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UNCERTAINTY AND THE ADVANTAGE OF COLLECTIVE SETTLEMENT

Howard M. Erichson*

INTRODUCTION

Judgments are printed in black and white; reality comes in shades of gray. The settlement palette available to negotiating parties, unlike the adjudication palette available to judges and juries, offers a range of grays to suit the realities of uncertain liability, uncertain causation, and uncertain damages. Settlement thus offers certain advantages over adjudication. I am not referring to process advantages, such as speed, economy, privacy, and relationship preservation. Rather, I am referring to the idea that settlements may offer outcomes that more accurately comport with justice under the relevant facts and law.

There is, of course, a long-running debate over whether settlement in general should be embraced or eschewed. Owen Fiss famously declared himself to be “against settlement,”¹ and more recently reaffirmed his view that “[t]he bargaining that normally takes place between litigants . . . has no connection to justice whatsoever.”² Others, meanwhile, have urged that settlement serves public and private values better than adjudication.³

In this Essay, I do not intend to engage that broader debate, although it will be no secret that in many cases I see significant benefits of settlement.⁴ Rather, this Essay explores a narrower question: When numerous claimants assert similar claims against a defendant, to what extent is justice particularly well served by collective settlement? Are there advantages of collective settlement that are unavailable

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through adjudication or through individual settlement? In particular, can collective settlement address the problem of uncertainty more satisfactorily than can adjudication or individual settlement?

Part II breaks down the problem of uncertainty into categories because on closer examination, the advantages of settlement depend on the types of uncertainty involved in a particular case. Looking at product liability litigation, one can identify at least six significant areas of potential uncertainty: (1) general causation, (2) liability, (3) exposure, (4) product identification, (5) individual causation, and (6) damages. Part III considers each of these six types of uncertainty in terms of the relative advantages of individual adjudication, collective adjudication, individual settlement, and collective settlement—the four basic ways in which mass litigation may be concluded. While collective settlement in any case offers advantages of compromise and efficiency, the justice advantages of collective settlement are most pronounced in cases involving uncertainty regarding product identification, damages, and above all, individual causation.

II. THE WIDGIUM LITIGATION: SIX CASES

This Essay explores the relationship between collective settlement and the problem of uncertainty. But I should not mention "the problem of uncertainty" as if it were a single problem. One must talk about problems of uncertainty in the plural. To explore the possible advantages of collective settlement in dealing with uncertainty, I will lay out six alternative stories, each reflecting a different type of uncertainty. With the problems of uncertainty sorted out—even if they tend to overlap—it will be easier to consider which types of uncertainty present distinct opportunities for serving justice through collective settlement as opposed to individual settlement, individual adjudication, or collective adjudication.

Consider the following hypothetical litigation: Widgetmaker, Inc. manufactures widgets. The company has been sued by thousands of consumers claiming that its widgets cause a particular type of cancer. The plaintiffs rely on a recent scientific study finding a link between cancer and exposure to widgium, a substance in the company’s widgets. Widgetmaker undoubtedly faces several types of claims, including medical monitoring and increased risk claims from exposure-only claimants, reduced value claims from consumers who purchased widgets, and securities claims from shareholders. For our purposes, how-

5. See infra notes 7–28 and accompanying text.
6. See infra notes 29–52 and accompanying text.
ever, we will focus only on the tort claims of the plaintiffs who have the particular type of cancer at issue and who assert that it was caused by widgium.

A. Case 1

The plaintiffs were exposed to widgium. The plaintiffs have cancer. The parties dispute whether widgium causes cancer. One epidemiological study suggests a link between widgium and cancer, but another study shows no statistically significant correlation. Although some scientists have offered explanations for how widgium might cause cancer, the causal link remains unclear. At their depositions, experts for the plaintiffs and the defendant offer competing testimony about whether widgium can cause cancer.

