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Our litigation system is broken. Scholars have long warned that professional litigants, such as debt-collecting firms, insurance companies, and commercial landlords, enjoy immense and unfair advantages over private individuals. What has gone unnoticed is professional litigants' ability to manipulate their litigatory position—that is, to choose whether they will litigate as plaintiffs or defendants. Extant literature assumes that the parties' litigatory positions are determined by the substance of the dispute: the party seeking a remedy is the plaintiff, and the party objecting to the award of a remedy is the defendant. We show that, in reality, professional litigants have both the incentive and the ability to switch between positions at will, assuming whichever litigatory role best serves their interests under given circumstances. These litigants essentially choose which side of the "v." they prefer to be on. This choice allows professional litigants to reshape litigatory interactions, secure easy victories against private individuals, and hinder the fair and equal adjudication of disputes.

Based on this observation, this Article makes three novel and important contributions. First, it reconceptualizes our understanding of the litigatory landscape. The Article challenges the existing understanding of the litigation system by deconstructing the traditional plaintiff-defendant dichotomy and highlighting the malleability of the litigatory setting. Second, it draws attention to the implications of professional litigants' manipulation tactics. Finally, it proposes legal reforms designed to balance the scales and update the institutions of litigation to the current reality, in which most legal disputes occur between private individuals on one side and professional adversaries on the other.

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INTRODUCTION

The litigation system has become starkly imbalanced.[1] Private individuals find it increasingly difficult to assert their rights against professional corporate adversaries.[2] Commercial repeat litigants,[3] such as debt-collecting firms,[4] banks,[5] copyright trolls,[6] and insurance companies,[7] enjoy immense advantages over individual, private onetime litigants.[8]

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1. *See* Deborah L. Rhode, *Access to Justice: A Roadmap for Reform*, 151 FORDHAM URB. L.J. 1227, 1228 (2014) ("Millions of Americans lack any access to justice, let alone equal access. Over four-fifths of the poor's legal needs and two- to three-fifths of the legal needs of middle-income Americans remain unmet."). On the significance of power balance in litigation, see William B. Rubenstein, *The Concept of Equality in Civil Procedure*, 23 CARDOZO L. REV. 1865, 1874 (2002) (noting that in adversarial adjudication, equal participation is "important . . . because it is thought to contribute to accurate and acceptable dispute resolution").

2. *See* Rhode, *supra* note 1, at 1228–40 (describing various financial, structural, doctrinal, and political barriers in the American legal system); Gideon Parchomovsky & Alex Stein, *Empowering Individual Plaintiffs*, 102 CORNELL L. REV. 1319, 1330 (2017) (describing the decline in private plaintiffs' ability to vindicate their rights through the legal system).

3. Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95, 100–01 (1974) (studying structural advantages of repeat litigants over onetime litigants). Many corporate litigants have a strong incentive to establish a reputation as tough opponents to deter future parties from facing them in court. In this respect, repeat litigants are analogous to incumbent monopolies who may prey on a new entrant to deter future entry into the market by obtaining a reputation of an aggressive monopolist. *See* Gideon Parchomovsky & Alex Stein, *The Relational Contingency of Rights*, 98 VA. L. REV. 1313, 1320, 1344–45 (2012) ("[I]n certain types of cases, the effects of asymmetric litigation costs are not randomly distributed across the population. Rather, they are systemic, favoring certain categories of litigants and disfavoring others."). *See generally* Phillip Areeda & Donald F. Turner, *Predatory Pricing and Related Prices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975) (analyzing the economic underpinnings of predatory pricing); RICHARD A. POSNER, ANTITRUST LAW 202 (2d ed. 2001) (discussing exclusionary practices—including tying, predatory price cutting, vertical mergers, exclusive dealings, and refusals to deal—that allow organizations to gain or maintain monopoly power).

4. Yonathan A. Arbel, *Adminization: Gatekeeping Consumer Contracts*, 71 VAND. L. REV. 121, 132 (2018) (describing how debt-collection firms abuse the litigation process to collect invalid debt).

5. Parchomovsky & Stein, *supra* note 2, at 1347–51 (highlighting the difficulties private individuals face when litigating against banks and other financial institutions).

6. Shyamkrishna Balganesh, *Copyright Infringement Markets*, 113 COLUM. L. REV. 2277, 2279 (2013) (stating that there has been "recent public outcry against 'copyright trolls,' entities that seek to profit from litigation by monetizing it").

7. Parchomovsky & Stein, *supra* note 2, at 1346–47; JAY M. FEINMAN, DELAY, DENY, DEFEND: WHY INSURANCE COMPANIES DON'T PAY CLAIMS AND WHAT YOU CAN DO ABOUT IT (2010); *see* AM. ASS'N FOR JUST., TRICKS OF THE TRADE: HOW INSURANCE COMPANIES DENY, DELAY, CONFUSE AND REFUSE 8, https://www.decof.com/documents/insurance-company-tricks.pdf (last visited Apr. 22, 2024) [https://perma.cc/G4HG-WK44] (quoting the South Carolina Supreme Court for the idea that insurance companies fight in court to ensure nothing is covered by disputed insurance contracts).

8. *See* Parchomovsky & Stein, *supra* note 2, at 1326; F. Patrick Hubbard, *The Nature and Impact of the "Tort Reform" Movement*, 35 HOFSTRA L. REV. 437, 471–72 (2006) ("Because these 'haves' know that they are repeat players on the defense side of the tort system, they have a common motive to reduce costs by reducing the amount of their potential liability in tort by

Debt collection, for instance, is a multimillion-dollar industry.[9] Specialized firms knowingly buy stale debts or claims backed by little to no evidence, which they then collect from individual debtors who cannot afford to defend themselves in court.[10] Similarly, copyright trolls are firms that specialize in aggressive enforcement of intellectual property rights against individuals.[11] Even individuals with valid defenses against these copyright trolls' claims find it preferable to settle and pay rather than litigate, due to the expected costs of protracted litigation.[12] Insurance companies are another example of professional litigants—typically defendants and not plaintiffs—that abuse their advantages. Insurance companies employ practices colloquially known as the "three Ds"—"deny, delay, defend"—whereby they attempt to drag out payment in the hope of draining opposing parties' resources, ultimately forcing individuals into lowball settlements.[13] Faced with

changing tort law in ways that favor defendants."); THOMAS F. BURKE, LAWYERS, LAWSUITS, AND LEGAL RIGHTS: THE BATTLE OVER LITIGATION IN AMERICAN SOCIETY 3 (2002). *See generally* Judith Resnik, *Diffusing Disputes: The Public in the Private of Arbitration, the Private in Courts, and the Erasure of Rights*, 124 YALE L.J. 2804 (2015).

9. *See* Arbel, *supra* note 4, at 132.

10. *Id.* at 122–23; Dalié Jiménez, *Dirty Debts Sold Dirt Cheap*, 52 HARV. J. ON LEGIS. 41, 44–46, 53, 71, 76 (2015) (explaining that creditors sometimes sell debts as lines on a spreadsheet with no additional information about the debt itself, even though these are nominally required by law, and referring to a study showing that only six percent of the debt buyers obtained any documentation at all on the debt); *see also* Peter A. Holland, *Junk Justice: A Statistical Analysis of 4,400 Lawsuits Filed by Debt Buyers*, 26 LOY. CONSUMER L. REV. 179, 239–40 (2014) (suggesting that banks be forced to sell off debts with the full information on the debt); Daniel Wilf-Townsend, *Assembly-Line Plaintiffs*, 135 HARV. L. REV. 1704, 1745 (2022) ("In 2010, for instance, the owner of the process server American Legal Process pled guilty to criminal fraud for knowingly failing to serve defendants in tens of thousands of debt-collection lawsuits.").

11. *See* Shyamkrishna Balganesh, *The Uneasy Case Against Copyright Trolls*, 86 S. CAL. L. REV. 723, 723, 725–27 (2013):

> A copyright troll refers to an entity that acquires a tailored interest in a copyrighted work with the sole objective of enforcing claims relating to that work against copiers in a zealous and dogmatic manner. Not being a creator, distributor, performer, or indeed user of the protected work, the copyright troll operates entirely in the market for copyright claims. With specialized skills in monitoring and enforcing copyright infringement, the troll is able to lower its litigation costs, enabling it to bring claims against defendants that an ordinary copyright owner might have chosen not to.

12. Brad A. Greenberg, *Copyright Trolls and Presumptively Fair Use*s, 85 U. COLO. L. REV. 53, 56 (2014):

> Righthaven's strategy was to purchase only copyrights that already had been infringed and to file no-warning lawsuits, often against unsophisticated individuals and nonprofits. It then would offer to settle for between $1,000 and $5,000. Considering the time, costs, and uncertainty of litigation, even defendants with strong defenses were wise to settle.

13. Parchomovsky & Stein, *supra* note 2, at 1346–47; FEINMAN, *supra* note 7, at 5–7.

these hurdles, it is unsurprising that only about 2% of accident victims sue for compensation and take insurers to court.[14]

The reality of modern litigation is that too many Americans are effectively forced to forgo their legal rights.[15] This is especially true for members of vulnerable and marginalized social groups.[16] Lower-income households are more likely to find themselves unable to fund lengthy litigation campaigns and vindicate their rights.[17] Members of racial minorities similarly suffer disproportionately from their inability to access the litigation system.[18] These power imbalances raise grave concerns regarding the truthfulness and fairness of trial outcomes, and regarding the ability of the litigation system to protect individuals'

14. BURKE, *supra* note 8, at 3; *see also* Richard L. Abel, *The Real Tort Crisis—Too* Few *Claims*, 48 OHIO ST. L.J. 443, 448–52 (1987) (surveying the literature to show that many tort victims fail to file claims); David A. Hyman & Charles Silver, *Medical Malpractice Litigation and Tort Reform: It's the Incentives, Stupid*, 59 VAND. L. REV. 1085, 1088–92 (2006) (suggesting the tort reform view "that Americans will sue at the drop of a hat" is misguided and providing examples of areas where claims are under submitted).

15. *See* Rhode, *supra* note 1, at 1228; Parchomovsky & Stein, *supra* note 2, at 1330. It is difficult to assess precisely what percentage of would-be litigants are forced to forgo their rights. But there is evidence that this unfortunate phenomenon is common in many areas. *See* Rhode, *supra* note 1, at 1230–32 (discussing categories of litigants and categories of cases in which litigants are typically dependent on assistance to bring their case but are not eligible for such assistance); Keith N. Hylton, *Litigation Costs and the Economic Theory of Tort Law*, 46 U. MIA. L. REV. 111, 113 (1991) (indicating similarities in the case of tort victims); Yotam Kaplan, *In Defense of Compensation*, 70 ALA. L. REV. 573, 576–77 (2018) (discussing tort reform campaigns designed to limit plaintiffs' access to the justice system). Note, additionally, that the use of contingency fees does not solve this problem. Contingency fees are used to solve liquidity problems by allowing plaintiffs to pay attorney fees only in case of success in court. Yet, the more fundamental problem is that the cost of a suit is often simply too high, meaning that the suit has a negative expected net value. In such cases, no contingency payment will suffice to give the lawyer an incentive to take the case. Similar problems persist in class actions, where potential compensation amounts are too low to give plaintiffs' attorneys a proper incentive. *See, e.g.*, Alon Harel & Alex Stein, *Auctioning for Loyalty: Selection and Monitoring of Class Counsel*, 22 YALE L. & POL'Y REV. 69, 71 (2004); *In re* Activision Blizzard, Inc. S'holder Litig., 124 A.3d 1025, 1070 (Del. Ch. 2015); Alan L. Zimmerman, Fiona McKenna, Daniel J. Bush & Cheryl Kaufman, *Economics and the Evolution of Non-Party Litigation Funding in America: How Court Decisions, the Civil Justice Process, and Law Firm Structures Drive the Increasing Need and Demand for Capital*, 12 N.Y.U. J.L. & BUS. 635, 643 (2016).

16. *See* Rhode, *supra* note 1, at 1228; Arbel, *supra* note 4, at 138–39.

17. *See* Sara Sternberg Greene, *Race, Class, and Access to Civil Justice*, 101 IOWA L. REV. 1263, 1265–66 (2016).

18. *See id.* at 1268–69; Kathryn A. Sabbeth, *Housing Defense as the New* Gideon, 41 HARV. J.L. & GENDER 55, 89–90 (2018).

rights.[19] And if courts fail to protect individuals' rights, this signifies a major failure of the legal system.[20]

Extant literature on the imbalance of the litigation system usually comes in one of two flavors. The first strand of scholarship studies the problem of overpowered defendants, such as insurance companies and healthcare providers, litigating against private plaintiffs.[21] The second strand of the literature studies the problem of professional plaintiffs, such as copyright trolls and debt-collecting firms, litigating against private defendants.[22] The treatment of the two settings as separate problems is to be expected, considering how fundamental the plaintiff-defendant dichotomy is to the conventional understanding of litigation. Under this standard view, the parties' position in litigation is dictated by the substance of the dispute: the party who allegedly owes money will be the defendant; the party who is allegedly owed money will be the plaintiff. Accordingly, scholars have regarded the problem of professional plaintiffs and the problem of overpowered defendants as two distinct issues and offered solutions tailored to each problem separately.[23]

This Article adds a hitherto missing element to this familiar picture: the ability of a professional litigant to manipulate their litigatory position. We show that professional litigants can control—to a large extent—whether they will litigate as plaintiffs or as defendants. We further argue that once this ability is recognized, it is easier to see the forest for the trees. The issue is neither overpowered plaintiffs nor overpowered defendants (as studied in existing literature). It is a problem of overpowered litigants.[24] More importantly, the ability of

19. Yotam Kaplan & Ittai Paldor, *Social Justice and the Structure of the Litigation System*, 101 N.C. L. REV. 469 (2023). Of course, legal rights are only meaningful if they can be vindicated in court. Chambers v. Baltimore & Ohio R.R., 207 U.S. 142, 148 (1907) ("The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government."); Parchomovsky & Stein, *supra* note 3, at 1314–21 (explaining that the realization of legal rights depends on the costs of vindicating these rights through the court system); Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 467 (1897) (equating a legal duty with the prediction of a legal sanction).

20. Kaplan & Paldor, *supra* note 19, at 471.

21. *E.g.*, Parchomovsky & Stein, *supra* note 2, at 1336.

22. *Infra* Section I.A.

23. *Infra* Part I.

24. To be sure, the imbalance between litigants of different socioeconomic backgrounds has been recognized, specifically in the context of financial aid and housing disputes. *See, e.g.*, Russell Engler, *Connecting Self-Representation to Civil* Gideon*: What Existing Data Reveal About When Counsel Is Most Needed*, 37 FORDHAM URB. L.J. 37, 47 (2010). But while the studies observe the imbalance and attribute it to the parties' socioeconomic characteristics, they too regard the parties' respective litigatory positions as given. For a rare exception, see Sabbeth, *supra* note 18, at 103–

powerful litigants to manipulate their litigatory position has far-reaching implications for litigation outcomes. This ability provides professional litigants with a decisive advantage, allowing them to preemptively win cases and drastically skew litigation outcomes in their favor.

To glean a quick insight into our argument, consider a simple example of a contractual dispute between a bank and a private borrower in which the bank, a classic professional litigant, alleges that the borrower has defaulted on a payment she was supposed to make on a loan. From a substantive perspective, the bank is a plaintiff. It is demanding a payment allegedly owed by the borrower. And indeed, the bank may sue the borrower and appear in court as a plaintiff. Alternatively, however, the bank may set off amounts from the borrower's checking account. If it sets off such amounts, the borrower will have to sue, and the bank will litigate as a defendant. Banks often require borrowers to open a checking account with the bank as a precondition for a loan.[25] While this may seem like a mere technical matter that allows for easy transfers of funds from the checking account to the loan account, it also facilitates setoffs. The bank controls the design of the contractual relationship between the parties ex ante, and it uses this control to ensure that, in case of a dispute, it will be able to play the role it finds most beneficial.

This is, of course, just one example. Powerful commercial litigants manipulate their litigatory position in myriad ways. A performance bond posted by the contractual counterpart at the behest of the stronger party is a similar example. It allows the stronger party to sue as a plaintiff for an alleged breach or cash in the bond and litigate the same dispute as a defendant.[26] Similarly, in the context of tort litigation, insurers can easily choose to litigate the same dispute as either defendants or plaintiffs. They may deny coverage, in which case they will litigate as defendants against the insured. Alternatively, they

09 (observing the effects of the disparity between tenants and landlords on housing conditions, and explaining how substandard conditions may have effects similar to eviction).

