ALIENABILITY OF MASS TORT CLAIMS

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Introduction

Whether the United States should follow the lead of the United Kingdom and Australia in permitting innovative forms of litigation financing for personal injury claims is a question of increasing interest to policymakers and legal scholars.[1] This Article seeks to contribute to that larger conversation by examining a hypothetical regime with expanded alienability of a particular subset of claims—claims in mass torts, such as personal injury claims against pharmaceutical companies involving drugs alleged to have harmful side effects. I have chosen to focus on this subset because I believe that the arguments in favor of complete alienability of personal injury claims are strongest with regard to these claims. Moreover, many of the staunchest critics of alternative litigation financing have expressed particular concern about its implications in the mass tort context.[2] Thus, any policy shifts toward greater alienability of personal injury claims in the United States would do well to focus on these claims. And those not persuaded by my analysis are unlikely to be persuaded by arguments for expanding the alienability of personal injury claims more generally.

This Article begins by describing the current state of affairs for both clients and their lawyers regarding the alienability and prosecution of mass tort personal injury claims. Despite various longstanding restric-

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1. *See, e.g.*, ABA Comm'n on Ethics 20/20, Informational Report to the House of Delegates (2011) [hereinafter ABA White Paper]; Marco de Morpurgo, *A Comparative Legal and Economic Approach to Third-Party Litigation Funding*, 19 Cardozo J. Int'l & Comp. Law 343 (2011); Maya Steinitz, *Whose Claim Is This Anyway? Third-Party Litigation Funding*, 95 Minn. L. Rev. 1268 (2011).

2. *See, e.g.*, John Beisner et al., U.S. Chamber Inst. for Legal Reform, Selling Lawsuits, Buying Trouble: Third-Party Litigation Funding in the United States 8–9 (2009).

tions on the alienability of personal injury claims in the United States,[3] substantial alienation of these claims is permitted, and is engaged in by both clients and their attorneys. In addition, Part II discusses the aspects of the prosecution of mass tort claims in the United States that make these claims especially good candidates for complete alienability.

Part III discusses the benefits and costs to mass tort claimants and their attorneys of a hypothetical regime under which a claimant could sell her entire claim to a law firm, rather than retain the firm to serve as her counsel on a contingent fee basis. The unique aspects of the litigation and resolution of mass tort claims—scarcely discussed in the literature on the alienability of claims—make them an especially apt test case for relaxing the current restrictions on the alienation of claims. If the benefits of complete alienability do not exceed the costs for these claims, it is unlikely that an analysis of any other category of personal injury claims will yield a more attractive result. Part III also discusses various practical issues that would need to be resolved before a claim-sale option for mass tort personal injury claims could become a reality. Part IV goes on to analyze the normative concerns that underlie the existing constraints on claim sales. It reveals that none of these concerns is a persuasive grounds for prohibiting mass tort claimants from selling their claims to an attorney (or, perhaps, to any other potential purchaser).

It is not at all clear that a market for mass tort personal injury claims would flourish even if the existing ethical and legal constraints were relaxed. But that possibility does not diminish the importance of the Article's larger conclusion that there are no compelling normative or economic reasons to prohibit the complete alienability of mass tort personal injury claims in the United States.

II. The Current Alienability and Prosecution of Mass Tort Claims in the United States: Facts and Fallacies

In the United States today, an individual who has a personal injury claim against a pharmaceutical manufacturer will often be one of

3. *See, e.g.*, Anthony J. Sebok, *The Inauthentic Claim*, 64 Vand. L. Rev. 61, 62 (2011) (discussing legal doctrines that prohibit or limit property rights in litigation, including assignment and maintenance and noting that "[a]ssignment of personal injury tort claims is prohibited throughout the United States"); Michael Abramowicz, *On the Alienability of Legal Claims*, 114 Yale L.J. 697, 699–700 (2005) (noting that some courts "have begun to view restraints on alienation skeptically" but that "[b]usinesses devoted to purchasing and prosecuting claims remain legally problematic at best").

thousands of individuals with similar claims. If she contacts an attorney regarding her claim, she may have chosen the attorney based on an Internet, television, or print advertisement, a Google search, or as a result of the recommendation of a family member or friend.[4] If, after the initial consultation, she and the attorney mutually decide to pursue her claim, she will almost certainly retain the law firm on a contingent fee basis, signing a standard contract that the firm provides.

The firm will begin to "work up" the case of the injured person, obtaining the relevant medical and pharmacy records, perhaps with the injured person's assistance. These records will be used by the firm to confirm that the injured person has legally cognizable proof of having taken the relevant drug during the requisite time period and for the requisite duration. In addition, the firm will seek to confirm that the injured person has legally cognizable proof of having suffered a compensable injury that has been linked scientifically to use of the relevant drug. Eventually, the firm will need to provide this proof of use and proof of injury to the defendant to obtain any compensation for the injured person's claim through a settlement. At some point, prior to the expiration of the statute of limitations, the firm will either file the injured person's claim in court or enter into a tolling agreement with the defendant regarding the claim.

Typically, several years will pass during which many of the thousands of cases filed throughout the country are consolidated into a handful of courts, and the parties conduct pretrial discovery. Cases filed in federal courts may be transferred to a multidistrict litigation (MDL) court chosen by the MDL panel.[5] Cases filed in state courts may also be consolidated in various ways.[6] Lawyers in the firm that is

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4. *See* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES 47–48, 48 tbl.3.1 (2004) (empirical study showing that the sources of clients for personal injury attorneys in Wisconsin were: client referrals (26%), lawyer referrals (19%), yellow pages advertisements (16%), community contacts (14%), existing clients (11%), other advertising other than direct mail (8%), direct mail (<1%), other (6%)); Stephen Daniels & Joanne Martin, *It Was the Best of Times, It Was the Worst of Times: The Precarious Nature of Plaintiffs' Practice in Texas*, 80 TEX. L. REV. 1781, 1789 tbl.4 (2002) (empirical study showing that the primary sources of clients for different types of contingency fee attorneys in Texas were: referrals from former clients (18%–36%) and referrals from other lawyers (20%–55%)).

5. For useful discussions of the MDL process, see generally Deborah R. Hensler, *The Role of Multi-Districting in Mass Tort Litigation: An Empirical Investigation*, 31 SETON HALL L. REV. 883 (2001); Edward F. Sherman, *The MDL Model for Resolving Complex Litigation If a Class Action Is Not Possible*, 82 TUL. L. REV. 2205 (2008).

6. *See, e.g.*, Sherman, *supra* note 5, at 2209 (noting that the MDL model "has recently spread to state courts with some sixteen states creating statewide MDLs or 'coordinated proceedings' for transfer of all cases relating to a particular kind of litigation to a single judge"). *See generally*

representing the injured person may or may not be among those chosen by the MDL court to serve on the Plaintiffs' Steering Committee (PSC) and take a leadership role in the discovery and pretrial processes.[7] Similarly, the law firm representing the injured person may or may not be directly involved in the concurrent proceedings in the various state courts.

The cases with the earliest trial dates in various state and federal courts will begin to receive the concentrated attention of the firms retained by those clients, as well as by the PSC, their associated trial counsel, and any state court equivalents of the PSC and their associated attorneys. The MDL judge may establish a procedure for selecting bellwether cases for trials in federal court, and the trial dates and venues will be set for that handful of cases.[8] Many of the cases with the earliest trial dates will settle on the courthouse steps, and some of those settlements may include other claimants represented by the same law firm. Trials will begin in a few cases, with some proceeding to a verdict while others settle during the trial.

Through this process of discovery, selecting bellwether cases for trial, and preparing for the first trials in state and federal court, counsel throughout the country for both the plaintiffs and the defendant will receive increasing information about the strengths and weaknesses of specific cases and of the general case for the defendant's liability. Any cases tried to a verdict will provide especially salient information on these issues, particularly regarding cases filed in the same court. All of this information will help establish the larger "market" for claims involving the pharmaceutical at issue, and will influence significantly the expected settlement values for claims with particular characteristics.

All of the above means that after a law firm takes on its first clients with claims against the pharmaceutical defendant, it will typically be several years before the firm will be able to negotiate settlement offers with the pharmaceutical defendant for some or all of the firm's

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William W. Schwarzer et al., *Judicial Federalism in Action: Coordination of Litigation in State and Federal Courts*, 78 VA. L. REV. 1689 (1992).

7. For a critical discussion of the process by which attorneys are chosen for MDL leadership positions, see Charles Silver & Geoffrey P. Miller, *The Quasi-Class Action Method of Managing Multi-District Litigations: Problems and a Proposal*, 63 VAND. L. REV. 107, 118–20 (2010). *See also* Dennis E. Curtis & Judith Resnik, *Contingency Fees in Mass Torts: Access, Risk, and the Provision of Legal Services When Layers of Lawyers Work for Individuals and the Collectives of Clients*, 47 DEPAUL L. REV. 425, 430–32 (1998); Judith Resnik, *From "Cases" to "Litigation,"* LAW & CONTEMP. PROBS., Summer 1991, at 5, 29–35, 50.

8. *See* Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 TUL. L. REV. 2323 (2008); *see also* Alexandra D. Lahav, *Bellwether Trials*, 76 GEO. WASH. L. REV. 576 (2008).

"inventory" of claims. During that period, the law firm will receive no revenue from the claims but will nonetheless be incurring, at a minimum, both the usual costs of operating the law firm and the costs of filing and investigating the client's claims (e.g., obtaining the individual client's medical and pharmacy records, advancing the costs of specialized medical testing such as echocardiograms for fen-phen claimants, interviewing the client, and having the client complete a detailed questionnaire regarding her drug use and medical history).

If the law firm has a case with an early trial date, it will also incur substantial expense as it hires experts on the pharmaceutical defendant's liability, on the science of the drug at issue, and on critical aspects of the trial plaintiff's case, and as it takes and defends depositions and otherwise engages in pretrial discovery against the defendant corporation. If one of the firm's lawyers has secured a coveted position in the leadership of the federal MDL (or a state equivalent), the firm will also be making significant financial investments in that enterprise. These may take the form of direct cash contributions, often in $100,000 increments, to the operating account of the MDL, or direct funding of specified aspects of the nationwide pretrial discovery process that is coordinated through the MDL.[9]

As the months and years pass, the law firm may need to secure outside financial assistance to continue to meet its monthly overhead as well as to continue to pursue its clients' claims against the pharmaceutical defendant. The firm may draw upon an established line of credit with its bank. Individual shareholders may loan personal funds to their firm. Or the firm may even borrow money from a specialized litigation funding company that may offer the firm a nonrecourse loan, but only at a high effective interest rate and after a thorough examination of the firm's inventory of cases against the defendant.[10]

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9. The Plaintiffs' Steering Committee (PSC) of an MDL typically establishes a fund for "shared costs" into which each member of the PSC contributes throughout the course of the litigation. *See, e.g.*, *In re* Bausch & Lomb Contact Lens Solution Prods. Liab. Litig., MDL No. 1785, No. 2:06-MN-77777-DCN, 2008 WL 2330571, at *5 (D.S.C. May 21, 2008) (order establishing common benefit fund) ("Shared Costs are costs that will be paid out of the PSC Fund administered by Plaintiffs' Personal Injury Lead Counsel. Each PSC member shall contribute to the PSC Fund at times and in amounts sufficient to cover plaintiffs' expenses for the administration of the MDL."); *see also* Glenn Collins, *A Tobacco Case's Legal Buccaneers*, N.Y. TIMES, Mar. 6, 1995, at D1 (discussing ad hoc consortium of sixty plaintiffs' firms that contributed $100,000 each to fund litigation against tobacco companies); Glenn Collins, *Judge Allows Big Lawsuit on Tobacco*, N.Y. TIMES, Feb. 18, 1995, at 1 (same).

10. *See, e.g.*, ABA WHITE PAPER, *supra* note 1, at 4–6, 8–9; STEVEN GARBER, RAND CORP., ALTERNATIVE LITIGATION FINANCING IN THE UNITED STATES: ISSUES, KNOWNS, AND UNKNOWNS 8–9, 13 (2010).

Another way for the firm to secure financial assistance is by, in essence, selling other law firms a portion of its anticipated fees from its cases against the pharmaceutical defendant. The sharing of fees by contingent fee lawyers is a long-standing practice[11] that is ethically permissible in every state so long as certain, typically undemanding, requirements are met.[12]

As the months and years pass, the firm's client may also be in increasing financial distress as she waits to receive a settlement offer from the pharmaceutical defendant. The client is, after all, an injured person. If she is seriously injured, she may have substantially reduced earning capacity or may no longer be able to work at all. She has likely received, and may continue to need, medical treatment that may only partially, if at all, be covered by insurance. In order to pay her ordinary monthly living expenses, she may begin to draw upon any savings, carry the maximum (high-interest) balance on her credit cards, and borrow money from relatives and friends.

