classwide liability—without securing compensation for class members’ underlying claims. Part III compares the ex post class action waiver in the Trans Union settlement with the more familiar ex ante variety found in many consumer arbitration clauses and highlights the differences in bargaining dynamics. Part IV turns to the normative desirability of settlements without peace, assessing whether they comport with our understandings of due process in the class action context and well as the compensation and deterrence goals of the class action device. It argues that the sale of aggregation rights is more problematic for negative-value claims than when motivated claimants have a realistic opportunity to litigate individually. The Article concludes by reconsidering ex ante class action waivers in light of what we’ve learned from the ex post model.
I. SETTLEMENT IN PURSUIT OF PEACE?

Preclusion was not the goal in the *Trans Union* case. But that runs counter to the conventional account of class action settlements as a vehicle for delivering peace to the defendant by wrapping up the entire litigation in a single transaction.

A. The Conventional Account

Peace is generally the goal of any settlement. In individual litigation, the armistice process is straightforward. The plaintiff and defendant each call off the battle and agree to resolve their dispute amicably outside of court. The conflict is over, and the rules of claim preclusion or res judicata allow both parties to confidently put the dispute behind them.

But when there are many plaintiffs with similar claims against a common defendant, settling with one—or even many—of those plaintiffs does not give the defendant peace. The defendant still faces the rest of the claims brought on behalf of the other plaintiffs, perhaps by the very same lawyer or handful of lawyers.

Defendants do not like this, for several reasons. First, it’s expensive. Despite making settlement payments, the defendant continues to bear ongoing litigation costs. And by settling claims piecemeal, it loses the economies of scale that come with defending against a mass of similar claims. Second, the defendant continues to be exposed to bad publicity stemming from the ongoing claims. Settling some claims may even generate more negative publicity about the unsettled claims or, worse, encourage additional plaintiffs to come forward with new claims. Third, and relatedly for business-entity defendants, the uncertainty created by a horde of unresolved claims might hurt the company’s stock price or

---

7 At least from the litigants’ perspective. Other players might have different goals. From a regulatory policymaker’s perspective, the goal might be policy implementation through the enforcement of the substantive law. From a judge’s perspective, the goal might be docket clearing. For a classic take on the goals and costs of settlement see Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1075, 1085 (1984). For a competing take see Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1195–97 (2009).


otherwise impair its ability to raise capital. At the very least, the defendant’s inability to “put the whole dispute behind it” ties up capital in litigation reserves and diverts the attention of managers away from their core business functions. Finally, depending on how much the defendant knows about the relative strength of the plaintiffs’ claims, piecemeal settlements can expose the defendant to adverse selection, where the weaker claims accept settlement offers, while the stronger hold out for more. This can leave the defendant in the unhappy situation of having overpaid to settle the weakest claims, only to be left facing the strongest in continued litigation. For these reasons, even if the defendant can settle a large chunk of the claims, the cost and risk of continued litigation against the remaining claims may be disproportionate to their number and size.

Peace, therefore, is the overriding goal of most class action settlements. As Professor William Rubenstein has explained, a settlement in any mass litigation is a transaction in which the defendant buys preclusion from the plaintiffs and their lawyers. The goal, from the defendant’s perspective, is to wrap up all of the claims and resolve the entire litigation in a single transaction—to essentially buy peace.

The class action mechanism makes this sort of transaction possible. It empowers the class action lawyer to credibly offer peace to the defendant because a class action settlement precludes future litigation by not only the lawyer’s individual clients, but by all class members who do not affirmatively opt out. In effect, certification of a class action gives the lawyer appointed as class counsel monopoly control over the class members’ claims. Consolidating control in class counsel’s hands helps to overcome the collective action problem that numerous and otherwise unrelated class members would face in most effectively pressing their claims. And class certification blocks other plaintiffs’ lawyers from

---

11 See, e.g., Sullivan v. DB Investments, Inc., 667 F. 3d 273, 339 n.9 (3d Cir. 2011) (Scirica, J., concurring); Rave, Anticommons, supra note 9, at 1194-95.
12 See Rave, Anticommons, supra note 9, at 1193-94.
13 See Rave, Anticommons, supra note 9, at 1193-95, for a more detailed discussion of why defendants prefer global settlements to piecemeal ones.
15 In the most common form of class actions, those seeking monetary damages, Federal Rule of Civil Procedure 23(b)(3) gives class members opportunity to opt out. Rules 23(b)(1) and (2) allow mandatory class actions if the relief sought is indivisible or to divide up a limited fund.
16 Nagareda, supra note 1, at 71.
strategically peeling off chunks of claims from the class to negotiate separately with the defendant.\textsuperscript{18} So the defendant can be confident that class counsel is the appropriate, and only necessary, counterparty in settlement negotiations and can actually deliver something approaching total peace.

Recognizing the peacemaking power of class action settlements, defendants—even those who have vociferously opposed class certification earlier in the litigation—typically want to expand the class definition as much as possible once the parties have reached the settlement stage.\textsuperscript{19} The broader the class definition—and the more claims that can be swept in—the more peace the defendant is buying.

Indeed, defendants will sometimes even pay a “peace premium” to avoid the potentially disproportionate costs and risks of continued litigation against a handful of claims.\textsuperscript{20} As Judge Scirica observed in \textit{Sullivan v. DB Investments, Inc.}, “achieving global peace is a valid, and valuable, incentive to class actions settlements,” for which a defendant “may be motivated to pay class members a premium.”\textsuperscript{21} This may explain why the shift from the private claims facility that BP set up to pay victims of the \textit{Deepwater Horizon} oil spill to a class action settlement that promised BP a much greater degree of finality resulted in significantly higher payments to claimants.\textsuperscript{22} It turns out that peace can be good for plaintiffs too, if they can bundle all of their claims together for sale to the defendant as a single package.\textsuperscript{23}

\textsuperscript{18} See Fed. R. Civ. P. 23, Advisory Committee Notes to 2003 Amendments (“[N]o class member may purport to opt out other class members by way of another class action.”); Carlough v. Amchem Prod., Inc., 10 F.3d 189 (3d Cir. 1993).


\textsuperscript{20} Rave, \textit{Anticommons, supra} note 9; see also Silver & Baker, \textit{supra} note 8, at 751; Zachary Savage, The Peace Premium: Theory and Practice, 22-25 (unpublished manuscript, on file with author).

\textsuperscript{21} 667 F.3d 273, 311, 339 (3d Cir. 2011) (Scirica, J., concurring).

\textsuperscript{22} Issacharoff & Rave, \textit{supra} note 7. The \textit{World Trade Center Disaster Site Litigation} illustrates the peace premium in a nonclass aggregate settlement. There the defendant was willing to make sizable “bonus payments” to get the last 5% of claimants to sign on to a global settlement of claims brought by rescue and cleanup workers in the wake of the terrorist attacks. In re \textit{World Trade Center Disaster Site Litig.}, 834 F. Supp. 2d 184 (S.D.N.Y. 2011); World Trade Center Litigation Settlement Process Agreement, As Amended §§ II.A, IV, V.E. available at http://www.nysd.uscourts.gov/cases/show.php?db=911&id540. See Rave, \textit{Anticommons, supra} note 9 for further discussion.

\textsuperscript{23} See Rave, \textit{Anticommons, supra} note 9, at 1185, 1201.
And the effort to secure peace is also why defendants often try to structure class action settlements to deter class members from opting out. Settling parties have used a number of techniques ranging from provisions allowing the defendant to walk away from the deal if too many claimants opt out, to “most-favored-nation clauses” precommitting the defendant to make matching payments to class members in the event that it settles on more favorable terms with any opt-outs, to securing the settlement fund with a preferential lien on all the defendants’ assets so that no opt-out can be paid before all class members are paid in full. And these techniques are often successful at minimizing the number of claimants who opt to continue to litigate against the defendant instead of joining the settlement.

But the push for peace does not always work to the advantage of individual plaintiffs, or even the plaintiffs as a whole. When opt-out deterrents function not merely to make participating in the class action settlement more attractive, but to actually impair the value of claims outside the settlement, they can shift bargaining leverage in the defendant’s favor. Destroying the value of opt-outs’ rights outside the settlement makes it difficult for individual plaintiffs to register their displeasure with the terms of the deal. In other words, opt-out deterrents disable “exit” as a lever of class action governance. Class members cannot simply vote against an inadequate settlement with their feet when opting out is no option at all. So the dealmakers—the defendant and class counsel—can foist a less attractive deal on the class and take more of the peace premium for themselves.

Still, the conventional story goes, the defendant’s desire for peace, and the premium that the class action lawyer able to deliver it can demand, will drive the negotiating parties to try to maximize closure through an expansive class action settlement. The defendant submits to a consent

---


26 See Rave, Anticommons, supra note 9, at 1208-10 (comparing opt out deterrents to coercive exit consents in sovereign bonds).
decree or sets up some alternative process for handing out compensation, and the class action judgment channels claimants into that process while precluding them from bringing claims in court. In a Rule 23(b)(3) damages class action, of course, some claimants may opt out of the settlement and retain their right to sue. But class members who do nothing (as we humans are so often wont to do) are bound by default. And the parties will do their best to structure the settlement to discourage opt-outs and definitively wrap up as many claims as possible in a single transaction.

B. Settlement Without Peace

But peace may not always be the goal of a class action settlement. The settlement in the Trans Union Privacy Litigation provides an intriguing example of a class action settlement that did not attempt to deliver finality to the defendant by definitively resolving the claims of the class members.

1. The Trans Union Privacy Litigation

In 1994, the Federal Trade Commission (FTC) brought an enforcement action against Trans Union, a national consumer reporting agency in the business of collecting information about consumers and selling credit reports. The FTC determined that Trans Union’s practice of selling lists of consumer names and addresses in its database to retailers for “target marketing” (i.e., sending junk mail) violated the Fair Credit Reporting Act, which regulates the collection and dissemination of consumer credit information. Trans Union vigorously defended its practices, arguing that the lists of names and addresses contained no consumer credit information. But the FTC found that because Trans Union used credit-related criteria to generate the lists, the inclusion of a consumer’s name on a mailing list implicitly contained information about the consumer’s creditworthiness. And, in 1999, the FTC permanently enjoined the company from selling lists to target marketers. The D.C. Circuit affirmed that decision on appeal.

27 See D. Theodore Rave, *Settlement, ADR, and Class Action Superiority*, 5 J. TORT LAW 91 (2014) (explaining that class action settlements are a form of ADR)
Private lawyers were quick to piggyback on the FTC’s enforcement action. In addition to authorizing FTC enforcement, the FCRA creates a private right of action for consumers whose credit information is disclosed without a statutorily defined “permissible purpose.” Consumers can seek actual damages for a negligent violation of the statute. But, seeing as the actual harm a consumer suffers from an invasion of privacy can be difficult to measure or prove, the FCRA also allows consumers to recover statutory and punitive damages for willful violations. Beginning in 1998, a series of consumer class actions were filed in state and federal court against Trans Union challenging the same practices that the FTC sought to enjoin. And, in 2000, the Judicial Panel on Multidistrict Litigation transferred the federal cases to Judge Gettleman in the Northern District of Illinois for consolidated pretrial proceedings.

The plaintiffs sought to certify a nationwide class of all consumers in Trans Union’s database since it began selling target marketing lists in 1987. As one of three national consumer reporting agencies, Trans Union’s database contained pretty much everyone who had ever used a credit card or sought any other form of credit. So the proposed class was enormous: at least 190 million people nationwide.

Trans Union’s potential liability was correspondingly enormous. The FCRA’s statutory damages for willful violations are between $100 and $1000 per instance. So Trans Union’s potential liability, if found to have willfully violated the statute, was at least $19 billion and as much as $190 billion. Even the smaller of these sums exceeded Trans Union’s net worth many times over. The company was worth about $1 billion at the time.

With such astronomical sums at stake, Trans Union would face considerable pressure to settle if a class were certified, rather than bet the company on the outcome of a single class action trial. And in 2002, the district court denied certification of a nationwide statutory damages class for this very reason. Judge Gettleman held that a class action would not be “superior” to other methods of adjudicating the dispute as required by

---

36 See In re Trans Union Privacy Litig., 741 F.3d 811, 812 (7th Cir. 2013).
37 See id. at 813.
38 See id. at 813.
39 Id. at 813.
41 See In re Trans Union Corp. Privacy Litig., No. 00-cv-4729, 2009 WL 4799954, at *23 (N.D. Ill. Dec. 9, 2009), order modified and remanded, 629 F.3d 741 (7th Cir. 2011).
42 See, e.g., In re Rhone-Poulenc Rorer, Inc., 51 F.3d 1293, 1298 (7th Cir. 1995).
43 In re Trans Union Privacy Litigation, 211 F.R.D. 328 (N.D. Ill. 2002).
Rule 23(b)(3). He reasoned that the minimum statutory damages of $19 billion dollars should the class prevail would be catastrophic for Trans Union and was grossly disproportionate to the harm actually suffered by class members.\textsuperscript{44} Further, the statutory scheme had other mechanisms—namely FTC enforcement—to deter widespread wrongdoing, and the availability of statutory damages and attorneys’ fees provided a realistic avenue for consumers to bring individual actions. Therefore, in Judge Gettleman’s view, a combination of FTC enforcement and individual actions would be superior to an all-or-nothing statutory damages class action.\textsuperscript{45}

The litigation muddled along for several years with more limited statewide classes being certified until two things happened to prompt settlement.