25. *See, e.g.*, *Personal Loans and Lines of Credit: Convenient Access to Funds, When You Need Them*, U.S. BANK, https://www.usbank.com/loans-credit-lines/personal-loans-and-lines-of-credit.html (last visited Apr. 22, 2024) [https://perma.cc/6UJT-3CQY].

26. Sometimes, it is not only the contractual relationship but the law (for which professional litigants lobbied) that allows a party to decide whether to litigate as plaintiff or as defendant. The law sometimes contains an explicit provision that allows a party to set off amounts against another party's entitlement. *E.g.*, 11 U.S.C. § 553. But this does not change the core analysis. The bank can design the contractual relationship so that it meets the law's prerequisites for setting off debts against entitlements. It is, again, the bank's control of the contractual relationship that allows it to assume the role most preferable to it when a dispute arises.

can grant coverage, subrogate the claim, and litigate as plaintiff against the injurer.[27]

As explained, the plaintiff-defendant dichotomy is fundamental to the architecture of the litigation system. As such, it carries a host of consequences ranging from court fees, which may prevent some disputes from ever being adjudicated, to burdens of proof, which may determine the outcome of litigation when a dispute is adjudicated.[28] This means that professional litigants' ability to manipulate their litigatory position can grant them significant advantages in litigation. In many instances, professional litigants will find it beneficial to assume the role of defendants rather than litigate as plaintiffs. Plaintiffs must incur fees when filing a claim[29] and—under the default rule—bear the burden of proof in civil litigation.[30] By strategically assuming the role of defendants, professional litigants can force their adversaries to overcome these hurdles. This can often render litigation prohibitively costly for the individual litigant. Plaintiffs are also subject to limitation periods.[31] If they are bootstrapped or otherwise

27. As we explain below, in the case described here the insurer manipulates not only its litigatory position, but also its adversary. We discuss this (and the possible incentives to manipulate the identity of the adversary) in Section II.B, *infra*.

28. *Frigaliment Importing Co. v. B.N.S. International Sales Corp.*, the famous "chicken case," is illustrative of the significance of burdens of proof to trial outcomes. 190 F. Supp. 116, 121 (S.D.N.Y. 1960) ("In any event it is unnecessary to determine that issue. For plaintiff has the burden of showing that 'chicken' was used in the narrower rather than in the broader sense, and this it has not sustained.").

29. Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 768 (1982) (describing the different types of fees plaintiffs may be required to pay to access the court system, including filing fees, services fees, notice fees, and prosecution bonds).

30. *See, e.g.*, 2 MCCORMICK ON EVIDENCE § 337 (Kenneth S. Broun ed., 6th ed. 2006); 9 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW §§ 2486–2493 (James H. Chadbourn ed., 1981); Bruce L. Hay & Kathryn E. Spier, *Burdens of Proof in Civil Litigation: An Economic Perspective*, 26 J. LEGAL STUD. 413 (1997). *See generally* Joel Sobel, *Disclosure of Evidence and Resolution of Disputes: Who Should Bear the Burden of Proof?*, *in* GAME-THEORETIC MODELS OF BARGAINING 341 (Alvin E. Roth ed., 1985) (developing a theory for which "bargainer" in litigation should bear the burden of proof). The burden of proof is typically understood in the probabilistic terms of the preponderance rule. 2 MCCORMICK, *supra*, § 339 ("The most acceptable meaning to be given to the expression, proof by a preponderance, seems to be proof which leads the jury to find that the existence of the contested fact is more probable than its nonexistence." (citing MODEL CODE OF EVIDENCE R. 1(3))); David Kaye, *Naked Statistical Evidence*, 89 YALE L.J. 601, 603 (1980) (reviewing MICHAEL O. FINKELSTEIN, QUANTITATIVE METHODS IN LAW: STUDIES IN THE APPLICATION OF MATHEMATICAL PROBABILITY AND STATISTICS TO LEGAL PROBLEMS (1978)) ("A majority of courts and almost all commentators have concluded that this [preponderance of the evidence] standard is satisfied by evidence that indicates to the trier of fact that the event that must be established is more likely to have occurred than not."). The default rule, according to which the plaintiff must discharge the burden of proof, has several exceptions. For a discussion of some of these, see *infra* text accompanying notes 241–242.

31. *See* Andrew J. Wistrich, *Procrastination, Deadlines, and Statutes of Limitation*, 50 WM. & MARY L. REV. 607, 616–18 (2008) (analyzing the way the statute of limitations balances competing values).

preoccupied and cannot bring their claim within a given period of time, their entitlement is lost.[32] This is not the case for defendants. Defendants' substantive arguments may be raised whenever a claim is filed against them, even after the limitation period has elapsed.[33] Similarly, plaintiffs are subject to pleading standards that sometimes allow defendants to quash claims regardless of their merit through motions to dismiss and summary judgments.[34] All of these features of litigation can provide incentives for professional litigants to strategically assume the role of defendants.

On the flip side, it is often advantageous for professional litigants to assume the role of plaintiffs. One reason is that plaintiffs, unlike defendants, have access to interim remedies.[35] When granted, interim remedies, such as preliminary injunctions,[36] can exert enormous pressure on defendants and may force them into settlements they would not have otherwise agreed to.[37] Litigating as the plaintiff may thus be extremely advantageous for professional litigants who can use this position to strongarm their opponents. A second typical advantage of being a plaintiff is that plaintiffs control the timing of litigation.[38] Claims may be brought when the defendant's key witnesses are unavailable to testify; when the defendant is preoccupied with other matters; or when the lawsuit is most harmful to the defendant for

32. *Id.*

33. *See, e.g.*, Pennsylvania R.R. v. Miller, 124 F.2d 160, 162 (5th Cir. 1941).

34. On the heightening of pleading standards, see Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 555 (2007) ("While a complaint . . . does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." (alteration in original) (citations omitted)). On the general applicability of the *Twombly* standards, see Ashcroft v. Iqbal, 556 U.S. 662, 684 (2009) ("Our decision in *Twombly* expounded the pleading standard for 'all civil actions,' and it applies to antitrust and discrimination suits alike." (citations omitted)).

35. *See* Gideon Parchomovsky & Alex Stein, Essay, *Preliminary Damages*, 75 VAND. L. REV. 239, 249–52 (2022) (reviewing the historical origins of the rules governing the award of interim remedies and the underlying rationale for linking between the interim remedy and the permanent remedy being sought).

36. *See* Bethany M. Bates, *Reconciliation After* Winter*: The Standard for Preliminary Injunctions in Federal Courts*, 111 COLUM L. REV. 1522, 1529–30 (2011); John Leubsdorf, *The Standard for Preliminary Injunctions*, 91 HARV. L. REV. 525, 525–26 (1978) (famously arguing that "the preliminary injunction may be the most striking remedy wielded by contemporary courts"); Jean O. Lanjouw & Josh Lerner, *Tilting the Table? The Use of Preliminary Injunctions*, 44 J.L. & ECON. 573, 576–77 (2001) (surveying the use of preliminary injunctions).

37. Anthony DiSarro, *Freeze Frame: The Supreme Court's Reaffirmation of the Substantive Principles of Preliminary Injunctions*, 47 GONZ. L. REV. 51, 52 (2011) ("Now that the plaintiff has much of what she wants, she has no desire to proceed expeditiously to trial and instead strives to exert pressure on the defendant to persuade her to settle the case.").

38. *See infra* Section II.B.

personal or commercial reasons—for example, before an initial public offering.[39]

If litigation were typically a battle between equals, the problem would not systematically benefit a certain type of litigant or disadvantage specific litigants. Litigatory positions would be assigned randomly, and parties would find themselves litigating as plaintiffs in some cases and as defendants in others. In the classic world of litigation—a world of two more-or-less equal adversaries—the parties' respective positions are indeed determined by the substance of the dispute. If Jill has defaulted on a payment to Jack, Jack will be the plaintiff. If Jack has defaulted on a payment to Jill, their roles in litigation will be reversed. But when one party can shape the litigatory setting at will, the outcome of the litigatory process may be systematically manipulated. The current reality is that the repeat litigants can do precisely that.

Based on this analysis, we offer a series of concrete policy recommendations. We propose legal reforms aimed at restoring balance in the litigation system by countering the ability of powerful commercial litigants to manipulate their litigatory position and skew the process of litigation in their favor. The general theme of our solution is straightforward: considering the ability of professional litigants to freely choose their role as either defendant or plaintiff, the legal consequences of this classification should be equally flexible. This will allow the legal system to reflect the true dynamic of litigation rather than the parties' formal positions. In particular, at least two fundamental features of procedural law must be revisited—court fees and burdens of proof.

Court fees are an integral part of our legal system. A party seeking relief from another party is perceived as the one making use of a public resource—the judicial system—for her private benefit.[40] Prima facie, it seems logical to charge this party, the plaintiff, a price for the service.[41] Plaintiffs must thus pay an upfront fee when bringing a claim.[42] But against the understanding developed here, plaintiffs are

39. Anup Basnet, Frederick Davis, Thomas Walker & Kun Zhao, *The Effect of Securities Class Action Lawsuits on Mergers and Acquisitions*, GLOB. FIN. J., May 2021, at 1, 9 (confirming the hypothesis that the market overreacts to class actions submitted against merging firms).

40. Frank I. Michelman, *The Supreme Court and Litigation Access Fees: The Right to Protect One's Rights* (pt. 1), 1973 DUKE L.J. 1153, 1161 (mentioning the common view, according to which court fees are designed to provide revenue that will partly offset the costs of operating the court system).

41. *Id.*; *see* Rex E. Lee, *The American Courts as Public Goods: Who Should Pay the Costs of Litigation?*, 34 CATH. U. L. REV. 267, 272–74 (1985) (discussing the effect of court fees on indigent litigants and the possibility that such litigants will be unable to access the court system).

42. *See infra* Section III.C.

not using the system any more than defendants. An insurance company that makes a practice of denying claims,[43] thereby increasing the costs of its onetime adversaries, makes use of the system in a far more profound and systematic way than its onetime adversary who was forced to sue. Some of the insurer's would-be adversaries never sue, and others settle for lowball settlements. In both cases, the insurance company pockets all or some of its adversaries' entitlements. Thus, it is logical to force these professional litigants to shoulder some of the costs of the litigation system. In reality, they are using the court system far more frequently than their onetime adversaries and are deriving far greater benefits from it.[44] For reasons discussed below, we propose splitting court fees between plaintiffs and repeat litigants.

A second feature of the court system that must be revisited is the allocation of burdens of proof. As a default rule, plaintiffs bear the onus of proof in civil litigation.[45] The underlying rationale is that a defendant's dollar is equal to a plaintiff's dollar. Therefore, in order to reduce the aggregate social cost of errors, dollars should not be transferred from a defendant to a plaintiff unless it is more likely than not that the defendant indeed owes the amount in dispute.[46] However, professional litigants may systematically abuse this rule to escape liability, playing the role of defendant and using uncertainty as a shield. When the parties' ex ante chances of success are balanced, defendants are more likely to triumph than plaintiffs. Burdens of proof are thus another institution that must be reshaped in light of the analysis we offer here.

This Article makes three novel and important contributions. The first contribution is analytical. We deconstruct the traditional plaintiff-defendant dichotomy and demonstrate that strong litigants can easily reshape the litigatory landscape to choose whichever position

43. *See, e.g.*, '*Colossus*' *Class Action Costing Defendants More than $293 Million*, LEGAL NEWSLINE (Aug. 2, 2007), https://legalnewsline.com/stories/510629228-colossus-class-action-costing-defendants-more-than-293-million [https://perma.cc/33MK-DFJY] (insurers have been accused of using a computer program colloquially known as "Colossus" to systematically underpay personal-injury claimants).

44. Wilf-Townsend, *supra* note 10, at 1731 (showing that a "small number of private companies account for a large percentage of all civil litigation filed in courts of general jurisdiction").

45. 2 MCCORMICK, *supra* note 30, §§ 336–338; WIGMORE, *supra* note 30, §§ 2486–2493; *see* Sobel, *supra* note 30, at 341–42.

46. *See* Bruce L. Hay, *Allocating the Burden of Proof*, 72 IND. L.J. 651, 656 (1997) (describing and criticizing common rationalizations for the allocations of evidentiary burdens); *see also* Fleming James, Jr., *Burdens of Proof*, 47 VA. L. REV. 51, 58–63 (1961) (criticizing some standard arguments and offering some alternative explanations); EDMUND MORRIS MORGAN, SOME PROBLEMS OF PROOF UNDER THE ANGLO-AMERICAN SYSTEM OF LITIGATION 75–76 (1956) (describing and criticizing the rationales for allocating the burden of persuasion).

best fits their needs. This malleability of the litigatory setting challenges the current understanding of our legal system. The Article's second contribution is in highlighting the implications of professional litigants' manipulation tactics. Had a party's litigatory position been inconsequential, professional litigants' ability to manipulate it might have been benign. But manipulation of the litigatory position is of extreme practical importance. The Article's third contribution is normative. We propose two legal reforms that tip the scales back. By altering the court-fee mechanism and burdens of proof, we update the institutions of litigation from the classic nineteenth century world of *Hadley v. Baxendale*[47] (two private parties litigating against one another) to the twenty-first century world of *Rudgayzer v. Google*[48] (an individual facing a tech giant).

The remainder of this Article unfolds as follows. Part I reviews the two separate branches of existing literature: the scholarship focusing on the problem of professional plaintiffs,[49] and the scholarship addressing the problem of professional defendants.[50] This Part shows that existing scholarship studies these issues as two separate problems and that the similarities between the issues have gone unnoticed. In Part II we explain why the two seemingly different problems are actually one. We show that professional litigants have both the ability[51] and the incentive[52] to manipulate their litigatory role. This Part provides a detailed menu of legal techniques that professional litigants strategically use to choose whether to litigate as plaintiffs or as defendants. After reviewing professional litigants' ability to manipulate their position, this Part also offers an equally detailed account of professional litigants' reasons for doing so. In Part III we consider the general policy implications of our reconceptualization of the problem.[53] We develop concrete proposals regarding court fees[54] and burdens of proof.[55] We argue that in assigning court fees and burdens of proof, courts should not base their decisions on the plaintiff-defendant distinction, which is highly malleable, but instead on the identity of the repeat professional litigant. We also discuss the implementation of our proposal and its implications. A short conclusion follows.

47. Hadley v. Braxendale (1854) 156 Eng. Rep. 145.
48. Rudgayzer v. Google, Inc., No. 13 CV 120, 2014 WL 12676233 (E.D.N.Y. Feb. 10, 2014).
49. *Infra* Section I.A.
50. *Infra* Section I.B.
51. *Infra* Section II.A.
52. *Infra* Section II.B.
53. *Infra* Section III.B.
54. *Infra* Section III.C.
55. *Infra* Section III.D.

I. THE PLAINTIFF-DEFENDANT DICHOTOMY

The litigation playing field is plagued by the imbalance of power between professional litigants and their onetime adversaries.[56] As a result, millions of Americans are effectively denied access to the legal system.[57] This represents a fundamental failure of the litigation system. Without effective access to justice for individual litigants, individual rights become a hollow promise.[58]

Existing literature has long recognized two manifestations of this problem. This Part shows that these two manifestations are regularly treated as two distinct problems: the problem of professional plaintiffs, and the problem of professional defendants. More importantly, the literature discusses possible solutions to each manifestation of the problem separately. Powerful litigants' ability to strategically alter between litigatory positions has not been investigated, and its implications for the treatment of the imbalance have thus received no attention.

A. Professional Plaintiffs

The literature has long recognized that certain types of plaintiffs, those who routinely litigate against onetime defendants, enjoy significant advantages. In a recent article entitled "Assembly-Line Plaintiffs," Daniel Wilf-Townsend observes that "today's courts are top-heavy, flooded by the claims of megafilers who bring cases in the thousands or tens of thousands within single jurisdictions every year, generating economies of scale to permit the profitable submission of masses of small-dollar cases."[59]

Wilf-Townsend finds that on average the top-ten filers account for approximately 23% of cases filed in a given state court.[60] The mere fact that a company files many lawsuits does not, in and of itself, indicate that the court system is unhealthy. As we subsequently show, repeat litigants enjoy economies of scale: Because they litigate many

56. *See* Alan W. Houseman, *Civil Legal Assistance for the Twenty-First Century: Achieving Equal Justice for All*, 17 YALE L. & POL'Y REV. 369, 402 (1998); David C. Leven, *Justice for the Forgotten and Despised*, 16 TOURO L. REV. 1, 6–7 (1999).