In Case 1, general causation is uncertain. For a non-fictional example of Case 1, consider the litigation against Merrell Dow concerning its anti-nausea drug Bendectin. In the Bendectin litigation, an early mass tort, the most important area of uncertainty was whether Bendectin caused birth defects. Indeed, Daubert v. Merrell Dow Pharmaceuticals, the leading case on admissibility of expert testimony, involved a challenge to the scientific basis for the plaintiffs' expert testimony in the Bendectin litigation. And in the Bendectin multidistrict litigation, Judge Carl Rubin trifurcated a mass Bendectin trial into phases so that the question of general scientific causation could be addressed first; the defendant prevailed on that question and was granted judgment as a matter of law. Case 1 also resembles the claims of systemic disease in the breast implant litigation, where a significant question was whether silicone gel breast implants caused auto immune disease and other systemic problems. Panels of scientific experts were appointed to examine this question by both Judge Sam Pointer in the federal multidistrict litigation and Judge Robert Jones

10. See In re Bendectin Litig., 857 F.2d 290, 296 (6th Cir. 1988).
in the District of Oregon.\textsuperscript{12} The parties negotiated a nationwide settlement class action in the shadow of this uncertainty.\textsuperscript{13}

\textbf{B. Case 2}

The plaintiffs were exposed to widgium. The plaintiffs have cancer. Widgium causes cancer, and the evidence is clear that it caused the cancer of at least some of the plaintiffs. It is unclear, however, whether any legal basis exists for holding Widgetmaker liable. Widgetmaker asserts that despite widgium’s potentially carcinogenic properties, widgets are not defective products or unreasonably dangerous. Widgetmaker asserts that the warnings on its packaging were adequate and that the company acted properly based on all the available information.

In Case 2, \textit{liability} is uncertain. Case 2 may be subdivided to distinguish factual uncertainty from legal uncertainty. In Case 2(a), the plaintiffs present some evidence that Widgetmaker may have withheld information about widgium’s carcinogenic properties, but Widgetmaker insists that it did not withhold information. The evidence is unclear about what Widgetmaker knew and when. In other words, Case 2(a) involves uncertainty about the \textit{facts} related to liability. In Case 2(b), Widgetmaker had information that it chose not to include in its warnings, but Widgetmaker asserts that any failure-to-warn claim is preempted by a federal agency’s approval of its widget warning. The plaintiffs argue that preemption does not apply in this setting. It is unclear how the court will rule on the preemption issue. In other words, Case 2(b) involves uncertainty about the \textit{law} related to liability. In Case 2(c), it is clear that Widgetmaker had information that it chose not to include in its warnings, and it is clear that the plaintiffs’ claims are not preempted by the federal agency approval. However, Widgetmaker argues that its warning was adequate under the common law standard, while the plaintiffs argue that Widgetmaker should be liable for failure to warn. In other words, Case 2(c) involves uncertainty about \textit{applying the facts to the law} on liability.

Case 2, in all of its permutations, resembles the tobacco litigation. In the early years, tobacco litigation also looked like Case 1 as manu-


facturers questioned the link between cigarettes and cancer.\textsuperscript{14} But even after it was beyond dispute that cigarettes cause cancer, the tobacco defendants continued to pursue defenses to liability, arguing that they did not withhold information (Case 2(a)), that claims were preempted (Case 2(b)), and that their conduct did not breach their legal duties (Case 2(c)).\textsuperscript{15} Case 2 also resembles the Agent Orange litigation, where the manufacturer defendants advanced several forceful arguments against liability, including the argument that if they had supplied the defoliant as requested by the military, the government-contractor defense protected them from liability to Vietnam veterans who were exposed to the chemical.\textsuperscript{16} The Agent Orange class action settled in the shadow of uncertainty about liability; indeed, Judge Jack Weinstein called on this uncertainty in convincing the plaintiffs that it was in their interest to settle.\textsuperscript{17}

\textbf{C. Case 3}

The plaintiffs have cancer. Widgium causes cancer. The plaintiffs allege that they were exposed to widgium, but Widgetmaker questions whether the plaintiffs were exposed to widgium at all. The plaintiffs have offered no proof of their exposure to widgium other than their own testimony.

In Case 3, \textit{exposure} is uncertain, creating uncertainty about individual causation. Case 3 resembles mass tort litigation concerning non-prescription products in which some of the plaintiffs who assert they were exposed to the product cannot produce labels, receipts, or other hard evidence of exposure.\textsuperscript{18} Even in pharmaceutical cases involving prescription drugs, questions of exposure arise. These are largely disputes about credibility. Case 3 also resembles the Woburn leukemia cluster litigation, in which one of the key issues was whether the chemical TCE had made its way from the defendants' facilities into