First, in 2007, the Supreme Court decided \textit{Safeco Insurance Co. of America v. Burr}, which made it significantly harder for plaintiffs to show the willfulness necessary to get statutory damages.\textsuperscript{46} The Court in \textit{Safeco} adopted something akin to a qualified immunity standard: a consumer reporting agency does not “willfully” violate the FCRA unless its actions were “objectively unreasonable” under “clearly established” law.\textsuperscript{47} This new standard threw the plaintiffs’ ability to recover statutory damages—particularly for violations that happened before the D.C. Circuit’s decision affirming the FTC became final in 2002—into question.

Second and more importantly, in March 2008, Judge Gettleman informed the parties that, in light of intervening changes in law in the Seventh Circuit, he might reconsider certifying a nationwide statutory damages class, even if that could mean putting Trans Union out of business.\textsuperscript{48} Suddenly Trans Union was under the gun again; it faced a relatively low probability of a catastrophic loss.

Less than two months later, the parties had agreed on a class action settlement structure.\textsuperscript{49}

2. \textit{The Trans Union Settlement Structure}

The settlement that the parties reached, however, was not a typical global class action settlement. It made no attempt to resolve the claims of the 190 million class members. Instead, the settlement only precluded class

\textsuperscript{44} Id. at 350-51.
\textsuperscript{45} Id. at 351.
\textsuperscript{46} 551 U.S. 47 (2007).
\textsuperscript{47} Id. at 69-70.
\textsuperscript{48} See In re Trans Union Corp. Privacy Litig., No. 00-cv-4729, 2009 WL 4799954, at *23 (N.D. Ill. Dec. 9, 2009), order modified and remanded, 629 F.3d 741 (7th Cir. 2011).
\textsuperscript{49} Stipulation of Settlement, In re Trans Union Corp. Privacy Litig., No. 00-cv- 4729 (N.D. Ill. May 20, 2008).
members from litigating on a class or aggregate basis. It left them free to pursue their claims individually.

The settlement was structured as follows. The court would certify a mandatory Rule 23(b)(1)(A) class consisting of all consumers who had a credit report with Trans Union—basically anyone in the United States with a credit card or any other form of credit account—between January 1, 1987 and May 28, 2008.50 Because this was a mandatory class, absent class members had no opportunity to opt out. But class members would release only their procedural rights to sue Trans Union as part of a class action or “aggregated action” (defined in the settlement agreement as the claims of two or more plaintiffs brought together in a single suit).51 They would retain their rights to bring their individual claims for statutory damages separately, and to seek attorneys’ fees if they prevail. Further, Trans Union agreed to waive the statute of limitations as a defense for all individual claims filed within two years.52

In exchange, Trans Union would provide “basic” in-kind relief for all class members who registered with the settlement administrator. This in-kind relief consisted of a six-month subscription to Trans Union’s credit-monitoring service, which had a retail value of $59.75.53 Class members who signed up for basic in-kind relief were not required to release their individual claims. They remained free to sue Trans Union in court. Likewise, class members who did nothing remained free to bring individual actions against Trans Union, though they too would be barred from participating in a class or aggregated action.54

The settlement also offered two options for additional relief to class members who were willing to release their claims in full. Class members could sign up for “enhanced” in-kind relief in exchange for a full release of their claims. This consisted of a nine-month subscription to Trans Union’s credit-monitoring service as well as a suite of other online products, like insurance scores and a mortgage simulator, with a combined retail value of $115.50.55 Or they could sign up for a potential cash payment from a $75 million fund set up by Trans Union.56

But they wouldn’t get that payment right away. The money in the fund would first be used to pay class counsel’s attorneys’ fees, which were capped at 25% of the fund or $18.75 million, as well as notice and

50 Id. ¶ 1.30.
51 Id. ¶¶ 1.3, 2.2(a).
52 Id. ¶ 2.4.
53 Id. ¶ 2.2(a).
54 Id. ¶¶ 2.2(a), 2.8(b).
55 Id. ¶ 2.2(b).
56 Id. ¶¶ 2.1(a), 2.1(b)(vi).
settlement administration costs. The named plaintiffs were also entitled to incentive payments of $3750 each out of the fund. And, most interestingly, Trans Union itself could obtain reimbursements from the fund for payments to class members who brought individual claims after the settlement. Trans Union could use the fund to pay, not only judgments in these individual post-settlement claims, but also to settle any lawsuit or presuit demand brought by a class member. Trans Union would still have to bear its own litigation costs, but the deal placed no restriction on its discretion to settle any individual claim. After two years, the remainder of the fund would be distributed pro rata to the class members who had registered for a payment.

About 450,000 class members registered for a cash payment out of the settlement fund and, accordingly, released their claims. Perhaps another 300,000 opted for the enhanced in-kind relief and released their claims. So for $75 million in cash plus in-kind relief worth about $35 million, Trans Union obtained releases from about 750,000 claimants: a large number perhaps, but far from total peace. The settlement left more than 189 million claimants still free to sue for statutory damages. Indeed, it extended the statute of limitations for those 189 million claimants by two years. But they would have to bring individual suits. The settlement barred them from proceeding on a class or aggregated basis. And, in the end, about 100,000 class members filed individual suits before the extended statute of limitations expired.

II. WHY PEACE MIGHT NOT BE THE GOAL

Why would a defendant like Trans Union pay tens of millions of dollars in a class action settlement and not get peace (or anything even approximating it; less than half a percent of class members released their claims) in return? And why would the class give up its biggest stick—the threat of a (devastating) classwide judgment at trial—without obtaining compensation for all class members in return? Peace—at least in the

---

57 Id. ¶ 4.
58 Id. ¶ 2.7.
59 Id. ¶ 2.1(b)(iv).
60 Id.
61 Id. ¶ 2.1(b)(vi).
62 In re Trans Union Privacy Litig., 741 F.3d 811, 814 (7th Cir. 2014).
63 I say “perhaps” because the number of claimants who opted for enhanced in-kind relief is not publicly available. The Seventh Circuit’s opinion states that Trans Union provided “roughly $35 million worth of enhanced relief.” 741 F.3d at 813. With the enhanced in-kind relief valued at $115.50 per consumer retail, that works out to approximately 303,030 claimants. The accuracy of this number is not critical to any of my claims or to understanding the settlement structure.
familiar form of preclusion—was obviously not the goal in the *Trans Union* case, and because it runs so counter to the conventional narrative, it is worth exploring why that might have been the case.⁶⁴ Let’s look at the incentives of the various players.

### A. The Defendant’s Perspective

While it is often defendants who push for peace in class action settlements, defendants are not interested in peace for its own sake. Instead, they are interested in minimizing their total payout over the course of a mass litigation. This includes not only the amount that they pay plaintiffs in judgments or settlements, but also the attendant costs of ongoing litigation both in legal fees and in the form of bad publicity, reduced access to capital, and the like.

In some cases, such as mass torts involving personal injuries, total peace may be the cheapest option. In these types of cases, individual case values are likely to be high; the threat of jury awards for medical expenses, lost wages, and pain and suffering can be substantial, making individual or small group litigation feasible. The rate of claiming is also likely to be high; plaintiffs who have suffered physical injury are often highly motivated to seek redress in the courts. And the risk of adverse selection in piecemeal settlements is great, as claim values are likely to vary and plaintiffs are likely to have more information about the strength of their individual claims than the defendant. Without total peace the defendant cannot be confident that the strongest claims are included in the settlement, and it has to worry that it is overpaying to settle weak claims.⁶⁵ Even if the defendant has to pay a premium to get all of the claimants on board, total peace may be a better deal than facing a large number of high value claims in piecemeal litigation.

But in other cases—particularly where claim values are low and fairly uniform (and adverse selection therefore unlikely)—eliminating the possibility of aggregation may lower defendants’ expected payout over the universe of potential claims. There are at least two mechanisms that could

---

⁶⁴ Indeed, earlier examples of class settlements without peace, like the Fen-Phen diet drug settlement, which gave class members an opportunity to opt out at the back end if they were diagnosed with an injury after the initial opt-out period, are widely considered to have been disastrous. *See, e.g.*, NAGAREDA, *supra* note 1, at 143-47.

⁶⁵ It was this fear that was driving the settlement structure in Vioxx, which conditioned participation by any clients of a lawyer on that lawyer recommending participation to 100% of his or her clients and retracting from representing those who opted not to take the settlement. *See* Samuel Issacharoff, *Private Claims, Aggregate Rights*, 2008 SUPREME CT. REV. 183, 215-19 and Howard Erichson & Benjamin Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 274-81 (2011) for competing takes on the Vioxx settlement.
cause this result. First, preventing aggregation may lower the rate of claiming, and, second, preventing aggregation may lower the amount of money the defendant pays per claim.

1. Rate of Claiming

Where individual case values are low, as in many consumer claims, the rate of claiming will be low in the absence of aggregation. The classic example would be negative-value claims, where the cost to the claimant of bringing an individual lawsuit exceeds the amount that the claimant could possibly recover. Without a class action or some other form of aggregation to share costs, the rate of claiming will approach zero. These claims simply make no economic sense to litigate individually. As Judge Posner colorfully explained, “only a lunatic or a fanatic sues for $30.”

But even where a statutory scheme includes incentives to litigate low-value claims, such as the FCRA’s provisions for statutory damages and attorneys’ fees, the rate of claiming for these modest, though clearly positive-value, cases may be low when claimants must litigate individually. Though a motivated plaintiff would have a realistic opportunity to litigate, the psychic cost of a lawsuit (not to mention the value of the plaintiff’s time) may exceed the $1000 maximum statutory damages award, even if the defendant pays all of the plaintiff’s costs and attorneys’ fees. And even that amount must be discounted by the expected chance of prevailing because the losing plaintiff will not have his or her attorneys’ fees and costs reimbursed. So many potential plaintiffs with modest positive-value claims may decide to forgo individual litigation entirely.

Lack of awareness and inertia may also be factors. Claimants with modest claims might not consciously decide to forgo pressing their rights in court. Rather, without a class action notice, they may be unaware that they have even been injured. And even when they know about the injury, they

may fail to sue out of simple inertia, if pursuing modest value claims is a low priority for them. Default rules can be powerful, and when the default is nonparticipation, many people will do nothing with their claims. Because a class action shifts the default rule from nonparticipation to participation, the class action pulls many litigants who might otherwise have sat on the sidelines into the judicial system.

So if a defendant can limit the number of claims actually filed by preventing class action aggregation, that might be significantly cheaper than using a class action settlement to buy peace from all of the claimants.

In the Trans Union litigation, for example, the defendant (as well as class counsel and the court) anticipated that relatively few claimants would file individual lawsuits and that the $75 million fund would be more than sufficient to satisfy all individual post-settlement claims with money left over to distribute to class members who signed up to receive cash payments in exchange for a release. The parties underestimated the entrepreneurial ingenuity of other members of the plaintiffs’ bar, who figured out an economical way to bring individual post-settlement claims against Trans Union. Primarily through Internet advertising, these lawyers solicited class members who retained their rights to sue Trans Union individually and filed their claims in formally separate, but substantively identical, actions in low-filing-fee jurisdictions. But even though these lawyers amassed an inventory of more than 100,000 individual claims—far more than the parties or the district court anticipated—that number represented only a tiny fraction of the more than 189 million class members who retained their claims against Trans Union.

At first glance, it might appear that Trans Union opened itself up to tremendous liability by not using the class action settlement to obtain releases from class members and instead actually waiving that other great tool of repose: the statute of limitations. Trans Union agreed to extend the statute of limitation for two years on two decades’ worth of individual statutory-damages claims by basically all credit-card holders in the United States.

But, as a practical matter, the amount of money Trans Union was likely to pay out was limited to the $75 million settlement fund. Because

---

68 See, e.g., Camerer et al., supra note 28; Thaler & Sunstein, supra note 28.
70 In re Trans Union Corp. Privacy Litig., 741 F.3d 811, 814 (7th Cir. 2014). Professors Myriam Gilles and Anthony Sebock’s claim that informal, internet-based aggregation can’t scale is thus overstated. See Myriam Gilles & Anthony Sebock, Crowd-Classing Individual Arbitrations in a Post-Class Action Era, 63 DePaul L. Rev. 447, 453 (2014).
Trans Union could obtain reimbursements from the fund for the cost of settling, but not defending, individual post-settlement claims, Trans Union had no incentive to put up a fight. Until the $75 million fund was depleted, Trans Union had every incentive to settle even weak claims as quickly as possible. This made the $75 million fund an attractive target for outside plaintiffs’ lawyers who could collect inventories of claims and settle them with little or no effort.

Going after Trans Union’s assets beyond the fund in a series of individual actions where the plaintiffs would have to prove willful violations of the FCRA was a much more daunting endeavor (particularly under Safeco’s qualified immunity standard), and one that promised a much lower profit margin. In theory, a lawyer might invest heavily in one case and try to use a victory there offensively, arguing that it should have issue preclusive effect in the remaining multitude of cases. (Unlike a typical class action settlement, the Trans Union settlement did not guarantee two-way preclusion.) Such an approach could benefit subsequent clients, assuming subsequent courts would be willing to apply offensive issue preclusion. But under a fee-shifting statute like the FCRA, it’s less clear what’s in it for the lawyer. In the first case the lawyer could seek a statutory fee award for all of the hours invested in the case under the lodestar approach, even though the first client gets a maximum of $1000 in statutory damages. But the lawyer would not get paid very much under the lodestar for subsequent clients who take advantage of the issue preclusive effect of the first judgment because litigating their cases would not take much billable time. The clients do pretty well—they get statutory damages with little effort—but without the class action mechanism to aggregate claims, the lawyer would have to invest a lot of effort into recruiting clients individually for a relatively meager return under the lodestar. Even worse, without the monopoly control that class-action treatment affords, the lawyer might face steep competition from other plaintiffs’ firms once issue preclusion makes these cases automatic winners, further cutting into profit margins.