57. DEBORAH L. RHODE, ACCESS TO JUSTICE 13 (2004).

58. *See, e.g.*, David Freeman Engstrom, *Private Enforcement's Pathways: Lessons from Qui Tam Litigation*, 114 COLUM. L. REV. 1913, 1918–20 (2014) (highlighting the crucial role of individual litigants in civil litigation).

59. Wilf-Townsend, *supra* note 10, at 1708.

60. *Id.* at 1729.

similar cases, their cost of litigating the marginal case is smaller.[61] They can optimize their decisionmaking processes, streamline their interactions with legal counsel (or employ inside counsel), use templates, and so on.[62] The use of economies of scale to reduce the cost of litigation, thereby allowing the firm to pursue meritorious lawsuits at a lower cost, is not objectionable in and of itself.[63] But the real problem is with what Wilf-Townsend labels "assembly-line litigation," in which

> a sophisticated corporate plaintiff brings a high volume of similar, small-value claims against individual natural-person defendants who are almost universally unrepresented and who often do not appear in court. In today's state courts, such litigation has come to resemble an automated assembly line, in which courts rubber-stamp the plaintiffs' claims with little or no analysis and issue judgments against the absent defendants. In doing so, courts transfer assets from unsophisticated, often-indigent persons to major corporations without seriously evaluating the merits of each case.[64]

Small-value claims cost assembly-line plaintiffs nearly nothing to file, due to economies of scale and specialization.[65] But for a onetime defendant, the costs of litigation often exceed the value of the claim itself, making the case prohibitively costly to litigate.[66] Defendants are thus typically better off yielding to assembly-line plaintiffs' demands. Assembly-line litigation consequently creates perverse incentives for plaintiffs.[67] Wilf-Townsend proposes three types of reforms that may alleviate the problem: implementing congestion pricing, whereby plaintiffs who generate disproportionately large shares of courts' civil dockets are charged a fee;[68] allowing defendants to aggregate defenses;[69] and setting up agencies that would oversee the merits of plaintiffs' allegations.[70] All three proposals are, naturally, geared at addressing the problem of powerful plaintiffs abusing the system to obtain undeserved payments from onetime defendants.

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61. Economies of scale exist when the average total cost of production declines with each additional unit. *See* N. GREGORY MANKIW, PRINCIPLES OF MICROECONOMICS 272–73 (6th ed. 2011).

62. Parchomovsky & Stein, *supra* note 2, at 1331; *see, e.g.*, Stephen J. Choi, *Motions for Lead Plaintiff in Securities Class Actions*, 40 J. LEGAL STUD. 205, 221 (2011) (highlighting the advantages of economies of scale in large law firms); Steven L. Schwarcz, *Explaining the Value of Transactional Lawyering*, 12 STAN. J.L. BUS. & FIN. 486, 494 (2007) (explaining the advantages of the "one-stop-shop" model for large layering firms).

63. Wilf-Townsend, *supra* note 10, at 1709.

64. *Id.*

65. *Id.* at 1718–20.

66. *Id.* at 1718–21.

67. *Id.* at 1756.

68. *Id.* at 1754–58.

69. *Id.* at 1762–65. Note, however, that Wilf-Townsend proposes a different scheme from the one regularly discussed—allowing defendant-side class actions. *Id.* at 1761–68.

70. *Id.* at 1769–70.

Wilf-Townsend's focus on powerful plaintiffs' advantages over onetime defendants is not unique. A 2014 study focusing on the debt-collection industry found that 85% of alleged debtors did not even bother to respond to a claim filed against them.[71] Of the 15% that did file a defense, 13% defended themselves, and only 2% were represented by lawyers.[72] The last category of defendants—those that retained counsel—did well in court.[73] They lost only 21% of the principal amount sought in the complaints.[74] This lends support to the conclusion that, in many of the cases, the plaintiffs' claims were not meritorious.[75] But the vast majority of defendants—98%—were not represented in court or never filed a response.[76] The defendants who could not defend themselves at all and never appeared in court fared very poorly.[77] Debt-collecting firms collected 82% of the alleged debt from these defendants.[78] The pro se defendants also fared poorly.[79] The study's findings suggest that "no [ ] adversary system exists for most defendants in consumer debt cases."[80]

In another study, Dalie Jiménez focuses on debt collectors' practice of buying debts without seeking any of the underlying documentation or information,[81] knowing that many of the claims will never be challenged.[82] Jiménez suggests regulatory intervention in this industry, as these professional plaintiffs (who often sell debts to one another) are unlikely to discontinue the practice.[83]

The housing industry is another setting in which the literature has identified a systematic imbalance between repeat plaintiffs and weak defendants. Landlords, typically repeat plaintiffs, file—and win—numerous eviction lawsuits against tenants, resulting in millions of

71. Holland, *supra* note 10, at 208.

72. *Id.*

73. *Id.* at 210.

74. *Id.* at 211. Holland notes that the data are not statistically significant enough to be a reliable measurement, but that additional data confirm the belief that lawyers make a difference in outcome.

75. *See id.* ("Overwhelmingly, defendants with an attorney succeeded in having the case dismissed.").

76. *Id.* at 179, 187, 201, 208.

77. *Id.* at 179, 210.

78. *Id.* at 210.

79. *Id.*

80. *Id.* at 179.

81. Jiménez, *supra* note 10, at 42.

82. *Id.* at 83 (describing allegations against a debt-collection firm that never paid for the debts it bought, but attempted to collect these debts with no entitlement or underlying evidence, presumably on the assumption that debtors would not contest the debts).

83. *Id.* at 106–18.

American tenants evicted annually.[84] A survey of jurisdictions nationwide explains that powerful plaintiffs (landlords) regularly use the system to strongarm their onetime adversaries: "While the details of eviction procedures vary, the common outcome measurements include possession, rent abatement, and repairs. Regardless of whether tenants appear or default, settle or go to trial, raise defenses or do not, the result invariably is a judgment for the landlord."[85]

In another important article on the topic, Kathryn Sabbeth points to the scope of the problem and to its devastating consequences for marginalized tenant-defendants.[86] She explains that tenants are often silenced when offering testimony and do not enjoy different procedural safeguards they are afforded by law as defendants.[87] Sabbeth also explains how landlords file nonmeritorious claims but nonetheless prevail or obtain favorable settlements because tenant-defendants cannot afford to spend all day in court to see a judge.[88]

But treating landlords as "natural" plaintiffs may be myopic. Indeed, the remedy sought is eviction, and the dispute regularly centers on overdue rent. It would thus seem that the landlord is the party seeking a remedy based on allegations levelled against the tenant, making landlords "natural" plaintiffs. However, in a recent article[89] Jessica Steinberg points to the fact that while the disputes focus on tenants' violations of leases, in reality

> lurking below the surface is the tenant's mutually enforceable right to safe and sanitary housing conditions. The implied warranty of habitability, enacted by ordinance or developed through common law in every jurisdiction in the country, makes mutually enforceable the landlord's right to demand rent payment and the tenant's right to seek repairs of defective housing conditions.[90]

Thus, landlords may be litigating as plaintiffs—thereby enjoying rulings in absentia against a large rate of tenants[91]—even though the tenants are the wronged party and perhaps even those who initially

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84. Sabbeth, *supra* note 18, at 59.

85. Engler, *supra* note 24, at 48. Engler's general theme draws attention to the core issue of the imbalance between poor litigants and wealthier ones, not to the plaintiff-defendant dichotomy. But following the writings on the topic, his discussion of the landlord-tenant relationship focuses on landlords as plaintiffs and tenants as defendants. *See id.* at 47–48.

86. Sabbeth, *supra* note 18, at 92–94 (explaining why women are more vulnerable to budget shortfalls and often have fewer opportunities than men to compensate for such shortfalls).

87. *Id.* at 79.

88. *Id.* at 80.

89. Jessica K. Steinberg, *A Theory of Civil Problem-Solving Courts*, 93 N.Y.U. L. REV. 1579, 1592–93 (2018).

90. *Id.*

91. Sabbeth, *supra* note 18, at 79–80.

made a demand.[92] But the solutions suggested are, for the most part, insensitive to the manipulation of the litigatory position. Steinberg suggests adapting the model of problem-solving courts[93] that is used in criminal cases[94] and implementing it in civil litigation.[95]

The problem of overpowered plaintiffs has thus received much attention. And suggestions for addressing the imbalance between powerful plaintiffs and their onetime adversaries are abundant. These suggestions are important and will significantly improve on the current situation. But they do not strike at a deeper problem: the imbalance between private and professional litigants, regardless of their position as plaintiffs or defendants. Since these proposals focus on overpowered plaintiffs, they do not address power imbalances that are not unique to plaintiffs. Similarly, these suggestions do not prevent plaintiffs from disguising themselves as defendants in a host of circumstances. If reforms focus on powerful plaintiffs, the fundamental problem—the imbalance between heavyweight professionals and onetime adversaries—will resurface one step removed, when professional litigants position themselves as defendants.

B. Professional Defendants

A second strand of the literature focuses on professional defendants' advantages over onetime plaintiffs. The archetypal professional defendants are insurance companies.[96] But healthcare providers,[97] banks,[98] and hospitals[99] also repeatedly litigate against private plaintiffs alleging a wrong.[100]

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92. *See id.* at 93–94, 103–06 (describing how eviction lawsuits serve as retaliation and the effects of substandard living conditions and their potential as central matters of dispute).

93. *See* Steinberg, *supra* note 89, at 1604–21.

94. DOUGLAS B. MARLOWE, CAROLYN D. HARDIN & CARSON L. FOX, NAT'L DRUG CT. INST., PAINTING THE CURRENT PICTURE: A NATIONAL REPORT ON DRUG COURTS AND OTHER PROBLEM-SOLVING COURTS IN THE UNITED STATES 7, 9 (2016); Greg Berman & John Feinblatt, *Problem-Solving Courts: A Brief Primer*, 23 LAW & POL'Y 125, 131 (2001); Richard C. Boldt, *Problem-Solving Courts and Pragmatism*, 73 MD. L. REV. 1120, 1121–22 (2014); Michael C. Dorf & Jeffrey A. Fagan, *Problem-Solving Courts: From Innovation to Institutionalization*, 40 AM. CRIM. L. REV. 1501, 1502 (2003); Peggy Fulton Hora & Theodore Stalcup, *Drug Treatment Courts in the Twenty-First Century: The Evolution of the Revolution in Problem-Solving Courts*, 42 GA. L. REV. 717, 771–72 (2008). For a critique, see Timothy Casey, *When Good Intentions Are Not Enough: Problem-Solving Courts and the Impending Crisis of Legitimacy*, 57 SMU L. REV. 1459, 1495–1502 (2004).

95. Steinberg, *supra* note 89, at 1604–21.

96. *See* Parchomovsky & Stein, *supra* note 2, at 1344–46.

97. *See id.* at 1336–39.

98. *See id.* at 1347–50.

99. *See id.* at 1344–47.

100. *See id.* at 1335–52 (providing a detailed analysis of private lawsuits against each of these types of defendants).

The literature has surveyed a plethora of barriers that rightsholders face when they attempt to uphold their rights.[101] First, as Gideon Parchomovsky and Alex Stein explain, well-organized repeat defendants, such as insurance companies, hospitals, product manufacturers, and financial institutions, enjoy ready access to litigation resources.[102] They employ in-house attorneys and have standing arrangements with large law firms for the provision of routine legal services.[103] They typically enjoy friendly payment arrangements and pay for legal services on a lenient, retainer-fee basis.[104] Their access to legal services is less expensive than onetime litigants' access.[105] Repeat defendants also enjoy economies of scale in litigation. As mentioned, they repetitively face the same legal dilemmas and procedures and can easily optimize their decisionmaking processes and streamline their interactions with legal counsel.[106] Therefore, for a repeat litigant, the marginal cost of one additional case is often negligible.[107]

These cost advantages translate into an ability to force onetime plaintiffs into lowball settlements or deter them from pursuing their rights in the first place.[108] Parchomovsky and Stein draw attention to a practice known as the "three Ds"—"deny, delay, defend"[109]—whereby insurers attempt to drag out payment in the hope of draining victims' resources, ultimately forcing them into lowball settlements.[110] In some cases, plaintiffs do not bring suit at all because they anticipate that defendants will try to drive up their costs.[111] Professional defendants can thus effectively deny plaintiffs access to justice (through strategic investment).[112]

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101. *See id.* at 1326–47.

102. *See id.* at 1335, 1344–45 (noting that asymmetric litigation costs "are not randomly distributed among litigants; nor are they randomly distributed among all legal domains," but "[r]ather, they arise from a systemic advantage of certain classes of litigants over others").

103. *Id.* at 1331; Parchomovsky & Stein, *supra* note 3, at 1344. *See generally* Gen. Dynamics Corp. v. Superior Ct., 876 P.2d 487, 491 (Cal. 1994) (showing that the use of in-house counsel is common and explaining its economic advantages for corporations).

104. Parchomovsky & Stein, *supra* note 3, at 1318, 1344.

105. *See* Galanter, *supra* note 3, at 98 (noting the economies of scale advantages of repeat defendants).

106. *See supra* notes 61–62 and accompanying text.

107. *See* Parchomovsky & Stein, *supra* note 2, at 1332.

108. *E.g.*, *id.* at 1347.

109. *Id.* at 1346–47; *see* FEINMAN, *supra* note 7, at 5–7.

110. FEINMAN, *supra* note 7, at 2, 5–7; Parchomovsky & Stein, *supra* note 3, at 1346–47.

111. *See* Francis J. Mootz III, *Protecting Victims from Liability Insurance Companies That Add Gratuitous Insult to Grievous Injury*, 17 J. GENDER RACE & JUST. 313, 315–19 (2014) (providing support for the contention that these tactics are commonly employed, focusing chiefly on liability insurers litigating against third-party claimants).

112. *Id.*

Securities litigation is another example of a setting in which the literature has identified advantages that professional defendants hold over their onetime adversaries. In 1995, Congress enacted the Private Securities Litigation Reform Act of 1995 ("PSLRA").[113] The PSLRA was enacted to target abusive practices of plaintiffs' lawyers.[114] To address these abuses, the PSLRA heightened the bar for the filing of private lawsuits in securities litigation.[115] Importantly in the current context, certain procedural measures make it extremely difficult to litigate such cases as a plaintiff. For example, in many cases, plaintiffs must state with particularity "facts giving rise to a strong inference that the defendant acted with the required state of mind."[116] This is often an insurmountable task for a plaintiff who does not know these facts at the pleading stage, prior to document disclosure.[117] Additionally, discovery is stayed until motions to dismiss have been decided.[118] These hardships are not uncalculated. Congress intentionally placed plaintiffs at a disadvantage in private securities litigation and even limited the scope of damages that they may recover.[119] To overcome these disadvantages, plaintiffs must often conduct pre-filing investigations, solicit whistleblowers, and so forth.[120] The literature has focused on the effects of the PSLRA on professional defendants.[121] In this context, too, the problem of professional defendants is treated as distinct from the problem of professional plaintiffs.

Finally, in recent years scholarly attention has been drawn to repeat defendants who typically harm large groups of similarly situated

113. Private Securities Litigation Reform Act of 1995, 15 U.S.C. § 77z-1, 77z-2, 78j-1, 78u-4, 78u-5.

114. Stephen J. Choi & Robert B. Thompson, *Securities Litigation and Its Lawyers: Changes During the First Decade After the PSLRA*, 106 COLUM. L. REV. 1489, 1489 (2006). For a comprehensive account of the development of these pre-complaint investigations as a response to heightened pleading standards (that are a prerequisite for disclosure) laid down by the PSLRA, see Roy Shapira, *Mandatory Arbitration and the Market for Reputation*, 99 B.U. L. REV. 873, 896–98 (2019).

115. Choi & Thompson, *supra* note 114, at 1493.

116. Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(b)(2)(A).

117. *See id.*

118. *Id.* § 78u-4(b)(3)(B); Securities Act of 1933, 15 U.S.C. § 77z-1(b).