\begin{footnotesize}
\begin{enumerate}
\item See Michael Orey, \textit{Assuming the Risk: The Mavericks, the Lawyers, and the Whistle-Blowers Who Beat Big Tobacco} 36–37, 49 (1999) (quoting a 1986 interrogatory response by American Tobacco Company—"There is a scientific controversy regarding the relationship, if any, between cigarette smoking and health"—and noting its similarity to the tobacco companies' joint 1953 statement that "there is no proof that cigarette smoking is one of the causes" of lung cancer).
\item See Peter H. Schuck, \textit{Agent Orange on Trial: Mass Toxic Disasters in the Courts} 61 (1986).
\item See \textit{id.} at 159–63.
\item See Paul D. Rheingold, \textit{Litigating Mass Tort Cases} § 7.16 ("In the L-tryptophan cases, for example, considerable work was done to trace the product backward from the user to the retailer to the wholesaler to the manufacturer.").
\end{enumerate}
\end{footnotesize}
the plaintiffs' drinking water. In the Woburn litigation, the dispute over exposure was largely a question of geology rather than a question of plaintiff credibility. Like Case 3, however, it involved uncertainty about the plaintiffs' exposure to the product or substance at issue.

D. Case 4

The plaintiffs have cancer. Widgium causes cancer. The plaintiffs allege that they were exposed to widgium from Widgetmaker's widgets. The defendant does not necessarily contest the plaintiffs' exposure to widgium, but it questions whether the plaintiffs were exposed to widgium from Widgetmaker widgets rather than from some other source.

In Case 4, product identification is uncertain. Like Case 3, this case involves contested assertions of exposure that leave uncertainty about individual causation. Case 4 resembles much of the asbestos litigation, where even if the plaintiffs' exposure to asbestos was undisputed, it was often difficult for the plaintiffs to identify which company's asbestos-containing products they may have been exposed to. Case 4 also resembles the diethylstilbestrol (DES) litigation, where even if the plaintiffs knew that their mothers had taken DES, the fungibility of the product and the time lag between a mother's ingestion and the child's medical problems made it impossible for most of them to identify the manufacturer.

E. Case 5

The plaintiffs were exposed to widgium. The plaintiffs have cancer. Widgium causes cancer. As to each individual, however, it is disputed whether the individual's cancer was caused by widgium. The plaintiffs point to epidemiological and other evidence to support their claim that widgium caused their disease. But Widgetmaker points out that the plaintiffs' cancer is not uncommon in the general population and that it can be caused by factors unrelated to widgium. Experts for the plaintiffs and the defendant offer conflicting testimony concerning whether each plaintiff's disease was caused by widgium. It is a statistical certainty that widgium caused the cancer of at least some of the plaintiffs, but it is equally certain that some of the plaintiffs would

have gotten cancer even if they had not been exposed to widgium; the difficulty is knowing which of the plaintiffs fall into each group.

In Case 5, individual causation is uncertain. The question of individual medical causation has stood out as a key point of dispute in mass tort litigation. In the litigation concerning Merck's painkiller Vioxx, eighteen trials occurred before a nationwide settlement was reached; in those trials, the parties vigorously contested whether the plaintiffs' heart attacks and strokes were caused by Vioxx, and Merck directed attention to the plaintiffs' individual risk factors. Similarly, a major question in litigation over the hormone replacement therapy Prempro was whether each plaintiff's breast cancer was caused by Prempro. Indeed, if one surveys the major mass torts—asbestos, tobacco, fen-phen, and so on—it is difficult to find any in which individual causation does not loom large. Questions about individual causation are a primary reason why mass tort personal injury and wrongful death cases rarely meet the predominance requirement of Rule 23(b)(3) for class certification.

F. Case 6

The plaintiffs were exposed to widgium. The plaintiffs have cancer. Widgium caused the plaintiffs' cancer. There is a basis for holding Widgetmaker liable. The extent of each plaintiff's harm, however, is disputed. Some of the plaintiffs claim significant lost income based on optimistic career projections. Other plaintiffs claim future medical expenses based on pessimistic medical plans, optimistic life expectancies, or both. The defendant disputes the extent of the plaintiffs' claimed damages for pain and suffering, and so on.

In Case 6, the amount of damages is uncertain. To name mass torts that involve this sort of uncertainty would be a bit silly; Case 6 resembles virtually every lawsuit ever filed. With minor exceptions such as debt claims and claims for statutory damages or liquidated damages, damages nearly always involve substantial uncertainty. Especially in the realm of personal injury and wrongful death claims, it is impossible to imagine a case free from uncertainty about damages. As Alexandra Lahav puts it, "All tort damages are rough justice." Non-economic damages, such as compensation for pain and suffering, obvi-

ously require subjective evaluation and leave significant room for argument. Economic damages, too, require subjective judgments and predictions, and there is evidence that jurors tend to consider damages holistically.