In the Trans Union case, it was much easier (and more profitable) for the raiding plaintiffs’ lawyers to fold their inventories into aggregate settlements of similar claims out of the pot of money that Trans Union had

---

72 In re Trans Union, 741 F.3d at 814-15.
74 And there is no guarantee that they would. Cf. Parklane Hosiery v. Shore, 439 U.S. 322, 332 (1979) (trial court has discretion to deny offensive nonmutual collateral estoppel when (1) plaintiff could have easily joined first action, (2) defendant lacked incentive to vigorously litigate first suit, (3) judgment against defendant was inconsistent with previous judgments on same issue, or (4) procedural opportunities that might be likely to cause a different result were unavailable in first action).
already made available and had no incentive to defend. And in the end, Trans Union was able to settle nearly all of these individual claims without exhausting the $75 million fund.\textsuperscript{75}

Even though the lack of closure theoretically left Trans Union exposed, Trans Union drastically lowered the number of claims actually filed from more than 190 million if the class were certified for litigation to fewer than 1 million (i.e., class members who opted for cash payment or enhanced in-kind relief plus those who filed individual post-settlement claims) by reaching a settlement that precluded plaintiffs from proceeding on a class or aggregated basis.

\textbf{2. Amount Paid Per Claim}

Beyond lowering the rate of claiming and therefore the absolute number of claims the defendant must pay, eliminating plaintiffs’ ability to proceed on a class or aggregate basis may also reduce the amount of money that the defendant pays per claim.

Aggregation—particularly class action aggregation—increases the stakes of the litigation for the defendant, not only by increasing the total number of claims that it faces, but also by changing the nature of the risk that the defendant faces. Without aggregation, the defendant faces a series of individual trials, over the course of which—as it wins some and loses some—the defendant can expect to pay something approximating the expected value of the litigation as a whole (i.e., the total damages alleged discounted by the plaintiffs’ chances of prevailing on average).\textsuperscript{76} This is nothing more than the law of large numbers. Flip a coin 1000 times and you can expect it to come up heads somewhere around 500 times. By contrast, a class action trial is like flipping a coin once. It’s an all-or-

\textsuperscript{75} Agreed Final Order Regarding Distributions From Settlement Fund and Terminating Proceedings, In re Trans Union Corp. Privacy Litig., No. 00-cv-4729, Doc. No. 1051 (N.D. Ill. Feb 22, 2013) ($16.5 million left in fund; $4.4 million reserved for Trans Union for future post-settlement claims; $12 million distributed to class members who released claims). Trans Union entered aggregate settlements with the raiding law firms to resolve more than 90% of their inventories of post settlement claims for between $300 and $443 per claimant. Order, In re Trans Union Corp. Privacy Litig., No. 00-cv-4729, Doc. No. 968 (N.D. Ill. Sept. 8, 2011). These aggregate settlements did effectively give Trans Union some degree of closure or peace, as the two-year extension of the statute of limitations had run by this point, so only the handful of individual claims that remained pending posed any threat to Trans Union. The Seventh Circuit noted that the “terms of the settlement allowed Trans Union to find peace by settling arguably worthless claims from the $75 million settlement fund” en masse rather than weeding out weaker claims that might have arisen after Trans Union ceased selling target marketing lists in 2001. In re Trans Union Corp. Privacy Litig., 741 F.3d 811, 817 (7th Cir. 2014).

\textsuperscript{76} The costs of litigation for both sides complicate the analysis, but it is safe to ignore them for the purposes of illustrating the point here.
nothing proposition: the defendant will either win and pay nothing or lose and pay damages to the entire class. The expected value remains the same, but the potential outcomes are only the extremes.

When the class is very large, and potential damages should the class prevail correspondingly large, the risk of an all-or-nothing class action trial can, as Judge Posner observed in *In re Rhone-Poulenc Rorer, Inc.*, generate an intense pressure to settle.77 Even if the defendant thinks it has a strong chance of prevailing, it may not be willing to roll those dice. In the *Trans Union* case, for example, the defendant faced potential statutory damages liability that exceeded its net worth many times over. Betting the company on the outcome of a single class action trial was not an attractive proposition.

The *in terrorem* effect of an all-or-nothing judgment may pressure a risk averse defendant into settling even weak claims and paying more than their expected value to avoid the small chance of a catastrophic loss.78 I don’t mean to take a position here on the normative implications of this settlement pressure; others have explored the issue in depth.79 But as an empirical matter, I don’t think it is too controversial to say that its effect is real and that one reason defendants often oppose class certification is to avoid the pressure to settle.80

Conversely, removing the prospect of a class action or other form of aggregation eliminates the *in terrorem* effect of an all-or-nothing trial and the corresponding pressure on the defendant to settle at a premium. Defendants can take a more risk-neutral approach to valuing individual claims and deciding whether to contest or settle them. And the average payments per claim are likely to be correspondingly lower.

So a settlement that only precludes class members from litigating on a class or aggregate basis but does not require them to release their individual claims may be a good deal for the defendant if it reduces the *in terrorem* effect and lowers the rate of claiming sufficiently to offset the

---

77 51 F.3d 1293 (7th Cir. 1995).
80 But see Silver, supra note 79, at 1404-15 (arguing that it may be wrong to assume that defendants are risk averse).
increase in costs from handling claims on a retail basis. By approaching claims retail, the defendant gives up the scale economies of a class action and opens itself up to adverse selection and the potentially disproportionate costs (e.g., negative publicity, drag on stock prices, etc.) of continued litigation. But in cases where claims are modest and fairly uniform, there is little risk that piecemeal settlement will just clear out the weak claims and leave the defendant facing the strongest in continued litigation. And the negative publicity, drag on stock prices, and uncertainty of ongoing litigation against the claimants who do file individually may be tolerable costs when the alternative is paying the entire class for peace.

**B. The Class’s Perspective**

If eliminating aggregation when claims are small is so advantageous to the defendant because it reduces the rate of claiming and the amount paid per claim, why would the plaintiff class agree to a settlement that limits their right to proceed on an aggregate basis? It is relatively easy to understand why peace can be attractive to defendants and plaintiffs alike if it generates value for defendants and frees up additional resources that they can devote to compensating claimants. But it is far less obvious why the class would give up its biggest stick—the threat of devastating classwide liability—without securing compensation for all class members.

When we talk about the plaintiff class, we are not talking about a monolithic entity. Really we are talking about the lawyers who control the class and the claimants who populate it. Absent class members have very little say in the design of a class action settlement. It is class counsel (perhaps, though not typically, with input from the named class representatives) who decides how the settlement will be structured, not the class members themselves. As in any situation where ownership and control are separated, class actions present a principal-agent problem: the interests of the agents (i.e., class counsel) may not align with those of their principals (i.e., the class members), and the agents may act to the principals’ detriment to benefit themselves. Class counsel, of course, has a duty at all

---

81 This is why defendants are sometimes willing to pay a peace premium. See supra notes 8-13 & 20-23 and accompanying text.

82 Rave, Anticommons, supra note 9, at 1192-98.

times to adequately represent the class, and the settlement must garner judicial approval under Rule 23(e), but the risk that class counsel’s preferences might diverge from those of absent class members is apparent.

Class counsel’s fee award is typically tied to the size of the settlement secured for the class. So why would class counsel give up the threat of a potentially bankrupting classwide trial judgment without using that leverage to secure additional compensation (and therefore fees) for a release of class members’ underlying claims?

One reason may be that agreeing to a settlement that only precludes plaintiffs from litigating on a class or aggregate basis allows class counsel to liquidate the in terrorem value of the class action at low cost and risk. The lawyers need not invest in preparing the case for a class action trial or take the risk of losing at trial and ending up with nothing. Nor, indeed, must the lawyers even make the full investment in persuading a court to certify the class for litigation purposes or take the risk of class certification being denied. If the proposed class is large enough to generate an in terrorem effect, the lawyers can cash out that value before any decision on class certification.

Settling the right to aggregate may also allow the lawyers to unlock value in a proposed class action that is blocked by practical obstacles. It might seem that representing a class of 190 million consumers with claims totaling somewhere between $19 billion and $190 billion would have tremendous settlement value. But the sheer size of the class can make getting at that value very difficult. The cost of providing adequate notice to all of the class members, for example, could prove an insurmountable obstacle to a traditional damages class action. Using a mandatory class


85 Class counsel’s fee awards are typically determined on either a percentage-of-the-fund method, by which the lawyers are awarded a percentage of the class’s total recovery (like a contingency fee) or the “lodestar” method, by which the number of hours the lawyers reasonably worked on the case is multiplied by a reasonable hourly rate. See 7B CHARLES ALAN WRIGHT, ARTHUR R. MILLER, MARY KAY KANE, RICHARD L. MARCUS & ADAM N. STEINMAN, FEDERAL PRACTICE AND PROCEDURE § 1803.1 (3d ed. 2014). But even the lodestar approach, which is more common under statutory fee shifting schemes, often includes a discretionary multiplier that the district court can use to reward good results and to offset the risk that the class will lose and class counsel will get nothing. See, e.g., Vaughn R. Walker & Ben Horwich, The Ethical Imperative of A Lodestar Cross-Check: Judicial Misgivings About “Reasonable Percentage” Fees in Common Fund Cases, 18 GEO. J. LEGAL ETHICS 1453 (2005).

86 Federal Rule of Civil Procedure 23(c)(2)(B) requires the “best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort.” See also Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950). And the financial burden of providing that notice falls squarely on the
instead to settle only class members’ procedural rights to proceed on a class action or aggregate basis—leaving their underlying claims untouched—allows class counsel to avoid the costs of individual notice (Rule 23(c) does not require notice for mandatory classes) as well as other potential manageability or ascertainability problems.\(^87\) The same strategy might work where individual issues render the prospects of class certification uncertain under Rule 23(b)(3)’s predominance inquiry. Using a mandatory class to settle the right to aggregate—to essentially settle the question of whether the case is appropriate for classwide treatment—might, for example, help class counsel unlock some value where choice-of-law issues would make certification of a nationwide damages class raising state-law claims difficult.\(^88\)

There is, of course, the risk of a sellout: that by surrendering claimants’ rights to aggregate, class counsel is cashing out for a generous fee and little real work on the class’s behalf. This is the familiar principal-agent problem endemic to all class action settlements, where the interests of class counsel may align more with the defendant’s interests in doing the deal than with the class’s interest in securing maximum relief.\(^89\) So the risk is that, instead of delivering peace to the defendant (and potentially even securing a premium for the class in return), class counsel delivers a low rate of claiming. This move may enable the lawyers for the class to obtain a premium for themselves in terms of a return on investment, but it will not necessarily maximize the value of the class’s claims as a whole.

But while such a sellout may fail to maximize the aggregate value of the class’s claims, it is less clear that it hurts individual absent class members in the same way as a classic sellout—at least where they have realistic opportunity to litigate individually.\(^90\) Settling only the right to

---

90 For true negative-value claims, the claimants would obviously prefer a global class action settlement that paid for the release of their underlying claims to a settlement that paid them less to release only their rights to procedural rights to aggregate. Something is
aggregate leaves class members’ substantive rights intact. Those who care to do so remain free to bring their claims individually. And, at least in the *Trans Union* case, the statutory damages and fee shifting provisions of the FCRA made individual litigation a realistic option; these are not negative-value claims. Those who do wish to litigate individually—and would have opted out of a Rule 23(b)(3) settlement that released their underlying claims—actually do better under the *Trans Union* model. They are paid for their procedural aggregation rights as class members and still get to proceed individually as an opt-out would.

Of course most class members probably will not sue individually; that is, after all, what makes this model attractive to defendants in the first place. While the $100 to $1000 in statutory damages at stake in *Trans Union* is probably not insignificant to most people in the same way as a $1.99 overcharge on an eBook might be, many claimants may not care very much about (or even be aware of) their claims. And individual litigation is hardly psychologically appealing, even with $1000 at stake and the ability to recover costs and attorneys’ fees making it economically feasible. As Judge Hand once said, “as a litigant, I should dread a lawsuit beyond almost anything short of sickness and death.”

Though they retain a valuable option to sue individually, class members who have no interest in exercising that option would have been better off with a global class action settlement that paid them to release their underlying claims, rather than splitting up their procedural and substantive rights.

Ironically, a *Trans Union*-style settlement’s minimal impact on the rights of absentees may actually exacerbate the risk that class counsel will fail to maximize the value of the class’s claims because it contributes to a potential governance breakdown. If the settlement of the aggregation rights is structured as a mandatory class action under Rule 23(b)(1)(A)—as it was in the *Trans Union* case—class members cannot register their dissatisfaction with the deal by opting out, even if they are not happy with what class counsel got in exchange for their aggregation rights.

And even if class members were permitted to opt out, they would have little incentive to do so, since they are not precluded from bringing their claims individually if they remain in the class. Indeed, claimants who wished to litigate individually would do better to remain in the class, get paid for their aggregation rights under the terms of the class settlement, and then proceed better than nothing; and nothing is what their claims are worth in the absence of aggregation.