119. Securities Exchange Act of 1934, 15 U.S.C. § 78u-4(e).

120. For a real-life example, see Makor Issues & Rts., Ltd. v. Tellabs Inc., 513 F.3d 702 (7th Cir. 2008).

121. *See* D. Katherine Spiess & Paula A. Tkac, *The Private Securities Litigation Reform Act of 1995: The Stock Market Casts Its Vote . . .* , 18 MANAGERIAL & DECISION ECON. 545, 546 (1997) (finding that firms that faced a higher risk of being sued showed positive abnormal returns around the congressional override of President Clinton's veto over the PSLRA); Marilyn F. Johnson, Ron Kasznik & Karen K. Nelson, *Shareholder Wealth Effects of the Private Securities Litigation Reform Act of 1995*, 5 REV. ACCT. STUD. 217, 223 (2000) (providing similar findings); John C. Coffee, Jr., *Reforming the Securities Class Action: An Essay on Deterrence and Its Implementation*, 106 COLUM. L. REV. 1534, 1536, 1536 n.5. (2006) (challenging these conclusions).

individuals. There are numerous examples of repeat defendants: employers who engage in systemic discrimination and face similar lawsuits filed by their employees,[122] manufacturers and sellers who face widespread consumer claims arising from their violations of consumer protection laws,[123] and so on. As has been observed, the enforcement of group rights has suffered in recent years due to measures employed by these repeat defendants. Such repeat defendants have made a practice of inserting mandatory arbitration clauses, which effectively preempt class actions, into boilerplate contracts signed with would-be plaintiffs.[124] As individual litigation is often prohibitively costly, such preemption of class actions effectively shields these would-be defendants from being held accountable for their wrongs. Courts have upheld these clauses, thereby allowing such repeat defendants to preempt many of the claims that would have been filed against them.[125] In view of these developments, inter alia, scholars have suggested increasing the use of qui tam litigation—a legislative mechanism that allows private citizens to bring action on behalf of the state in the interest of vulnerable communities (and be rewarded when the state is vindicated).[126] Once again, the focus is on vulnerable groups of plaintiffs facing powerful defendants that use arbitration clauses to shield themselves from liability.

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Both the problem of professional plaintiffs facing off onetime defendants and the problem of powerful defendants litigating against

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122. Myriam Gilles & Gary Friedman, *The New Qui Tam: A Model for the Enforcement of Group Rights in a Hostile Era*, 98 TEX. L. REV. 489, 502 (2020).

123. *See, e.g.*, *id.* at 491 (noting that there have been "[r]ecent scandals involving blatant and systemic violations of consumer protections").

124. *Id.* at 490.

125. *E.g.*, AT&T Mobility LLC v. Concepcion, 563 U.S. 333, 352 (2011) (enforcing a class-banning arbitration clause); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231–38 (2013) (upholding an arbitration clause that effectively prevented antitrust victims from filing a lawsuit); Epic Sys. Corp. v. Lewis, 584 U.S. 497, 510 (2018) (upholding an arbitration clause, thereby denying workers the ability to take collective action).

126. Janet Cooper Alexander, *To Skin a Cat:* Qui Tam *Actions as a State Legislative Response to* Concepcion, 46 U. MICH. J.L. REFORM 1203, 1208 (2013) (highlighting possible judicial responses to undo the courts' policy); Gilles & Friedman, *supra* note 122, at 535:

> It therefore falls to state enforcement agencies to carry an unprecedented enforcement burden. . . . [T]he options are to either (a) find the funding to support radically stepped-up state-level enforcement activity, or (b) do something else. We are proposing something else. Properly established and administered, the new qui tam regime will more than pay for the burden the state will assume in vetting cases and approving settlements.

onetime plaintiffs have received scholarly attention.[127] But the two problems are discussed separately. If professional litigants can manipulate their litigatory position, solutions geared at one problem in isolation of the other are likely to be much less effective.

II. CHALLENGING CONVENTIONAL WISDOM

This Part challenges the understanding of the two problems as separate problems. We first show how easily professional litigants can—and do—switch litigatory positions. Importantly, professional litigants can disguise themselves as plaintiffs or as defendants when litigating the same substantive dispute. We then explain the numerous motivations for such manipulations.

A. The Ability to Manipulate Litigatory Positions

Professional litigants repeatedly litigate similar substantive disputes.[128] Health providers litigate medical malpractice cases that share common elements.[129] Insurers repetitively litigate bodily injury cases. And media outlets often invoke the same defenses in defamation cases.[130] Debt collectors litigate what is basically the same claim against

127. *E.g.*, Wilf-Townsend, *supra* note 10 (studying the problem of professional plaintiffs); Parchomovsky & Stein, *supra* note 2 (studying the problem of professional defendants).

128. *E.g.*, Parchomovsky & Stein, *supra* note 2, at 1323:

> [S]ince there are typically many commonalities in the cases brought against them, [repeat players] can often reuse documents, briefs, research, and legal expertise from past cases. Consider, for example, an insurance company that is sued by an insured. In the typical case, the suit will be based on the contract between the parties. Not only was that contract drafted by the legal department of the insurance company, which gives it a critical informational advantage, but also, chances are, that the insurance company handled multiple similar lawsuits in the past and can therefore readily respond to the present suit;

Galanter, *supra* note 3, at 98 (noting the advantages repeat litigants enjoy due to the fact that they litigate the same issues over and over again).

129. Parchomovsky & Stein, *supra* note 2, at 1343 ("Defendants in medical malpractice suits also enjoy economies of scale that are not available to plaintiffs. They can use the same medical expertise in multiple cases. They can also hire specialized attorneys to represent them in multiple cases in exchange for a discounted fee.").

130. Seth C. Lewis, Amy Kristin Sanders & Casey Carmody, *Libel by Algorithm? Automated Journalism and the Threat of Legal Liability*, 96 JOURNALISM & MASS COMMC'N Q. 60, 63–65 (2019) (showing that First Amendment protection, the bedrock of traditional understanding of media law, is common to numerous settings, and that this defense has been extended over the years by the courts to apply to new technologies).

millions of debtors,[131] as do copyright trolls.[132] Each of these professional litigants has a large degree of control over pre-litigatory interactions with its would-be adversaries. Healthcare providers sign similar contracts with numerous patients. Insurers sell policies to millions of clients. Banks provide loans that are no different from one another to a large number of borrowers, and the list goes on. Even when these professional litigants do not have a preexisting contractual relationship with their would-be adversaries, they nonetheless have pre-litigatory interactions with their opponents. The pre-litigatory interaction offers repeat players a host of mechanisms that may allow them to manipulate their litigatory position. Some of these mechanisms are reviewed next.

1. Contractual Design

The most straightforward mechanism for controlling future litigatory relationships is through contractual design. When the parties have a contractual relationship, contractual provisions may allow the professional party to choose the preferable litigatory role.

First, setoffs are a prototypical mechanism that allows a party to assume the role of defendant rather than that of plaintiff. The example of a bank forcing clients seeking loans to hold a checking account illustrates this neatly. Consider a borrower refusing to pay the full amount of an installment because the bank overcalculated interest or levied an unwarranted fee. From a substantive standpoint, the bank is the plaintiff. It demands a payment that its contractual counterpart denies. However, forcing the borrower to open a checking account changes the litigatory playing field. If the borrower refuses to pay the overcharge, the bank can set off any amount from the checking account, which will force the borrower to sue if she wants to be repaid. She will be forced to pay court fees and shoulder the burden of proof. She will also lose her claim if the overcharge goes unnoticed for a long enough period and the lawsuit is thus barred by an applicable statute of limitations.

It is important to observe that there is no inherent link between a checking account and a loan. It may seem easier to process payments

131. *See, e.g.*, TOM FELTNER, JULIA BARNARD & LISA STIFLER, CTR. FOR RESPONSIBLE LENDING, DEBT BY DEFAULT: DEBT COLLECTION PRACTICES IN WASHINGTON 2012–2016, at 1 (2019) (finding that a single law firm that frequently represented debt buyers filed 21,354 collection cases in Washington Superior Courts in a four-year period); LISA STIFLER, TOM FELTNER & SAFA SAJADI, CTR. FOR RESPONSIBLE LENDING, UNDUE BURDEN: THE IMPACT OF ABUSIVE DEBT COLLECTION PRACTICES IN OREGON 1 (2018) (finding that six debt buyers collectively filed seventy-five thousand cases in Oregon courts over a five-year period).

132. Balganesh, *supra* note 6, at 2279.

if the borrower has a checking account with the lender. But the borrower can easily transfer money from a checking account at a different bank. When loans are obtained from a lender who is not a bank, payments are easily processed without the borrower holding a checking account with the lender.[133] Even when the lender is a bank, a checking account is not always a prerequisite.[134] Not surprisingly, when there is no extreme imbalance of power between the bank and the borrower—for example, when the borrower is a bidder that has won an infrastructure project or a business—banks do not demand that the borrower open a checking account.[135] But when the borrower is a retail borrower, banks impose not only an obligation to hold a checking account but often an obligation to hold a minimum balance in the account.[136]

Bonds and bank guarantees are two other contractual mechanisms that allow a party to litigate as a defendant even though it would be considered a plaintiff from a substantive perspective. Contractors performing works for a public entity are often required to post a bond or a bank guarantee.[137] During the execution of a long-term contract, disputes often arise regarding the contractor's obligation to perform a specific task. Commonly, disputes arise regarding the question of whether or not a task is included in the scope of the works

133. Kathryn Fritzdixon, *Bank and Nonbank Lending over the Past 70 Years*, FDIC Q., 3d Q. 2019, at 31 (surveying the trends and changes in lending in different sectors and the choice between bank lending and nonbank lending in the various sectors).

134. *See, e.g.*, *Home Equity Line of Credit: Unlock the Possibilities*, BANK OF AM., https://promotions.bankofamerica.com/homeloans/home-equity-rates?subCampCode=30256&dmcode=18097656148&cm_sp=CRE-HELOC-_-HE019-_-HEH6L53O01_L1_homeloans_HELOC_Acq_Opendoors_Nov23_L1Nav_helocOpeningDoorsContractNavCta (last visited Apr. 22, 2024) [https://perma.cc/936R-T73A] (allowing for the repayment of a certain kind of loan from a Bank of America account, but charging higher interest rates when payments are made from a different bank).

135. *See, e.g.*, *Business Loans: Prepare for the Unexpected*, U.S. BANK, https://www.usbank.com/business-banking/business-lending/business-loans.html (last visited Apr. 22, 2024), [https://perma.cc/2V8Z-SLV3]. Note that *none* of the six loans offered for business purposes requires checking with the bank as a prerequisite for the loan. *Id.* The same bank requires a checking account as a prerequisite to *all* six loans offered to private borrowers. U.S. BANK, *supra* note 25.

136. Rebecca Safier, *How Do Bank Loans Work?*, FORBES (Feb. 22, 2023, 9:00 AM), https://www.forbes.com/advisor/personal-loans/how-do-bank-loans-work/ [https://perma.cc/GR8J-VWDA] ("You usually don't have to be an existing customer of a bank to borrow a personal loan. However, some banks require that you open an account and offer special perks to current customers, such as better interest rates or higher loan maximums."). For such a requirement in a loan designed specifically for retail consumers' needs ("Balance Assist"), see *Balance Assist Can Help with Unexpected Expenses*, BANK OF AM., https://promotions.bankofamerica.com/deposits/balance-assist (last visited Apr. 22, 2024), [https://perma.cc/QT24-BQK9].

137. *Guarantees Program*, WORLD BANK, https://www.worldbank.org/en/programs/guarantees-program (last visited Apr. 22, 2024), [https://perma.cc/CL35-QFHM].

contracted for.[138] Suppose that the public entity demands that the contractor perform such a task and the contractor refuses, arguing that the task is not in the contracted scope of work. Under substantive law, the public entity may file a lawsuit for specific performance.[139] Alternatively, it may pay a different contractor for performance of the work and then sue for repayment. In either case, it will litigate as plaintiff. But a bank guarantee or bond provides the public entity with a third option: It can argue that it has suffered damages—whether in the form of contracting with a different contractor, in the form of performance of the work itself, or otherwise—and cash the guarantee. If the contractor sues for the forfeited amount, the public entity will litigate as defendant. The bond or bank guarantee thus serves to allow the stronger party to alter its litigatory position.

Generalizing, contractual self-help mechanisms are one kind of mechanism that allows a powerful party to secure the litigatory position it finds most advantageous.[140] The ability to choose a litigatory position is troubling enough. But the problem is compounded because self-help mechanisms do not even compel the stronger party to make this choice ex ante. Self-help mechanisms provide an option that the stronger party may exercise at will, if and when a dispute arises. In the example above, nothing compels the bank to set off amounts allegedly owed. If the bank prefers to litigate as a plaintiff, which it may for a host of reasons we subsequently discuss,[141] it may do so just as easily. The litigatory role is a choice made by the stronger party rather than a reflection of the substance of the dispute.

2. Ongoing Payments and Financial Relationships

In many situations, the parties have an ongoing relationship, within the framework of which the professional litigant is obligated to make payments to its counterpart. These future payments may be entirely unrelated to the dispute. But they allow the repeat litigant to

138. PRAC. L. REAL EST., DISPUTE RESOLUTION MECHANISMS IN CONSTRUCTION CONTRACTS IN THE US (2024), Westlaw w-028-3729 ("Disputes are fairly common on construction projects and often relate to the scope of work, project time and delay, design and construction details, or the discovery of unforeseen conditions or hazardous materials.").

139. PRAC. L. COM. TRANSACTIONS, CONTRACT MANAGEMENT: OVERVIEW (2024), Westlaw 2-618-0697.

140. Self-help may sometimes be afforded by law, not only by contractual design. *See, e.g.*, 53 Foot Trawler Pegasus, No. 08–cv–117–Orl–18, 2008 WL 4938345 (M.D. Fla. Nov. 18, 2008). Such self-help mechanisms may also be the result of powerful litigants' lobbying efforts. We do not discuss these kinds of self-help mechanisms because they are not directly designed or tailored by professional litigants on an ad hoc basis.

141. *See infra* Section II.B.

manipulate its litigatory position. To illustrate this, consider Example 1 below:

EXAMPLE 1

> Peter is a Corporate Inc. employee. Corporate Inc. believes that between the years 2018 and 2022, it mistakenly overpaid some of its employees, including Peter, due to a clerical error. Peter, like other employees, was unaware of the mistake and had no way of knowing about it. In fact, Peter is not even sure if he was affected by the mistake. He believed in good faith that he was fully entitled to the amounts in his paycheck and still believes that the payments were deserved.

In Example 1, the employer can sue Peter and the other employees for restitution of any sums paid in excess. Yet, Corporation Inc. can easily manipulate its litigatory position and assume the role of defendant instead of plaintiff. Instead of suing the employees for restitution, the employer will simply make cuts to the employees' future paychecks. This way, the employer can secure payment without going through the court. Now, if the employees want the matter adjudicated, they are the ones who must act as plaintiffs and sue (which they might be hesitant to do, for multiple reasons).

In Example 1, there is no contractual provision allowing the professional adversary to assume the role it finds most beneficial. In fact, the amounts being withheld are, as a legal matter, entirely detached from the dispute. The dispute pertains to past payments, mistaken or not, and the cutbacks are made to future payments, which the employees fully deserve. To see how artificial the setting is, consider what would have happened had Peter left the company. Corporate Inc. would have then had to sue Peter if it wanted to be repaid. Importantly, Corporate Inc. does not challenge the employees' entitlement. It simply abuses the economic relationship. Because employees receive a stream of payments (a salary) from their employer, the employer has the ability to force them into the litigatory position most preferable to it. If the employer sues the employees, it will need to litigate against all of them. If it chooses to make cuts to their future paychecks, some employees may not even notice the cuts; others may fear retaliation if they sue their employer and may thus give up on their claims. The choice of the litigatory position may thus be determinative of the substantive outcome.

3. Insurers and Subrogation

In the context of tort law, we are accustomed to thinking of injurers as paradigmatic defendants, and of victims as paradigmatic plaintiffs.[142] Supposedly, the very nature of tort law[143] is to allow victims to vindicate their violated rights in court.[144] Yet this traditionally accepted view neglects an important aspect of tort litigation—insurers' power to manipulate it. Insurers are repeat tort litigants who accumulate invaluable experience in tort litigation and who have a tremendous influence on the tort system, both as litigants[145] and as lobbyists.[146] Accordingly, insurers easily transcend the traditional dichotomy under which victim-plaintiffs supposedly battle injurer-defendants. In fact, insurers, the most common and powerful tort litigants, choose their litigatory role at their convenience. Consider the following example:

EXAMPLE 2

> Sheela opens a new restaurant. An owner of a nearby food establishment, disgruntled by the competition, makes vague threats against Sheela. Sheela's restaurant is subsequently torched to the ground. Closed-circuit TV footage shows a man similar in height and build to the competitor who made the threats burning the restaurant.