If subjectivity and uncertainty are unavoidable when calculating compensatory damages, they are equally unavoidable and even more prominent when calculating punitive damages. Constitutional constraints create an upper limit on the amount of punitive damages, but those constraints do not eliminate the inherent subjectivity of the determination. Punitive damages, therefore, inject a substantial dose of uncertainty into any case that presents a serious possibility that such damages will be awarded.

III. SETTLING THE WIDGIUM LITIGATION

Let's break down the possible outcomes of mass litigation along two lines: adjudication versus settlement and individual versus collective. This yields four basic possibilities as to how the litigation might be concluded. First, each claimant's case may be resolved by individual adjudication. By individual trials or by pretrial rulings such as summary judgment, courts may determine the outcome for each plaintiff. Second, the claims may be resolved by collective adjudication. The archetypical collective adjudication would be a class action verdict, but collective adjudications may be achieved as well by other aggregation mechanisms such as joinder and consolidation as well as through bankruptcy. Third, each claim may be resolved by individual settlement, negotiated by the defendant as to each plaintiff. Fourth, and by far the most likely scenario, the claims may be resolved by collective settlement. Collective settlements come in various procedural forms. For purposes of this Essay, collective settlements include class settlements, non-class aggregate settlements, and collective negotiated resolutions in bankruptcy.

Looking at the six versions of the Widgium story laid out above—each of which involves a different aspect of uncertainty—what conclusions can we reach about the relative strengths of individual adjudication, collective adjudication, individual settlement, and collective settlement in each situation? In particular, which of the stories and

25. See id. at 4.
26. Id. at 5.
variations suggest that collective settlements offer advantages for advancing justice in the face of uncertainty? I suggest that the advantage of collective settlement is most pronounced in three of the scenarios: Case 4 (uncertainty about product identification), Case 5 (uncertainty about individual medical causation), and Case 6 (uncertainty about damages). In each of those cases, as I will explain, collective settlement offers special opportunities to create just outcomes in the face of uncertainty.

In the other three scenarios—Case 1 (uncertainty about general causation), Case 2 (uncertainty about liability), and Case 3 (uncertainty about exposure)—the advantage of collective settlement is less clear. This is not to say that parties would not or should not settle in these scenarios, or that they would not or should not settle collectively. Collective settlements in the face of these sorts of uncertainty may advance goals of efficiency and finality and may well serve the parties’ objectives given the risks they face in the litigation.29 But whereas Cases 1, 2, and 3 may result in sound collective settlements as a matter of compromise and expediency, Cases 4, 5, and 6 present distinct opportunities to achieve greater justice through settlement than could be accomplished through either adjudication or individual settlement. Above all, as I shall explain, certain instances of Case 5 offer ideal opportunities for using collective settlement to reach sound resolutions.

A. Case 1

Of the six scenarios, Case 1 presents the weakest justice-based case for settlement. When general causation is uncertain, settlement may disserve justice. If widgium in fact does not cause cancer, the tort justifications for extracting compensation from Widgetmaker are nonexistent. This is not to say that compensating persons with cancer would serve no purpose, but only to say that if Widgetmaker bears no responsibility, then no purpose would be served by taking that compensation from Widgetmaker as opposed to taking it from a social insurance scheme that spreads risk generally.

Of course, parties often choose to settle in the face of uncertainty about causation. If the claims stand a significant chance of failure, rational plaintiffs may decide to accept whatever they can get. Defendants may find it cheaper to settle than to fight general causation,

at least if the plaintiffs' experts survive a Daubert challenge. Risk aversion comes naturally to defendants facing mass litigation.\textsuperscript{30} But it is one thing to say that settlement in the face of uncertain general causation serves the interests of the parties and another thing to say that it serves the interest of justice. Situations like Case 1 give the strongest resonance to Fiss's contention that "settlement is a capitulation to the conditions of mass society" rather than a determination of a just outcome.\textsuperscript{31}

In the face of uncertainty about general causation, settlement may be a sensible outcome, but its justification is one of necessity and compromise. We would not say that settlement does justice better than a determination of whether widgium causes cancer. We might say, however, that we lack confidence in our litigation system to reach a reliable determination of whether widgium causes cancer\textsuperscript{32} and that settlement is justified in the face of the uncertainty created by an imperfect system of adjudication.

\textbf{B. Case 2}

Both Case 1 and Case 2 involve uncertainty about whether Widgetmaker bears any liability for the plaintiffs' cancer. To a large extent, therefore, the same arguments apply to Case 2. If, in fact, Widgetmaker has done nothing to subject itself to liability under the applicable legal norms, then arguably justice is disserved by any outcome that extracts compensation from Widgetmaker.