The injured person may also (or instead) turn to an "advance funding" loan company, which will provide her a nonrecourse cash advance on her anticipated settlement funds at a high interest rate.[13] In deciding whether to provide the injured person any funds, the loan company will typically require information from both the injured person and her law firm regarding the facts surrounding her injuries and medical condition, as well as the nature of her legal claim against the pharmaceutical defendant. Because this is a nonrecourse loan, the in-

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11. The sharing of fees as a means of funding the plaintiff side of mass tort litigation has been well documented at least as early as the Agent Orange litigation. *See* PETER H. SCHUCK, AGENT ORANGE ON TRIAL: MASS TOXIC DISASTERS IN THE COURTS 46–47, 51–53 (1986); *see also* KIP PETROFF WITH SUZI ZIMMERMAN PETROFF, BATTLING GOLIATH: INSIDE A $22 BILLION LEGAL SCANDAL 103–05 (2011).

12. ABA Model Rule 1.5(e), on which most states' ethics rules governing fees are based, has long provided that "[a] division of a fee between lawyers who are not in the same firm may be made" so long as all of the following conditions are met:

> (1) the division is in proportion to the services performed by each lawyer or each lawyer assumes joint responsibility for the representation;
> (2) the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing; and
> (3) the total fee is reasonable.

Model Rules of Prof'l Conduct R. 1.5(e) (2013); *see also* STEPHEN GILLERS ET AL., REGULATION OF LAWYERS: STATUTES AND STANDARDS 2013, at 185–86 (detailing history of adoption of current Model Rule 1.5).

In recent years, a few states, including Texas, have imposed additional restrictions on fee sharing among attorneys, restrictions that arguably do not benefit the clients of the affected attorneys. *See* Lynn A. Baker, *The Politics of Legal Ethics: Case Study of a Rule Change*, 53 ARIZ. L. REV. 425 (2011); *see also* GILLERS ET AL., *supra*, at 186–91 (summarizing selected state variations on ABA Model Rule 1.5).

13. *See, e.g.*, GARBER, *supra* note 10, at 9–12.

jured person will be obligated to pay back the cash advance only if she ultimately both receives and accepts an offer to settle her claims against the pharmaceutical defendant.[14] If the injured person accepts a future settlement offer, the loan company (as well as the injured person's contingent fee lawyers and any governmental or private health insurance providers) will have an enforceable lien against her settlement proceeds.

Some injured persons may die between the time that they hire a law firm to pursue their claims and the time that the firm is able to negotiate a settlement offer on their behalf. In many of these cases, the injured person's claims become a part of her estate, and a court-appointed personal representative will stand in the shoes of the deceased claimant with regard to the decision whether to accept a settlement offer from the pharmaceutical defendant.

As time goes on, a law firm that has taken out loans to pay its monthly overhead and the continuing costs of the litigation will be driven by the increasing financial pressures both to agree to a settlement of its inventory of claims against the pharmaceutical defendant and to accept a lower total settlement amount than would a law firm for which it is less costly to continue to hold out in the hope of eventually negotiating a higher total settlement amount. Once a settlement is reached, the agreement will typically provide the plaintiffs' firm a set amount of money for a specified number of claims that meet certain criteria. Allocating those funds to provide an individual settlement offer for each of the firm's potentially eligible claimants will usually be left to the law firm.

When the law firm subsequently presents the individual settlement offers to each of its potentially eligible clients, those clients who are feeling the greatest financial pressure will be most eager to accept the settlement offer, whether or not they believe the offer to be a good one. Counterintuitively, the clients who have received an advance on their settlement payment from a loan company may be the least interested in accepting their settlement offer. Depending on the terms of the loan a client has taken out and on how long prior to the settlement the client received the loan funds, the accrued interest may total the entire net value of the settlement. In this case, there is no reason for the injured person to accept the settlement offer since doing so will

14. *See id.* at 9–10. The fact that the injured person is not obligated to pay back the nonrecourse loan unless she accepts a settlement offer predictably results in some injured person's rationally determining that there is no reason to accept the settlement offer in instances in which the injured person will net nothing more than the amount of the loan already received from the litigation loan company.

not put any additional money in her pocket. Her entire settlement will go to repay her advance funding loan (and any accrued interest and fees), and to pay attorneys' fees, reimburse litigation expenses incurred by the law firm on her behalf, pay any MDL assessment,[15] and pay any governmental or private medical liens related to the injuries at issue.[16]

A few key points merit emphasis:

- In modern mass tort litigation, very few cases go to trial. In the Vioxx litigation that was largely resolved through a $4.95 billion nationwide settlement in 2009, more than 47,000 claimants had filed cases and were potentially eligible to participate in the settlement, but only 16 cases involving 17 claimants were tried.[17]

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15. In order to fund the work of an MDL's leadership and "common benefit" attorneys, the MDL court typically issues an order establishing a "common benefit fee and expense fund." *See, e.g.*, Case Management Order No. 14 (Establishing Common Benefit Fee and Expense Fund) at 5, *In re* Yasmin and Yaz (Dropsirenone) Mktg., Sales Practices and Relevant Prods. Liab. Litig., No. 3:09-md-02100-DRH-PMF (S.D. Ill. Mar. 25, 2013) (establishing assessment of 6% (4% for common benefit attorneys' fees and 2% for costs) for "Early Participation Counsel," and assessment of 10% (8% for fees and 2% for costs) for "Late Participation Counsel"); *see also* Silver & Miller, *supra* note 7, at 131 (discussing common benefit assessment).

16. Given all this, it will not be surprising that the injured person's attorney in such a case will have an interest in negotiating with the injured person's advanced funding loan company in order to obtain a reduction in the injured person's loan repayment amount so that the injured person will have some financial incentive to accept the settlement offer. At the time the settlement offer is made in such a case, the injured person's attorney and the loan company will often have the largest stakes in the injured person's settlement funds. And neither the attorney nor the loan company receives any money at all in connection with the injured person's claim if the injured person does not accept the settlement offer. Attempting to negotiate a reduction in the interest that the injured person owes the loan company is typically more attractive to the plaintiff's attorney than simply reducing her own fee, not only because the attorney will typically prefer a larger fee to a smaller one, but also because the attorney's disclosure obligations under the "aggregate settlement" rule may preclude (or greatly complicate) any such reduction in fees. *See* ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006).

17. *See Client Cover Letter*, OFFICIAL VIOXX SETTLEMENT, http://www.officialvioxxsettlement.com/documents/Client%20Cover%20Letter%20-%20FINAL.pdf (last visited Jan. 15, 2014) (official letter to Vioxx claimants summarizing the litigation history and settlement). It is especially significant that only 16 of 47,000 Vioxx cases were tried, because the defendant, Merck & Co., repeatedly stated throughout the litigation that it intended to try every single case. *See, e.g.*, Alex Berenson, *Plaintiffs Find Payday Elusive in Vioxx Suits*, N.Y. TIMES, Aug. 21, 2007, at A1 ("Promising to contest every case, Merck has spent more than $1 billion over the last three years in legal fees. It has refused, at least publicly, to consider even the possibility of an overall settlement to resolve all the lawsuits at once."); Alex Berenson, *Merck Suffers a Pair of Setbacks Over Vioxx*, N.Y. TIMES, Aug. 18, 2006, at C1 (noting that Merck "says it did nothing wrong in researching or marketing [Vioxx] and plans to defend every lawsuit"); Lewis Krauskopf, *Merck Agrees to Pay $4.85 Billion in Vioxx Settlement*, REUTERS (Nov. 9, 2007, 3:52 PM), http://www.reuters.com/article/2007/11/10/businesspro-merck-vioxx-settlement-dc-idUSL0929726620071110 ("The settlement marks a shift in strategy for Merck, which previously said it intended to fight Vioxx litigation on a case-by-[case] basis rather than consider a broad settlement.").

- Some (perhaps many) law firms that represent hundreds or thousands of claims against a particular defendant involving a particular drug will not try any of those cases.
- It is possible for a law firm that reaches a settlement agreement with a pharmaceutical defendant regarding a large inventory of claims to have already sold, or alienated, nearly all of the value of its original contractual fee interest through a combination of fee-sharing with other lawyers and loans (plus accrued interest) from nonlawyer financial entities such as lines of credit at a bank.
- It is possible for an injured person who receives a settlement offer as part of a law firm's group settlement with a defendant to have already sold, or alienated, nearly all of her recovery through an advanced funding loan (plus accrued interest), in addition to attorneys' fees, reimbursable litigation expenses, and governmental and private medical liens.

III. Alienability of the Mass Tort Client's Claim

Consider a hypothetical regime under which an injured person with a claim against a pharmaceutical defendant has the option to sell her claim to a law firm, rather than retain the firm to represent her on a contingent fee basis. As discussed above, currently in the United States, it is possible—and entirely permissible—for an individual with a mass tort personal injury claim to have liquidated the entire value of that claim prior to its resolution with the defendant. If the injured person has retained legal counsel to prosecute the claim on her behalf, the law firm will now have a significant (typically 40%) contingent fee interest in her claim. In addition, the firm will have a lien against any future recovery for the reimbursement of certain litigation-related expenses incurred on the client's behalf. Similarly, governmental and private providers of health insurance may have liens for the repayment of medical expenses incurred on behalf of the injured person in connection with the injury that is the focus of the claim. Finally, the injured person may have obtained a nonrecourse "advanced funding" loan from a finance company that she is also obligated to repay, with interest, from any proceeds resulting from the resolution of her claim.

At the present time in the United States, however, an individual with a mass tort personal injury claim is not permitted simply to sell that claim outright to an attorney—or anyone else other than the defendant(s)—at the outset of the litigation process, or at any other time. There are three broad categories of limitations on the complete alienability of the claim: (1) prohibitions on maintenance, champerty, and barratry;[18] (2) "a refusal by some courts to enforce contracts purporting to sell choses in action";[19] and (3) state bar rules of professional responsibility that prohibit attorneys from acquiring a proprietary interest in a client's cause of action or providing financial assistance to a client in connection with pending or contemplated litigation.[20]

Others have recently documented the contemporary trends toward limiting, rather than expanding, these prohibitions and have debated the normative appeal of such changes.[21] In addition, several legal scholars have provided useful analyses of the potential costs and benefits, both economic and noneconomic, of generally permitting the

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18. *See, e.g.*, ABA WHITE PAPER, *supra* note 1, at 9–12 (discussing the history and contemporary views on maintenance, champerty, and barratry); Abramowicz, *supra* note 3, at 699 & nn.4–6 (2005) (citing sources and observing that the common law doctrines of barratry, maintenance, and champerty "collectively form one of two legal obstacles to the development of legal claims markets"); Sebok, *supra* note 3, at 72–74, 94–120 (discussing past and present laws regulating maintenance and champerty); Marc J. Shukaitis, *A Market in Personal Injury Tort Claims*, 16 J. LEGAL STUD. 329, 330–34 (1987) (discussing the historical and current legal doctrines that bar the operation of a market in personal injury tort claims); Steinitz, *supra* note 1, at 1286–92 (discussing history of maintenance, champerty, and lawyers sharing fees with nonlawyers); Ari Dobner, Comment, *Litigation for Sale*, 144 U. PA. L. REV. 1529, 1543–57 (1996) (discussing history and present state of champerty laws in the United States).

19. Abramowicz, *supra* note 3, at 699–700, 700 nn.7–8 (discussing current law regarding assignability of various types of claims); *see also* Sebok, *supra* note 3, at 72–94 (discussing past and present laws regulating assignments of claims).

20. *See* ABA WHITE PAPER, *supra* note 1, at 19–21 (discussing ABA Model Rule 1.8(e), which prohibits a lawyer from providing financial assistance to a client except in specified circumstances, and ABA Model Rule 1.8(i), which prohibits a lawyer from acquiring a proprietary interest in the client's cause of action, except in specified circumstances). Texas is a notable exception, in that "legal claims are generally assignable, and the bar on champerty has been lifted, but barratry remains a criminal offense and the courts have found that certain classes of cases, such as malpractice, are not assignable." Abramowicz, *supra* note 3, at 700–01 (footnotes omitted) (citing TEX. PROP. CODE ANN. § 12.014(a) (West 2004) ("[A]n interest in a cause of action on which suit has been filed may be sold, regardless of whether the judgment or cause of action is assignable in law or equity, if the transfer is in writing."); Beech Aircraft Corp. v. Jinkins, 739 S.W.2d 19, 22 (Tex. 1987) (discussing assignability of claim); Perry v. Smith, 231 S.W. 340, 342 (Tex. Comm'n App. 1921) (discussing lifting of bar on champerty); TEX. PENAL CODE ANN. § 38.12(a)(1) (West 2003) (making it a crime to "knowingly institute[ ] a suit or claim that the person has not been authorized to pursue"); Medlock v. Comm'n for Lawyer Discipline, 24 S.W.3d 865 (Tex. App. 2000) (upholding discipline against an attorney accused of barratry). Further complicating matters in Texas is the fact that the Texas Disciplinary Rule of Professional Conduct 1.08(h) is identical to ABA Model Rule 1.8(i) in prohibiting a lawyer from acquiring a proprietary interest in the client's cause of action, except in similar specified circumstances. *Compare* MODEL RULES OF PROF'L CONDUCT R. 1.8(i) (2013), *with* TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(h) (2005).