Example 2 describes a simple tort scenario. Supposedly, Sheela is the victim-plaintiff, and she will sue her competitor, the injurer-defendant. Yet the reality of litigation is far more complex. Sheela is insured. Under the terms of the insurance policy, Sheela justly expects the insurance company to pay for her damages, subrogate her claim,

142. Parchomovsky & Stein, *supra* note 2, at 1336–44.

143. John C.P. Goldberg & Benjamin C. Zipursky, *Civil Recourse Defended: A Reply to Posner, Calabresi, Rustad, Chamallas, and Robinette*, 88 IND. L.J. 569, 572 (2013) (highlighting the important connection between the idea of tort and the right of action by the injured party).

144. *Id.*; *see also* Benjamin C. Zipursky, *Rights, Wrongs, and Recourse in the Law of Torts*, 51 VAND. L. REV. 1, 18–21 (1998); JOHN C.P. GOLDBERG & BENJAMIN C. ZIPURSKY, THE OXFORD INTRODUCTIONS TO U.S. LAW: TORTS 6 (2010).

145. Parchomovsky & Stein, *supra* note 3, at 1352–55.

146. *See, e.g.*, Yonathan A. Arbel & Yotam Kaplan, *Tort Reform Through the Back Door: A Critique of Law and Apologies*, 90 S. CAL. L. REV. 1199, 1203 (2017); PUB. CITIZEN, MEDICAL MALPRACTICE BRIEFING BOOK: CHALLENGING THE MISLEADING CLAIMS OF THE DOCTORS' LOBBY 85 (2004); Gabriel H. Teninbaum, *How Medical Apology Programs Harm Patients*, 15 CHAP. L. REV. 307, 311 (2011); Michael B. Runnels, *Apologies All Around: Advocating Federal Protection for the Full Apology in Civil Cases*, 46 SAN DIEGO L. REV. 137, 148–49 (2009).

and assume the role of plaintiff vis-à-vis the arsonist.[147] The insurer, however, can as easily choose to litigate as defendant. Assume for instance that the insurance company refers Sheela to the terms of her policy, noting that the policy requires Sheela to install sprinklers as a condition for coverage against arson. Even though Sheela did in fact install sprinklers as required, and even provided documentation of the installation to the insurer in real time, the insurer falsely and knowingly claims that Sheela failed to install the mandatory protective measures and denies coverage. Sheela will be forced to sue the insurer, who will now litigate the case as a defendant. Importantly, the moment coverage is denied, Sheela becomes a plaintiff who must prove all elements of her claim, including those that the insurer was expected to prove. Sheela cannot simply prove that she installed sprinklers—the alleged reason for the insurer's refusal to cover her damages—but also all other elements of her claim, including those that the insurer was expected to prove after subrogating her claim. The insurer knows full well that the court will rule against it on the issue of whether or not sprinklers were installed. But by artificially making this argument, it can assume the role of defendant with respect to other matters. As we subsequently show,[148] on the other issues—and specifically on the issue of the arsonist's identity—litigating as defendant is likely to tilt the outcome in its favor. The insurer manipulates the litigatory positions so that the risk of not identifying the arsonist—the very risk it assumed in the insurance contract—is shifted ex post to its adversary.

4. Commercial Injurers and Invalid Waivers

Commercial injurers are another type of powerful tort litigant. Commercial injurers, such as hospitals, carriers, and manufacturers, regularly purchase liability insurance. This means they may litigate as defendants against private victims or as plaintiffs against their own insurers (after compensating their victims). But these commercial litigants and their insurers both prefer that the commercial injurers litigate as (co)defendants rather than as plaintiffs. That way, both are aided in their defense by a powerful codefendant and face private, unsophisticated plaintiffs. The alternative—facing each other as

147. For a concise explanation of the subrogation process and a brief history of subrogation claims, see Stephen J. Spurr, *Subrogation and Its Consequences for Tort Litigation*, 67 INT'L REV. L. & ECON. 1, 1–2 (2021).

148. *See supra* Subsection II.B.1.

plaintiff and defendant—is far less appealing.[149] Commercial injurers and their insurers can easily manipulate the commercial injurers' litigatory position by including invalid waivers in their consumer contracts. Consider Example 3 below:

EXAMPLE 3

> Donna spends her winter vacation in a ski resort. Early one morning, Donna falls while skiing and suffers a severe leg injury. Upon approaching resort management, Donna is surprised to learn that the "terms and conditions" form she signed when checking into the resort includes a broad waiver, releasing the resort from any liability for injuries suffered by visitors and guests.

Example 3 illustrates a common practice, highlighted in a recent article by Edward Cheng, Ehud Guttel, and Yuval Procaccia. As the authors show, injurers seem to be ignorant of, or at least oblivious to, case law directly affecting their operations. As every tort-law student knows, a waiver as the one described in Example 3, relieving a potential injurer from liability before harm as occurred, is generally invalid.[150] Repeat injurers, such as ski resorts, gyms, restaurants (where patrons risk allergic reactions), bowling alleys, and transportation companies, thus seem to have little reason to insist that potential victims sign such waivers. Yet surprisingly, repeat injurers—including those who litigated the validity of such waivers and lost—do just that.[151] But the phenomenon is even more puzzling; as Cheng, Guttel, and Procaccia show, repeat injurers do so at the behest of their insurers, who specialize in tort law and are clearly aware of the waivers' invalidity.[152]

Cheng, Guttel, and Procaccia point to the puzzle and offer an explanation:

> If a liability waiver is clearly unenforceable, then why do injurers persist in requiring them? In the case of sophisticated actors or those with ample notice of unenforceability, the most obvious reason is simple: to deceive plaintiffs. After suffering an injury, victims

149. On the reasons for this, see our analysis below, which is based largely on the analysis offered in Edward K. Cheng, Ehud Guttel & Yuval Procaccia, *Unenforceable Waivers*, 76 VAND. L. REV. 571 (2023).

150. *See, e.g.*, Dalury v. S-K-I, Ltd., 670 A.2d 795, 796 (Vt. 1995); Hanks v. Powder Ridge Rest. Corp., 885 A.2d 734, 741–42 (Conn. 2005); *see also* RICHARD A. EPSTEIN & CATHERINE M. SHARKEY, CASES AND MATERIALS ON TORTS 315–18 (12th ed. 2020); JOHN C.P. GOLDBERG, LESLIE C. KENDRICK, ANTHONY J. SEBOK & BENJAMIN C. ZIPURSKY, TORT LAW: RESPONSIBILITIES AND REDRESS 526–34 (5th ed. 2021); JOHN FABIAN WITT & KAREN M. TANI, TORTS: CASES, PRINCIPLES, AND INSTITUTIONS 281–83 (5th ed. 2020).

151. Cheng et al., *supra* note 149, at 588.

152. *Id.* at 589.

> who remember, reread, or are told about their preinjury waiver might easily and erroneously conclude that they have no valid claim against the injurer.[153]

This dynamic is easily illustrated in Example 3. Faced with the clear contractual waiver, Donna, unaware of her rights, is highly likely to forgo any legal action against the resort. In this sense, the resort faces an easy choice. It could pay Donna and litigate as plaintiff against its insurer, another powerful repeat litigant. If that were the litigatory setting, the invalid waiver would likely play no role. Neither party would seriously attempt to rely on it, knowing full well that its opponent would easily overcome any argument based on an invalid document. But the resort and its insurer have another option—they can rely on the invalid waiver, in which case the resort will litigate the case as a defendant (together with the insurer) against Donna, a private, uninformed plaintiff. The resort and the insurer both prefer this option.

Insurers therefore require repeat injurers to include invalid waivers in their contracts, effectively conspiring together to deceive onetime litigants.[154] In doing so, the insurers effectively switch the role of their potential adversaries—the repeat injurers—from plaintiffs to (co)defendants.

B. The Incentives to Manipulate Litigatory Positions

As shown in the previous Section, powerful commercial litigants can manipulate their litigatory position. Importantly, powerful commercial litigants also have strong incentives to do so. Such litigants often stand to profit greatly by switching their role from plaintiff to defendant and vice versa. We next discuss several reasons for why professional litigants might prefer one litigatory role to the other.

1. Burdens of Proof

A basic tenet of civil procedure is that the burden of proof in a civil claim is on the plaintiff.[155] This is often sufficient to determine the outcome of litigation. To illustrate, recall Example 2 above, describing the arson case in which Sheela's store was burned to the ground. In this case, we showed the insurer can easily choose to litigate as a defendant rather than as a plaintiff. Now, we highlight a complementary point: It is not only that the insurer can easily choose to litigate this case as a defendant. This is also extremely advantageous for the insurer and is

153. *Id.* at 588 (footnote omitted).

154. *Id.*

155. 2 MCCORMICK, *supra* note 30; WIGMORE, *supra* note 30, §§ 2486–2493; Sobel, *supra* note 30, at 341.

in fact determinative of the case's outcome. Switching litigatory positions is, in this case, tantamount to deciding who will win the case. The reason for this is that the case in Example 2 is difficult to prove. While Sheela has a very strong claim against the insurer, her tort claim is far less certain. Recall that the only evidence tying Sheela's competitor to the arson is a vague threat and the footage showing a person of similar height and build burning Sheela's establishment. It will not be easy to prove in court that Sheela's neighbor is the arsonist and should be forced to pay damages. Therefore, the insurance company will not want to take Sheela's claim through subrogation and litigate it as a plaintiff against the arsonist. Instead of shouldering the burden of proof, the insurance company will prefer to rid itself of the risk by denying coverage and litigating as a defendant.

Importantly, as noted above, by denying coverage, the insurer is able to shift the burden of proof with respect to all pertinent facts, not only to the ones it initially disputes. The insurer's proclaimed reason for denying coverage was its argument that Sheela had not installed sprinklers. The insurer knew full well that the argument had no merit, and that it would lose on this argument. But raising the argument turned it into a defendant on all issues and shifted the burden of proof with respect to the identity of the arsonist from the insurer to Sheela.

More broadly, insurers and other powerful litigants will choose to litigate as defendants when factual ambiguity is high. And as the literature has shown, these are precisely the cases most likely to be litigated, because when factual ambiguity is high, parties have the greatest difficulty in assessing the outcome of trial in advance.[156] When the parties' claims are difficult to prove, and accurate and verifiable evidence is hard to produce (as is often the case), powerful litigants will choose to litigate as defendants rather than plaintiffs. Due to current rules regarding the burden of proof, this will usually grant the powerful litigant an easy win.

2. Remedies

The previous example demonstrated that powerful commercial litigants will sometimes prefer to litigate as defendants. But they may also find it more advantageous to manipulate their litigatory position in order to appear in court as plaintiffs. For instance, in Example 2 above, assume that the arsonist is caught and admits his crime, so there is no difficulty in proving the case. Assume further that due to the

156. Keith N. Hylton, *Asymmetric Information and the Selection of Disputes for Litigation*, 22 J. LEGAL STUD. 187, 187 (1993).

nature of the arsonist's crime, the insurer expects the case to result in a hefty monetary payment in the form of punitive damages or some other augmented remedy.[157] Such augmented remedies are available when an injurer acted with malice,[158] reckless disregard,[159] or committed what might be considered a "public wrong," as the arsonist clearly has.[160] In such a setting, the insurer has an incentive to litigate the case as a plaintiff rather than a defendant. This is not merely a theoretical possibility. First-party insurers are known to "prosecute tort claims for full tort damages—pecuniary, non-pecuniary, punitive."[161]

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157. *See, e.g.*, Cooper Indus., Inc. v. Leatherman Tool Grp., Inc., 532 U.S. 424, 432 (2001):

> Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered . . . . The latter . . . operate as 'private fines' intended to punish the defendant and to deter future wrongdoing;

RESTATEMENT (SECOND) OF TORTS § 908(1) (AM. L. INST. 1979) ("Punitive damages are damages, other than compensatory or nominal damages, awarded against a person to punish him for his outrageous conduct and to deter him and others like him from similar conduct in the future."); Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 351–52 (2003) (suggesting that punitive damages can serve not only the goals of deterrence but can also provide compensation for societal harm, as opposed to the harm caused to the specific plaintiff); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. L. REV. 1, 3 (1982) (suggesting that punitive damages can serve the following purposes: (1) punishment of the defendant; (2) specific deterrence; (3) general deterrence; (4) preservation of the peace; (5) incentivization for private law enforcement; (6) individual compensation; and (7) attorney fee shifting).

158. *See, e.g.*, Linthicum v. Nationwide Life Ins. Co., 723 P.2d 675, 679–80 (Ariz. 1986) (describing the "evil mind" threshold in punitive damages evaluations).

159. White Constr. Co. v. Dupont, 455 So. 2d 1026, 1028 (Fla. 1984) (requiring "something more than gross negligence" to justify punitive damages); *see also* Wisker v. Hart, 766 P.2d 168, 173 (Kan. 1988) ("Punitive damages may be awarded whenever the elements of fraud, malice, gross negligence, or oppression mingle in the controversy."); Seals v. St. Regis Paper Co., 236 So. 2d 388, 392 (Miss. 1970) (requiring "reckless indifference to the consequences"); McClellan v. Highland Sales & Inv. Co., 484 S.W.2d 239, 242 (Mo. 1972) ("[A]cts justifying imposition of punitive damages must be . . . so reckless as to be in utter disregard of consequences.").

160. *See, e.g.*, Chrysler Corp. v. Wolmer, 499 So. 2d 823, 825 (Fla. 1986) (providing that punitive damages can be imposed for conduct that can be construed to constitute a "public wrong"); Rocanova v. Equitable Life Assurance Soc'y of U.S., 634 N.E.2d 940, 944 (N.Y. 1994) ("[A] private party seeking to recover punitive damages must not only demonstrate egregious tortious conduct by which he or she was aggrieved, but also that such conduct was part of a pattern of similar conduct directed at the public generally.").

161. David Rosenberg, *Deregulating Insurance Subrogation: Towards an Ex Ante Market in Tort Claims* 315 (Harvard L. Sch. Pub. L. Research Paper, Paper No. 043, 2002), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=350940 [https://perma.cc/FWV6-SG3U].

Similar incentives arise with other forms of augmented remedies, such as aggravated damages,[162] exemplary damages,[163] statutory damages,[164] treble damages,[165] or disgorgement remedies.[166] This translates to a more general observation. Namely, if the prospect of the available remedy seems promising and litigation seems a potentially profitable venture, the insurer will choose to pay the injured her damages (which, of course, will not include augmented remedies), subrogate the claim, and litigate as plaintiff; otherwise, the insurer will prefer to assume the role of defendant.

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162. Allan Beever, *The Structure of Aggravated and Exemplary Damages*, 23 OXFORD J. LEGAL STUD. 87, 87 (2003) (arguing that the concept of aggravated damages is distinct from that of exemplary damages, and that while the former constitutes an essential aspect of civil litigation, the latter should be abolished).

163. James Goudkamp, *Exemplary Damages*, *in* COMMERCIAL REMEDIES: RESOLVING CONTROVERSIES 318 (Graham Virgo & Sarah Worthington eds., 2017) (reviewing the debate regarding exemplary damages); *see* James Edelman, *Exemplary Damages for Breach of Contract*, 117 LAW Q. REV. 539, 539 (2001) (discussing the possibility of exemplary damages in contract law).

164. Pamela Samuelson & Tara Wheatland, *Statutory Damages in Copyright Law: A Remedy in Need of Reform*, 51 WM. & MARY L. REV. 439, 441 (2009) (describing the doctrine of statutory damages).

165. The doctrine of treble damages refers to the practice of tripling the amount of damages awarded in a lawsuit. However, scholars suggest that its application by the courts is inconsistent with this framing. *See* John M. Connor & Robert H. Lande, *Not Treble Damages: Cartel Recoveries Are Mostly Less than Single Damages*, 100 IOWA L. REV. 1997, 1998–99 (2015) (describing the doctrine of treble damages and offering a criticism of its application by courts).