Case 2 differs from Case 1, however, in that it is clear that Widgetmaker's product caused injury. On strict liability theories of cost-internalization, risk-spreading, and non-reciprocal risks, at least some justifications exist for imposing costs on Widgetmaker to compensate the plaintiffs. Moreover, even if uncertainty exists concerning the ultimate question of a defendant's liability, there may be evidence of wrongdoing on the defendant's part.

Judge Weinstein, who oversaw the Agent Orange litigation, has called that litigation an example of a case in which settlement was "essential" to a just disposition of the case.\textsuperscript{33} Significantly, he viewed it as a case in which the defendants had acted wrongfully, notwith-


\textsuperscript{31} Fiss, \textit{supra} note 1, at 1075.

\textsuperscript{32} See \textit{GREEN}, \textit{supra} note 7, at 328 ("[I]t seems reasonably clear that no plaintiff should be able to satisfy the burden of proof on causation in a Bendectin case. Yet, approximately 40 percent of all juries found for plaintiffs.").

standing his doubts about whether liability could be imposed through adjudication:

Litigation would likely have resulted in the rejection of veterans’ claims based on the lack of scientific support as well as the manufacturers’ government contractor and war powers defense.

Nevertheless, it was apparent that there had been some negligence in the production of Agent Orange and other herbicides. Excessive amounts of dioxin, a carcinogen, had been negligently incorporated in the herbicides supplied to the government. An appropriate resolution could only be achieved through settlement.

Judge Weinstein saw the Agent Orange litigation as a case of uncertain liability and causation. He anticipated that without a settlement, adjudication would result in zero liability—indeed, he later granted summary judgment for the defendants against the plaintiffs who had opted out of the class action. But he pushed the settlement as the only way to achieve “an appropriate resolution.”

Judge Weinstein evidently considered the class settlement a more “appropriate” resolution than a defense judgment, even though he considered himself bound to issue such a judgment as a matter of law against the plaintiffs who did not participate in the settlement. Whether others would agree surely depends on the extent to which they define justice in terms of the parameters of applicable law or in broader terms.

C. Case 3

When there is uncertainty about a plaintiff’s exposure to Widgetmaker’s product, does settlement achieve justice? The answer may depend on whether the uncertainty flows from doubts about exposure to any widgium or doubts about product identification. In other words, we must consider Case 3 (uncertainty about whether the plaintiff was exposed to widgium) separately from Case 4 (uncertainty about whether the plaintiff was exposed to Widgetmaker’s widgium).

If a plaintiff was not, in fact, exposed to widgium, it is difficult to see any justification for extracting money from Widgetmaker to compensate that plaintiff. If a plaintiff’s allegation of exposure is a misrepresentation or a mistake, the policies of tort law are not served by a settlement in which Widgetmaker compensates the plaintiff. In this regard, the analysis of Case 3 follows the analysis of Case 1 (uncertainty as to general causation). As in Case 1, settlement may be justi-

34. Id. at 1268–69.
36. Weinstein, supra note 33, at 1269.
fied, but the justification is one of compromise in the face of an imperfect system of adjudicatory fact-finding.

D. Case 4

The story looks quite different when uncertainty about exposure follows from the difficulty of identifying the correct manufacturer of a fungible product, as happened in much of the asbestos litigation and DES litigation. In an individual lawsuit there may be no significant difference between Case 3 and Case 4, but in a mass dispute they play out differently.

Uncertainty about product identification presents a good opportunity for justice through collective settlement. If widgium causes cancer and a basis exists for holding widget manufacturers liable, but the fungibility of the products renders it difficult to connect the dots between specific plaintiffs and defendants, then justice may come more easily by collective settlement than by either adjudication or individual settlement. In the absence of a market-share liability rule or comparable alteration of standard tort causation requirements,37 adjudication would result in denial of liability for many plaintiffs. Yet it may be clear that each of the plaintiffs was harmed by exposure to widgium, and it may be equally clear, as a statistical matter, that Widgetmaker's widgets caused harm to a portion of the plaintiffs. If a collective settlement can be negotiated that includes a critical mass of plaintiffs and a critical mass of defendants, such a settlement can direct compensation to the plaintiffs and direct liability to the defendants in amounts that approximately reflect the extent to which each defendant's products caused harm to the plaintiffs as a group.