21. *See generally, e.g.*, BEISNER ET AL., *supra* note 2; GARBER, *supra* note 10; Abramowicz, *supra* note 3; Susan Lorde Martin, *The Litigation Financing Industry: The Wild West of Finance Should Be Tamed Not Outlawed*, 10 FORDHAM J. CORP. & FIN. L. 55 (2004); Jonathan T. Molot, *A Market in Litigation Risk*, 76 U. CHI. L. REV. 367 (2009); Sebok, *supra* note 3; Shukaitis, *supra* note 18; Steinitz, *supra* note 1; Dobner, *supra* note 18.

alienability of legal claims.[22] This Article seeks to advance both of those discussions by offering an analysis of the potential costs and benefits of permitting mass tort personal injury claimants to sell their claims outright to attorneys. I have chosen to focus on this particular subset of potential buyers and sellers of legal claims because substantial partial alienation of mass tort claims is already permitted and regularly occurs. Thus, it is especially interesting to consider what the likely effects of the next step—permitting complete alienation *to an attorney*—might be.[23] In addition, there are other unique aspects of the litigation and resolution of mass tort claims, not previously explored in the literature on the alienability of claims, that make them an especially good test case for relaxing the current restrictions on the alienation of claims. If an analysis of the expected effects of permitting complete alienation of mass tort claims reveals that the costs are likely to exceed the benefits, it is highly improbable that an analysis of any other category of personal injury claims will yield a more compelling case for relaxing the current restrictions.

A. Benefits to Mass Tort Clients of Lifting the Prohibitions on Complete Alienation

If mass tort personal injury claimants had the option to sell their entire claim to an attorney rather than granting the attorney the typical 40% contingent fee interest in the claim, many of the benefits to the clients would be straightforward and would be the same benefits that other types of claimants would realize if similarly permitted to sell their entire claim. Most obviously, the clients would be able to receive their settlement funds sooner and with greater certainty regarding the net value of their claim. Importantly, such a regime would have numerous other benefits for clients—especially mass tort claimants—that have not previously been discussed by scholars.[24] Some of these expected benefits may be unique to, or greater for, mass tort claimants as a result of both the nature of mass tort claims and the type of attorney-client relationship that is typically involved.

22. *See generally, e.g.*, Abramowicz, *supra* note 3; Molot, *supra* note 21; Sebok, *supra* note 3; Shukaitis, *supra* note 18.

23. It merits underscoring that I am not especially wedded to the idea that the claim purchaser be an attorney. I have specified an attorney as the purchaser in my analysis simply as a way of taking the smallest possible next step in relaxing the current restrictions, given the existence and acceptability of the contingent fee.

24. To date, the special issues surrounding the alienability of mass tort claims have received only a few pages of attention in the law reviews. *See* Ryan Guerrero, Note, *Reevaluating Proposals for Tort Claims Markets in a World of Mass Tort Litigation*, 32 REV. LITIG. 299, 314–22 (2013).

First, concerns about any inefficiencies or apparent lack of competitiveness in the market for contingent fee mass tort attorneys would dissipate for those claimants who chose to sell their claims. Some scholars have argued that there is substantial uniformity in the fees charged by these attorneys, which suggests that the market for those services is not sufficiently competitive and perhaps even collusive.[25] Other scholars contend that this market is competitive, but that the competition sometimes occurs not with regard to the fee charged but rather with regard to the level and quality of service provided for the fee.[26] These scholars go on to question the ability of claimants to obtain useful information on this service variable when deciding which attorney or firm to retain.[27] Finally, some of these critics contend that the typical 40% fee charged by these attorneys is in any event too large and does not accurately reflect what the critics argue is the minimal risk of nonrecovery borne by the contingent fee attorney in most cases.[28]

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25. *See, e.g.*, LESTER BRICKMAN, LAWYER BARONS: WHAT THEIR CONTINGENCY FEES REALLY COST AMERICA 6 (2011); Richard W. Painter, *Litigating on a Contingency: A Monopoly of Champions or a Market for Champerty?*, 71 CHI.-KENT L. REV. 625, 656–68 (1995).

26. *See, e.g.*, Michael Abramowicz, *How Lawyers Compete*, REGULATION, Summer 2004, at 38, 38 (noting that "[t]he absence of price competition . . . does not mean that there is no competition at all. Lawyers can compete on quality."). Herb Kritzer has provided substantial empirical evidence to support his claim that "there is substantial variation in the contingency fee system vis-à-vis the fees charged," but adds that he has "no evidence that indicates that the variation reflects market competition." KRITZER, *supra* note 4, at 42. *See also* John Fabian Witt, *Bureaucratic Legalism, American Style: Private Bureaucratic Legalism and the Governance of the Tort System*, 56 DEPAUL L. REV. 261, 279 (2007) (noting that "despite some limited evidence of price competition in the plaintiffs' market, the price term in plaintiffs'-side personal injury retainers is remarkably sticky").

27. *See, e.g.*, BRICKMAN, *supra* note 25, at 75–78. Kritzer's empirical evidence that personal injury attorneys receive 37% of their cases through client referrals (26%) and existing clients (11%) suggests, however, that a significant portion of clients will have some useful information on attorneys' quality of service. *See* KRITZER, *supra* note 4, at 48 tbl.3.1, 61–63. In addition, as Michael Abramowicz notes, "everyone knows the difference between the luxe interiors of the offices of the high-end plaintiffs' bar and the storefront offices of lawyers who may have barely passed the bar exam." Abramowicz, *supra* note 26, at 39. For Abramowicz, the more likely difficulty that clients face is "to identify the claims for which lawyer quality is more important" and "how to balance price/quality tradeoffs." *Id.* Nora Freeman Engstrom identifies a different source of apparent market failure: "[C]ontingency fee clients are, for a number of reasons, uniquely insensitive to the prices they pay. Much like health insurance appears to blunt patients' sensitivity to the cost of medical care, clients' contingency fee insensitivity may help to explain the long-identified oddities of the personal injury marketplace." Nora Freeman Engstrom, *Attorney Advertising and the Contingency Fee Cost Paradox*, 65 STAN. L. REV. 633, 692 (2013).

28. *See, e.g.*, BRICKMAN, *supra* note 25, at 4–5; Lester Brickman, *Contingent Fees Without Contingencies:* Hamlet *Without the Prince of Denmark?*, 37 UCLA L. REV. 29, 30–32 (1989); Lester Brickman, *Effective Hourly Rates of Contingency-Fee Lawyers: Competing Data and Non-Competitive Fees*, 81 WASH. U. L.Q. 653, 664 (2003) ("I conclude that the market for contingent-fee financed tort claims is not competitive and that the uniform pricing which prevails is a prod-

At the core of each of these contentions is, ultimately, a difficult empirical question to which no definitive answer has yet been given. Each of those questions, however, would become irrelevant to claimants who might choose to sell their claims rather than retain an attorney on a contingent fee basis, since no attorneys' fees, contingent or otherwise, would be involved. Rather, the claimant would be able to compare the dollar values (i.e., net recoveries) offered for her claim by various law firms in much the same way that she might comparison shop for peanut butter or a new set of tires. Thus, scholars and others concerned about a potential lack of competitiveness in the market for contingent attorneys' fees should be especially inclined to celebrate a regime under which claimants had the option to simply sell their claims to an attorney.[29]

A second, previously undiscussed benefit of a claim-sale option is that the settlement offer received by a mass tort claimant would be likely to more accurately reflect the relative strength of the individual's claim. All types of claims might reap this benefit from a sale-option regime, but mass tort personal injury claims are especially likely to do so. The reason is that under the current regime, the eventual gross settlement value of an individual's mass tort personal injury claim will be significantly affected by a number of factors that are both uniquely present in the mass tort context and have little to do with the strength of an individual's claim.

In the mass tort context, an individual, Anna, who has chosen Firm A to represent her, may have a personal injury claim involving Drug X that is identical in all potentially relevant respects to that of Betty, who has retained Firm B. Both women may have taken Drug X in the same dose for the same period of time and beginning on approximately the same date, both may have suffered the same type of injury on approximately the same date, and both may have similar medical and personal histories. Thus, given the comparable "merits" of their claims within the tort system,[30] one would expect Anna and Betty to

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uct of collusive behavior by contingency-fee lawyers to generate rents."); Painter, *supra* note 25, at 649–50.

29. Indeed, Lester Brickman, a long-time, prominent critic of contingent fees, would seem to subscribe to this view, albeit without particular reference to attorneys as the potential purchasers of claims. *See* BRICKMAN, *supra* note 25, at 18, 93 (suggesting that rules forbidding the outright sale of claims insulate contingency fee lawyers from market competition). As I explain *supra* at n.23, I have specified an attorney as the purchaser in my analysis simply as a way of taking the smallest possible next step in relaxing the current restrictions, given the acceptability of the contingent fee. In some respects, of course, having an attorney as the claim purchaser may raise additional issues. *See, e.g.*, ABA WHITE PAPER, *supra* note 1.

30. There is no single accepted or uncontroversial way to evaluate the "merits" or "value" of a claim, either in a vacuum or relative to other claims against the same defendant. Two common

receive comparable gross settlement offers. At present, however, it is likely that these two women will end up receiving different—perhaps substantially different—gross settlement offers for their claims unless they are represented by the same firm *and* receive their settlement offers pursuant to the same group settlement agreement.[31]

There are many causes of this variation in gross settlement offers for individuals like Anna and Betty who have claims of similar merit. Differences in the total group settlement offers negotiated by different law firms are a primary source of the variation. With rare exception, the defendant will negotiate with individual law firms, firm by firm, to settle the entire inventory of Drug X claims held by each.[32] Thus, Firm A and Firm B may both have inventories of 1,000 claims but may ultimately negotiate with the defendant substantially different total settlement offer amounts for their respective inventories. Those different total dollar amounts may in part reflect the different composition of each firm's group of claims in terms of the severity and types of the claimants' injuries, as well as other aspects of the relative "merits" of their claims within the tort system.[33] The dollar amounts negotiated for the two inventories, however, may also reflect factors having nothing to do with the merits of the relevant claims, such as: the bargaining skills of the negotiating plaintiffs' lawyers; the financial ability of each plaintiffs' law firm to hold out (potentially many

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models of claim valuation are the "economic" model, which focuses on the expected value of a plaintiff's claim at trial, and the "satisficing" model, which involves a set of criteria or aspirations to be satisfied at a threshold level, such as "putting the plaintiff in the financial position she would have been in but for the injury," discounted for the probability that the defendant was not (fully) responsible for the plaintiff's injuries. *See* Charles Silver & Lynn Baker, *I Cut, You Choose: The Role of Plaintiffs' Counsel in Allocating Settlement Proceeds*, 84 VA. L. REV. 1465, 1518–22 (1998).

31. Even if two clients with similar claims are represented by the same attorney, they may receive significantly different settlement offers if they are not part of the same settlement agreement. There are a number of ways this might occur. For example, the attorney who represents each of them might have entered into more than one group settlement with the defendant, with each of the two clients included in different groups; or the attorney who represents each of them might have referred out some claims for inclusion in a different settlement negotiated by a different lead law firm while also being the lead lawyer in negotiating his own settlement agreement; or the attorney whom the two clients share may not have been the lead attorney in negotiating any settlement agreement, but simply referred out his cases to various attorneys for inclusion in their separate settlements.

32. The defendant will typically request information from the firm regarding each of its claims including, for example, the dates of prescriptions for the drug, the dates and types of subsequent injuries claimed to have been caused by the drug, dates and types of any medical procedures related to those injuries, and other potentially relevant information regarding the claimant's medical history. Based in part on its evaluation of that information, the defendant will negotiate a total settlement offer amount with the law firm for its inventory of claims.