166. The disgorgement remedy is a type of legal relief that aims to prevent unjust enrichment. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 51(4) (AM. L. INST. 2011). It requires a defendant to return any ill-gotten gains or profits obtained through illegal or unethical means. Pamela Samuelson & Mark Gergen, *The Disgorgement Remedy of Design Patent Law*, 108 CALIF. L. REV. 183, 184 (2020). The purpose of this remedy is to restore the parties to their original positions and to discourage behavior that would otherwise undermine the integrity of the market or legal system. The disgorgement remedy can be ordered by a court in a variety of contexts, including securities fraud, breach of contract, and intellectual property infringement cases. Pamela Samuelson, John M. Golden & Mark P. Gergen, *Recalibrating the Disgorgement Remedy in Intellectual Property Cases*, 100 B.U. L. REV. 1999, 2002–03, 2002 n.7 (2020). The remedy is usually considered to be an equitable one and is used when compensatory damages are not enough to fully remedy the harm suffered by the plaintiff. Cameron K. Hood, *Finding the Boundaries of Equitable Disgorgement*, 75 VAND. L. REV. 1307, 1309, 1313, 1318 (2022). The amount of disgorgement ordered by the court is meant to reflect the exact amount of profits or gains obtained by the defendant, and is therefore intended to be a precise measure of relief, rather than a speculative or punitive one.

3. Interim Remedies

The availability of interim remedies, such as preliminary injunctions,[167] freezing orders,[168] interim payment orders,[169] and temporary foreclosures,[170] also provides a strong incentive to litigate as plaintiff rather than as defendant. Defendants are not generally entitled to interim remedies, as those are designed to secure the rights being sought in litigation—that is, by plaintiffs.[171] This asymmetry naturally draws powerful repeat litigants to assume the role of plaintiffs when they can use interim remedies to exert pressure on private onetime litigants.

Interim remedies can be of immense practical importance and can often be more significant for the parties than the outcome of the litigatory process. In many cases, a court decision can only be expected years after the suit is filed.[172] For a onetime litigant with limited financial resources, if their bank account has been frozen, the fact that they will eventually be vindicated (years in the future) is of little relevance. Interim remedies thus easily push private litigants to agree to settle, even if the claim against them is bogus.

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167. *See* Times Mirror Mags., Inc. v. Las Vegas Sports News, L.L.C., 212 F.3d 157, 160 (3d Cir. 2000) (explaining that the grant or denial of preliminary injunctions requires "delicate balancing of the probabilities of ultimate success at final hearing with the consequences of immediate irreparable injury which could possibly flow from the denial of preliminary relief"); Doe v. Sundquist, 106 F.3d 702, 707 (6th Cir. 1997) (indicating that "the degree of likelihood of success that need be shown to support a preliminary injunction varies inversely with the degree of injury the plaintiff might suffer"). For an explanation of the doctrinal elements and policy goals of preliminary injunctions, see Thomas R. Lee, *Preliminary Injunctions and the Status Quo*, 58 WASH. & LEE L. REV. 109, 110, 113, 115 (2001). For a critique regarding the inconsistency in the application of preliminary injunctions by courts, see Bates, *supra* note 36, at 1530–35; Leubsdorf, *supra* note 36, at 526 (lamenting "[t]he dizzying diversity of formulations" in the adjudication of preliminary injunctions in courts).

168. Ebsco Indus., Inc. v. Lilly, 840 F.2d 333, 336 (6th Cir. 1988) (explaining the conditions under for granting a freezing order).

169. *See* David M. Rubenstein, *The Problem of Delay in Tort Recovery and the British Interim Payment Scheme*, 39 U. CHI. L. REV. 836, 837–38 (1972) (describing the details and goals of the doctrine).

170. Michael H. Schill, *An Economic Analysis of Mortgagor Protection Laws*, 77 VA. L. REV. 489, 493–94 (1991):

> One of the primary objectives of mortgage foreclosure law is to have the sheriff, judge, or trustee sell the property for a price that equals its fair market value. For several reasons, however, this rarely occurs. . . . When the foreclosure sale price is less than the debt owed to the mortgagee, the mortgagee may proceed against the borrower for a deficiency judgment in the amount of the shortfall if the terms of the loan allow such an action.

171. *See, e.g.*, Rubenstein, *supra* note 169, at 837–38.

172. *Id.* at 836.

4. Statute of Limitations and Counterclaims

Claims brought by plaintiffs are limited in time.[173] The statute of limitations provides predetermined time periods after which plaintiffs lose the ability to claim debts in civil courts.[174] This time limit is a major disadvantage for plaintiffs, as they are limited in their ability to seek redress.[175] On the other hand, defendants may be able to argue defenses and sometimes file counterclaims, even if the limitation period has elapsed.[176] The statute of limitations therefore creates a strong incentive for repeat litigants to assume the role of defendant. As defendants, they can defend themselves using claims that would be unavailable to them if they had assumed the role of plaintiff. Moreover, they can sometimes even revive (counter) claims they would be unable to use had they operated as plaintiffs. In appropriate cases, the threat of reviving such counterclaims beyond the limitation period can deter onetime litigants and discourage them from initiating legal action.

5. (In)access to Justice

Private onetime litigants do not enjoy easy access to the litigation system,[177] and their ability to litigate effectively is in

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173. Michael D. Green, *The Paradox of Statutes of Limitations in Toxic Substances Litigation*, 76 CALIF. L. REV. 965, 971–72 (1988) (describing the common justifications and historical origins of the doctrine).

174. *Id.* at 971.

175. *See, e.g.*, *id.* at 968–71; Suzette M. Malveaux, *Statutes of Limitations: A Policy Analysis in the Context of Reparations Litigation*, 74 GEO. WASH. L. REV. 68, 70 (2005) (describing the injustice caused to plaintiffs seeking reparation due to the statute of limitations).

176. For the origins of this rule, see Pa. R.R. Co. v. Miller, 124 F.2d 160, 161 (5th Cir. 1941) ("The cited portion of the bill of lading is a limitation upon the time within which suits to enforce the recovery of claims may be instituted . . . but is not a limitation upon a defense by way of recoupment."); A.P.G., *Counterclaim: Effect of Statute of Limitations*, 31 CALIF. L. REV. 210, 210 (1943) ("[T]he running of the statute of limitations has no effect on defendant's counterclaim when the counterclaim is tantamount to common law recoupment."); Nan S. Ellis, *The Applicability of the Statute of Limitations to Truth-in-Lending Counterclaims*, 19 AM. BUS. L.J. 471, 472 (1982) (discussing the possibility of a counterclaim by the debtor following default on a loan and a collection suit filed by the creditor); John L. Sobieski, Jr., *Counterclaims and Statutes of Limitations: A Critical Commentary on Present Tennessee Law*, 42 TENN. L. REV. 291, 291–92 (1975) (studying this possibility under state civil procedure rules).

177. *See* Lawrence M. Friedman, *Claims, Disputes, Conflicts and the Modern Welfare State*, *in* ACCESS TO JUSTICE AND THE WELFARE STATE 251, 258 (Mauro Cappelletti ed., 1981):

> Litigation had also become terribly expensive. No one decided, deliberately, to raise the price of law. This simply happened or evolved over the years. The reasons hardly matter. Access to the courts for relief against mistakes and injustices of the state became very, very costly. . . . Quality, of course, is always expensive. A well-trained, professional body of judges costs money. . . . The legal profession is now highly professional, as well. . . . Good lawyers have become extremely expensive.

See generally MAGALI SARFATTI LARSON, THE RISE OF PROFESSIONALISM: A SOCIOLOGICAL ANALYSIS (1977) (providing a sociological explanation for the rise in litigation costs); Richard L.

decline.[178] The costs associated with initiating legal action are prohibitive for many private plaintiffs.[179] Because initiating legal action is often not an option, turning such litigants into plaintiffs is likely to silence their claims. This provides powerful commercial litigants with a strong incentive to manipulate their litigatory position and assume the role of defendant. For example, in the context of tort law, only about 2% of potential plaintiffs (typically individual litigants) actually take insurers to court.[180] This low percentage illuminates the prohibitive costs of initiating legal action, the difficulty in accessing the litigation system, and the great effectiveness of insurers' manipulation techniques.[181] Essentially, by assuring that private individuals will systematically have to litigate as plaintiffs, insurers dramatically reduce their exposure to liability.

But these trends are in no way limited to tort victims. In commercial litigation, "costs of $100,000 per month are commonplace and bills of $1 million per month are not rare."[182] Such costs are prohibitive for many, especially considering extremely large and constantly growing wealth gaps.[183] With wealth gaps at historic highs[184] (the top 1% of Americans holds more than 30% of the wealth, and the bottom 50% owns only 2.8%),[185] it is unsurprising that many potential

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Abel, *The Rise of Professionalism*, 6 BRIT. J.L. & SOC'Y 82 (1979) (reviewing the conditions that contributed to the rise in the costs of professional legal services); Richard L. Abel, *Toward a Political Economy of Lawyers*, 1981 WIS. L. REV. 1117 (explaining lawyers' interest in costly litigation).

178. Parchomovsky & Stein, *supra* note 3, at 1314.

179. Greene, *supra* note 17, at 1269–70.

180. *See* BURKE, *supra* note 8.

181. FEINMAN, *supra* note 7, at 2–7.

182. Zimmerman et al., *supra* note 15, at 635, 643–44, 655.

183. For a comprehensive study, see Jonathan Heathcote, Kjetil Storesletten & Giovanni L. Violante, *The Macroeconomic Implications of Rising Wage Inequality in the United States*, 118 J. POL. ECON. 681, 708–16 (2010).

184. *See* THOMAS PIKETTY, CAPITAL IN THE TWENTY-FIRST CENTURY 430–70 (Arthur Goldhammer trans., 2014).

185. *DFA: Distributional Financial Accounts: Distribution of Household Wealth in the U.S. Since 1989, Wealth by Wealth Percentile Group*, BD. GOVERNORS FED. RSRV. SYS., https://www.federalreserve.gov/releases/z1/dataviz/dfa/distribute/table/#quarter:129;series:Net%20worth;demographic:networth;population:all;units:shares (last updated Dec. 15, 2023) [https://perma.cc/4RSX-M3D4]. Income inequality has received significant attention in both national politics and literature. *See generally* Dave Boyer, *Obama to Use State of the Union as Opening Salvo in 2014 Midterms*, WASH. TIMES (Jan. 26, 2014), http://www.washingtontimes.com/news/2014/jan/26/obama-to-focus-state-of-the-union-address-on-incom/ [https://perma.cc/AV8E-KRR2] (highlighting income inequality as a major focus of the Obama Administration); EDWARD N. WOLFF, TOP HEAVY: THE INCREASING INEQUALITY OF WEALTH IN AMERICA AND WHAT CAN BE DONE ABOUT IT 7–20 (1996) (discussing the development of income inequality over time); LISA A. KEISTER, WEALTH IN AMERICA: TRENDS IN WEALTH INEQUALITY 3–20 (2000) (analyzing theory and data of household wealth distribution from the 1960s to the 1990s); James B. Davies, Susanna Sandström, Anthony Shorrocks & Edward Wolff, *The Global Pattern of Household Wealth*, 21 J.

plaintiffs find that they are unable to approach the court and sue. Of course, it also does not help that onetime litigants are usually billed based on high hourly rates,[186] while repeat litigants pay lower rates to in-house attorneys and have standing arrangements with large law firms.[187] Moreover, onetime litigants bear additional costs if they want to sue as plaintiffs.[188] Private litigants face search costs and informational barriers: They need to collect and analyze information about the merits of their case to decide whether or not to approach an attorney.[189] They need to search for potential attorneys and meet with them, negotiate fees, and navigate through the process of hiring an attorney.[190] For a onetime litigant, being forced into the position of plaintiff and faced with the financial and personal costs of initiating legal action is often equivalent to losing the entitlement altogether.

6. Forum Shopping

Forum shopping is yet another reason for a party to prefer a specific litigatory position—normally that of plaintiff. Both federal and state laws allow parties a great degree of leeway in choosing the court before which their dispute will be adjudicated. Under the Fourteenth Amendment, a state court may assert personal jurisdiction over a party who resides in the state, is served while present in the state, consents to personal jurisdiction in the state, or has sufficient minimum ties to the state.[191] Federal law provides similar options,[192] and in specific instances—such as antitrust and securities claims—even broader options.[193] As a general rule, the plaintiff may file the claim in any of

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INT'L DEV. 1111, 1111 (2009) (examining global trends in wealth distribution); THOMAS M. SHAPIRO, TOXIC INEQUALITY: HOW AMERICA'S WEALTH GAP DESTROYS MOBILITY, DEEPENS THE RACIAL DIVIDE, & THREATENS OUR FUTURE 14–15 (2017) (discussing the recent rise of wealth inequality in the United States).

186. *See* Parchomovsky & Stein, *supra* note 3, at 1344.

187. *Id.*; Parchomovsky & Stein, *supra* note 2, at 1331; *see* Gen. Dynamics Corp. v. Superior Ct., 876 P.2d 487, 491 (Cal. 1994) (showing that the use of in-house counsel is common, and explaining its economic advantages for corporations).

188. *See* Parchomovsky & Stein, *supra* note 3, at 1344; Hubbard, *supra* note 8, at 453–54 ("Because defendants in tort disputes tend to have more wealth than plaintiffs, they have an advantage in the litigation." (footnote omitted)).

189. *See* Parchomovsky & Stein, *supra* note 2, at 1331.

190. *Id.*

191. John Coyle & Katherine C. Richardson, *Enforcing Inbound Forum Selection Clauses in State Court*, 53 ARIZ. ST. L.J. 65, 76 (2021); Scott Dodson, *The Culture of Forum Shopping in the United States*, *in* COMPENDIUM ON COMPARATIVE PROCEDURAL LAW AND JUSTICE (forthcoming 2025) (manuscript at 14–15), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4332658 [https://perma.cc/K5ZM-9WYT].

192. *See* FED. R. CIV. P. 4(k); Dodson, *supra* note 191, at 16.

193. Scott Dodson, *Personal Jurisdiction and Aggregation*, 113 NW. U. L. REV. 1, 41 (2018).

the courts that have personal jurisdiction over the defendant.[194] Effectively, therefore, the plaintiff is afforded several options from which to choose the court that will adjudicate the case. This choice is limited by the forum non conveniens doctrine,[195] which allows a court to refuse to hear a case if there is another forum where the trial will best serve "the convenience of the parties and the ends of justice."[196] But within very broad boundaries, the plaintiff may file the case in any of the competent courts.[197]

The choice of forum allows plaintiffs to determine, or at least affect, the outcomes of cases in at least three ways: First, and most intuitively, plaintiffs may choose the forum that is least convenient for the defendant as a geographic matter.[198] If litigating the case in one of the jurisdictions that has personal jurisdiction is costly for the defendant, the plaintiff can exploit these expected costs to extract a more favorable settlement.[199] Second, through the choice of forum, the plaintiff may effectively choose the laws that will govern the dispute.[200] If different fora are expected to apply different substantive laws or different procedural laws, the plaintiff can effectively choose the most convenient law to govern the case.[201] This may happen both with respect to the choice between federal and state courts (when these courts have concurrent jurisdiction)[202] and with respect to the choice between different state courts.[203] Finally, plaintiffs may abuse their choice of forum to effectively choose the judge that will preside over the case. To be sure, mechanisms designed to preempt "judge shopping"[204] are in place and attempt to randomize the allocation of cases to judges. But certain districts or courts "are known to be staffed by a single judge or

194. *See* Int'l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945) (providing the basic rule); Hanson v. Denckla, 357 U.S. 235, 251 (1958); William M. Richman, *Understanding Personal Jurisdiction*, 25 ARIZ. ST. L.J. 599, 599–605 (1992) (explaining the two-step test for jurisdictional restriction).

195. Koster v. (Am.) Lumbermens Mut. Cas. Co., 330 U.S. 518, 527 (1947).

196. *Id.*; *see also* William S. Dodge, Maggie Gardner & Christopher A. Whytock, *The Many State Doctrines of Forum Non Conveniens*, 72 DUKE L.J. 1163, 1165–73 (2023) (surveying the different forum non conveniens doctrines in the various states).

197. *See* Dodson, *supra* note 191 (manuscript at 7).

198. *Id.*

199. Of course, the costs borne by the defendant are not limited to the direct costs of travel. They include the costs of searching for an attorney in a jurisdiction to which the defendant is foreign, verifying the attorney's quality, and any other costs associated with familiarizing the defendant with the rules and procedures.