The question, then, is whether such a collective settlement is likely to materialize. With a market-share liability rule in effect,38 such a settlement may be possible, although collective action problems could interfere as multiple defendants jockey for position. But if standard tort requirements apply, each defendant may conclude that each plaintiff would have little chance of success at trial, and thus it may be unlikely that the defendants would agree to a settlement of Case 4 on terms that reflect each defendant's actual responsibility for the harm. On the other hand, if each plaintiff might be able to establish expo-

sure to the defendant’s product, then a satisfying collective settlement might become a possibility.

E. Case 5

This is the case of the indeterminate plaintiff. Kenneth Abraham describes this as “the class of cases in which an identified defendant has caused injury, but it is not possible to prove which individuals the defendant has injured.” This case offers significant potential for doing justice by collective settlement, but this advantage is likely to come to fruition only in cases that display a particular version of causation uncertainty.

Suppose widgium from Widgetmaker’s products caused the cancer of 30% of the plaintiffs, and the probability is spread evenly among the plaintiffs. That is, suppose each plaintiff can establish a 30% likelihood that widgium caused the plaintiff’s cancer. In this scenario, the defendant is likely to prevail against each and every plaintiff. The end result in the under-50% indeterminate-plaintiff scenario is undercompensation and underdeterrence. But it makes little difference, in terms of the substantive outcome, whether the case ends in individual adjudications, collective adjudication, individual settlements, or collective settlement. The defendant may pay nuisance value to settle the claims, but as long as the plaintiffs must prove individual causation by a preponderance of the evidence, a defendant is unlikely to offer substantial compensation to settle claims in this scenario.

Suppose instead that widgium caused the cancer of 70% of the plaintiffs, and the probability is spread evenly among the plaintiffs. That is, suppose each plaintiff can establish a 70% likelihood that widgium caused his cancer. Now, instead of the defendant prevailing against every plaintiff, every plaintiff is likely to prevail. Under the conventional approach to causation, each plaintiff in this scenario establishes but-for causation by a preponderance of the evidence; therefore, the defendant is liable to each plaintiff to the full extent of the

40. Professor Abraham explains the underdeterrence problem when the evidence shows only a 30% likelihood that each plaintiff’s cancer was caused by the defendant’s product:
In that scenario the defendant is less probably than not a but-for cause of any given plaintiff’s harm. The manufacturer therefore knows in advance that under the conventional approach to causation it will never be held liable for any of the harm that its product causes. The conventional approach therefore cannot create its normal incentive effect in this situation, because the defendant does not face the prospect of “too much” liability in some cases and “too little” in others. Instead there is always too little liability (i.e., none) threatened.
Id. at 116–17.
plaintiff's damages.\footnote{41} The end result in the over-50% indeterminate-plaintiff scenario is excessive liability. Again, it makes little difference for these purposes whether the case ends in individual adjudications, collective adjudication, individual settlements, or collective settlement. Collective settlement may offer efficiency advantages, but it does not solve the problem of overliability. As long as the parties are bargaining in the shadow of the law,\footnote{42} and as long as the law offers full damages upon proof by a preponderance of the evidence, this scenario ends in overpayment.

In theory, the problems of underdeterrence and overdeterrence in indeterminate-plaintiff cases could be addressed by reforming substantive tort law to permit proportional liability. If the substantive law were changed to permit proportionate damages, collective adjudication would hold substantial appeal for resolving mass litigation involving indeterminate plaintiffs.\footnote{43} Proportional liability in Case 5 would be akin to market-share liability in Case 4. Professor Abraham describes the idea of using proportional liability in the over-50% indeterminate-plaintiff scenario as radical to the point of infeasibility:

If proportional liability is designed to remedy underdeterrence, then why not also use it to remedy overdeterrence? The answer, of course, is that adopting this approach would require so radical a shift in the way causation is determined and damages are calculated that no one even imagines that we would do this across-the-board. For both reasons, I think, there has been no real move to adopt proportional liability in cases involving the indeterminate plaintiff.\footnote{44}

But actually, there has been something of a move to adopt proportional liability in cases involving indeterminate plaintiffs—not by adjudication, but by settlement. Let's call it proportional collective settlement. The Vioxx settlement, for example, resolved approximately 50,000 claims of plaintiffs who asserted that their heart attacks and strokes were caused by Merck's painkiller.\footnote{45} In a number of trials, the plaintiffs had presented strong evidence that Vioxx caused heart attacks and strokes, but due to the commonness of heart attacks and strokes and the existence of other risk factors, no plaintiff could

\footnote{41. Depending upon whether the jurisdiction permits proof of causation by statistical evidence alone, this result may turn on whether each plaintiff supplements statistical evidence with individualized forms of proof.}
\footnote{44. ABRAHAM, supra note 39, at 117.}
be certain of prevailing on individual causation. Nor could Merck be confident that it would prevail, as a number of plaintiffs won jury verdicts. In the face of uncertainty in each plaintiff's case about whether that plaintiff could establish causation, both sides saw a substantial benefit in negotiating a settlement that reduced the risk for both sides.