---

91 Learned Hand, *The Deficiencies of Trials to Reach the Heart of the Matter*, 3 Lectures on Legal Topics 89, 105 (1926).

individually on their substantive claims.\textsuperscript{93} Thus we cannot rely on the threat of exit to discipline class counsel in its negotiations over the value of the class members’ rights to aggregate (though objectors and judicial supervision will continue to work the voice and loyalty levers of class action governance).\textsuperscript{94}

I do not mean to suggest here that the \textit{Trans Union} settlement was, \textit{necessarily}, a sellout. Class counsel litigated for years in the \textit{Trans Union} case before cashing out the aggregation rights. Certification of a litigation class faced practical hurdles and, indeed, had been previously rejected. Success on the merits of the class’s statutory damages claims was far from assured, particularly after the \textit{Safeco} decision, and there was no chance of extracting $190 billion from a company that was worth only $1 billion. Still, the lawyers for the class bargained for in-kind relief that had real value in exchange for class members’ rights to aggregate.\textsuperscript{95} It is certainly possible that this was the best deal the class could get. But class counsel’s ability to deliver to the defendant not peace, but rather a means of suppressing the rate of claiming, without securing compensation for class members’ underlying claims, increases the opportunities for attorney disloyalty. If this form of settlement becomes an attractive strategy in many cases—particularly in cases where pursuing claims on an individual basis is not a realistic option—the agency costs could be substantial.

\textbf{C. Unbundling Aggregation and Preclusion}

The parties in the \textit{Trans Union} settlement stripped the transaction down to its essentials. Class counsel recognized that aggregation—not preclusion—was what the defendant valued. \textit{Trans Union} did not need total peace in this case; partial peace was good enough. It was perfectly willing to litigate claims on an individual basis against the predictably small fraction of claimants who had any interest in doing so. \textit{Trans Union} made the safe bet that most claimants would be apathetic toward modest-value claims. And \textit{Trans Union} wasn’t worried about adverse selection; it wasn’t worried that the settlement would clear out all the weak claims, leaving it facing only the strongest in continued litigation, because the claims were

\textsuperscript{93} Groups of claimants might do better by opting out (if permitted to do so) and bringing their claims in a second class action or other aggregate proceeding. But a substantial collective action problem stands in their way, and courts do not look kindly on lawyers’ attempts to opt a chunk of claimants out of one class action by means of another class action. \textit{See} Fed. R. Civ. P. 23, Advisory Committee Notes to 2003 Amendments (“\textit{No class member may purport to opt out other class members by way of another class action.}”); Carlough v. Amchem Prod., Inc., 10 F.3d 189 (3d Cir. 1993).


\textsuperscript{95} \textit{See} In \textit{re} Trans Union Privacy Litigation, 629 F.3d 741 745-46 (7th Cir. 2011).
largely uniform in strength. What Trans Union wanted to avoid was a class action that would pull apathetic claimants into the litigation system and leave it facing the prospect of a bet-the-company class action trial.

The traditional account of settlement in pursuit of peace therefore does not apply in all cases. Total peace, backed by claim preclusion, is the goal when adverse selection is likely and when continued litigation will impose disproportionately costs on the defendant. This is most likely in cases where claims are large and vary in size or strength. But defendants don’t need total peace when claims are modest and uniform, so long as they can block aggregation. In other words, aggregation and preclusion have different values depending on the nature of the underlying claims.

Indeed, protection from aggregation may be what defendants really value in many class action settlements, particularly when claims are modest and fairly uniform. It is not the threat of future individual litigation that defendants fear—again, in cases where adverse selection and disproportionately costly individual litigation are unlikely—but rather that some other lawyer will aggregate claims into a formidable collective that can pose a significant threat. But in the typical settlement, class counsel delivers protection from aggregation through class-wide preclusion. The preclusive effect of the class action settlement and judgment blocks other lawyers from bringing a subsequent class action or even informally aggregating claims into an inventory worth litigating. That’s the important part. Precluding the underlying individual claims is just a byproduct.

What makes the Trans Union case so interesting is that class counsel figured out a way to transact in aggregation without purporting to affect the substantive rights of class members. We might think of this as a form of “unbundling,” like offering a hit song for individual download rather than forcing consumers to buy the whole album. 96 Class counsel is selling the defendant what it wants—protection from aggregation—without a product that it doesn’t need, i.e., preclusion of individual damages claims. And because the transaction purports to leave class members’ substantive rights untouched, it does not trigger all of the cumbersome protections (e.g., individualized notice, the right to opt out, searching inquiries into predominance, etc.) that the class action rules and due process require before absent class members can be precluded from bringing individual damages claims. 97 (More on this below.)

96 See Justin Fox, How to Succeed in Business by Bundling – and Unbundling, HARV. BUS. REV. (Jun. 24, 2014). Another example might be the recent trend among cable companies to allow consumers to pick a handful of channel that they actually want to watch instead of buying the whole lineup of 800 channels that no one has ever heard of.

In unbundling the class’s aggregation rights from their underlying substantive claims and settling only the former, the lawyers for the class surrender their monopoly control over class members’ claims. This makes it possible for other lawyers to raid their erstwhile captive clients. But class counsel retains monopoly control over what counts: aggregation. And they can still credibly claim to be the only counterparty the defendant needs to deal with. Class counsel does not need to offer the defendant full-blown claim preclusion in order to cut out other class action lawyers and guarantee that no one else can bring a class action. The goal of this settlement-without-peace strategy, thus, is to alter the market for legal services on the plaintiffs’ side to eliminate the major players. But class counsel does cede the field to competitors willing to handle claims on an individual basis.

While the ban on future class actions makes these claims less marketable, entrepreneurial lawyers may find economical ways to pursue these claims through informal aggregation. The Trans Union case provides a vivid example. Through an internet-advertising campaign touting the $75 million settlement fund Trans Union had made available, a handful of law firms amassed over 100,000 claims and brought them in nominally separate actions in low-filing-fee jurisdictions. Despite their best efforts, there was little class counsel could do to stop these post-settlement claims from depleting the settlement fund or to persuade either the district court or the Seventh Circuit that they deserved a cut of the raiding lawyers’

98 The parties to the controversial Vioxx settlement had a similar goal, though they achieved it through a very different approach. There the defendant reached an agreement with the major aggregators on the plaintiffs’ side to settle their entire inventories of claims. But in order for any of their clients to participate in the settlement, the lawyers had to recommend the settlement to all of their clients and withdraw from representing any who rejected the deal. This assured the defendant that the lawyers couldn’t cherry pick their cases, settling the weak and litigating the strong. But it also left claimants who didn’t like the offer stuck without a lawyer and with little prospect of finding an experienced Vioxx lawyer willing to take their cases. Compare Issacharoff, supra note 65, with Erichson & Zipursky, supra note 65, for competing takes on the Vioxx settlement. Having essentially destroyed the value of litigating individually by buying off all the major aggregators, the Vioxx settlement was tremendously effective at deterring claimants from opting out and guaranteeing the defendant peace (which may have allowed it to put more money on the table). See Rave, Anticommons, supra note 9, at 1208-10. The Trans Union settlement, by contrast, was not trying to deter opt-outs or secure global peace. Rather it effectively treated all class members as opt-outs and basically converted the settlement to an opt-in structure in the hopes that few claimants would actually bother to opt in. So the two settlements take very different routes to destroying the market for legal services—one by saying “we bought all the lawyers, so our deal is the only one in town” and the other by saying “we bought all the class action lawyers (by paying one), so go ahead and sue us.”

fees. But even with relatively low barriers to entry for new lawyers to aggregate and prosecute individual claims, the settling parties were able to dramatically suppress the rate of claiming to only a tiny fraction of the entire class. And Trans Union’s ability to pay these post-settlement claims out of the money it had already committed to the settlement meant that the $75 million settlement fund acted as a sort of de facto cap on what raiding lawyers could profitably target.

III. EX POST CLASS ACTION WAIVERS

In effect, what the parties did in the Trans Union settlement was to craft a sort of ex post version of the class action waivers that have become ubiquitous in consumer arbitration clauses following the Supreme Court’s controversial decisions in AT&T Mobility LLC v. Concepcion and American Express Co. v. Italian Colors Restaurant.

A. Class Action Waivers

Starting in the 1990s, many companies began inserting arbitration clauses with class action waivers into their form contracts with consumers and employees. By purchasing a product or service or accepting employment under one of these adhesion contracts, the consumer or employee agrees to arbitrate any future disputes that might arise out of the contractual relationship. And while these clauses often create a streamlined alternative dispute resolution process that may offer significant cost savings over litigation, the catch is that they require the parties to bring their claims on an individual basis—not as a part of a class action.

The first generation of these arbitration clauses with class action waivers were blatantly one-sided, as some companies tried to take advantage of the Supreme Court’s generally solicitous view of arbitration. They included damages caps and imposed high upfront filing fees and inconvenient forums to deter claimants from filing individually. Many courts found these one-sided arbitration clauses unconscionable and refused to enforce them. And despite its general willingness to enforce

---

100 In re Trans Union Corp. Privacy Litig., 741 F.3d 811, 818-19 (7th Cir. 2014).
101 See supra notes 72-75, and accompanying text.
102 131 S. Ct. 1740 (2011)
106 Id. at 10-11.
107 Id.; see also Bruhl, supra note 104.
arbitration clauses even in contracts of adhesion, the Supreme Court suggested in *Green Tree Financial Corp. v. Randolph*, that arbitration has to give claimants a chance to “effectively vindicate” their rights, which it clearly would not do if filing fees were prohibitively high.  

But companies soon wised up and began including much more consumer-friendly arbitration clauses in their form contracts. The high-water mark came with AT&T Mobility’s arbitration clause in its cell phone service contracts. While the clause included a class action waiver, AT&T didn’t try to throw up procedural obstacles to deter claimants from bring individual claims. It took the opposite strategy and crafted an arbitration clause designed to actually encourage consumers to arbitrate individually. AT&T agreed to pay all of the costs of the arbitration; claimants could pursue claims in person, by telephone, or on submissions; and if the arbitrator’s award was greater than AT&T’s last settlement offer, AT&T would pay a minimum of $7500 plus twice the claimant’s attorneys’ fees.

Class action plaintiffs tried to challenge AT&T’s arbitration clause as unconscionable under California law. But, in *Concepcion*, the Supreme Court held that California’s blanket rule against class action waivers in consumer adhesion contracts was preempted by the Federal Arbitration Act. The Court took pains to note (in a passage that it would subsequently ignore in *Italian Colors*) that AT&T’s arbitration procedure was “quick, easy to use, and likely to prompt full or excessive payment to the customer without the need to arbitrate or litigate.” The inability to aggregate did not mean that aggrieved consumers had no recourse; arbitrating individually was a realistic option. Indeed from an individual perspective, the Court observed, claimants might even be “better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which could take months, if not years, and which may merely yield an opportunity to submit a claim for a recovery of a small percentage of a few dollars.” This was so even if the inability to

---

108 531 U.S. 79, 81 (2000). The Court’s actual holding in *Green Tree* was that the plaintiff had not come forward with enough evidence that the filing fees were prohibitively expensive. *Id.* And the Court implicitly cast doubt on *Green Tree’s* dicta in *Italian Colors*, but stopped short of actually condoning prohibitively high filing fees. American Express Co. v. Italian Colors Rest. 133 S. Ct. 3204, 2311 & n.3 (2013).


110 131 S. Ct. 1740, 1744 (2011).

111 *Id.*

112 *Id.* at 1745.

113 *Id.* at 1753; see also Rave, *Settlement, ADR & Class Action Superiority*, supra note 27, at 97-99.
aggregate might undermine other state goals, like deterrence, by allowing many “small-dollar claims” to “slip through the legal system.”

The decision set off a firestorm of controversy, with critics arguing that class actions waivers in arbitration clauses would undercut the deterrent effect of a robust model of private enforcement of the substantive law. Without class action aggregation, the argument goes, few claimants will bother to press small claims individually, even when they have a realistic opportunity to do so—which may or may not be the case depending on the design of the arbitration scheme. And even fewer lawyers will have enough incentive to invest resources in ferreting out wrongdoing and holding defendants accountable for unlawful conduct that causes small injuries to large numbers of people. Defendants can therefore effectively insulate themselves from large swaths of liability to consumers. And sure enough, with the Supreme Court’s blessing in Concepcion, many companies followed suit and incorporated arbitration clauses with class action waivers into their form contracts. By offering a procedure for individual arbitration, these companies can avoid the cost and risk of class action litigation.

The Trans Union settlement follows the same basic model. Without purporting to affect the substantive rights of claimants, the parties agreed that all future claims must be brought on an individual, rather than class action, basis. The class action waiver in a Trans Union–style settlement without peace simply comes after the dispute has arisen instead of before.

From the defendant’s perspective, settling only the right to aggregate, as in the Trans Union settlement, is attractive for the same reasons that ex ante class action waivers in arbitration clauses are attractive: it lowers the rate of claiming and reduces the risk of a catastrophic loss in

---

114 131 S. Ct. at 1753.
116 Compare AT&T’s claimant-friendly scheme in Concepcion with American Express’s much less claimant-friendly arbitration clause upheld in Italian Colors and discussed below.
117 See Gilles, Opting Out of Liability, supra note 115.
118 Gilles, Killing them with Kindness, supra note 103, at 853.
single class action trial. The defendant can buy off the risk of firm-threatening liability without having to pay for total peace.