33. *See supra* note 30 and accompanying text.

months) for a potentially larger settlement amount;[34] the general risk preferences of each law firm; whether a law firm is among the first or the last to negotiate a Drug X settlement with the defendant; whether a law firm's inventory includes one or more claims with an imminent (or early) trial date and the strength of the relevant claim(s); and whether the law firm has an attorney who is playing a leading role on the MDL Steering Committee, or who is otherwise perceived by the defendant to be an especially formidable adversary at trial or on appeal.[35]

Even if Firm A and Firm B each negotiate the same total gross settlement offer amount from the defendant for their respective inventories of 1,000 claims, it is still likely that Anna and Betty will be offered different amounts to settle their individual claims. This is because the defendant's settlement agreement with a plaintiffs' law firm typically will not specify the individual gross amount to be offered to each qual-

34. The ability (as distinct from the willingness) of a law firm to "hold out" in settlement negotiations will largely be a function of how well capitalized the law firm is. A firm that is financing the litigation from its own cash reserves would be expected to feel much less pressure to settle early than a firm that is incurring substantial interest costs each month from a line of credit or other form of litigation funding loan. This variable seems especially likely to affect both the gross and net settlement value of a mass tort client's claim, but is an issue about which a client typically will have no particular reason to ask or investigate when choosing a law firm. I am not aware of any way for potential clients easily to get this information, short of asking a firm directly. In some instances, however, clients may be able to infer the existence, or future likelihood, of such a loan from statements in the contingent fee agreement regarding expenses. If the agreement discloses that interest on loans that might be obtained for advancing litigation expenses may be charged to the client in the event of a recovery, the client may at least have more reason (and opportunity) than otherwise to inquire about how the firm anticipates funding the relevant litigation.

35. This variable is relevant insofar as an increasingly standard provision in mass tort settlement agreements is the affirmation of the signatory plaintiffs' law firm that, *to the extent permitted by the relevant state(s)' ethics rules*, the firm will undertake to withdraw from further representing any claimant who might decline her settlement offer. See, for example, Settlement Agreement Between Merck & Co., Inc. and the Counsel Listed on the Signature Pages Hereto § 1.2.8, at 5–6 (Nov. 9, 2007) [hereinafter Vioxx Settlement Agreement], *available at* http://www.officialvioxxsettlement.com/documents/Master%20Settlement%20Agreement%20-%20new.pdf, which states in relevant part:

> 1.2.8. While nothing in this Agreement is intended to operate as a "restriction" on the right of any Claimant's counsel to practice law within the meaning of the equivalent to Rule 5.6(b) of the ABA Model Rules of Professional Conduct in any jurisdictions in which Claimant's Counsel practices or whose rules may otherwise apply, it is agreed that . . . :
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> 1.2.8.2. If any such Eligible Claimant disregards such recommendation [of Claimant's Counsel to enroll in the settlement program] . . . to the extent permitted by the equivalents to Rules 1.16 and 5.6 of the ABA Model Rules of Professional Conduct in the relevant jurisdiction(s), [Counsel shall] (i) take . . . all necessary steps to disengage and withdraw from the representation of such Eligible Claimant . . . .

ifying covered claimant to settle her claim.[36] Rather, the defendant will likely explicitly leave to the plaintiffs' counsel the responsibility for allocating the total group settlement amount into the individual gross settlement offers to be made to each of the claimants covered by the settlement agreement.

In making their respective allocations, Firm A and Firm B may each arrive in good faith at a matrix or formula that treats like cases alike but which simultaneously values Anna's and Betty's claims significantly differently. This may reflect the two firms' different treatment of certain aspects of the claims about which reasonable and informed plaintiffs' attorneys simply disagree. For example, Firm A might reduce a gross claim value by 50% if the claimant had been a smoker while taking Drug X, while Firm B might impose only a 35% reduction.

Different valuations for Anna's and Betty's claims may also reflect differences in the overall composition of the two firms' inventories. For example, Anna's and Betty's alleged injuries from Drug X may be of moderate severity given the range of possible injuries and when considered relative to the nationwide pool of claims. Within Firm A's inventory, however, Anna's claim may be one of a small number involving relatively severe injuries and it may thus be allocated a gross value well above the per-case average for the group. Firm B's inventory, however, might include mostly claims involving injuries comparable to Betty's in their severity, with only a few claims involving more severe or less severe injuries. Betty's claim may therefore be allocated a gross settlement value right at the per-case average for the group.

Further, consider a different example in which (1) the distribution of the severity of injuries is substantially similar among claimants in the Firm A and Firm B inventories, and (2) injuries such as Anna's and Betty's are considered to be in the top 10% of both inventories in terms of their severity. Firm A, however, might conclude that claims such as Anna's should receive six times the per-case average for its

36. It is an increasingly common preference of defendants in "inventory" settlements to specify in the master settlement agreement with the plaintiffs' counsel that responsibility for allocating the total settlement offer amount to individual settling claimants covered by the settlement agreement is the sole responsibility of the signatory law firm and that the parties expressly disclaim that the defendant has any responsibility for, or role in, that allocation process. The nationwide Vioxx settlement was a notable exception in this regard, insofar as the Settlement Agreement included numerous Exhibits, agreed to by the defendant, that set out the "Points Award Methodology/Criteria" and other criteria that would be used to determine each claimant's settlement offer amount. *See id.* at iv ("Table of Exhibits and Schedules").

inventory; Firm B, meanwhile, might conclude that such claims (including Betty's) should receive only three times the per-case average.

Thus, under the current regime, Anna and Betty will frequently be offered substantially different gross amounts to settle their very similar claims as a result of factors that have little to do with the relative merits of their claims within the tort system. It is important to note, however, that none of this variation among law firms in their ultimate valuations of claims is inherently problematic as a matter of legal ethics or of the relevant attorneys' fiduciary obligations. This variation in gross settlement offer values will occur even if Firm A and Firm B are both acting entirely reasonably and in good faith, are both earnestly striving to fulfill all of their fiduciary duties to each of their individual clients, and are both meticulous about complying with all potentially applicable rules of legal ethics, including the aggregate settlement rule.[37]

From the perspective of client welfare, the primary problem with this variation in eventual gross settlement values is that a potential client simply cannot know at the time she is choosing a firm to represent her whether Firm A, Firm B, or one of their competitors would ultimately, several years later, be able to obtain the largest gross settlement offer for her claim.[38] Indeed, the law firms them-

37. Every state's rules of legal ethics include an "aggregate settlement rule" that is based on ABA Model Rule 1.8(g), which states:

> A lawyer who represents two or more clients shall not participate in making an aggregate settlement of the claims of or against the clients . . . unless each client gives informed consent, in a writing signed by the client. The lawyer's disclosure shall include the existence and nature of all the claims . . . involved and of the participation of each person in the settlement.

MODEL RULES OF PROF'L CONDUCT R. 1.8(g) (2013). For critical discussions of this rule's costs and benefits for clients in mass tort settlements, see Lynn A. Baker & Charles Silver, *The Aggregate Settlement Rule and Ideals of Client Service*, 41 S. TEX. L. REV. 227 (1999); Silver & Baker, *supra* note 30; Charles Silver & Lynn A. Baker, *Mass Lawsuits and the Aggregate Settlement Rule*, 32 WAKE FOREST L. REV. 733 (1997).

38. This uncertainty may have yet another layer if the client's claim is ultimately referred out to another firm by the law firm that she originally retained to represent her. The client's consent to such a referral will typically be required under the relevant state(s)' ethics rules. *See, e.g.*, ABA MODEL RULES OF PROF'L CONDUCT R. 1.5(e) ("A division of a fee between lawyers who are not in the same firm may be made only if . . . the client agrees to the arrangement, including the share each lawyer will receive, and the agreement is confirmed in writing . . . ."); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.04(f) (2005) ("A division or arrangement for division of a fee between lawyers who are not in the same firm may be made only if . . . the client consents in writing to the terms of the arrangement prior to the time of the association or referral proposed . . . ."). The client, however, is unlikely to have any useful information for purposes of that decision, beyond the information that her initial law firm apparently deems the referral to be in her best interest, as well as their own. *See* Baker, *supra* note 12, at 443.

selves would likely not know with certainty.[39] Relatedly, if a client were especially keen to receive her expected settlement funds sooner rather than later—and were willing to accept, say, a 25% lower gross settlement amount if she received the funds one year earlier—the client similarly could not know which law firm, if any, would be most likely to obtain the hoped-for minimum gross settlement offer value within her preferred time frame.

In addition to these uncertainties regarding gross settlement offer values, mass tort claimants currently do not have, and are not able to get, useful information at the time they are choosing a law firm regarding the total expenses they will need to reimburse the firm in the event of a financial recovery. In addition to attorneys' fees (about which the client will have complete information at the time of choosing a firm[40]), the other major variable that will affect a mass tort claimant's eventual *net* settlement value is reimbursable expenses.[41] The contingent fee retainer agreement will necessarily set out the kinds of expenses that will be advanced by the law firm on behalf of the client and that the client will be obligated to repay in the event of a recovery.[42] But the eventual total dollar amount of those expenses cannot be known by a potential client in advance and is likely to vary across law firms.[43] The only consolation for clients is that in a fair number of cases the variation across law firms on this component may

39. The law firms might have a somewhat informed "gut feel" on this issue, however, based on past experience. And the firms *would* each know certain things, such as how well capitalized they are, what their general risk preferences are, and whether they seem to be acquiring a large inventory of relatively high quality claims—and those factors would be likely to affect the size of the total settlement offer negotiated for the firm's inventory of claims. Even so, the firm would not know many other potentially relevant factors with any certainty.

40. The contingent attorneys' fee is obligated by state ethics rules to be disclosed with precision—at least with regard to the *percentage* fee, and whether the fee will be based on the gross recovery or the net after reimbursable expenses are deducted. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(c); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R 1.04(d).

41. Various health care-related insurance liens, including Medicare and Medicaid liens, may also affect the client's net settlement value. But those lien amounts will often not be affected by the client's choice of law firm. And many clients will not have any governmental (or other) medical liens in any case.

42. These details and others are typically required by state ethics rules to be included in any contingent fee retainer agreement. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(c); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R 1.04(d).

43. In some instances the variation across law firms regarding per-client reimbursable expenses has been a matter of litigation, allegations of fraud, and even criminal prosecution. *See, e.g.*, Fleming v. Kinney *ex rel.* Shelton, 395 S.W.3d 917, 921 (Tex. App. 2013) (reversing on other grounds a trial court decision that plaintiff's attorney breached his fiduciary duty when he allegedly deducted from settling clients' fen-phen recoveries "a share of expenses attributable to echocardiograms performed on thousands of other potential clients" whose cases were turned down); Nick Brown, *Ex-Lawyers Get 20, 25 Years In Fen-Phen Fraud Case*, LAW360 (Aug. 17, 2009), http://www.law360.com/articles/116828/ex-lawyers-get-20-25-years-in-fen-phen-fraud-

not be substantial, at least when compared to other factors affecting their net settlement value—most notably the individual's gross settlement value.[44]

These sorts of uncertainties regarding gross and net claim values and payment dates would be substantially mitigated if mass tort personal injury claimants had the option to sell their entire claim to an attorney. That option would enable a claimant to shop her claim among various law firms and then to accept whatever offer she deemed best, given her preferences regarding net settlement value, timing of payments, risk, and anything else. And if the claimant did not consider any of the offers to buy her claim outright to be sufficiently appealing, she would still have the opportunity to retain a law firm on the traditional contingent fee basis with all of the attendant uncertainties discussed above.

The availability of a claim-sale option may also, but would not necessarily, result in larger net settlements for mass tort clients to the extent that plaintiffs' law firms handling such claims would have lower operating costs than under the current regime. In particular, these law firms would likely realize savings in the current area of ongoing client service, because they would no longer have as many clients in the traditional sense with whom they would need to regularly communicate in order to provide litigation updates, answer questions, and the like. It is possible, of course, that these firms instead would simply

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case?article_related_content=1 (two attorneys convicted for "taking about $55 million more than they were entitled to, in a massive settlement" related to the diet drug fen-phen).

44. In some cases, the variation across law firms might be very substantial. The source of this variation in most instances will not be "case specific" expenses, such as the costs of obtaining an individual client's medical and pharmacy records or the costs of filing a client's case in court. In addition to being relatively fixed, the total amount of these sorts of costs incurred on behalf of an individual client will also typically be relatively small. Any significant variation in reimbursable expenses across firms is likely to be due to differences in the total amount of general or group expenses, as well as the method of allocating those expenses. For example, a firm that has a case with an early trial date may incur substantial expenses during discovery and in the course of otherwise preparing for that trial. Many of those expenses may benefit the law firm's entire inventory and be properly shared among each of the firm's Drug X clients as general or group expenses. Clients of a firm without such a trial date may have substantially lower, if any, general/group expenses.

Relatedly, even clients of firms with comparable total group or general expenses to be allocated across a similar number of clients may end up paying substantially different amounts depending on whether the total group or general expenses are allocated equally (per capita) or proportionally (pro rata) across the group of benefitted clients. Either method of allocation is permissible under current ethics rules. *See, e.g.*, ABA Comm. on Ethics & Prof'l Responsibility, Formal Op. 06-438 (2006). Nonetheless, the effects of these different methods of allocating expenses may result in substantial variation between law firms, especially with regard to clients who ultimately receive especially high or especially low gross settlement offer amounts relative to the other claimants in the relevant law firm's inventory.

end up shifting costs from ongoing client service to front-end claim evaluation and claim purchasing, resulting in no net savings in the firms' operating costs to be passed through to their mass tort claimants.