Therein lies the key to the advantage of collective settlement in cases of uncertain individual causation. For a collective settlement to achieve justice by extracting compensation from a defendant in proportion to the likelihood that the defendant caused the plaintiff's harm, both sides must face a risk.

Returning to the widgium litigation, suppose the situation is not that each plaintiff can establish a 30% likelihood of causation (in which case Widgetmaker is unlikely to settle for any amount beyond nuisance value), but rather that each plaintiff has a 30% likelihood of prevailing on the question of causation. If Widgetmaker knows that each plaintiff has a 30% chance of prevailing, then it might rationally negotiate a settlement for something along the lines of 30% of damages. Alternatively, suppose the situation is not that each plaintiff can establish a 70% likelihood of causation (in which case the plaintiffs are unlikely to settle for much less than full compensation), but rather that each plaintiff has a 70% likelihood of prevailing on the question of causation. If Widgetmaker knows that each plaintiff has a 70% chance of prevailing, then a settlement in the 70% range seems plausible. Either way—whether the likelihood of each plaintiff's prevailing is 30%, 70%, or anything else between 0 and 100—a proportional collective settlement is possible and holds the promise of imposing costs on the defendant reflective of the harm the defendant caused.

Neither individual adjudications nor collective adjudication can provide as satisfactory a result in this scenario. From the perspective of deterrence, individual adjudications could impose an appropriate level of cost on the defendant. If each plaintiff has a 30% chance of prevailing, then in individual adjudications Widgetmaker would be required to pay full compensation to approximately 30% of the plaintiffs. Similarly, if each plaintiff has a 70% chance of prevailing, then individual adjudications would impose liability on Widgetmaker.

46. See Erichson & Zipursky, supra note 22, at 116.
47. See id.
48. To be clear, I am not suggesting that a series of individual trials would be a sensible way to resolve the entire widgium litigation. Rather, the point of this exercise is to explore the potential advantages of collective settlement relative to the outcome that would be had if each widgium claim were to be individually adjudicated.
totaling approximately 70%. Assuming the 30% or 70% odds reflect approximately the percentage of the plaintiffs whose disease was caused by widgium, the overall imposition of liability on Widgetmaker should be in keeping with the harm its product caused. Thus, individual adjudications would not present a problem of either over- or underdeterrence. The problem would be compensation. Rather than compensating each plaintiff in proportion to the likelihood that widgium caused the plaintiff to get cancer, individual adjudications would give full damages to some plaintiffs and zero damages to others.

Collective adjudication presents a different problem. It presents the risk of a single all-or-nothing judgment to govern the widgium class or the group of joined widgium plaintiffs, with the possibility of no liability and the possibility of full liability, neither of which would accurately reflect the extent of harm imposed by Widgetmaker. It is unlikely, however, that a case fitting the description of Case 5 would result in a collective adjudication, because courts are reluctant to certify class actions or to order joint trials when individual causation is a major issue.

In sum, Case 5 presents a golden opportunity for achieving a just outcome by collective settlement, but only in the Vioxx-like scenario where each plaintiff has a chance of prevailing and where the likelihood of each plaintiff’s success reflects approximately the likelihood that the defendant caused the plaintiff’s harm. Perhaps the best way to describe the scenario is that neither the plaintiff nor the defendant could win a summary judgment motion on the question of causation; a reasonable jury could but need not find by a preponderance of the evidence that the defendant caused the plaintiff’s harm.

F. Case 6

When liability and causation are clear and the only question is the amount of damages, one might think that individual adjudications or individual settlements would be the most sensible route for providing each plaintiff with appropriate compensation. But there are strong arguments that collective approaches may result in more accurate in-

49. See Abraham, supra note 39, at 116.

[T]he aims of deterrence are perfectly well served in ordinary cases by threatening the same defendants with liability for 100 percent of the plaintiff’s damages in some cases and no liability in others, even when in each case there is only a probability of causation, higher than 50 percent when there is liability and lower than 50 percent when there is not . . . . In the long run pretty much the right amount of liability probably is threatened and imposed by this all-or-nothing approach in ordinary cases.