Like the consumer-friendly arbitration clause in Concepcion (and unlike the much less claimant-friendly clause upheld in Italian Colors), the Trans Union settlement left claimants with a viable procedure to pursue their claims individually. Indeed, the cost-shifting and bounty provisions in the AT&T’s arbitration agreement in Concepcion bear a striking resemblance to the statutory damages and attorneys’ fees provision of the FCRA. But both are designed to facilitate bringing claims on an individual basis when the amount of money at stake may be low.

But Trans Union, like AT&T, bet that relatively few consumers would take advantage of even a consumer-friendly process for bringing individual claims. And thus the rate of claiming would be far lower than in a class action, which would sweep in everyone who didn’t affirmatively opt out. The companies were willing to compensate aggrieved claimants who cared enough to file individual claims—and, indeed, to incur additional costs in these individual cases—so long as they could avoid facing the greater risks of a full-scale class action. They calculated that buying off the right to aggregate (either ex ante or ex post) would reduce the rate of claiming and in terrorem increment enough to offset the loss of economies of scale, increased transactions costs, negative publicity, and risk of adverse selection of disputing claims serially. In short, it would be cheaper than paying for total peace through a global class action settlement.

B. Ex Ante v. Ex Post

There are, however, reasons to believe that this type of ex post class action waiver by way of class action settlement will tend to be more favorable to claimants than the more familiar ex ante class action waiver found in arbitration clauses. At least three factors account for this difference.

---

119 AT&T’s arbitration clause required the company to pay all the costs and, if arbitrator’s award exceeded AT&T’s last settlement offer, to pay twice the claimant’s attorneys’ fees plus a $7500 bounty. AT&T Mobility LLC v. Concepcion, 131 S. Ct. 1740, 1744 (2011). Compare this with the FCRA, which entitles prevailing plaintiffs to an attorneys’ fee award and provides for statutory damages between $100 and $1000 in the event of a willful violation. 15 U.S.C. § 1681n.

120 See David L. Noll, Rethinking Anti-Aggregation Doctrine, 88 NOTRE DAME L. REV. 649, 664-65 (2012) (“The logic—and likely objective—of [AT&T-style] agreements is to diminish the defendant’s net liability exposure by restricting claimant-favoring features of aggregate litigation, all while rebutting the contention that the agreement eliminates claiming entirely. [The agreements] reflect a bet that the settlements, judgments, premium payments, and attorneys’ fee awards that result from encouraging individuals to sue will be less than the company’s liability exposure if aggregation is permitted.”).
First, in the ex post scenario, claimants have an empowered agent—the class action lawyer—bargaining on their behalf to secure value in exchange for releasing the right to sue on a class or aggregate basis. In the ex ante scenario, by contrast, there is typically no one bargaining on the potential claimant’s behalf. Most arbitration clauses with class action waivers are found in contracts of adhesion, where their terms are presented to a population of potential claimants on a take-it-or-leave-it basis with no opportunity to separately negotiate over aggregation rights. Either because of an inability or a (perhaps quite rational) unwillingness to invest the energy needed to understand the terms, most people do not even read the contracts. And even if they wanted to negotiate separately, individuals would lack leverage without some means of coordinating with the disaggregated population of similar potential claimants to share resources and risk. While the law usually trusts market forces and reputational pressures to discipline adhesion contracts, relying on these constraints to set terms and prices is a far cry from a robust bargaining process between equals.

In the ex post scenario, the class action lawyer (who will often be a sophisticated repeat player) can coordinate the group’s activities and spread costs and risks. The lawyer can also act as an information intermediary to digest information for the rationally ignorant claimants and translate it into a more salient form, much like political parties digest information for rationally ignorant voters. And both competition among potential class counsel and the need for to secure judicial approval of the class action and

121 Rave, Settlement, ADR, and Class Action Superiority, supra note 27, at 105-06.
123 Rave, Settlement, ADR and Class Action Superiority, supra note 27, at 105.
125 But see Robert Brendan Taylor, Note, Consumer Driven Changes in Online Form Contracts, 67 N.Y.U. ANN. SURV. AM. L. 371 (2011) (arguing that, at least in some circumstances, consumer-driven negative feedback on social media can cause companies to change their form contracts).
126 Rave, Settlement, ADR, and Class Action Superiority, supra note 27, at 102-04.
eventual settlement enhance the benefits of an agent negotiating on the class’s behalf.

Empowering an agent to bargain on behalf of the group inevitably generates agency costs (i.e., the risk of a sell-out) that are absent when individuals themselves waive their rights to aggregate at the time they contract with the defendant. Judicial review of the settlement for fairness and adequacy under Rule 23 may cabin some of these costs. But, more to the point, agency costs only come up when it makes sense to hire an agent.

Second, and relatedly, the very fact of aggregation gives class members more leverage in the ex post scenario than the diffuse mass of consumers who might enter a transaction governed by an ex ante class action waiver. While the whole point of a class action waiver (ex ante or ex post) is for the defendant to avoid facing that very leverage, the mere threat of class certification in a putative class action gives class counsel some degree of leverage to negotiate on behalf of the class in a settlement without peace.

And third, in the ex post scenario, the deal is struck after the contours of the dispute have been defined instead of at a time when a dispute is only hypothetical. Ex ante, the potential defendant has an informational advantage because it knows much more than potential claimants about whether its behavior is illegal or close to the line at the time it proposes the class action waiver. Ex post, claimants and their lawyers can make a more informed and intelligent judgment about the wisdom of surrendering their aggregation rights in a particular context and what to demand in return.

As a result, the pricing for the class action waiver may be very different ex ante and ex post. A defendant might have to pay quite a bit more to purchase claimants’ aggregation rights ex post than it would have to discount its products or services to get potential claimants to agree to a class action waiver in an arbitration clause ex ante.

Part of that difference will stem from the fact that a dispute has actually arisen. In the ex ante scenario the price the defendant pays for a class action waiver has to be discounted by the chances that no dispute will ever arise. So if the parties think there is only a 50% chance that they will have a dispute, the defendant will only be willing to pay (and the claimants

---

129 Various cognitive biases may also play a role. For example, consumers might underestimate ex ante their chances of getting into a dispute with the defendant in the first place (optimism bias). There is also a possibility that people place a higher value on their procedural rights once a dispute has arisen than they do ex ante (endowment effect). My colleague Jim Hawkins is developing a study to test this latter effect on consumer arbitration clauses.
would only demand) half as much for the aggregation rights as if a dispute was certain.\textsuperscript{130} In the ex post scenario, by contrast, the parties know there is a dispute, so there is no longer any need to discount for that uncertainty.

But part of the difference in price may also stem from the differences in bargaining dynamics. A lawyer for the putative class is in a much stronger position to extract concessions from the defendant than a disaggregated mass of consumers who are probably far more concerned with simply purchasing a product or service than with what they are getting in return for modifying the procedures for resolving a hypothetical dispute.

The price that defendants pay for ex ante class action waivers (i.e., the amount that they discount their products or services\textsuperscript{131}) is, of course, difficult to observe. But we can see at least some evidence of companies taking advantage of their superior bargaining positions with respect to the terms of their arbitration clauses containing class action waivers. Four years after Concepcion, AT&T’s clause remains the gold standard. Though many viewed AT&T’s clause as a “safe harbor” in the wake of Concepcion, even companies adopting “consumer-friendly” arbitration clauses with class action waivers have not tended to match all of its claim-facilitating features.\textsuperscript{132} Other companies have made no effort to make their arbitration procedures claimant-friendly and seem unlikely to do so without further judicial prodding.

Indeed, the Supreme Court’s more recent decision in American Express Co. v. Italian Colors may spell an end to the trend toward consumer-friendly arbitration clauses.\textsuperscript{133} There the Court enforced a class action waiver in an arbitration clause where claimants had no realistic opportunity to proceed individually. In order to prove the alleged antitrust violation in Italian Colors, the plaintiffs needed expert economic testimony that was more expensive than the maximum damages any class member could hope to recover (even trebled), making it wholly irrational for any member of the plaintiff class to sue individually.\textsuperscript{134} But the arbitration clause governing the claims prohibited class actions as well as less formal means of aggregation that would have allowed claimants to share the costs of the necessary expert testimony.\textsuperscript{135} Applying a formalistic distinction, the

\textsuperscript{130} Assuming fully informed, rational, risk-neutral parties.

\textsuperscript{131} Cf. Carnival Cruise Line, Inc. v. Shute, 499 U.S. 585 (1991) (enforcing forum selection clause in adhesion contract on the theory that it was “priced in” to the bargain in the form of a lower-cost cruise).

\textsuperscript{132} Gilles, Killing them with Kindness, supra note 103, at 853-59.

\textsuperscript{133} 133 S. Ct. 2304 (2013).

\textsuperscript{134} Id. at 2311.

\textsuperscript{135} Id. at 2318-19 (Kagan, J. dissenting). This was a point of contention between the majority and the dissent. As the dissent pointed out, the arbitration clause barred any other method of joinder and its confidentiality provisions stood as an obstacle to informal cost
Court held that so long as individual claimants retained the “right to pursue” a claim, it did not matter that they had no realistic opportunity to do so because of the “expense involved in proving” that claim. The upshot, as Justice Kagan explained in dissent, was not to channel claims into individual arbitration proceedings, but rather to prevent any claims from going forward at all.

Class action waivers—ex ante or ex post—are thus even more valuable to defendants facing true negative-value claims. If claimants lack the practical ability to proceed individually, then a Trans Union–style settlement of class members’ aggregation rights would reduce the rate of claiming to zero—much like the ex ante waiver in the arbitration clause in Italian Colors. But, while the Supreme Court has blessed ex ante class action waivers for negative value claims, as I explain below, the prospects of securing judicial approval of a class action settlement of only aggregation rights may be much more tenuous where claims are not viable on an individual basis. As I have argued previously, courts tend to scrutinize class action settlements much more skeptically than similarly structured arbitration clauses.

One additional factor is worth discussing. An ex ante contractual class action waiver, as in a consumer arbitration clause, is at least theoretically, the product of individual consent. Individuals voluntarily enter contracts containing these waivers. By contrast, using a mandatory class action under Rule 23(b)(1)(A) to settle class members’ procedural rights to aggregate involves no individual consent whatsoever. Class members can be bound without notice (though the Trans Union settlement included a notice campaign) and even over their objections.

This raises an interesting question of whether this is an appropriate use of a mandatory class, one that I tackle below in Part IV.C.1.
mandatory class removes even the fig leaf of individual consent to a class action waiver in the ex post context, consent wasn’t doing all that much work in the ex ante context either. An ex ante class action waiver is typically the product of a contract of adhesion where the arbitration clause containing the waiver is not likely to be a salient term for consumers.\textsuperscript{141} Many consumers may not know that they have waived the ability to participate in a class action—or even what a class action is—so their individual consent to that waiver is not all that meaningful.\textsuperscript{142} The presence of an empowered agent and judicial supervision in the ex post class action waiver context are probably more effective at protecting claimants’ interests than individual consent in the ex ante context.\textsuperscript{143}

IV. IS SETTLEMENT WITHOUT PEACE PROBLEMATIC?

So far, the settlement structure in the \textit{Trans Union} litigation appears unique. But the ex post class action waiver in \textit{Trans Union} provides a roadmap for defendants to buy off the risk of firm-threatening liability without paying for peace. And parties may follow suit in other statutory damages cases or even non-statutory damages cases where the defendant sees more value in reducing the rate of claiming than in securing a lasting peace (i.e., small- or modest-dollar claims), just as we have seen companies increasingly include class action waivers in their arbitration clauses.\textsuperscript{144}

In this part, I explore some of the normative implications of class action settlements without peace, looking at how they comport with the compensation and deterrence goals of class actions. It turns out that this sort of settlement structure is more problematic on both compensation and deterrence grounds when we are talking about negative-value claims than when individual litigation is a realistic option, as it was in the \textit{Trans Union} case.

I then turn to the doctrinal implications of settling claimants’ aggregation rights by way of a mandatory class, with no opportunity to opt out. While this strategy may be consistent with due process and Rule 23(a), I argue that courts should—and likely will—be very skeptical of its use for

\textsuperscript{141} See Issacharoff \& Delaney, supra note 115; cf. Bone, supra note 124, at 367-68 (explaining that lack of consent is not what is problematic with class action waivers in arbitration clauses).


\textsuperscript{143} Rave, Settlement, ADR, and Class Action Superiority, supra note 27, at 111-12.

\textsuperscript{144} See Gilles, Killing Them With Kindness, supra note 103, at 853.
negative-value claims when reviewing class action settlements under Rule 23(e).

The lessons from analyzing these sorts of ex post class action waivers can then be applied to the ex ante versions found in arbitration clauses, where the bargaining dynamics are weaker—a task I turn to in the conclusion.

A. Compensation

When a class action settlement extinguishes only the right to sue on a class or aggregate basis, class members retain the right to proceed individually and obtain compensation for the violation of their substantive rights. In the Trans Union case, this was a realistic option because the FCRA authorizes statutory damages and attorneys’ fee awards as a way of enabling individual plaintiffs to bring small claims. But in the absence of such claimant-friendly features, many small claims will be negative-value claims for which individual litigation is not a realistic option.

When there is a no realistic opportunity to sue on an individual basis, then settling only the right to aggregate means that claimants will get no compensation for their substantive rights. Class members are not paid for those rights in the class action settlement and they have no realistic shot at vindicating them in individual litigation. A class action that extinguished the right to aggregate negative-value claims without securing some compensation for class members’ substantive rights would look suspiciously like a sellout. And class counsel would face an uphill battle in explaining to the court how such a settlement was consistent with the duty to adequately represent absent class members.