200. Dodson, *supra* note 191 (manuscript at 17).

201. *Id.* (manuscript at 11, 20).

202. *Id.* (manuscript at 11).

203. *Id.* (manuscript at 17).

204. *Id.* (manuscript at 20).

a small group of judges with largely homogenous views."[205] And a judge who is relatively experienced or knowledgeable in a specific area of law may, in many courts, be assigned a disproportionate share (and perhaps even all) of the cases pertaining to that area of law.[206]

Thus, when forum shopping allows a plaintiff to choose between geographically distant courts, or between courts with relatively large divergence in the law applied, choosing to be a plaintiff may allow the professional litigant to determine the outcome of the case. At the very least, forum shopping allows the professional litigant to greatly disadvantage its onetime adversary in terms of chances of vindication and impose additional costs on the defendant.

7. Controlling the Timing of Litigation

Closely related to forum shopping is what can be termed "time-shopping." Within the timeframe set by the statute of limitations, plaintiffs have complete control over when a case will be filed. Defendants may be sensitive to the date of filing.[207] For example, a startup company that is trying to raise capital will be extremely sensitive to the filing of a claim against it.[208] Investors will discount its value because of the claim.[209] This may bring the defendant to its knees and force it to settle almost regardless of the merits of the claim.[210]

Similarly, a lawsuit against a private defendant that is filed when the defendant is bootstrapped for cash, incapacitated, or unable to deal with the lawsuit due to an illness may pressure the defendant into a settlement even though she might have otherwise successfully defended herself against the claim. Of course, professional litigants need not follow individual would-be adversaries on a day-to-day basis in order to know when the best timing is for filing a claim against them. Such a scheme would be fantastical, certainly on a large scale. A professional litigant may sometimes have information at its disposal that will allow for an inference regarding its onetime adversary's vulnerability. For example, a bank may observe that a customer has been withdrawing amounts greater than her paycheck for several months or that her checking account has been overdrawn for several

205. *Id.*

206. For an explanation of this phenomenon and its advantages, see Jonathan Remy Nash, *Expertise and Opinion Assignment on the Courts of Appeals: A Preliminary Investigation*, 66 FLA. L. REV. 1599, 1608–11, 1616–18 (2014).

207. Basnet et al., *supra* note 39, at 3, 9.

208. *Id.*

209. *Id.* at 4.

210. *Id.* at 11.

weeks. An inference that the client is experiencing financial hardship may be immediate, and the bank may then file a lawsuit for an alleged missing payment on a loan that occurred months or years beforehand. It can be relatively confident that the customer is likely to be too preoccupied to contest the charge. Similarly, an insurance company that is processing an insured's claim and receives a new claim for additional medical expenses stemming from a second injury can infer that the individual—suffering from at least two major personal injuries—is unlikely to be able to handle a series of claims. Thus, abusing control over the timing of cases requires no special measures or elaborate schemes. Landlords make use of "time-shopping," keeping causes for eviction (such as delayed payments) "in their back pockets" or violations of occupancy rules as ammunition to be used when most convenient.[211]

8. Avoiding Unfavorable Precedents

In many situations, the position of plaintiff is favorable because it entails the ability to initiate legal action, to refrain from doing so, or to control the sequence in which similar cases are litigated. This is particularly useful when powerful repeat litigants fear that a specific dispute might produce an unfavorable precedent (from their perspective) if it reaches the court. By assuming the role of plaintiff, the powerful litigant can control the sequence in which similar cases are tried. If one of the cases is expected to produce a precedent that is favorable to the repeat litigant, the litigant can withhold the other cases and file them only after the first case has been adjudicated. Similarly, if the first case does not go as well as expected, the repeat litigant can settle that case, thereby preempting the precedent, and then initiate the case that is the next most likely to produce a favorable precedent.[212] Likewise, the plaintiff may simply refrain from bringing the cases that are likely to yield unfavorable precedents, or to initiate them after a more favorable precedent has been set.

211. Sabbeth, *supra* note 18, at 94 (focusing on the abuse of this "ammunition" to force tenants to tolerate abuse and noting that when demands are not met, retaliation takes the form of an eviction lawsuit).

212. The costs of settling the first precedent will be higher than the repeat plaintiff would prefer, because the defendant in that case will also know that the case is likely to yield an outcome unfavorable to the plaintiff. But if there are numerous other (similar) cases, the cost may be well worth the creation of the best possible precedent.

9. Exploiting Legal Ignorance

In many cases, powerful litigants will find it profitable to manipulate their litigatory position to best exploit the other party's ignorance of the law. To illustrate, recall the details of Example 1, in which Corporate Inc. allegedly paid its employees some money due to a clerical error over a long period of time. The employer's "natural" litigatory position is that of plaintiff. The employer demands that the employees repay it certain amounts. But instead of suing the employees for restitution, Corporate Inc. can make cuts to the employees' future paychecks against the employees' debt. As it turns out, under circumstances as described in Example 1, the employer has a strong incentive to act in this way due to the nature of the employer's claim, and the employees' ignorance of their rights.

Since Peter and other employees relied on the payment in good faith, they may invoke the change-of-position defense if they are sued.[213] The logic of this rule is simple: Relying on the employer's mistake, which they could not have controlled or detected, the employees increased their expenses and spent more money.[214] If they are forced to return the full amounts they received, they are left worse off through the employer's fault.[215] For this reason, if the employer acts as a plaintiff and sues the employees, it will probably not receive the full amount it paid by mistake. It will receive only partial restitution, or none at all.[216]

Assuming the role of defendant allows Corporation Inc. to bypass this defense quite easily. If it makes cuts to the employees'

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213. RESTATEMENT (THIRD) OF RESTITUTION & UNJUST ENRICHMENT § 65(A) cmt. a (AM. L. INST. 2011) indicates that in cases of a detrimental change of position:

> The law of restitution, like the law of torts, assigns losses on the basis of fault. Loss incurred as a result of the recipient's change of position may be allocated to the claimant by eliminating or reducing the recipient's liability in restitution, so long as the recipient is no more responsible than the claimant for the transaction the claimant seeks to reverse;

Hanoch Dagan, *Mistakes*, 79 TEX. L. REV. 1795, 1804–06, 1813 (2001) (explaining the requirement of detrimental reliance in the context of the change-of-position defense); Maytal Gilboa & Yotam Kaplan, *The Mistake About Mistakes: Rethinking Partial and Full Restitution*, 26 GEO. MASON L. REV. 427, 431–34 (2018) (explaining the key features of the change-of-position doctrine).

214. In the language of the change-of-position doctrine, we would say the employees relied on the payment to their detriment. *See, e.g.*, First Nat'l City Bank v. McManus, 223 S.E.2d 554, 558–59 (N.C. Ct. App. 1976).

215. *Id.*; Lipkin Gorman v. Karpnale Ltd. [1991] 2 AC 548 (HL) (appeal taken from Eng.).

216. *Lipkin Gorman*, 2 AC 548; Peter K. Huber, *Mistaken Transfers and Profitable Infringement on Property Rights: An Economic Analysis*, 49 LA. L. REV. 71, 105 (1988) (providing the economic justification for the change-of-position rule); J. Beatson & W. Bishop, *Mistaken Payments in the Law of Restitution*, 36 U. TORONTO L.J. 149, 153 (1986) (illustrating the difficulties of calculating reliance).

future paychecks, it can secure payment without ever going through the court system and without encountering the change-of-position defense. Now, if the employees want the dispute to be adjudicated, they must take it to court themselves. Unfortunately, it is highly likely that the employees will not know they have any reason to take the case to court, as they are likely unaware of the change-of-position defense (few people are).[217] If they are unaware of the defense, they have no reason to sue or even seek legal counsel, as they assume they are legally obligated to pay the sums the employer has taken from them. Similar dynamics are demonstrated by Example 3, in which the ski resort and its insurer assumed the role of defendants, which allowed them to hoodwink unsuspecting tort victims. By assuming the role of defendant, a professional litigant can abuse an opposing party's (or parties') ignorance of the law and easily flip the outcome of the case. Unfortunately, the details of Examples 1 and 3 are highly representative. Private individuals are often unaware of their legal rights, will not always know when to consult with an attorney, and will not always have the financial means to do so.

10. Judicial Error

The process of litigation, like any other process, is prone to error. Thus, judges and juries may sometimes come to wrong conclusions on factual or legal questions. Yet the structure of the litigation system dictates that plaintiffs and defendants do not suffer from such mistakes equally. In particular, it has been argued that the possibility of error in adjudication systematically favors defendants over plaintiffs.[218] The reasons for this is that plaintiffs have to prove multiple elements of their claim in order to win in court, while defendants can prevail by proving a single defense.[219] For example, in a contractual dispute, the defendant may defend itself by arguing for misrepresentation, mistake, impossibility, frustration of purpose, unconscionability, fraud, conditions, undue influence, economic duress, laches, limitation, and other defenses.[220] If any one of the defendant's arguments is upheld, the defendant will prevail.[221] The plaintiff, by contrast, must win each of

217. *See* Maytal Gilboa & Yotam Kaplan, *The Costs of Mistakes*, 122 COLUM. L. REV. F. 61, 62–63 (2022) (lamenting the unfortunate neglect of the law of restitution).

218. *See* Jef De Mot & Alex Stein, *Talking Points*, 2015 U. ILL. L. REV. 1259.

219. *Id.* at 1261.

220. *Id.* at 1265–66.

221. *Id.* at 1268, 1273; *see also id.* at 1266 ("[T]his system severely discriminates against plaintiffs while favoring defendants. Under this system, plaintiffs have only one talking point and no fallbacks: in each and every lawsuit, the plaintiff must specify and subsequently prove the defendant's violation of the applicable legal rule or standard.").

the so-called "talking points" on the preponderance of evidence in order to prevail.

To illustrate this point, assume that the claim depends on five distinct issues. Assume further that the plaintiff has a winning case, meaning that the plaintiff is supposed to win on all five issues, but also that there is a 10% chance of judicial error on each of these issues. Since the plaintiff needs to win on all elements, she will only win if there is no judicial error at all, which leaves her with a winning chance of just under 60%, even though the chance of error per issue is relatively small (only 10%).[222] Compare this outcome with the case in which the defendant is right on all elements of the claim, and assume the same 10% chance of judicial error per issue. Under these assumptions, the defendant's chance of winning the case is 99.99%.[223] The reason for this is that the defendant, unlike the plaintiff, only needs to win on one issue, not all of them, to prevail.[224]

* * *

As the first Section of this Part shows, a plethora of techniques allow professional litigants to choose their litigatory position almost at will.[225] And there are many reasons, surveyed in the second Section of this Part, for a powerful litigant to prefer a specific litigatory position. In certain settings, playing the role of plaintiff will be beneficial and may even determine the outcome of the legal proceeding. In other cases, litigating as defendant will be preferable and will similarly dictate the outcome.

Ultimately, professional litigants have both the ability and the incentive to manipulate their litigatory position. The fundamental understanding of the parties' respective litigatory positions as predetermined by the substance of their dispute must be revisited. This analysis carries important policy implications, which we now turn to.

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222. For the plaintiff to win, the court must not err in *any* of the five different issues. The probability of this is $(90\%)^5$, or 59%. *See id.* at 1269.

223. For the defendant to win, it is enough that the court gets just one issue right; in other words, the defendant will lose only if the court errs on *all* issues. The probability of this is $(10\%)^5$, or 0.001%. *See id.*

224. *Id.* at 1268, 1273.

225. *Supra* Section II.A.

III. POLICY IMPLICATIONS

A. Abandoning the Plaintiff-Defendant Dichotomy

By manipulating their litigatory position, powerful repeat litigants can win cases even before they reach the court. The repeat litigants can secure payment for unmeritorious claims and avoid liability at will. This is unjust, as well as inefficient. First, if individuals' rights are not enforced in court, corrective justice is effectively denied.[226] Private individuals cannot secure payments and compensation owed to them and are made to pay sums they do not owe. Second, deterrence is compromised, and powerful commercial actors are allowed to act in harmful and inefficient ways. Potential wrongdoers, aware that they will not be held fully accountable for the harm they inflict, will not take socially desirable measures to prevent or reduce harm.[227] Banks—who can effectively and inexpensively prevent overcharges to borrowers—will make no efforts (or insufficient efforts) to prevent such overcharges.

To address these problems, we must first acknowledge that the plaintiff-defendant dichotomy, around which the litigation system is currently structured, is outdated. The existing arrangements reflect the assumption that the plaintiff is the party whose rights were violated and who approaches the legal system to seek redress, and the defendant is the party defending herself from the plaintiff's attempt to be awarded her money (justly or unjustly). Therefore, the plaintiff must, for instance, pay court fees and bear the burden of proof. But this assumption is detached from current reality, in which the litigatory role of the parties has much more to do with strategic choices made by repeat litigants and much less to do with the nature of the dispute.

Therefore, the first step of our proposal is to reconceptualize the idea of litigatory positions. Instead of asking which party is the plaintiff and which is the defendant (a question that reflects almost nothing about the parties and the dispute), we argue that the court should ask which is the private onetime litigant and which is the repeat commercial litigant. This distinction is far more relevant and far more telling of the dynamic that led the parties to court. The next step will be to propose an alteration of some of the rules that currently govern

226. *See* Ernest J. Weinrib, *Corrective Justice in a Nutshell*, 52 U. TORONTO L.J. 349, 349 (2002) (explaining that justice requires reparation following violations of rights).

227. *See* Richard A. Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399, 402–08 (1973).

civil litigation to reflect this new understanding of the litigatory process.

B. Identifying the Onetime and Repeat Litigants

To address the systematic abuse of onetime litigants by professional adversaries in the civil litigation system, we propose that courts should divert from the familiar plaintiff-defendant distinction. Instead, we suggest that courts structure litigation based on the more important distinction between onetime and repeat litigants. The first step in this process is to accurately identify these two groups of litigants.

To be workable, this distinction must be made quickly and at little cost. If determining this requires complex litigation, little will be gained from the understanding. Surprisingly, this can indeed be easily accomplished.

We suggest that courts consider the number of lawsuits each litigant has been a party to over the three-year period preceding the initiation of the case at hand. If a litigant has been a party to more than ten lawsuits on average in this time period, that litigant should be considered a repeat litigant.[228] This approach can easily and cheaply allow the court to distinguish onetime from repeat litigants.

It is important to note that in some cases, both parties may be repeat litigants, such as when two banks are suing each other. Similarly, in some cases both parties might be onetime litigants, for instance, in a dispute between neighbors owning two adjacent apartments. In such cases, the court can adhere to existing practices and continue operating under the current rules of civil procedure, following the familiar plaintiff-defendant distinction. However, where one party is a repeat litigant and the other is a onetime litigant, the court should take this distinction into consideration when assigning court fees and determining the burdens of proof.

C. Court Fees

Court fees are a real hurdle. Unlike attorneys' fees, they cannot be paid on a contingency basis,[229] and ethical rules prohibit lawyers

228. For a similar suggestion in a different context, see Kaplan & Paldor, *supra* note 19, at 514.

229. Litigation funders and contingency fees are both examples of mechanisms designed to allow plaintiffs to borrow (from a third party or from their attorneys) to fund litigation. *See* Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL L. REV. 233, 234–35, 237–39 (2014) (discussing litigation funders and their effect on

from paying these fees for their clients.[230] They are the only litigation expenditure that must be incurred and paid upfront using the plaintiff's resources. As such, they may sometimes be the sole insurmountable barrier to justice, even though their magnitude may not be very significant.[231] Once the court identifies the case as one in which a professional repeat litigant is facing a onetime litigant, we argue that the repeat litigant (and not necessarily the plaintiff) should shoulder at least a portion of the court fees. The logic of this proposal is simple. The current system assumes that the plaintiff is the party who is owed money, the victim of a wrong, or the party calling upon the litigation system to act in response to their misfortune. As such, it stands to reason that the plaintiff, the party using the system, be required to pay court fees as a way of participating in the costs of its operation. Yet, in reality, the plaintiff is none of these; rather, it is simply the party assigned the role of plaintiff by the stronger litigant. In fact, the party who is enjoying the benefits of the litigation system, who is consistently using its resources and the opportunities it offers, who has through designation of litigatory positions "won" numerous cases that were never brought, is the repeat litigant.[232] Therefore, it is only fair and efficient that the repeat litigant pay court fees.