One of the most significant potential benefits to claimants of a claim-sale option is that they would no longer need to seek out high-interest advanced funding loans. At present, a noteworthy number of mass tort personal injury claimants take out such loans.[45] The loans often are for only a few thousand dollars, typically for no more than 10% of the estimated value of the claim, and the interest (or "financing fee") accrues at a significant monthly rate.[46] The loans are typically nonrecourse, however, which means that the debtor-claimant owes nothing if she receives no compensation for her claim and that the amount ultimately to be repaid will not in any event exceed the eventual recovery.[47] If the debtor-claimant obtains a financial recovery for her claims, the loaned funds must be repaid along with the specified financing fees, which are commonly 3%–5% per month from the time of loan origination.[48]

Some mass tort claimants may take out such a loan to pay their rent and otherwise scrape by while awaiting the resolution of their claims. Others may do so to ensure that they receive at least some money for their claim, whether because they are extremely risk averse or because they fear their claim is weak and may result in no eventual recovery.[49] Given the high effective interest rates typically charged for such loans, one would expect that most recipients have exhausted, or do not qualify for, less costly sources of financing, such as consumer bank loans or

45. As of early 2010, at least twenty-nine companies offered consumer legal funding to U.S. plaintiffs. GARBER, *supra* note 10, at 10–11.

46. *See id.* at 12 (noting that "two industry leaders estimate the average sizes of their cash advances to be $1,750 and $4,500, and that advances average less than 10 percent of conservatively estimated values of the underlying legal claims," and further noting that "monthly fees of 2 to 4 percent are fairly common"); *see also* Jonathan T. Molot, *Litigation Finance: A Market Solution to a Procedural Problem*, 99 GEO. L.J. 65, 93 (2010) (noting that firms that offer cash advances to personal injury victims charge "very high interest rates . . . typically 3% to 5% monthly interest, and often much higher"); George Steven Swan, *Economics and the Litigation Funding Industry: How Much Justice Can You Afford?*, 35 NEW ENG. L. REV. 805, 824 (2001) (reporting that most funders "advance a maximum of $20,000 to individual plaintiffs").

47. GARBER, *supra* note 10, at 9–10.

48. Molot, *supra* note 46, at 93.

49. Of course, the financing company would be unlikely to make a loan to a claimant with a weak case. Thus, the willingness of the financing company to make a loan should signal to a rational claimant that the claim does have merit and is likely to result in a recovery at least 90% greater than the amount that the company is willing to loan the claimant. Even with this information, however, a claimant may be sufficiently risk averse that she prefers the relatively small loan with its high effective interest rate to "taking her chances" and waiting for a potentially much greater settlement unburdened by finance charges.

credit cards.[50] In some instances, however, clients who do have other, potentially less costly options may be attracted to this type of funding because their eventual repayment obligation is capped by the size of the future recovery, if any.

Many legal scholars and bar association committees have expressed concerns about various aspects of these loans, including ethical and practical issues that may arise for the attorneys of clients who seek such funding.[51] In the mass tort context, one significant issue arises at the time the claimant who has obtained an "advanced funding" loan receives a settlement offer. Depending on the size of the loan, the effective interest rate, and how much time has passed since the claimant received the loan, the claimant's entire settlement proceeds may be destined for the loan company.[52] In that event, the claimant may have no incentive to accept the settlement offer.[53] A decision by the claimant to decline the settlement offer has special import in the mass tort context, however, beyond depriving the claimant's law firm of its fee and reimbursement of its expenses. It may also make it more difficult for the claimant's law firm to meet any participation threshold specified in the group settlement agreement, thereby putting at risk

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50. The effective interest rates charged for these loans commonly exceed even the very high interest assessed on certain credit card balances. *See, e.g.*, Rancman v. Interim Settlement Funding Corp., 789 N.E.2d 217, 219 (Ohio 2003) (discussing lower court's holding that the contingent advances on settlements were illegal loans because the potential profit exceeded the legally allowable interest rate); Molot, *supra* note 46, at 94 ("[B]ecause the risk associated with litigation is higher than that of nonpayment for conventional loans, cash advance firms charge high rates of interest. Indeed, the rates are so high that, in many instances, they might violate usury laws were they subject to those laws." (footnote omitted)).

51. *See, e.g.*, ABA WHITE PAPER, *supra* note 1, at 15–39; BEISNER ET AL., *supra* note 2, at 7–8; Douglas R. Richmond, *Other People's Money: The Ethics of Litigation Funding*, 56 MERCER L. REV. 649, 669–81 (2005); Yifat Shaltiel & John Cofresi, *Litigation Lending for Personal Needs Act: A Regulatory Framework to Legitimatize Third Party Litigation Finance*, 58 CONSUMER FIN. L. Q. REP. 347, 350–51 (2004); Steinitz, *supra* note 1, 1318–25 (2011); Courtney R. Barksdale, Note, *All That Glitters Isn't Gold: Analyzing the Costs and Benefits of Litigation Finance*, 26 REV. LITIG. 707, 725–33 (2007); Andrew Hananel & David Staubitz, Current Development, *The Ethics of Law Loans in the Post-*Rancman *Era*, 17 GEO. J. LEGAL ETHICS 795, 804–12 (2004).

52. The claimant's settlement proceeds here are exclusive of the claimant's contractual attorneys' fees, reimbursable litigation expenses, and any governmental or private medical liens.

53. It is useful to contrast the incentives of the mass tort claimant with an advance funding loan with those of an ordinary personal injury claimant with such a loan. The latter claimant, who likely will have more control over the timing of settlement negotiations than any mass tort claimant, might be expected to "rush" to settle and to accept an offer that is potentially too low in order to stop the clock on the continued accrual of high interest. This is more than a little bit perverse, since one obvious function that the advance funding loans might serve is to level the playing field a bit between defendant and plaintiff, and to enable the claimant potentially to hold out for a better offer. *See, e.g.*, JONATHAN T. MOLOT, BURFORD CAPITAL LLC, THEORY AND PRACTICE IN LITIGATION RISK 2–4 (2013), *available at* http://www.burfordcapital.com/wp-content/uploads/2013/08/Booklet-Theory-and-Practice.pdf; Molot, *supra* note 46, at 93–95.

the settlement offers to the other claimants covered by the agreement.[54]

The availability of a claim-sale option would enable a claimant to receive her entire net settlement promptly, and would particularly benefit the subgroup of claimants that currently seeks advance funding loans to make ends meet while awaiting their settlement offer. Those clients would no longer effectively be spending a substantial portion of their eventual settlement on interest and financing fees. Of course, some law firms engaged in buying claims may themselves be taking out loans to finance that enterprise, and passing their own financing costs on to those whose claims they purchase. One would expect the law firm, however, to be able to borrow at a substantially lower interest rate than the effective interest rate of the typical claimant's advance funding loan, resulting in a net savings to the claimant relative to the current state of affairs.

A related benefit is that claimants will have more and better information about the present value of their claim. Currently, clients are able to receive some information from their attorneys regarding the potential value of their claims, and one would expect most attorneys to be cautious and conservative in the assessments they provide. At the same time, however, clients may be reading news reports of vastly larger verdicts in trials involving the same drug that is the basis for their own claims, while reports of the trials in which the defendant prevailed and the claimant received nothing are often less visible.[55]

54. *See, e.g.*, Vioxx Settlement Agreement, *supra* note 35, § 11.1, at 41–42 (providing that defendant Merck had the option to terminate the settlement agreement if fewer than a specified number of potential claimants did not enroll in the settlement program).

55. The public's understanding of the American civil justice system is especially poor with regard to jury verdicts, in part due to the inevitable biases in news reporting. A $253 million verdict in a case will make the front page of the *New York Times*. *See, e.g.*, Alex Berenson, *Jury Calls Merck Liable in Death of Man on Vioxx*, N.Y. TIMES, Aug. 20, 2005, at A1 [hereinafter Berenson, *Jury*]; *see also* Alex Berenson, *A Lawyer's Stock Rises With Victory Over Merck*, N.Y. TIMES, Aug. 22, 2005, at C1, while a take-nothing judgment for the defendant pharmaceutical company will receive little, if any, press coverage, and is almost never front-page news. *See* Lynn A. Baker & Charles Silver, *Introduction: Civil Justice Fact and Fiction*, 80 TEX. L. REV. 1537, 1540 (2002) (noting that "[l]arge jury awards receive more coverage than small awards and defense verdicts, even though the latter are far more common"); *see also* Daniel S. Bailis & Robert J. MacCoun, *Estimating Liability Risks with the Media as Your Guide: A Content Analysis of Media Coverage of Tort Litigation*, 20 LAW & HUM. BEHAV. 419 (1996).

In addition, a substantial portion of the public may not know or understand that a $253 million verdict does not mean that the plaintiff walked out of the courthouse with a check for that amount. (Even though the news report, as in the case of Lanier's Vioxx verdict, may well report that fact along with others aimed at explaining what, really, the verdict likely means for the plaintiff, many who read the report could be expected to remember the headline and not those much less interesting, "legalistic" details.) In fact, the prevailing plaintiff may need to wait several years while such a verdict is appealed, perhaps twice, to know whether she will receive

Such asymmetrical information, combined with the well-documented human tendency to consider one's self "above average" in comparison to one's peers regardless of the reality,[56] is likely to cause claimants in the current regime to have inflated expectations regarding their eventual settlement offer amounts.

Such unrealistic expectations regarding the value of one's claim will be more difficult to maintain in a world with a claim-sale option. Many claimants could be expected to sell their claim for the going rate, rendering moot the entire issue of expectations. And individuals who choose not to sell their claim and instead hire an attorney on a contingent fee basis to pursue the possibility of a larger net settlement offer would be doing so with a more accurate baseline of information regarding the likely value of their claim. The information generated by the claim-sale market should cause even these clients to be less disappointed in, and therefore more likely to accept, their eventual settlement offer. Further, while awaiting their settlement offer, these clients may be less likely to embark on financially damaging, overly optimistic shopping sprees spurred by unrealistic expectations regarding the size of their eventual settlement offer.[57]

Another benefit of a claim-sale option is that mass tort claimants will not have unrealistic expectations about having their "day in court." When selling her claim to an attorney, the claimant will necessarily confront the fact that she will be receiving compensation for her claims, but will not have an opportunity to tell her story to a jury. At present, only a very tiny number of mass tort cases are ever tried, which means that claimants, with rare exception, have no reason to

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anything at all for claims. And in at least some cases, the successful trial plaintiff may receive nothing after the appeals process is completed. *See, e.g.*, Alex Berenson, *Courts Reject Two Major Vioxx Verdicts*, N.Y. TIMES, May 30, 2008, at C2 (discussing decision of Texas state appeals court that reversed the $253 million Vioxx verdict (which had already been reduced to $26 million by a state law on punitive damages)).

56. *See, e.g.*, Lynn A. Baker & Robert E. Emery, *When Every Relationship Is Above Average: Perceptions and Expectations of Divorce at the Time of Marriage*, 17 LAW & HUM. BEHAV. 439 (1993) (empirical study of representativeness heuristic causing newlyweds to grossly underestimate the likelihood that their marriage might end in divorce).

57. Such shopping sprees sometimes cause mass tort claimants to throw additional good money after bad by suing their attorney for malpractice or breach of fiduciary duty. *See, e.g.*, Jacobs v. Tapscott, 516 F. Supp. 2d 639 (N.D. Tex. 2007) (breach of fiduciary duty lawsuit brought unsuccessfully against plaintiffs' law firm by family members of deceased asbestos claimant after settlement for $2.5 million was obtained for them by the law firm), *aff'd*, 277 Fed. App'x 483 (5th Cir. 2008). Not having received the settlement offer amount they were hoping for, and having already spent the hoped-for settlement funds, some disappointed claimants decide that their attorney did not represent them sufficiently well or that the attorney at some point lied to or misled them about the expected value of their claim. These claimants may then hire an attorney on an hourly rate basis to sue their mass tort attorney.

expect that they will have their day in court. But it is not clear how many claimants understand this when they retain an attorney to pursue their claims.[58] One might expect a claimant who cared at least as much about having a day in court as about any potential compensation to inquire about the likelihood of, and anticipated time frame for, a trial when choosing an attorney to pursue her claims. If most claimants (incorrectly) expect that their claims will eventually be tried, however, they may not feel it necessary to ask these questions.