On the other hand, when there is a realistic opportunity to pursue claims on an individual basis, then even if class counsel settles the right to aggregate, class members can still vindicate their substantive rights individually. In statutory damages cases under fee-shifting statutes, for example, those claimants who care about receiving the compensation they are owed can simply file their own individual lawsuits.

While they retain the right to seek individual relief from the defendant, class members lose the benefits of aggregation. They lose the economies of scale and increased leverage of a class action. They lose the

145 By “compensation,” I mean the relief to which claimants are entitled under the relevant substantive law, not what would make them “whole” in some sort of corrective justice sense. Thus I include in this category relief that is not necessarily tied to the extent of the claimants’ injuries, such as statutory or treble damages, and that may at times be “overcompensatory.” Punitive damages present a harder question—one that I would like to set aside for purposes of this article—though there is at least an argument that under the Supreme Court’s individualized approach in Phillip Morris USA v. Williams, 549 U.S. 346 (2007), they might fit within my definition of “compensation” here.
opportunity to offer the defendant peace in exchange for a premium. And they lose the ability to extract an *in terrorem* premium over the expected value of their claims from a risk averse defendant by threatening an all-or-nothing trial.

But depriving class members of the benefits of aggregation is only problematic if two conditions are met: (1) they are entitled to these benefits and (2) these benefits are not priced into the settlement.

1. *The Compensatory Baseline*

What do substantive legal rights get you? One way to value a claimant’s legal rights would be to discount the damages claimed by the chances of prevailing in litigation. But it strikes me as rather silly to think of the value legal rights in the abstract without considering the cost of enforcing them. As we have known at least since *Marbury v. Madison*, a right is only as good as the remedy that goes with it.\(^{146}\) So a more realistic way to value a claimant’s substantive right would be to look at the expected value of litigation to enforce it, that is: the damages claimed multiplied by the likelihood of success minus the litigation costs.

This expected value is often negative in individual litigation where claims are modest and parties must, under the American rule, bear their own attorneys’ fees. Even if a claimant thought there was a 90% chance of prevailing on a claim for breach of warranty on a $20 product, he would be hard pressed to litigate the case to judgment if it would cost $1000 to hire a lawyer and pay court filing fees. The expected value of the litigation would be negative ($20 x .90 - $1000 = -$982). But even claims for substantial amounts of damages can have negative values if they require costly investigation, discovery, or expert testimony to prove. The plaintiff’s individual antitrust claim in *Italian Colors*, for example, could have brought in up to $39,000 in treble damages, but proving it would have required hiring an expert at a cost of several hundred thousand dollars.\(^{147}\)

Informal aggregation of claims by lawyers or groups of lawyers might be able to turn the expected value positive in many instances if litigation costs can be spread across many cases.\(^{148}\) Class action aggregation can turn the expected value positive in even more cases by making aggregation and cost-spreading the default and thus reducing the costs of recruiting and coordinating an inventory of claimants.

So what, then, is the proper baseline for measuring the value of substantive legal rights: individual litigation or aggregate litigation? If individual litigation is the baseline, then many rights recognized by the

---

146 5 U.S. (1 Cranch) 137, 147 (1803).
147 133 S. Ct. 2304, 2308 (2013).
substantive law will effectively have negative values. And these negative-value rights will not be limited to small-dollar claims; even claims for substantial amounts of money can have negative values, as the Italian Colors example illustrates. If, on the other hand, class action litigation is the baseline, then many more substantive rights will have positive values, and some may even end up overvalued relative to costless enforcement if they include peace or in terrorem premiums.

This baseline matters. This question of procedural choice—whether claimants can aggregate their claims or must proceed individually—affects how we think of the underlying substantive rights. In other words, the substantive law cannot be procedurally neutral. The baseline question is difficult, and I do not pretend to resolve it here. But I can offer some factors to consider.

First, there is no reason to presume that individual litigation is some sort of natural state of affairs. Claimants can and do aggregate their individual claims in all sorts of ways, and they have been doing so for a very long time—for much longer than the modern damages class action has existed. As the Supreme Court has long held, a legal claim—a chose in action—is the claimant’s property. And one of the quintessential traits of property ownership is a near despotic control over how the property is disposed of. Claimants can assign their claims to a private aggregator. They can hire a lawyer who has an inventory of similar claims across which to spread the costs of litigation. They can form voluntary litigation groups by contractually agreeing with other claimants to jointly conduct the litigation, share costs, and present a united front in settlement

149 133 S. Ct. at 2308.
negotiations. 156 While there are some limitations on the steps claimants and the lawyers can take to aggregate—e.g., limitations on the types of claims that can be assigned, 157 prohibitions on champerty and maintenance, 158 and legal ethics rules governing aggregate settlements 159—there is no a priori reason to think that claimants cannot work together within these limits to maximize the value of their claims. And even in the class action context, Rule 23 allows aggregation of any type of claim, so long as its procedural requirements are met. The rule makers made a conscious choice not to limit class actions to a certain type or even size of claim. 160 So aggregation is as plausible as individual litigation as a baseline.

Second, to the extent that we are worried that aggregation will lead to overcompensation relative to costless enforcement of the entitlement set by the substantive law because of the potential for a peace premium or in terrorem premium, perhaps we should not be so concerned. 161 The peace premium is a win-win proposition. A defendant will not pay a peace premium for a class action settlement unless it values closure more than the chance to litigate claims one at a time. 162 When delivering closure to the defendant creates value, it’s not obvious what could be objectionable about plaintiffs sharing in some of that newfound surplus. The same cannot be said about the in terrorem premium: it is surely not a win-win. But there are reasons to question whether the premium that a risk-averse defendant will pay to avoid the small chance of a catastrophic loss is all that troubling outside of the statutory damages context where class action aggregation may distort the balance that the legislature struck when it created incentives

157 Personal injury claims, for example, are not freely assignable in most states. See 6 AM. JUR. 2D Assignments §§ 46, 48, 55 (2013).
158 See 14 AM. JUR. 2D Champerty, Maintenance, and Barratry §§ 1–15 (2013) (explaining that rules against champerty prohibit nonparties from acquiring an interest in the recovery from a lawsuit). There has been movement toward relaxing these rules in some states. E.g., Saladini v. Righellis, 687 N.E.2d 1224 (Mass. 1997).
159 ABA Model Rule of Professional Conduct 1.8(g) (200); see also Rave, Anticommons, supra note 9 at 1204-06 (discussing interpretations of the aggregate settlement rule).
161 Cf. Bone, supra note 150, at 134 & n.20 (“[T]he substantive law does not give plaintiffs any right to benefit from a peace premium or impose any obligation on the defendant to pay it.”).
162 Rave, Anticommons, supra note 9, at 1193-98.
for bringing small-dollar claims individually.\textsuperscript{163} And even if we view the peace and \textit{in terrorem} premiums as problematic, the chances of undercompensation relative to the substantive entitlement seem at least as great as the chances of overcompensation, given the cost of litigation. You’d need a pretty big peace or \textit{in terrorem} premium to offset litigation costs, even taking the economies of scale of a class action into account.\textsuperscript{164} So maybe we should err on the side of aggregation under conditions of uncertainty.

Third and cutting in the opposite direction, there may be thresholds below which people just don’t care about compensation, even when the costs of obtaining it are very low. Class action settlements provide a vivid illustration. Although the default rule in a class action is participation and class members who do not opt out are bound by the judgment, in order to actually get paid, class members often have to file a claim with the settlement administrator. But even when class members just have to fill out a form to get free money, the claims rate is remarkably low, ranging from 2% to 20% in consumer class action settlements according to one study.\textsuperscript{165} Should we really be prioritizing compensation according to substantive legal rights in the face of such apathy on the part of the injured parties? If claimants don’t care about vindicating their rights even when they are aggregated, that’s not all that different, from the claimants’ perspective, from leaving the rights unenforced because their expected values are negative when brought on an individual basis.

\textsuperscript{163} See Nagareda, \textit{Aggregation and Its Discontents}, supra note 79; see also Parker v. Time Warner Entertainment Co., 331 F.3d 13 (2d Cir. 2003).

\textsuperscript{164} That’s not to say it could never happen. In the BP oil spill controversy, the claimants appeared to do better under a class action settlement that offered BP peace than under the Gulf Coast Claims Facility that BP voluntarily set up, which could not offer the same degree of closure, even after subtracting the $600 million set aside to pay the class action lawyers. See Issacharoff & Rave, \textit{supra} note 8, at 402, 404-12.

\textsuperscript{165} Rust Consulting, \textit{Anticipating Claim Filing Rates in Class Actions} (2013) (finding claims form completion rates ranging from 2% to 20% of eligible claimants in consumer class action settlements, from 20% to 35% in securities cases and from 20% to 85% in labor and employment cases), http://www.rustconsulting.com/Knowledge_Sharing/Articles_and_Publications/ID/124/Anticipating_Claims_Filing_Rates_in_Class_Action_Settlements; see also Pace & Rubenstein, \textit{supra} note 67. Brian Fitzpatrick and Robert Gilbert found significantly higher claiming rates in class action settlements where claimants are simply mailed a check without having to fill out a form. Claimants cashed even very small checks at relatively high rates. Brian T. Fitzpatrick & Robert C. Gilbert, Compensation in Consumer Class Actions: Data & Reform, NYU School of Law Center on Civil Justice Fall Conference, The Future of Class Action Litigation, Nov. 14, 2014 (video available at http://www.law.nyu.educenters/civiljustice/fallconference).
2. What Is Priced In to Settling the Right to Aggregate?

Even if individual claimants are entitled to the benefits of aggregation, a settlement that extinguishes the right to aggregate (but leaves them free to sue on their own) would not be problematic if the benefits of aggregation were priced into the deal.

In a class action settlement without peace, of course, there can be no peace premium. A class action settlement that does not preclude class members from subsequently bringing individual claims cannot guarantee the defendant peace. But in the types of cases where defendants would be willing to agree to such a settlement, it is unlikely that the defendant would have paid much of a premium—if any—for total peace. The potential for adverse selection is the main driver of the peace premium, and adverse selection requires claims that are (1) large enough to be viable in individual or small group litigation and (2) vary significantly in strength or value so that the plaintiffs have an informational advantage over the defendant.\(^\text{166}\) But, as discussed above, the types of cases where settlement without peace is an attractive option for defendants are those where claims are relatively uniform and small dollar.\(^\text{167}\) So class members may not be losing much in the way of a peace premium in such a settlement.

By contrast, class members may be giving up the opportunity to extract a significant \textit{in terrorem} premium in the types of cases where settlement without peace is attractive to defendants. The \textit{Trans Union} case is a perfect example. The sheer size of the class—190 million people—coupled with an inflexible per-claimant measure of statutory damages, unconnected to proof of any actual harm, made it very unappealing for a risk-averse defendant to contest liability at a class action trial where the stakes of that single decision could reach $190 billion dollars. But there is reason to believe that the premium the defendant would pay to avoid an all-or-nothing class action trial will be priced into the settlement of the right to aggregate. Indeed, it is the prospect of liquidating that premium that makes settling the right to aggregate attractive to class counsel in the first place.

Finally, in settling the right to aggregate, class members lose the economies of scale that the class action device offers. In ordinary cases, where the American rule that parties bear their own litigation costs applies, this loss of scale economies and the ability to spread costs across many claims is significant. It may prevent many claimants from bringing claims at all, and even those who do have claims large enough to bring individually will see their recoveries eroded by increased litigation costs.

\(^\text{166}\) Rave, \textit{Anticommons}, supra note 9, at 1193-94.
\(^\text{167}\) See supra Part II.A; see also Savage, supra note 20.
In cases under fee-shifting statutes, like the FCRA, the loss of economies of scale may not be all that problematic from the claimants’ point of view, even if they are not accurately priced into the settlement. If the defendant will have to pay the prevailing plaintiff’s attorney’s fees, then individual plaintiffs do not need the economies of scale that a class action offers in order to obtain compensation. Still, the loss of aggregation may come at a cost to these claimants. They can no longer sit back and do nothing while a class action attorney vindicates their substantive rights; they must take the initiative and file suit individually, though the costs of the suit can ultimately be shifted to the defendant. And it is unlikely that claimants could hire the same caliber of lawyer to handle a $1000 claim under a statutory fee-shifting regime as those who would take on a multimillion- (or even billion-) dollar class action.

In a true negative-value claim, by contrast, class members will have no realistic opportunity to seek vindication of their substantive rights in individual litigation; those rights are worthless without aggregation. It is possible that the loss of economies of scale would be priced into the settlement of the class’s aggregation rights. Since the aggregation rights are the only rights worth anything—the underlying substantive rights are worth $0 in the absence of aggregation—a deal that accurately priced in the loss of economies of scale should not look all that different from a more traditional global class action settlement that would preclude all class members’ claims. But that only begs the question of why the parties would choose this sort of settlement structure in the first place instead of throwing preclusion into the deal—unless it’s a sellout. A settlement of aggregation rights only in a case of true negative-value claims should raise red flags. It is possible that class counsel faithfully chose this settlement structure to maximize the value of the class’s claims when something like notice costs would have eaten up a large chunk of the recovery in a Rule 23(b)(3) damages class. But because reducing the rate of claiming by depriving claimants of economies of scale is one of the main reasons why defendants find settlement without peace attractive, there is a considerable risk that the lawyers for the class will try to deliver a low rate of claiming to the defendant in order to maximize the return on their investment in the litigation.