Forcing the defendant to incur a cost simply because its adversary has decided to file a lawsuit is in no way at odds with the current civil litigation system. In fact, in this sense, our proposal is no different from attorneys' fees. Attorneys' fees must also be borne by the defendant simply because the plaintiff has filed a lawsuit. And in our civil litigation system, the defendant does not—as a general rule—recoup these fees. Under the rule governing the award of costs in the

litigation); Eyal Zamir & Ilana Ritov, *Revisiting the Debate over Attorneys' Contingent Fees: A Behavioral Analysis*, 39 J. LEGAL STUD. 245, 245–47 (2010) (highlighting the advantages of contingence fees from a behavioral perspective).

230. *See* Zamir & Ritov, *supra* note 229, at 255 n.10 ("[U]nlike their American peers, Israeli lawyers are ethically prohibited from financing the plaintiff's out-of-pocket expenses, such as court fees and expert-witness fees.").

231. Of course, this is not to suggest that attorneys' fees are *never* a barrier to justice. *See* Kaplan & Paldor, *supra* note 19, at 479 (discussing litigation costs, including attorneys' fees).

232. Wilf-Townsend, *supra* note 10, at 1731:

> In courts throughout the United States, a small number of private companies account for a large percentage of all civil litigation filed in courts of general jurisdiction. The top-filer burden in courts in the large, demographically diverse states of California and Texas is 25.63% and 28.43%, respectively. The smaller, more rural, and predominantly white states of North Dakota and Kansas come in at 28.63% and 15.77%, respectively. In each of these states, a handful of private companies account for a very large share of all civil litigation.

United States,[233] colloquially referred to as the "American rule,"[234] each litigant normally bears its own litigation costs, regardless of the outcome of the case.[235] A full discussion of the justifications for, and demerits of, the American rule is beyond the scope of this Article.[236] For current purposes, it is sufficient to observe that whenever a lawsuit is filed, the defendant is immediately forced to incur fees. But while attorneys' fees are borne by both parties—so that there is no reason to believe, a priori, that they disadvantage one party—court fees are only borne by the plaintiff. Given the new conceptualization of the litigatory process advanced in this Article, there is little reason to force the onetime litigant to incur these fees in full simply because she was forced into the position of plaintiff. And, conversely, there is also no reason why the professional litigant making repeated use of the system should not shoulder these fees.

In order to prevent the creation of perverse incentives, we do not advocate an outright abolition of court fees for plaintiffs. If a plaintiff faces no immediate cost for filing a lawsuit, too many lawsuits may be filed. As a plaintiff can agree with an attorney that the attorney will represent her on a contingency fee basis,[237] court fees play an important role in weeding out frivolous lawsuits[238] and disincentivizing would-be plaintiffs from filing such claims.

Court fees should therefore be split. Both plaintiffs and repeat litigants should bear a portion of these fees. A fee for repeat litigants is just and fair. It will also calibrate professional litigants' incentives without overincentivizing would-be plaintiffs to file frivolous lawsuits.

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233. The rule was recently upheld by the Supreme Court. *See* Peter v. NantKwest, Inc., 140 S. Ct. 365, 370–74 (2019) ("This Court's 'basic point of reference' when considering the award of attorney's fees is the bedrock principle known as the 'American Rule': Each litigant pays his own attorney's fees, win or lose, unless a statute or contract provides otherwise." (internal quotation marks omitted)); Octane Fitness, LLC v. Icon Health & Fitness, Inc., 572 U.S. 545, 557 (2014).

234. *See* John J. Donohue III, *Opting for the British Rule, or if Posner and Shavell Can't Remember the Coase Theorem, Who Will?*, 104 HARV. L. REV. 1093, 1096–97 (1991).

235. *See* Alyeska Pipeline Serv. Co. v. Wilderness Soc'y, 421 U.S. 240, 247 (1975); Theodore Eisenberg & Geoffrey P. Miller, *The English Versus the American Rule on Attorney Fees: An Empirical Study of Public Company Contracts*, 98 CORNELL L. REV. 327, 327–29 (2013) (describing the American rule). Specific acts, most notably in the areas of intellectual property and antitrust, contain fee-shifting provisions that are applicable in a subset of the cases. This is the case, for example, in trademark-violation disputes, see 15 U.S.C. § 1117(a) ("The court in exceptional cases may award reasonable attorney fees to the prevailing party."), patent disputes, see 35 U.S.C. § 285 (containing similar language), and antitrust disputes when the plaintiff prevails, see 15 U.S.C. § 15(a) (allowing a person injured by a violation of antitrust law to recover their attorney's fees). But these are exceptions to the broad rule.

236. For an account of these critiques, see Kaplan & Paldor, *supra* note 19, at 490–92.

237. *See* Zamir & Ritov, *supra* note 229, at 245–47.

238. On mechanisms for weeding out frivolous lawsuits (although challenging the very concept), see generally Suja A. Thomas, *Frivolous Cases*, 59 DEPAUL L. REV. 633 (2010).

If court fees are currently perfectly calibrated to deter frivolous lawsuits, an additional fee may be levied on professional litigants without reducing current fees. If existing fees are imperfectly calibrated, they may be split. Thus, for example, court fees could be set so that their amount does not change, but the plaintiff pays 30% of the fees and the professional litigant pays 70% of the fees. When the professional litigant is also the plaintiff, it would pay the full fee.

Imposing a court fee on professional litigants can also be expected to increase the number of out-of-court settlements. Today, professional litigants often find it desirable to resort to litigation because of the imbalanced playing field. Specifically, litigation costs have a disparate effect on repeat litigants and on onetime litigants.[239] As explained, well-organized repeat litigants enjoy ready access to litigation resources. For the reasons surveyed, their access to legal services is less expensive than onetime litigants' access.[240] Repeat litigants also enjoy economies of scale in litigation. Imposing a court fee on professional litigants can partially offset these effects. This will not completely level the playing field; professional litigants will still enjoy advantages over private onetime litigants. But it will provide a more balanced setting and impose an immediate additional marginal cost on professional litigants for every case litigated. More cases can consequently be expected to settle out of court.

D. Burdens of Proof

Under our current system, the default evidentiary rule is that the plaintiff must prove her case by a preponderance of evidence in order to prevail.[241] This rule has exceptions, designed to address various concerns. For example, the rule of res ipsa loquitur essentially relieves the plaintiff of part of the burden—that is, of proving negligence—when the defendant or defendants have control over the instrumentality of the accident and the accident was of a kind that does not ordinarily occur in the absence of negligence.[242] But notwithstanding specific

239. *See* Parchomovsky & Stein, *supra* note 2, at 1331.

240. *See* Galanter, *supra* note 3, at 98 (noting the economies of scale advantages that repeat defendants enjoy).

241. *See* 2 MCCORMICK, *supra* note 30, §§ 336–339; WIGMORE, *supra* note 30, §§ 2486–2493; Sobel, *supra* note 30, at 341–61.

242. *See* Charles E. Carpenter, *The Doctrine of Res Ipsa Loquitur*, 1 U. CHI. L. REV. 519, 519–20 (1934); Stanley Schiff, *The Res Ipsa Loquitur Nutshell*, 26 U. TORONTO L.J. 451, 451–52 (1976); *see also* G.H.L. Fridman, *The Myth of Res Ipsa Loquitur*, 10 U. TORONTO L.J. 233 (1954) (offering a critique). A key reason for this allocation of the burden (or for allowing the plaintiff to rely on the inference) is that in certain cases the defendant has better information regarding the cause of the accident or better access to obtaining this information. *See* RESTATEMENT (SECOND) OF TORTS

exceptions, the general rule is that the plaintiff—the party demanding a payment from its opponent—bears the onus of proof.

Under the traditional understanding of the legal system, this rule is sensible. In fact, it is almost unavoidable. If plaintiffs and defendants are assigned their respective litigatory roles at random (or, at least, by the substance of the dispute), there is no reason to think that either party is systematically more likely to be in a better position in litigation than the other. If that is the case, a requirement that facts be found only when it is more likely than not that they occurred minimizes the expected number of errors that a fact finder will make.[243] Coupled with the assumption that the parties' respective utilities from their money are similar, a rule minimizing the expected number of errors provides the most efficient outcome.[244]

But here too, we argue that focusing on the plaintiff-defendant distinction may be myopic. If the burden of proof is systematically placed on plaintiffs, professional litigants will opt to be defendants. In some cases, this may not matter, because one version of the events will be more likely than the other. But when uncertainty is greatest—when the scales are likely to be balanced—burdens of proof are determinative of the outcome. And, as has been shown, these are the cases that are most likely to be adjudicated.[245] Because these are the cases in which parties have the greatest difficulty in evaluating the outcome of trial in advance, these kinds of cases are overrepresented in the litigatory universe.[246] Thus, the rule requiring the plaintiff to discharge the burden of proof allows professional litigants to tilt the outcome of the fact-finding process in their favor in a very large subset of cases.

We propose a shift in the fundamental evidentiary rule. When two professional litigants litigate, or when two nonprofessional

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§ 328D cmt. k (AM. L. INST. 1965); Jeffrey H. Kahn & John E. Lopatka, *Res Ipsa Loquitur: Reducing Confusion or Creating Bias?*, 108 KY. L.J. 239, 253 (2019). The presumption incentivizes the defendant to uncover this information and divulge it.

243. *See* Kaye, *supra* note 30, at 604–05; Mike Redmayne, *Standards of Proof in Civil Litigation*, 62 MOD. L. REV. 167, 169 (1999).

244. *See* Posner, *supra* note 227, at 408–09 (detailing an economic approach to burdens of proof); Redmayne, *supra* note 243, at 169–71 (explaining the necessity of the assumption of equal utility to justify this rule); ALEX STEIN, FOUNDATIONS OF EVIDENCE LAW 219–25 (2005). For a critique of this assumption, see Eyal Zamir & Ilana Ritov, *Loss Aversion, Omission Bias, and the Burden of Proof in Civil Litigation*, 41 J. LEGAL STUD. 165, 189–90 (2012) (offering an alternative explanation for the rule based on behavioral insights).

245. William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & ECON. 61 (1971) (offering a model for the probability of settlement versus the probability of litigation). For later development of the basic model, see generally John P. Gould, *The Economics of Legal Conflicts*, 2 J. LEGAL STUD. 279 (1973); Posner, *supra* note 227; George L. Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. LEGAL STUD. 1 (1984).

246. *See* Hylton, *supra* note 156, at 196 (discussing how, theoretically, disputes in which a defendant's innocence or guilt is uncertain are more likely to lead to litigation).

adversaries face each other in court, the classic assumptions hold—there is no reason to assume that one party is systematically in a better position than the other and no reason to assume different utilities from a given amount. In such cases, the burden of proof may remain with the plaintiff. But when a professional litigant is trying a case against a onetime adversary, the professional litigant should bear the onus of proof. Identifying these settings should be done using the method proposed in Section III.B. Despite the "optical illusion" of the plaintiff-defendant divide in a specific case, the professional litigant is, in essence, the party obtaining a payment from its adversary through the court system. Dollars are being transferred from onetime litigants as a group to the professional litigant on a systematic basis. The professional litigant should, as a default rule, discharge the initial burden of proof.

Another benefit of shifting the burden of proof to the repeat litigant is that this can be expected to lower the overall cost of fact-finding.[247] If the parties are equals, there is no reason to think that one party's costs of collecting evidence and presenting it are lower than the other party's costs. It thus makes sense to order the plaintiff to bear the duty of persuasion.[248] But when the reality of modern litigation is acknowledged, it must also be recognized that, as a typical matter, a professional litigant's costs of obtaining evidence and presenting it should generally be lower than those of a private litigant. To begin with, professional litigants repeatedly face similar cases, so they acquire expertise in the collection of evidence, in assessing its importance, and in its proper preservation. Insurance companies employ investigators; healthcare providers have ready access to cutting edge research and to the relevant experts, which allows them to produce expert opinions at a low cost as compared to a private litigant. Additionally, the professional litigant is likely to be in possession of evidence pertaining to the specific case at hand. For example, healthcare providers should regularly have information on what transpired in the course of a medical procedure. They also have the ability to put in place mechanisms that would record and document relevant information. As the cost of implementing such measures would likely be prohibitive for a patient undergoing a single procedure, it seems reasonable to have healthcare providers obtain and preserve this information. Similarly, debt-collecting firms and banks are likely to be able to obtain and preserve information pertaining to the relevant case for a lower cost

247. Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 STAN. L. REV. 1477, 1484–85 (1999) (focusing on the cost-minimization of the collection of evidence).

248. *See id.* at 1502–07.

than the individual borrower or customer. Thus, placing the burden of proof on the professional litigant (when the professional litigant faces a private litigant) is not only just, but efficient.

Our suggested rule calls for future research as well. Under the current system, the basic evidentiary rule has exceptions. The plaintiff does not bear the burden of proof for every fact in dispute under all circumstances. Similarly, our proposed rule need not eliminate all exceptions to the rule. For example, the res ipsa loquitur rule may function under our proposed rule as well. Additional exceptions may also be justified. Thus, future research may offer qualifications to the general rule. But the fundamental default rule governing the allocation of burdens of proof in civil litigation should be altered. When a repeat litigant faces a onetime adversary, the professional litigant should be forced to discharge the burden of proof.

CONCLUSION

Private litigants are severely disadvantaged when they approach the litigation system.[249] Such individuals end up losing exorbitant amounts, even when the law on the books is on their side.[250] Moreover, when individual litigants do appear in court and argue their cases, their ability to do so effectively is incomparable to that of their professional adversaries.[251] This state of affairs contradicts a fundamental assumption on which the litigation system is based: a fair competition between equal parties,[252] which is supposed to produce truthful factual and legal findings.[253] This state of affairs is also inefficient, as professional litigants are underincentivized to act in the manner prescribed by law, knowing they will not be held accountable.

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249. *See* Rhode, *supra* note 1, at 1228–40.

250. *See* Wilf-Townsend, *supra* note 10, at 1745:

> In 2010, for instance, the owner of the process server American Legal Process pled guilty to criminal fraud for knowingly failing to serve defendants in tens of thousands of debt-collection lawsuits. The New York Attorney General estimated that the company's actions resulted in wrongful default judgments in around 100,000 cases, with an average of $5474 seized by the plaintiff debt collector in each case.

(footnotes omitted); Sykes v. Mel Harris & Assocs., 285 F.R.D. 279, 284 (S.D.N.Y. 2012), *aff'd*, 780 F.3d 70 (2d Cir. 2015) (finding sewer-service practices to be a routine part of the debt-collection business model).

251. *See* Galanter, *supra* note 3, at 98–101; Wilf-Townsend, *supra* note 10, at 1709–10; Parchomovsky & Stein, *supra* note 2, at 1331.

252. *See* Earl Johnson, Jr., *The Justice System of the Future: Four Scenarios for the Twenty-First Century*, *in* ACCESS TO JUSTICE AND THE WELFARE STATE 183, 184–95 (Mauro Cappelletti ed., 1981).

253. *See* Marvin E. Frankel, *The Search for Truth: An Umpireal View*, 123 U. PA. L. REV. 1031, 1035–41 (1975).

Within this broad context, an important—and yet unnoticed—advantage that professional litigants have is their ability to manipulate their litigatory position. Sophisticated repeat litigants can strategically shape the litigation landscape to allow themselves to assume whichever role suits them best in any specific case, that of plaintiff or that of defendant. Professional litigants' ability to act in this way offers them immense advantages. They can—and do—pick and choose from the wide variety of legal tools available to each litigatory role. They can—and do—litigate in the role most likely to effectively preempt their adversaries from having their day in courts. And they can—and do—tilt the outcomes in their favor even in those cases that are adjudicated.

This analysis carries important implications. If professional litigants can simply choose their litigatory position, it makes little sense to treat the plaintiff-defendant distinction as representing the underlying structure of the legal dispute. Instead, policymakers should look beyond these largely symbolic titles when setting the rules of litigation. These rules must be set with an eye to the reality of the contemporary litigation processes. The party making use of the litigation system is not the plaintiff but the repeat litigant, the party using the system as part of its business model. Debt-collection firms, copyright trolls, and insurance companies use litigation as part of their day-to-day business. It is both more efficient and more just to have them incur some of the litigatory system's operation costs. Similarly, professional litigants should be the ones discharging the onus of proof, at least as a default rule. Burdens of proof should also be assigned based on the litigatory reality rather than on the parties' formal positions.