There is a dearth of systematic empirical data on mass tort claimants' expectations and preferences regarding their day in court.[59] The little data that exist suggest that the nature and context of the claim may significantly affect a claimant's preferences in this area. Individuals with property damage claims, such as those arising out of the 2010 BP oil spill, might be expected to care primarily, even exclusively, about receiving fair financial compensation as expeditiously as possible. A day in court is unlikely to be of independent interest to such claimants, not least because the costs of a successful trial will ultimately be borne by the claimant.[60]

At the other end of the preference continuum might be individuals pursuing certain wrongful death claims on behalf of a deceased family member. As Gillian Hadfield's study of such claimants after the 9/11 tragedy revealed,[61] many claimants accepted settlements through the 9/11 Fund administered by Ken Feinberg, either because they "wanted

58. Mass tort retainer agreements typically include a wide range of details about the attorney-client relationship and the anticipated handling of the client's claim, most of which are required by state ethics rules to be included. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.5(c) (2013); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R 1.04(d) (2005). But the retainer agreements do not, in my experience, typically include any discussion of the likelihood that a client's case will be tried.

59. An especially noteworthy and valuable exception is Gillian Hadfield's empirical study of claimants in the 9/11 Victim Compensation Fund. *See* Gillian K. Hadfield, *Framing the Choice Between Cash and the Courthouse: Experiences with the 9/11 Victim Compensation Fund*, 42 LAW & SOC'Y REV. 645 (2008).

60. Even when represented on a contingent fee basis, a claimant will be responsible in the event of a recovery for reimbursing the litigation costs advanced by her attorney. Indeed, attorneys are currently prohibited by the ethics rules of every state from entering into any arrangement with a client that does not require the reimbursement of litigation costs from an eventual recovery. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(e) (prohibiting an attorney from "provid[ing] financial assistance to a client in connection with pending or contemplated litigation, except that . . . a lawyer may advance court costs and expenses of litigation, the repayment of which may be contingent on the outcome of the matter"); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(d) (same but also permitting attorneys to make contingent advances of "reasonably necessary medical and living expenses"). If a case is tried to a jury, these costs can be substantial and will commonly exceed $150,000 in cases involving any scientific or medical expertise.

61. Hadfield, *supra* note 59, at 665–66.

to put the matter behind them" or because pressing financial needs resulting from the loss of the family breadwinner left them no alternative.[62] But many of those who settled reported feeling "'discomfort, regret, shame, anger'—about not filing suits, which might have provided more information, accountability, and change."[63] Indeed, some of those who chose to file suit rather than accept compensation from the 9/11 Fund asserted that "the fear of losing in court was not a worry."[64] According to one claimant who lost her husband, "[i]t was never a risk to me because it was never about getting more money . . . . I wanted to know why and how this happened in this country . . . . If suing for money is how I have to do it then that's what I'm going to do."[65]

In between these two groups is likely the bulk of mass tort personal injury claimants. These individuals can be expected to need and want the financial compensation they believe they are owed for their injuries. Although the more personal and intimate nature of their injuries may cause them to be somewhat more interested than property damage claimants in having an opportunity in court to formally express their outrage against the defendant, one would still expect their primary focus to be on maximizing their net financial recovery. Because they are pursuing their own claim and not a claim on behalf of a deceased family member, they are not likely to feel that they are letting anyone else down if they take the money and forego the expensive option of using the litigation system to tell their story, uncover the truth, hold the defendant accountable, or effect larger social change.

Perhaps the most intriguing evidence in support of this view is the content of "spam" email advertisements soliciting mass tort personal injury claimants. During the two-month period of February 3, 2013 to April 4, 2013, I received forty-two such emails concerning potential personal injury claims resulting from a variety of pharmaceuticals and legal devices: Zoloft®, Paxil®, Depakote®, Effexor®, Prozac®, Topamax®, Celexa®, Lexapro®, GranuFlo® and NaturaLyte® dialysis devices, and mesh implants. Every one of these emails includes, and typically leads off with, some variant of "compensation available," "you may be entitled to compensation for your injuries!," "settle-

62. Benjamin Weiser, *Value of Suing Over 9/11 Deaths Is Still Unsettled*, N.Y. TIMES, Mar. 13, 2009, at A20.

63. *Id.*; *see also* Hadfield, *supra* note 59, at 670–73.

64. Weiser, *supra* note 62.

65. *Id.* (internal quotation marks omitted). Even this claimant ultimately settled, although outside the Fund. "But she said that the legal process became oppressive, and Ms. Roth, who has remarried, settled her lawsuit two years ago. 'I moved forward,' she said, confident that others would 'see this through to the end to get the answers we all deserve.'" *Id.*

ments," or "big settlements."[66] None of the emails made any reference to having one's day in court, pursuing one's claim in the courts, or litigating one's claim.[67] It is possible, of course, that the advertisements do not mention having one's day in court because the law firms involved know that few, if any clients, will receive one (and that trials are rarely cost effective for the median mass tort personal injury claimant in any case). Still, the direct and exclusive focus on compensation and settlements in these solicitations suggests that their authors believe that offers of money alone are attractive to a significant portion of the target groups.

It is a small step from law firm advertisements stating that "compensation" and "settlements" may be available for certain claims to law firm advertisements stating that "we buy claims" involving those same pharmaceuticals and medical devices. And the analysis above suggests that most potential claimants would view favorably the even more direct focus on compensation in solicitations that would be possible if a claim-sale option were available. The subset of claimants still interested in pursuing justice through litigation would continue to have that option. But even they might benefit from the availability of a claim-sale option that increased the amount of accurate information available to claimants about the small likelihood and substantial expense of having the desired day in court.

A final potential benefit of a claim-sale option is that more claimants with meritorious claims would receive compensation. At present, there are undoubtedly some individuals who do not pursue their claims for any of a number of plausible reasons: they may generally dislike or distrust lawyers; they may not understand that they can obtain contingent fee representation at no out-of-pocket cost; they may believe that they must be involved in a trial to receive any compensation and do not want to become entangled in "the legal system"; they

66. These emails are on file with the author. One email, received on January 14, 2013, led off with the enticing "Woman received $5 Million Settlement and Husband is awarded $500,000 in mesh recall case!" The email went on to ask: "Do you have a mesh implant used to treat Pelvic Organ Prolapse (POP) or Stress Urinary Incontinence (SUI)?" and noted that "You may be entitled to substantial financial compensation!" No further details were provided about the $5 Million settlement. *See* E-mail from Mesh Injury Comp. Ctr. to author (Jan. 14, 2013) (on file with author).

67. Some emails, however, did include the warning: "DON'T DELAY! THERE IS A LIMITED TIME TO FILE YOUR CLAIM!" *See, e.g.*, E-mail from ZoloftLawsuit to author (Dec. 4, 2012) (on file with author); E-mail from Mesh Injury Legal Ctr. to author (Dec. 14, 2012); E-mail from Mesh Injury Comp. Ctr. to author (Jan. 13, 2013) (on file with author); E-mail from Mesh Patch Recall Ctr. to author (Apr. 23, 2013); E-mail from Dialysis Injury Legal Ctr. to author (May 30, 2013) (on file with author); E-mail from Mirena Legal Injury Connect to author (June 17, 2013) (on file with author).

may think that in order to pursue their claims they must sue or "blame" their personal physician and do not want to do so; they may believe that "the legal system" is biased against individuals of their race, gender, ethnicity, religion, or social class and that they especially have no chance to prevail against a major corporation; or they may not be comfortable with the idea of suing anyone or any entity, including a corporation.[68]

In sum, there may currently be many individuals with meritorious mass tort personal injury claims who are entirely comfortable with the idea of receiving compensation for their injuries but who very much do *not* want to have their "day in court" or to otherwise be involved with a lawsuit or lawyers.[69] A claim-sale option would make it vastly more attractive for these individuals to seek fair compensation for their claims, thereby ensuring that that the maximum number of individuals with meritorious claims receive compensation.

B. Costs to Mass Tort Claimants of Lifting the Prohibitions on Complete Alienation

As set out above, there are many expected benefits to mass tort claimants of having the option to sell their entire claim to an attorney in addition to the current option of granting the attorney a substantial contingent fee interest in their claim. This subpart examines the expected, albeit few, costs to claimants of providing that option.

68. One major plaintiffs' firm states the following on its website: "Many times we've heard from our clients 'I'm not the type to file a lawsuit,' until they realize the full extent of the damage that the drug companies have caused." *See Why a Pharmaceutical Attorney?*, BLIZZARD & NABERS, http://www.blizzardlaw.com/why-pharmaceutical-attorney (last visited Mar. 17, 2014). This reluctance to sue may be especially prevalent among women and certain racial or cultural groups. *See, e.g.*, Michele Hoyman & Lamont Stallworth, *Suit Filing by Women: An Empirical Analysis*, 62 NOTRE DAME L. REV. 61, 81–82 (1986) (empirical study of 876 union members employed by the same public sector employer, which found that, with regard to employment discrimination claims, "blacks are exercising their rights (or at least they are filing at a greater rate than whites) but women are not"); *see also* David Marcus, *Some Realism About Mass Torts*, 75 U. CHI. L. REV. 1949, 1984–85 (2008) (book review) ("Whether the reason be conflict avoidance, indifference, or something else, most people eschew litigation even when they have potentially valuable claims.").

69. Some of these individuals may be analogous to those who are keen to buy a new car, but are mortified at the prospect of having to bargain with a salesperson in order to do so. The Saturn corporation, a self-described "new kind of car company," arose in 1990 and its innovative "no haggle" pricing was specifically designed to satisfy the sector of the automobile market uncomfortable with conflict or "haggling." *See* WILLIARD N. ANDER & NEIL Z. STERN, WINNING AT RETAIL: DEVELOPING A SUSTAINED MODEL FOR RETAIL SUCCESS 116–19 (2010); *see also* Peter Valdes-Dapena, *Saturn: Secrets of the 'No-Haggle' Price*, CNN MONEY (Sept. 9, 2006), http://money.cnn.com/2006/09/19/autos/debating_no-haggle/ (noting that "[f]ew people actually like the process of haggling for the best price on a new car," and "almost two-thirds of car shoppers in a recent survey said they would prefer to pay a single, set price").

The availability of a claim-sale option would simply provide mass tort personal injury claimants expanded choice when deciding whether and how to proceed with a potential claim. Claimants would still have the opportunity to retain an attorney on the traditional contingent fee basis and to litigate their claim in the tort system. A claimant keen to have her day in court would still be able to pursue that option and, as explained in the previous subpart, would likely have more complete information about the likelihood and potential financial and other costs of trying her claim to a jury.

The only significant concern for claimants under such a regime would be felt by some claimants who chose to retain an attorney on the traditional contingent fee basis. If they were represented by an attorney whose inventory of claims also included claims that the attorney had purchased outright, and in which the attorney therefore had a 100% interest rather than a 40% interest, the contingent fee claimants might fear that the attorney's allocation of any eventual settlement fund would be biased in favor of the claims that the attorney owned in their entirety.[70] It is possible that such a situation might never arise, however, because it may violate state equivalents of current ABA Model Rule 1.7, which prohibits an attorney from representing a client if "there is a significant risk that the representation . . . will be materially limited by the . . . personal interest of the lawyer."[71] A first-blush solution to this potential conflict and related claimant concerns, is to limit law firms to being either claim-purchase firms or contingent fee firms with regard to a particular mass tort.

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70. At present, a firm's "ownership interest" in its inventory is often "mixed" in a slightly less extreme way. For example, a firm may have a 40% fee interest in some cases but may only have a 20% fee interest in cases that it received on referral from another law firm and with which it has agreed to share fees. To date, the only significant remedy mandated for such situations has been that set out in ABA Comm. on Prof'l Ethics & Grievances, Formal Op. 06-438 (2006), which specified that disclosure of the various fee interests be made to all of the clients covered by the settlement agreement as a further elaboration of the disclosures currently required under ABA Model Rule 1.8(g) regulating "aggregate settlements."

71. MODEL RULES OF PROF'L CONDUCT R. 1.7(b) (2013); *see also, e.g.*, TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.06(b)(2) (2005). For purposes of my larger argument, I am assuring that state equivalents of other ABA Model Rules that my proposal would seem to violate, such as current Model Rule 1.8(i), which prohibits a lawyer from "acquir[ing] a proprietary interest in the cause of action or subject matter of litigation the lawyer is conducting for a client," MODEL RULES OF PROF'L CONDUCT R. 1.8(i), would be amended as appropriate to permit the proposal.

C. *Benefits to Mass Tort Attorneys of Lifting the Prohibitions on Complete Alienation*

If attorneys had the option to purchase an individual's mass tort personal injury claim in its entirety rather than contract to represent that person for a contingent fee interest in the claim, they would potentially realize numerous benefits. First, they would no longer need to fear unpredictable cuts to their contractual contingent fees imposed by courts as the larger litigation nears its end. Such *ex post* fee cuts are ordered with increasing frequency, particularly by federal MDL judges.[72] Among the many problems with such cuts is the uncertainty they create for plaintiffs' lawyers regarding their eventual fees and therefore the "correct" amount to invest in any given case or litigation. The likely result is that, over time, plaintiffs' lawyers will invest less in a new litigation, to the potential disadvantage of the relevant clients, in order to protect against the possibility that a court will later cut their contractual fees.