---

168 Cf. Phillips Petroleum v. Shutts, 472 U.S. 797, 810 (1985) (“Unlike a defendant in a normal civil suit, an absent class-action plaintiff is not required to do anything. He may sit back and allow the litigation to run its course, content in knowing that there are safeguards provided for his protection.”)

169 See Nagareda, Aggregation and Its Discontents, supra note 79, at 1905-06.

170 See supra note 86 and accompanying text.
In short, in a case like *Trans Union*, many of the benefits of aggregation are likely to be either small or priced into the settlement of the right to aggregate. And claimants who care about compensation for their legal injuries face no additional obstacles—beyond their own inertia—to seeking it in individual lawsuits. They may have to content themselves with lower caliber lawyers to handle their individual claims, but the settlement does not make them all that much worse off. Like the cell phone customers subject to AT&T’s consumer-friendly arbitration clause, they have a realistic opportunity to sue for compensation individually and recoup their costs of doing so.

In a true negative-value claim, by contrast, the benefits of aggregation are less likely to be priced accurately into a settlement of class members’ aggregation rights. And class members will have no realistic opportunity to seek vindication of their substantive rights in individual litigation; those rights are worthless without aggregation. To the extent we care about compensating individuals according to their substantive entitlements, a settlement that precludes class members from litigating on a class or aggregate basis in negative-value claims without paying them to release their individual substantive claims looks problematic.

**B. Deterrence**

Settling the right to aggregate may also undercut the deterrent effect of class actions if it succeeds in reducing the rate of claiming.

The theory behind the private enforcement model of class actions is that paying damages to claimants causes defendants to internalize all of the costs of their unlawful conduct, which, in turn creates incentives for the defendants to modify their conduct to take all cost-justified precautions. But defendants only internalize costs if claims are actually brought and paid.

The class action mechanism helps ensure that claims are actually brought. It gives a class action lawyer, acting as a sort of private attorney general, a low-cost way to aggregate claims and press them on behalf of those unable or unwilling to do so themselves, either because of resource constraints, the inability to share costs, or pure apathy. By setting the default rule as participation, the class action mechanism allows class counsel to pursue damages for harms to the entire class, even if many class

---

members will not bother to actually file the claim forms necessary to get paid in the class action settlement or judgment. Any unclaimed money does not usually revert to the defendant; instead it is typically distributed as additional payments to class members who did come forward or given to a charity as a cy pres award.\footnote{See, e.g., In re Baby Prods. Antitrust Litig., 708 F.3d 163 (3d Cir. 2013); ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION \S 3.07 (2012). Cy pres is controversial, but it is usually justified by the need to maintain the deterrent effect of class actions. Id.; see Jay Tidmarsh, Cy Pres and the Optimal Class Action, 82 GEO. WASH. L. REV. 767 (2014); Martin H. Redish, Peter Julian & Samantha Zyontz, Cy Pres Relief and the Pathologies of the Modern Class Action: A Normative and Empirical Analysis, 62 FLA. L. REV. 617 (2010).} So the defendant is forced to internalize the costs it imposed on the whole class (minus those who opt out), even in the face of claimant apathy. Indeed, some scholars, like Professor David Rosenberg, have argued for mandatory class actions as the only way to achieve optimal deterrence.\footnote{David Rosenberg, Mandatory-Litigation Class Action: The Only Option for Mass Tort Cases, 115 HARV. L. REV. 831 (2002); David Rosenberg, Class Actions for Mass Torts: Doing Individual Justice by Collective Means, 62 IND. L.J. 561, 569 (1987); Campos, supra note 17.} But we may be able to get at least a reasonable approximation with a Rule 23(b)(3) opt-out class so long as there aren’t too many opt-outs or too much adverse selection.

By reducing the rate of claiming, a Trans Union–style settlement structure screws up this model of deterrence. Settling only the right to aggregate and not the underlying claims essentially makes all class members opt-outs. The defendant must pay only those claimants who affirmatively bring individual claims and prevail. If many potential claimants do not bother to file claims, then the defendant is not forced to internalize all of the costs of its unlawful conduct and is left underdeterred.\footnote{Brian T. Fitzpatrick, Do Class Action Lawyers Make Too Little?, 158 U. PA. L. REV. 2043, 2068 (2010); David Rosenberg, Adding A Second Opt-Out to Rule 23(b)(3) Class Actions: Cost Without Benefit, 2003 U. CHI. LEGAL F. 19, 67 (2003).}

The risk of underdeterrence is a strong argument against allowing a Trans Union–style settlement without peace for negative value claims—and even many positive value claims—at least if the goal is optimal deterrence or something approaching it. Indeed, scholars have been highly critical of ex ante class action waivers in arbitration clauses for the same reason.\footnote{E.g., Gilles, Opting Out of Liability, supra note 115; Sternlight, Creeping Mandatory Arbitration, supra note 115.}

But when we are talking about statutory damages that are already designed to encourage claiming on an individual basis and are not tied to any measure of the harm caused by the defendant, aggregation can overshoot in the other direction. As Professor Richard Nagareda has
explained, aggregation of statutory damages claims can result in overdeterrence, throwing off the balance that Congress struck when it included claims-enabling features in the statutory scheme. Should Trans Union really have taken $190 billion worth of precautions to prevent consumers from being exposed to junk mail? So, even though the Trans Union settlement did not force the defendant to face the full brunt of the entire class’s claims, it may have actually gotten closer to an optimal level of deterrence than a more traditional global settlement would have.

The Trans Union example highlights some of the difficulties of trying to use procedure to calibrate deterrence. The argument for class actions as an essential tool for achieving optimal deterrence depends on the substantive law getting it right. But if the substantive law gets the deterrent effect wrong, aggregation can amplify the error. And whether aggregation will get us closer to optimal deterrence or have a distorting effect may depend on the operation of claims-enabling features embedded into the substantive law, like treble, statutory, or punitive damages. Again, the substantive law cannot be procedurally neutral.

Sometimes there can also be a tradeoff between compensation and deterrence. For example, claimants who want to litigate individually and would have opted out of a global settlement in order to do so are better off getting paid for their aggregation rights in a Trans Union–style settlement, even though this sort of settlement without peace has far less deterrent effect. The tension is even more stark with the ex ante class action waiver in Concepcion. There, the district court found that individual claimants would do better under AT&T’s consumer-friendly arbitration scheme than they could possibly expect to do in a class action settlement (whether or not the benefits of aggregation were accurately priced into their cell phone service contracts), even though the class action would have much greater deterrent effect. In some ways, insisting on a class action in order to achieve optimal deterrence in the face of an alternative that would leave claimants who care enough to proceed individually better off is like paying for deterrence with the claimants’ money.

But trying to calibrate private enforcement of legal claims so that defendants internalize all of the costs of their behavior is not the only way

178 131 S. Ct. 1740, 1753 (“Indeed, the District Court found that the Concepcions were better off under their arbitration agreement with AT&T than they would have been as participants in a class action, which ‘could take months, if not years, and which may merely yield an opportunity to submit a claim for recovery of a small percentage of a few dollars.’”).
179 Rave, Settlement, ADR, and Class Action Superiority, supra note 27, at 101.
to deter unlawful conduct. In the Trans Union case, for example, the district court found that the amount Trans Union paid in the settlement—which seemed to be a rough approximation of a disgorgement of the profits from its unlawful conduct—was enough to deter future violations, especially when combined with the threat of FTC enforcement.\textsuperscript{180} Perhaps there may be other indicators that a class action settlement—even one where the defendant only pays for the aggregation rights—will achieve sufficient deterrence to implement the policy goals of the substantive law.

The active involvement of an agency with jurisdiction and a regulatory mandate to monitor the defendant’s conduct may create a strong deterrent effect—sometimes even stronger than private enforcement through a class action.\textsuperscript{181} Similarly, publicity can serve as a deterrent if the defendant suffers reputational costs for its unlawful conduct and is punished by the market as consumers or investors spend their money elsewhere. And sometimes (often spurred by risk of regulatory or reputational reprisals) defendants will even create voluntary schemes for handing out compensation to the victims of their wrongful conduct, like a refund offer to accompany a product recall or the Gulf Coast Claims Facility that BP set up to pay victims of the Deepwater Horizon oil spill.\textsuperscript{182} Even if a voluntary compensation scheme is part of a strategy to head off certification of a class action,\textsuperscript{183} by handing out money to victims the defendant will internalize at least some of the costs of its conduct. The presence of some or all of these factors—in addition to the money the defendant pays to purchase the aggregation rights—may be indicators that a settlement without peace achieves sufficient deterrent effect to implement the policy of the substantive law, even if many private legal claims go unenforced.\textsuperscript{184}

Where these factors are absent, however, a settlement that suppresses the rate of claiming by precluding aggregate litigation without resolving the underlying claims may undermine deterrence. This is true even where the claims have positive values, but it is particularly worrisome with negative value claims where there will be \textit{no} private enforcement—and therefore no deterrent effect—absent aggregation.

\textsuperscript{180} Order Granting Final Approval of Settlement and Final Judgment, In re Trans Union Corp. Privacy Litig., No. 00-cv-4729, Doc. No. 515, ¶ 21 (N.D. Ill. Sept. 17, 2008).
\textsuperscript{181} Bone, \textit{supra} note 150, at 130-31, 132-33.
\textsuperscript{182} See Rave, \textit{Settlement, ADR, and Class Action Superiority, supra} note 27; Issacharoff & Rave, \textit{supra} note 8.
\textsuperscript{183} See, \textit{e.g.}, In re Aqua Dots Prod. Liability Litig., 654 F.3d 748 (7th Cir. 2011) (refusing to certify a class because the defendant had already set up a refund program).
\textsuperscript{184} Cf. Bone, \textit{supra} note 150, at 132-33 (arguing for safe harbor along similar lines when courts ask whether a voluntary compensation scheme should block class certification).
C. Class Action Doctrine and Due Process

Even if a settlement without peace may sometimes comport with the compensation and deterrence goals of the class action mechanism, we still must ask whether, from a doctrinal standpoint, Rule 23 and the Due Process Clause allow parties to use a mandatory class action to settle the right to aggregate while leaving class members’ rights to bring their claims individually intact. The Trans Union settlement, for example, was structured as a mandatory class under Rule 23(b)(1)(A), and the district court’s judgment approving the settlement was accompanied by an antisuit injunction barring all class members from initiating or participating in a class action or aggregated action, with no opportunity to opt out.\(^\text{185}\) In exchange for surrendering their procedural rights to aggregate, class members received the opportunity to sign up for in-kind relief with a retail value of $59.75, a cy pres award of $150,000 to go to charities jointly chosen by the named plaintiffs and defendant, and a two-year extension of the statute of limitations.\(^\text{186}\)

1. Mandatory Class

This sort of settlement structure and antisuit injunction does not map neatly onto the ALI’s distinction (seemingly adopted by the Supreme Court in Wal-Mart Stores, Inc. v. Dukes\(^\text{187}\)) between divisible and indivisible relief. The ALI Principles of Aggregate Litigation explained that a mandatory class action under either Rule 23(b)(1)(A) or 23(b)(2) is only appropriate when the relief sought by the class is indivisible; that is if granting relief to some class members will inevitably affect the availability or application of that relief to others.\(^\text{188}\) If the relief is divisible—if giving relief to some claimants does not dictate the availability of relief to other class members—then the class action must afford class members a chance to opt out.

The claimants in the Trans Union case were pursuing the classic form of divisible relief—monetary damages—but the mandatory class action settlement did not require class members to give up the right to pursue that divisible relief on an individual basis. They only surrendered the right to bring another class action or aggregated action. So, in effect, the “relief” at issue in the Trans Union mandatory class was aggregation.

\(^{185}\) Order Granting Final Approval of Settlement and Final Judgment, In re Trans Union Corp. Privacy Litig., No. 00-cv- 4729, Doc. No. 515, ¶ 16 (N.D. Ill. Sept. 17, 2008).

\(^{186}\) Id. ¶ 17(c); see also Stipulation of Settlement, In re Trans Union Corp. Privacy Litig., No. 00-cv- 4729 (N.D. Ill. May 20, 2008).

\(^{187}\) 131 S. Ct. 2541, 2557 (2011)

\(^{188}\) ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION § 2.04 (2012).
itself—i.e., the ability to pursue their claims for divisible relief on a class action basis—not damages for class members’ underlying FCRA claims.

The ability to maintain a class action lawsuit is not “indivisible” in the same sense that an injunction barring a factory from emitting pollutants is. The factory is either enjoined as to all class members or as to none. But one claimant could surrender his or her right to participate in a class action without significantly affecting the rights of other claimants; indeed, that is precisely what opting out of a Rule 23(b)(3) class action does. ¹⁸⁹

Still, there is something inherently classwide about the answer to the question of whether the litigation can be maintained on a class basis; and the dispute over that question is effectively what the parties settled in the Trans Union case. In this type of settlement, allowing opt-outs would not have accomplished much. Individual claimants would have had little incentive to opt out of the Trans Union settlement had they been permitted to do so because it did not preclude class members from pursuing their claims individually. Now some class members might have wanted to opt out of the settlement of aggregation rights, not to pursue their claims individually, but to launch a competing class action. But courts do not look kindly on such attempts at preemptive strikes.¹⁹⁰ Even in a Rule 23(b)(3) opt-out class, one class member is not allowed to use a second class action to opt a group of other claimants out of the first on a representative basis.¹⁹¹

So even if it is not a classic form of indivisible relief, the case for using a mandatory class action to settle only the class’s aggregation rights under Rule 23(b)(1)(A) appears plausible.