50. See Stier, supra note 27, at 1044.
individual compensation. As Michael Saks and Peter David Blanck have argued, a collective approach to damages improves consistency and arguably improves accuracy.\(^5\) Treating damages in the aggregate reduces some of the variability in individual verdicts attributable to different juries, lawyers, judges, and other non-merits factors. Alexandra Lahav takes the point a step further. She asserts that tort damages, by their very nature, are comparative: “Our system measures the acceptability of tort damages by establishing a going rate through a comparison of outcomes of similar cases.”\(^5\) In her view, collective resolution—whether by adjudication or settlement—offers superior justice because just outcomes may be defined only by reference to the outcomes received by comparable claimants.

Punitive damages especially lend themselves to collective resolution in mass disputes. Individual adjudications of punitive damages raise the specter of windfalls to some plaintiffs and nothing to other plaintiffs, despite their having suffered harm due to the same conduct by the defendant. It is harder to analyze the benefits of individual or collective settlements for handling uncertainty about punitive damages, as defendants often insist that they are unwilling to settle claims for punitive damages. But if Widgetmaker faces a realistic risk of punitive damages, it is reasonable to assume that the risk of punitive damages factors into Widgetmaker’s evaluation of its settlement position in the widgium litigation. The benefit of collective adjudication in spreading punitive damages proportionally among the plaintiffs applies equally to collective settlement.

IV. Conclusion

Settlements proceed in the face of uncertainty; indeed, uncertainty can be a prime driver of settlements. Adjudications, too, proceed in the face of uncertainty. In cases involving multiple claimants with related claims, settlements and adjudications can be handled individually or collectively. This Essay has explored the benefits of collective settlements in the face of various types of uncertainty that arise in tort litigation.

Certain types of uncertainty do not suggest any special advantage for collective settlements. When general causation, liability, or exposure is uncertain, settlement may disserve justice. These types of uncertainty go to the core question of whether the defendant bears any

\(^5\) Lahav, supra note 24, at 35.
responsibility for the plaintiffs’ harms. Settlements go forward in these scenarios as a matter of expediency and risk-aversion and may be justified on those grounds.

Other types of uncertainty, however, create scenarios in which collective settlements offer special advantages for achieving just outcomes. In the face of uncertainty about product identification, a collective settlement could bridge gaps between multiple plaintiffs and multiple defendants, but such a settlement may be unlikely in the absence of market-share liability or related doctrines.

When parties face uncertainty about individual causation, a collective settlement may offer an excellent opportunity for an outcome that reflects proportional liability, even in the absence of a proportional liability rule of tort law. However, collective settlement offers this advantage only when the uncertainty relates to the likelihood that each plaintiff will prevail on causation. If causation is uncertain but it is clear that each plaintiff can or cannot meet the preponderance standard, then collective settlement would reflect the same overliability or underliability that would result from individual or collective adjudication.

When liability and causation are clear but the amount of damages is uncertain, collective resolution—whether by adjudication or settlement—offers the benefit of reducing variability and possibly providing greater accuracy. Particularly with regard to punitive damages, collective resolution can serve the important function of reducing variable results among similarly situated claimants.

In the end, one scenario—uncertainty about each plaintiff’s ability to prevail on individual causation—presents the most promising opportunity for using collective settlement to accomplish just outcomes that could not be achieved any other way. Moreover, among mass disputes involving uncertain individual causation, it is possible to identify those disputes that present the most realistic opportunity for collective settlements to enhance the justice of outcomes.

One weakness in my analysis is that I have left “justice” largely undefined, relying instead on a relatively loose conception that to some extent equates justice with the imposition of liability according to prevailing legal norms, and to some extent equates justice with compensation in proportion to the likelihood that a particular plaintiff’s harm was caused by the defendant. This may be an inadequate definition of justice. And to the extent this implicit definition honors prevailing legal norms on liability but nonetheless favors proportional compensation in dealing with indeterminate plaintiffs, it may be internally incoherent as well. But whatever definition of justice one chooses to
apply when thinking about mass dispute resolution, it is worth asking whether collective settlement offers advantages for achieving just outcomes so defined. On that front, I hope the analytical structure advanced in this Essay—breaking down the types of uncertainty and considering how each plays out in the four basic types of outcomes—proves useful.