To be sure, a claim-sale option will not eliminate all uncertainty regarding the "correct" amount for an attorney to invest in a litigation. As under the current regime of contingent fees, attorneys who purchase claims will be left to negotiate a price for the release of those claims to the defendant, and that price will not be known in advance. A claim-sale option simply limits the plaintiffs' attorneys' uncertainty to the settlement amount, while eliminating the additional uncertainty presented by the possibility of a court-ordered fee cut. The result is less total uncertainty for the plaintiffs' lawyer and therefore a greater opportunity to invest the "correct" amount in any given litigation.

A second potential benefit to attorneys of a claim-purchase option is that their eventual settlement negotiations with the defendant may yield a finality "premium" that is not available under the current regime due to various ethical restrictions.[73] An attorney who owns the

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72. *See, e.g.*, *In re* Vioxx Prods. Liab. Litig., 650 F. Supp. 2d 549 (E.D. La. 2009) (affirming cap on plaintiffs' attorneys' fees at 32%); *In re* Guidant Corp. Implantable Defibrillators Prods. Liab. Litig., MDL No. 05-1708 (DWF/AJB), 2008 WL 682174 (D. Minn. Mar. 7, 2008) (capping plaintiffs' attorneys' fees at 20%, but giving attorneys the ability to petition for increasing cap to 33.33% if justified); *In re* Zyprexa Prods. Liab. Litig., 424 F. Supp. 2d 488 (E.D.N.Y. 2006) (capping plaintiffs' attorneys' fees at 35%, adjustable to a minimum of 30% and a maximum of 37.5%). Judges in product liability MDL cases are not alone in their interest in sua sponte regulation of plaintiffs' attorneys' fees. *See* Lynn A. Baker et al., *Setting Attorneys' Fees in Securities Class Actions: An Empirical Assessment*, 66 VAND. L. REV. 1677, 1682 (2013) (documenting sua sponte judicial cuts of plaintiffs' attorneys' fees in nearly 20% of cases brought under the PSLRA).

73. These ethical restrictions include the aggregate settlement rule, MODEL RULES OF PROF'L CONDUCT R. 1.8(g), as well as limitations on the lawyer's ability to practice law (in terms of both withdrawal from current cases and declining new cases going forward). *Id.* R. 5.6(b). For discus-

entire claim (and group of claims) will be able to assure the defendant that the settlement is final; there will be no need to present individual settlement offers to clients and seek their consent to the settlement.[74] There will be no instances of an individual client within a law firm's larger inventory declining to settle, holding out for a larger settlement offer, or insisting that the attorney take the case to trial—all of which are current possibilities that adversely affect the finality that the defendant prizes. A defendant is likely to pay more for the greater finality available under a claim-sale option. This in turn means that the entire plaintiff-side market for such claims will be better than under the current regime, redounding also to the benefit of the injured person who sells her claim to an attorney.[75]

Relatedly, the absence of a traditional client or attorney-client relationship means that attorneys need not worry about potential ethical violations or claims by clients that they have engaged in malpractice or have breached a fiduciary duty.[76] This should reduce the cost of (or need for) malpractice insurance, thereby reducing the plaintiffs' attorney's operating costs. (And one would expect some portion of this reduction in the attorneys' costs to be passed on to the injured person in the form of a (marginally) higher offer to purchase her claim.)

Finally, the availability of a claim-sale option would enable attorneys to solve a costly problem that they currently confront in certain situations.[77] Consider a hypothetical asbestos claimant who hired an attorney fifteen years ago who has been diligently pursuing defend-

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sion of the "finality premium" in mass tort litigation, see, for example, Silver & Baker, *supra* note 37, at 760–63; Howard M. Erichson & Benjamin C. Zipursky, *Consent Versus Closure*, 96 CORNELL L. REV. 265, 318–20 (2011); Samuel Issacharoff & D. Theodore Rave, *The BP Oil Spill Settlement and the Paradox of Public Litigation*, 74 LA. L. REV. 397, 412–18 (2014).

74. The aggregate settlement rule in every state requires that the settling clients give "informed consent, in a writing signed by the client" after disclosure by the plaintiff's lawyer of "the existence and nature of all the claims . . . involved and of the participation of each person in the settlement." *See* MODEL RULES OF PROF'L CONDUCT R. 1.8(g).

75. *See* Silver & Baker, *supra* note 37, at 760–63; *see also* Erichson & Zipursky, *supra* note 73, at 270–71; Issacharoff & Rave, *supra* note 73, at 412–18.

76. The ethical concerns affect defense counsel as well as plaintiffs' counsel. *See, e.g.*, MODEL CODE OF PROF'L CONDUCT R. 5.6 ("A lawyer shall not participate in *offering or making* . . . an agreement in which a restriction on the lawyer's right to practice is part of the settlement of a client controversy" (emphasis added)); *id.* R. 8.4 ("It is professional misconduct for a lawyer to . . . violate or attempt to violate the Rules of Professional conduct, knowingly assist or induce another to do so, or do so through the acts of another . . . ."). In the mass tort context, however, it is the plaintiffs' attorneys who historically have incurred the more significant and potentially costly burdens of any potential violation. *See* Burrow v. Arce, 997 S.W.2d 229, 240 (Tex. 1999) (holding that "a client need not prove actual damages in order to obtain forfeiture of an attorney's fee for the attorney's breach of fiduciary duty to the client").

77. In addition to the asbestos example explored at length below, there are analogous situations involving residual defendants in pharmaceutical and other mass tort cases.

ants and obtaining settlements on the client's behalf. At present, the claimant may have settled with the vast majority of defendants against which he has a viable claim, but may still have valid claims pending against, for instance, six additional defendants, all of whom are currently in bankruptcy. At various (and unpredictable) points in the future, the bankruptcy process may yield a relatively small settlement offer for the client from a given defendant. In some situations, the cost to the law firm of keeping the client's file open, as well as the processing costs of handling the paperwork and funds involved with the series of small settlements, may make the handling of such claims no longer cost effective for the law firm. The claimant also suffers because he ultimately bears the postage and other non-overhead costs that attend the settlement process, as well as the uncertainty of the timing and expected net amount of such settlements.

Under a claim-sale option, the law firm could simply purchase outright the client's residual claims against the defendants in bankruptcy.[78] The client would receive her remaining settlement funds promptly in a lump sum, and the law firm would be able to close the client's file. If all of the firm's asbestos clients sold their residual claims in this way, the firm would save all of the overhead and other costs that currently attend these open files and future small settlement offers. In effect, the firm would end up with a single client—itself—in future dealings with the bankrupt defendants regarding the firm's inventory of claims, with all of the attendant savings of transaction and other costs.[79]

78. Because the firm currently has a fiduciary relationship with the relevant clients, and the purchase by the firm of the clients claims would necessarily be a business transaction between the firm and the client, the firm would need to take various precautions mandated by state ethics rules, such as advising the clients to consult another attorney in deciding whether or not to accept the offer, ensuring that the price being offered for the claim is reasonable, and so on. *See, e.g.*, MODEL RULES OF PROF'L CONDUCT R. 1.8(a); TEX. DISCIPLINARY RULES OF PROF'L CONDUCT R. 1.08(a) (2005).

79. It is important to note that in the bankruptcy context the trial of a claimant's case is not an option. At the moment that the debtor files its bankruptcy petition, all actions and proceedings against the debtor are automatically stayed. 11 U.S.C. § 362(a) (2006); *see also* Troy A. McKenzie, *Toward a Bankruptcy Model for Nonclass Aggregate Litigation*, 87 N.Y.U. L. REV. 960, 1004 & n.165 (2012) (noting that the stay prevents the continued prosecution of a tort case against the debtor, and that none of the Bankruptcy Code's enumerated exceptions to the automatic stay are generally applicable in the mass tort context). Thus, any concerns about a claim-sale option's effects on the credibility of the claim purchaser's threat to take the case to trial are moot. *See infra* Part II.D.

D. Costs and Concerns for Mass Tort Attorneys of Lifting the Prohibitions on Complete Alienation

For mass tort attorneys, the availability of a claim-sale option may raise some concerns to go along with the various benefits discussed above. First, some sort of claim "registry" would need to be established to ensure that clients do not sell their cause of action to more than one law firm. Even under the current regime, a plaintiffs' attorney often learns when formalizing a group settlement with a defendant that some of the clients whom the attorney thought his firm represented had also retained another, unrelated firm.[80] Such double-retention instances are problematic under the current regime[81] and would be even more costly to attorneys under a claim-sale option. Given modern technology, a central claim registry (presumably based on Social Security numbers and available for both state and federal claims) should be relatively inexpensive to establish and maintain under the supervision of the federal judiciary, and would benefit both the claimants and law firms involved in claim sales.

Similarly, law firms interested in buying claims will need to undertake a higher level of due diligence than the standard contingent fee attorneys to ensure that the injured person seeking to sell a claim is the owner of the claim. In addition to checking the claim registry for notice of a prior sale, a firm contemplating a claim purchase will also want to confirm that the injured person is not currently (and has not previously been) involved in a bankruptcy proceeding that would make the claim part of the bankruptcy estate. If the bankruptcy estate, and not the injured person, currently "owns" the claim, the injured person has no claim to sell to a potential purchaser. Such due diligence regarding bankruptcies—which typically involves only a check of the online PACER database of bankruptcy filings—is a cost

80. The issue here should not be confused with a pre-agreed referral or fee-sharing situation which is typically initiated by the attorney with whom the client originally signs a contract. Rather, the issue is when the client simply signs retainer agreements with more than one law firm without any of the firms knowing that it is not the only firm that the client has retained in the matter. Because many mass tort cases are not filed prior to settlement, attorneys typically have no way to know about the double-retention until the defendant brings it to their attention when consummating a group settlement. Some plaintiffs' firms do include language in their retainer agreement in which the client affirms that she has not retained other counsel to pursue the same claim, but this language alone provides little deterrence in practice, whether due to client ignorance or intended cleverness.

81. Under the current, contingent fee regime, attorneys from all of the relevant firms must spend time determining (usually in consultation with the client) which firm (or firms) is or will be representing the client going forward; and the defendant typically will not finalize the relevant firm(s)' larger inventory settlement(s) until these issues are resolved, sometimes after significant delay.

that firms currently bear, but typically not until the defendant has made a settlement offer, and the plaintiffs' attorneys must obtain a signed release from whoever owns the injured person's claim. Thus, the availability of a claim-sale option will primarily alter the timing of this due diligence and will not significantly increase the costs to the law firm purchasing the claim.[82]

A second category of concern that mass tort attorneys might be expected to have about a claim-sale option is ensuring the participation of the injured person in any future legal proceedings. One might expect an injured person who has sold her entire claim to be unwilling to participate in the legal process with regard to that claim since she no longer has any financial interest in it. As other scholars have observed in the context of individual claims, this issue could potentially be handled through a contract between the injured person and the purchasing firm which obligates the injured person to participate as needed in any eventual legal proceedings.[83] In the alternative, the purchasing firm could withhold a portion of the monies due the injured person until she has fulfilled any participatory obligations or it is clear that there will not be any.[84] In the mass tort context, the problem is even less likely to arise, and when it does, these solutions should be no less effective.[85] As discussed above, only a minute percentage of cases in any mass tort will proceed through trial, and the selection of cases for trial is largely a matter regulated by the MDL court, with the joint cooperation of defense counsel and the Plaintiffs' Steering Committee (or its analogue).

A third concern for mass tort attorneys would be the effect of a claim-sale option on a defendant's willingness to resolve claims through settlement. To the extent that a claim-sale option reduces the credibility of a plaintiff's attorney's threat to take the defendant to trial, the defendant might be correspondingly reluctant to settle that attorney's inventory of claims (or be interested in settling only at substantially reduced claim values). As explained above, however, a

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82. Of course, the claim-sale option will result in many more such bankruptcy checks being conducted. Under the current regime, the bankruptcy status of a claim for which no settlement offer is received from the defendant typically is not researched.

83. *See, e.g.*, Abramowicz, *supra* note 3, at 751–52; Shukaitis, *supra* note 18, at 340 (noting that "such cooperation clauses are routinely found in standard insurance contracts, which raise the mirror problem with the defense of claims").

84. *See, e.g.*, Abramowicz, *supra* note 3, at 751–52; Shukaitis, *supra* note 18, at 340–41.