2. Due Process

For similar reasons, binding absent class members to a class action judgment that precludes them from bringing a future class action, but does not preclude them from litigating individually appears, at least at first glance, consistent with due process. Even without an opportunity to opt out, each class member retains the property interest—the chose in action—that the Due Process Clause protects. In that sense, the question here is easier than the due process question in Philips Petroleum Co. v. Shutts, where an opportunity to opt out was required because absent class members’ substantive claims could be extinguished by the class action

¹⁸⁹ Opt outs may have some marginal effect on the strength of the negotiating position of remaining class members as they make the class incrementally smaller. This can become a problem if there is adverse selection, see Rosenberg, Mandatory Class Actions, supra note 173, but is a much smaller problem where claims are fairly uniform.


¹⁹¹ Fed. R. Civ. P. 23, Advisory Committee Notes to 2003 Amendments (“[N]o class member may purport to opt out other class members by way of another class action.”).
judgment.\textsuperscript{192} Class members in a settlement without peace fully retain the ability to assert their substantive claims individually.

But they do give up the right to aggregate. So the answer to the due process question depends on the nature of absent class members’ entitlement to aggregate their claims. Is the ability to sue on a class action or aggregate basis a property interest protected by the Due Process Clause? This, of course, depends on the baseline discussed above. The Supreme Court’s decision in \textit{Italian Colors} could be read to suggest that the appropriate baseline is one of individual litigation. There Justice Scalia explained that “the antitrust laws do not guarantee an affordable procedural path to the vindication of every claim” and that a class action waiver “no more eliminates [the] parties’ rights to pursue their statutory remedy than did federal law before its adoption of the class action for legal relief in 1938.”\textsuperscript{193} It is the “right to pursue” a remedy, not the “expense involved in proving” it that matters.\textsuperscript{194}

Viewing legal claims as property, however, would suggest a different baseline. Each claimant has a right to use or dispose of his or her legal claims as he or she sees fit, including abandoning them, pressing them individually, selling them to the defendant, or joining with other claimants to sue by whatever means the procedural law allows.\textsuperscript{195} In other words, the right to aggregate is one of the sticks in the bundle of rights that make up the property interest in a chose in action. And with many forms of property, owners can peel off and sell some rights (e.g., a life estate) while leaving the rest of the bundle intact.\textsuperscript{196} The actual holding of \textit{Italian Colors} is

\textsuperscript{192} 472 U.S. 797 (1985). In an intriguing new article, Ryan Williams suggests that the property interest that due process protects by requiring a chance to opt out is actually the right to decide \textit{not} to sue. Williams, \textit{supra} note 153. Even on this view, class members in the \textit{Trans Union} settlement retained the right not to press their substantive claim or hold the defendant to account for them.

\textsuperscript{193} 133 S. Ct. 2304, 2309, 2311 (2013).

\textsuperscript{194} \textit{Id.} at 2311.

\textsuperscript{195} \textit{See} Williams, \textit{supra} note 153, at 27 (quoting Blackstone); \textit{see also} text accompanying notes 152-160 \textit{supra}.

\textsuperscript{196} Indeed, there are many contexts where parties have peeled off and settled some of their procedural or substantive rights while leaving their underlying claims intact. The parties might agree on a forum, thereby settling the plaintiff’s venue privilege or the defendant’s personal jurisdiction defenses. They might agree to a bench trial or even post-dispute binding arbitration, thereby settling the right to a jury trial. Or they might settle claims for punitive damages while leaving claims for compensatory damages intact. \textit{See}, e.g., \textit{Nagareda, supra} note 1, at 141-143 (discussing Fen-Phen settlement). Indeed, many global class action settlements can be understood as settlements of procedural rights, like a forum selection or post-dispute arbitration agreement that surrenders the right to a jury trial and court procedures by replacing litigation with a form of alternative dispute resolution: a claims facility to adjudicate claims and hand out compensation. \textit{See} Rave, \textit{Settlement, ADR, and Class Action Superiority, supra} note 27, at 93.
consistent with this view, as the claimants there simply sold their rights to aggregate in the transaction in which they agreed to arbitrate any claims on an individual basis.

In the ex ante context, individual consent does the work of avoiding any due process problem. Even if aggregation rights are count as property, claimants—at least theoretically—individually consent to their waiver by accepting a contract containing an arbitration clause with a class action waiver. In the ex post context, by contrast, even theoretical individual consent is absent.

Even so, a mandatory class action disposing of absent class members’ rights to aggregate legal claims may not count as a deprivation for due process purposes of their recognized property interest in their claims. Instead, it may be better understood as a restriction on how the property can be used—simply a restraint on alienation. Claimants retain their property interests in their claims, but they can no longer aggregate them with other claims.

Perhaps the easiest way to see this point is by analogy to takings. Imagine that the district court had certified the class of 190 million consumers in the Trans Union case and set a date for trial on their statutory damages claims. Faced with up to $190 billion in liability Trans Union does not settle, but instead successfully lobbies Congress to retroactively amend the FCRA to prohibit class actions. Would the class have a Fifth Amendment takings claim because their aggregation rights were extinguished, even if they retained the right (and practical ability) to bring their claims on an individual basis? My instinct is no. Congress would be well within its rights to prohibit aggregation while leaving the claimants’ substantive rights intact. And if it was not—if certification of a class action created vested rights that Congress could not extinguish without providing just compensation—that would violate the Rules Enabling Act’s command that the Federal Rules of Civil Procedure “shall not abridge, enlarge, or modify any substantive right.”

So as long as a settlement without peace leaves the claimants’ substantive claims intact, and otherwise meets the requirements of Rule 23, there does not appear to be a due process violation.

3. Other Rule 23 Considerations

Any class action settlement—mandatory or opt-out—that extinguished class members’ aggregation rights would still have to satisfy Rule 23(a)’s prerequisites for class certification (numerosity, typicality, 

197 28 U.S.C. § 2072. But see NAGAREDA, supra note 1, at 84 (arguing that just because Congress can modify rights by legislation doesn’t mean private lawyers can do it through a class action).
commonality, and adequate representation) and survive judicial scrutiny under Rule 23(e) of the settlement’s fairness, reasonableness, and adequacy. In a settlement without peace, this becomes a sort of meta–class action inquiry, since the parties are trying to use a class action to settle, not the underlying claims themselves, but rather their dispute over whether claimants can use a class action to prosecute their underlying substantive claims.

In many ways, the inquiry mirrors the Supreme Court’s assessment of settlement classes in *Amchem Products, Inc. v. Windsor.*198 There the Court explained that, in evaluating a settlement class, some questions about the manageability of the litigation on a class basis could be avoided for the proposal is that there will be no trial. But the Rule 23 requirements designed to protect absent class members “demand undiluted, even heightened attention.”199 Similarly, when settling aggregation rights, some questions of manageability can be avoided—particularly questions of predominance and superiority under Rule 23(b)(3)—since the proposal is that there will be no class action to pursue the underlying claims. But, particularly in light of the unconventional nature of this settlement structure, the requirements designed to protect absentees demand heightened attention.

Thus the reviewing court will have to ensure that, at least with respect to the prospect of future aggregation, the class was cohesive, that it lacked structural conflicts of interest, and that both the class representative and class counsel adequately represented absent class members at all times.200 And once the court is convinced that the prerequisites are satisfied, it will have to ensure that the settlement without peace is fair, reasonable, and adequate under Rule 23(e).

This inquiry is where the judge can assess the compensation and deterrence concerns raised above. On both compensation and deterrence grounds, a court should be very skeptical of a settlement that precludes class members from litigating on a class or aggregate basis, but not an individual basis, when claimants have no realistic avenue to pursue their claims individually (i.e., negative-value claims). It is difficult to see how a settlement that undercompensates class members and underdeters defendants could be fair, reasonable, and adequate, or how the lawyer negotiating that deal could have been adequately representing the class. It is, of course, possible that even though the claims have negative values individually, the value of aggregation is accurately priced into the

199 *Id.* at 620.
200 See, e.g., *Id.* at 627; see also ALI PRINCIPLES OF THE LAW OF AGGREGATE LITIGATION §§ 2.01, 2.07 (2012).
settlement; that is, class counsel negotiated the same deal for a settlement of only the aggregation rights as they could have gotten if they also included preclusion of the underlying claims in a more traditional global class action settlement. In that case claimants would be fully compensated and the defendant fully deterred. But where the substantive claims are worth nothing without aggregation, there aren’t many reasons to choose this strategy over a traditional global settlement unless it’s a sellout and the parties are trying to pull the wool over the reviewing court’s eyes.

Even when there are realistic avenues for motivated claimants to pursue their claims individually because of statutory damages or fee shifting provisions, courts should consider whether a settlement without peace will result in undeterrence because of a low rate of claiming. Note that the district court did not think this was the case in the Trans Union settlement. It found that Trans Union would be sufficiently deterred by the payments made under the settlement—which roughly disgorged its profits from the challenged conduct—and ongoing monitoring and the threat of enforcement by the FTC.\(^{201}\) So the participation of a government agency with enforcement authority or the payment of a significant sum of money tied to a reasonable measure of the harm caused (that won’t revert to the defendant if the claims rate is low) may be signals that settling the right to aggregate will achieve sufficient deterrent effect to implement the policies of the substantive law.\(^{202}\)

Finally, courts should consider what notice should be sent to absent class members. Notice is not generally required for a mandatory class under Rule 23(b)(1) or (b)(2). And indeed, avoiding the cost of sending individualized notice to 190 million class members was one of the major factors driving the plaintiffs to settle only their aggregation rights in the Trans Union case, and to do so by way of a mandatory class. But Rule 23(c) gives the district court discretion to order notice when appropriate. In the Trans Union case, for example, the court did not order individual notice to all class members, but did approve a notice campaign that included television, radio, internet, and print advertising.\(^{203}\)

A court would be well advised to condition this sort of settlement without peace on an adequate notice campaign. Notice need not be of the full-blown *Mullane* variety (i.e., first class mail to each class member who


\(^{202}\) Cf. Bone, *supra* note 150, at 132-33 (suggesting a safe harbor along these lines for voluntary compensation schemes).

can be identified). After all, the settlement will not deprive class members of their property—they retain their individual claims. But the main attraction for the defendant of settling the right to aggregate without setting the underlying claims is the effect it will have in lowering the rate of claiming. It is one thing for a defendant to count on claimants’ apathy when they know about their claims and have a realistic opportunity to pursue them. It is quite another to use a class action settlement without peace as a mechanism for keeping the litigation quiet. In addition to jeopardizing the opportunity of motivated claimants to pursue their claims, keeping the settlement quiet may also undermine the deterrent effect that publicity would have. Courts should therefore require a notice campaign sufficient to apprise class members of the claimed violation, the terms of the settlement, and their rights to pursue claims individually before certifying even a mandatory class action that extinguishes aggregation rights.

CONCLUSION: EX ANTE CLASS ACTION WAIVERS RECONSIDERED

Analysis of the creative ex post class action waiver in the Trans Union settlement highlights some of the problems with the ex ante model of class action waivers that we increasingly see in consumer arbitration clauses. While the surrender of aggregation rights drastically reduced the rate of claiming, the Trans Union settlement preserved a realistic opportunity for motivated claimants to pursue their statutory damages claims on an individual basis. And the combination of the money that the defendant put on the table in a settlement that would not guarantee it peace and the FTC’s ongoing supervision of its operations would help provide some measure of deterrence. The district court considered both of these compensation and deterrence factors in finding the settlement fair, reasonable, and adequate under Rule 23(e).

But it would have been a totally different story if the parties had tried to apply this sort of ex post class action waiver in a case raising negative value claims. A court should not—and probably would not—approve a class action settlement

206 See In re Trans Union Corp. Privacy Litig., 741 F.3d 811, 814 n.1 (7th Cir. 2014) (“We recognize that giving up the right to pursue some form of collective action or other cost-sharing device will often mean that no relief is available.... Class settlements that limit ‘only’ class members’ procedural options could extinguish their substantive rights as a practical matter. As we explain below, however, the settlement in this case did not foreclose outside lawyers from asserting and settling thousands of modest follow-on claims.”).
without peace in the absence of a realistic opportunity for claimants to bring their claims individually.

Yet that is exactly what the Supreme Court did in the ex ante context in *Italian Colors*. The Supreme Court upheld an ex ante class action waiver where potential claimants surrendered their aggregation rights in negative-value claims. And it did so even though ex ante class action waivers are likely to be less favorable to claimants than their ex post counterparts, where the claimants have a class action lawyer digesting information and bargaining on their collective behalf and a court reviewing the terms of the deal for adequacy and fairness to absentees. If we wouldn’t be willing to accept an ex post class action waiver for negative value claims when there is an empowered bargaining agent and court supervision, how can we accept an ex ante waiver?

Consent has to do all of the work in the ex ante context. It is the claimants’ individual consent to the arbitration agreement and class action waiver at the time they contract with the defendant that must justify depriving them of their aggregation rights when their underlying claims are worthless absent aggregation. But that may be more weight than consent can bear when we are talking about contracts of adhesion.

It is one thing for a court to enforce a class action waiver—ex post or ex ante—that preserves a realistic opportunity for claimants to pursue claims individually. In that regard *Concepcion* looks very similar to the *Trans Union* settlement. But in enforcing a class action and aggregation waiver that left claimants with no realistic avenue to vindicate their substantive legal rights, *Italian Colors* went well beyond anything we would accept in the ex post context.