85. In addition, the experience in (and outside) the mass tort world with successfully trying wrongful death claims might suggest that it is entirely possible—if perhaps not preferable—to pursue claims on behalf of an absent party. The $253 million Vioxx verdict obtained by Mark Lanier in 2005 in a case involving a man who died in 2001 is perhaps the best known example. *See supra* note 54.

claim-sale option need not adversely affect—nor even change—the likelihood that a claim will be tried. In addition, many factors besides the threat of trial (or of a possible plaintiff's verdict) affect a defendant's interest in resolving claims through settlement. As long as mass tort claims are pending against a corporate defendant, its share price will likely be suppressed. Clearing the liability from the company's ledger is the best way to remove the cloud over its stock.[86] Historically, mass tort defendants have ultimately been willing to resolve pending claims via group settlements even while publicly professing that they "will never settle" and "will try every case,"[87] and even when the litigation to date has yielded no plaintiff victories and no reasonable expectation of any in the future.[88]

A final issue for plaintiffs' lawyers would be the out-of-pocket cost of buying entire claims. The current contingent fee regime requires a law firm to advance the costs of prosecuting a client's claim, as well as its human capital and the opportunity costs of its employees' and shareholders' time. But the actual cash outlay per claim is substantially less than would be required to purchase a client's claim. In addition, the contingent fee regime enables the firm to share with the mass tort client the various risks regarding the eventual value of the client's claim, including whether the larger litigation, including the underlying science critical to establishing legal causation, will proceed in a direction favorable to the plaintiffs. At present, neither the firm nor the client is "paid," if at all, until the claim is resolved with the defendant via settlement or trial. Purchasing an entire claim necessarily shifts all

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86. To take just one recent, notable example: The concern with the company's stock price, as well as with its larger relationship with U.S. governmental regulators, likely explains in significant part BP's eagerness to admit liability and establish the Gulf Coast Claims Facility after the 2010 Deepwater Horizon oil spill. *See* Kenneth R. Feinberg, Who Gets What: Fair Compensation After Tragedy and Financial Upheaval 129–31 (2012); *cf.* Alex Berenson, *Analysts See Merck Victory in Vioxx Deal*, N.Y. Times, Nov. 10, 2007, at A1 (noting that Merck stock rose 2.3% on news of the $4.85 billion nationwide Vioxx settlement "even as the broader stock market was sharply lower"); Berenson, *Jury*, *supra* note 55 (noting that Merck shares fell 7.7% after the verdict was announced).

87. This was Merck's public position in the Vioxx litigation prior to entering into a $4.85 billion nationwide settlement. *See supra* note 17.

88. In the Seroquel litigation, for example, the defendant AstraZeneca settled more than 28,000 claims nationwide despite winning two jury verdicts, prevailing on a motion for summary judgment in one bellwether case, and having no adverse trial results. *See* Jef Feeley, *AstraZenica Resolves Most Suits Relating to Seroquel Drug for $647 Million*, Bloomberg (July 28, 2011), http://www.bloomberg.com/news/2011-07-28/astrazeneca-resolves-almost-all-seroquel-suits-for-647-million.html; *see also* Leigh Kamping-Carder, *AstraZenica Puts 4K Seroquel Injury Claims to Bed*, Law360 (Aug. 4, 2010), http://www.law360.com/articles/185350/astrazeneca-puts-4k-seroquel-injury-claims-to-bed; Brendan Pierson, *AstraZeneca Win In Seroquel Bellwether Affirmed*, Law360 (Apr. 6, 2010), http://www.law360.com/articles/160186/astrazeneca-win-in-seroquel-bellwether-affirmed.

of the risk to the firm: the "client" receives the liquidated value of her claim immediately, while the firm continues to pursue a recovery from the defendant, the timing and amount of which remain uncertain. One would expect the amount paid by a firm for a claim to take into account those increased risks, but the firm's cash outlay prior to reaching a settlement with the defendant will in every case be significantly greater than under the current regime.

All of this suggests that if the current restrictions on complete alienation of mass tort personal injury claims were lifted, many (perhaps most) plaintiffs' firms would continue to conduct business as usual. They would continue to enter into traditional attorney-client relationships governed by contingent fee agreements and would forego the opportunity to buy a "client's" claim outright. But the possibility that most firms might not be able or willing, at least initially, to bear the financial risk and cash outlay that a claim-sale option entails is not a persuasive argument against providing that option. Many attorneys also do not charge for their services on a contingent fee basis, but that fact alone is not a persuasive argument against offering attorneys and their clients that choice. Moreover, as discussed above with regard to the asbestos bankruptcy claims, there will likely be occasions when a firm (and its clients) would eagerly take advantage of a claim-sale option, even if the firm in most instances preferred the traditional contingent fee attorney-client relationship. In sum, the analysis above suggests that the benefits to attorneys of a claim-sale option are likely to exceed any costs.

IV. Analyzing the Normative Arguments Against the Claim-Sale Option for Mass Tort Personal Injury Claims

Part III has shown that the benefits of a claim-sale option for claimants and attorneys are likely to outweigh any costs, and by a significant margin. In light of that analysis, it is worth critically examining the normative concerns that arguably underlie the constraints that currently preclude such sales or that have otherwise been discussed by scholars in this context.

A prominent argument against the alienability of claims, as embodied in traditional prohibitions against maintenance, champerty, and barratry, is a concern with promoting or "inciting" litigation, especially "frivolous" litigation. In the general mass tort context, however, there is typically very little litigation in terms of cases tried to a jury, although there may be many thousands of claims filed against the defendant in various courts. There is no reason to think that permitting claimants to sell their claim outright to an attorney would increase the number of cases tried to a jury, not least because most mass tort trials would presumably still take place within the bellwether regime of the MDL. The number of claims filed in courts might increase simply because more injured persons might come forth to sell their claims, but those filings would rarely represent a potential trial. Cases would presumably be filed either to avoid the running of a statute of limitations or because doing so would be necessary for the purchasing law firm to "record" or establish ownership of the claim. Further, one would expect purchasing law firms to be happy to use less costly alternatives to formally filing a claim, such as listing it on a tolling agreement or merely "registering" (rather than filing) it with the MDL court.[89]

There is also no reason to expect an increase in "frivolous litigation" under a regime with a claim-sale option.[90] As noted above, there are very few trials involving mass tort cases,[91] and mass torts involving claims of limited merit do not survive summary judgment.[92] Neither of these facts is likely to be affected by the addition of a claim-sale option. To be sure, within a given mass tort there are always weaker claims and stronger claims, but the incentives provided by the contingent fee make meritless claims unattractive investments for plaintiffs' lawyers. There would seem to be even less incentive for those lawyers to purchase frivolous claims outright since their own financial risk would typically be greater with no commensurate expected increase in return on the investment. Indeed, one might expect plaintiffs' attorneys under a claim-sale option to be especially likely to buy only strong claims for fear that they would not be able to recover their investment, let alone make a profit, when ultimately negotiating a settlement with the defendant.

Another type of normative concern with the alienability of claims focuses on the potential effects on the attorney-client relationship. Specifically, these concerns include: that acquiring a proprietary interest in the cause of action would interfere with the lawyer's capacity to exercise independent judgment in the representation; that if the lawyer has a proprietary interest in the cause of action, a dissatisfied client will have a difficult time discharging the lawyer; and that

89. A case "registration" system, albeit of a somewhat different sort, was part of the nationwide Vioxx settlement. *See* Vioxx Settlement Agreement, *supra* note 35, § 1.1, at 2–3.

90. For other discussions supporting this claim, see, for example, GARBER, *supra* note 10, at 31–32; Shukaitis, *supra* note 18, at 341–43; Jason Lyon, Comment: *Revolution in Progress: Third-Party Funding of American Litigation*, 58 UCLA L. REV. 571, 593–94 (2010). For discussions arguing against this claim, see, for example, BEISNER ET AL., *supra* note 2, at 5–7.

91. *See supra* note 17 (discussing Vioxx litigation).

92. *See supra* note 88 (discussing Seroquel litigation).

providing financial assistance to a client would give an attorney too great a financial stake in the litigation.[93] Under a claim-sale option, however, there would be no attorney-client relationship for claimants who chose to sell their claims. Thus, issues concerning the purchaser-lawyer's ability to exercise independent judgment or the client's ability to discharge the lawyer would never arise. Nor could the attorney properly be understood as providing "financial assistance" to a client in this context; rather the attorney is purchasing an individual's claim in an arm's length commercial transaction, and no attorney-client relationship in the traditional sense ever exists. In this regard, it is noteworthy that the absence of an attorney-client relationship for individuals who sell their claims will eliminate any concerns, embodied in state rules of legal ethics or elsewhere, regarding the attorney's loyalty to her client or agency problems more generally.[94]

In recent years, scholars have focused on another group of concerns regarding the alienability of claims. These include issues of "commodification," procedural justice, and the effects on the legal process.[95] Although others have provided useful analyses of these issues with regard to claim sales in general, they deserve a further look in the special context of mass tort personal injury claims. The commodification concerns related to the sale of legal claims embodies a notion that an individual's "personhood" is bound up in the claim and selling the claim is therefore analogous to, and attended by the same concerns as, selling one's bodily organs.[96] As others have noted, whatever force this concern might initially have had is largely lost in a world in which settlement is available and very few claims are ever tried.[97] As explained above, the typical mass tort claim is even less likely than other personal injury claims to proceed through trial. Moreover, the typical mass tort settlement currently involves the use by the plaintiffs' attorney of a formula or matrix of some sort to determine the appropriate settlement offer value for each claim included in the settlement. It would not seem that adding a claim-sale option to this regime would result in any further commodification. Indeed, under a claim-sale op-

93. *See, e.g.*, ABA WHITE PAPER, *supra* note 1, at 15–39; BEISNER ET AL., *supra* note 2, at 7–9; Abramowicz, *supra* note 3, at 717–22.

94. *See, e.g.*, Abramowicz, *supra* note 3, at 717–18.

95. *See, e.g.*, *id.* at 703–11, 722–726; Sebok, *supra* note 3, at 134–39; Shukaitis, *supra* note 18, at 344–46.

96. *See* Margaret Jane Radin, *Market-Inalienability*, 100 HARV. L. REV. 1849, 1855–59 (1987); *see also* Abramowicz, *supra* note 3, at 703–11.

97. *See, e.g.*, Abramowicz, *supra* note 3, at 726 ("Because most cases settle, the typical choice is between market resolution and settlement. There are good reasons to think that litigants will react better to alienating claims to third parties than they would to settlements.").

tion, a claimant is likely to have a greater ability than at present to negotiate an individualized value for her claim that more precisely reflects those aspects of her claim for which she desires compensation.

The procedural justice concerns that some scholars have raised have focused on the lower esteem in which some might view the entire justice system if claim sales were an option, as well as related concerns regarding the "dignitary" interests of claimants.[98] Unfortunately, there is limited empirical data regarding what "the public" actually understands or thinks of various aspects of the current civil justice system or what changes might cause the public to view the system in a better light. Nor has there been much systematic study of what mass tort claimants who have participated in the civil justice system have most appreciated or would most like to see changed. In the absence of such data, one can only speculate. It is possible, however, that mass tort claimants would embrace with enthusiasm—and consider more just—a system that gave them the option to completely liquidate their claim today for an amount determined within a competitive market, rather than waiting several years to receive an unpredictable settlement offer that they may have no real choice other than to accept. The public, too, might consider this an improvement over the current state of affairs.

Another issue raised by some scholars has been the effects of claim alienability on the legal process. The concern is that an injured person who has sold the entirety of her claim will not be willing to participate in the legal process with regard to that claim since she no longer has any financial interest in it. As discussed above, however, there are various ways to secure the participation of the claim seller in any future legal proceedings, and only a handful of cases in any mass tort are likely to proceed to trial in any event. Thus, a claim-sale option is not likely to pose any special threats to the integrity of the legal process.

V. Conclusion

This Article has embarked on a thought experiment: What would the likely effects on claimants and plaintiffs' attorneys be if an injured person had the option to sell her entire claim to a law firm rather than retaining the firm to represent her on a contingent fee basis? An analysis of the costs and benefits reveals that both groups would be expected to prefer such a regime to the current state of affairs. In

98. *See, e.g.*, *id.* at 722–26 (discussing these concerns raised by others and noting that the argument that a market for claims offends procedural justice "assumes that only trial-like procedures can produce feelings of procedural justice").

addition, none of the normative arguments against a claim-sale option that were explored were found to be persuasive in this context.

The implications of this analysis are significant. If, as this Article contends, there are no compelling normative or economic reasons to prohibit the sale of mass tort personal injury claims to attorneys, there may also be no compelling reasons to prohibit the sale of any type of claim to any interested purchaser or investor.

To be sure, various practical issues would need to be resolved before a claim-sale registry could become a reality, including the creation of a claim registry and the amending of various rules of legal ethics. And it is far from certain that a market for such claims would flourish even if the existing constraints on alienability were relaxed. Most clients and plaintiffs' firms might well continue to enter into traditional attorney-client relationships governed by standard contingent fee agreements. But that possibility is not a dispositive argument against offering attorneys and injured persons another choice.