THE PROBLEM OF BIASED PRECEDENTS

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This Article addresses the problem of biased precedents, wherein sophisticated repeat players, often corporate and state entities armed with superior resources and a vested interest in shaping the law, manipulate legal proceedings to systematically establish self-advantageous precedents. Specifically, by strategically choosing to litigate cases they anticipate will lead to favorable precedents and settling those expected to produce unfavorable outcomes, these players systematically bias the law over time to their advantage, at the expense of one-shot parties and society at large. The problem of biased precedents challenges the commonly held view about the efficiency and fairness of the legal system and raises questions about the social benefits of settlements.

This Article introduces two innovative, implementable, market-based solutions inspired by the realm of insurance: judgment insurance ("JI") and settlement insurance ("SI"). JI involves a third-party "insurer," which could be an NGO, an interest group, or a state entity, that cares about the precedential value of a certain case and is willing to pay for it and provides the plaintiff a premium-free coverage for the expected judgment that the plaintiff is likely to receive. SI operates similarly to JI, but insures an existing or future settlement offer rather than an expected court judgment.

Both mechanisms aim to incentivize one-shot litigators to refrain from settling their cases and instead pursue them to a conclusion with a precedential court decision. They help level the legal playing field between powerful corporate entities and weaker individuals, ensuring that precedents are established in an impartial manner. After introducing JI and SI and demonstrating their superiority over

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existing legal mechanisms that could, in theory, tackle the problem of biased precedents, this Article explores potential obstacles and strategic challenges associated with JI and SI. It shows that both are doctrinally feasible and have the potential to restore justice to the legal system.

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INTRODUCTION

Our legal system often favors powerful corporations and institutional entities at the expense of the average individual.[1] With more resources, top-tier legal counsel, and access to the best experts, these entities are often better positioned to secure favorable outcomes in court. Beyond these well-known advantages, this Article sheds light on a less discussed, yet much more important, manner by which these potent entities come out ahead: systematically molding the legal apparatus to their advantage, giving rise to what we term "biased precedents." To better understand the problem, imagine the following three scenarios, all drawn from real cases:

Afifa, a car owner, initiates legal action against a car manufacturer for product liability. She argues that the car was defective, and the car manufacturer was aware of the defect but concealed it from the public, resulting in her injury. During court proceedings, the judge shows sympathy for Afifa's situation, leading the corporation's legal team to hastily advise settling. Their concern lies in the potential establishment of an unfavorable precedent that could reverberate across thousands of car owners.[2]

In the second scenario, Bruce takes his grievances against a gym to court, claiming a violation of the Telephone Consumer Protection Act (TCPA) due to unsolicited text messages. The gym counters, asserting that their automated text messaging system is not what the Act defines as an "autodialer." In court, the judge seemingly sympathizes with the gym's arguments, leading the gym's legal counsel to advise *rejecting* Bruce's lawyers' proposal to settle the case. Hoping for a favorable court ruling

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1 *See generally* STEPHANIE MENCIMER, BLOCKING THE COURTHOUSE DOOR: HOW THE REPUBLICAN PARTY AND ITS CORPORATE ALLIES ARE TAKING AWAY YOUR RIGHT TO SUE (2006); ERWIN CHEMERINSKY, CLOSING THE COURTHOUSE DOOR: HOW YOUR CONSTITUTIONAL RIGHTS BECAME UNENFORCEABLE (2017); STEPHEN B. BURBANK & SEAN FARHANG, RIGHTS AND RETRENCHMENT: THE COUNTERREVOLUTION AGAINST FEDERAL LITIGATION (2017); Helen Hershkoff & Luke Norris, *The Oligarchic Courthouse: Jurisdiction, Corporate Power, and Democratic Decline*, 122 MICH. L. REV. 1 (2023).

2 This vignette draws inspiration from the Volkswagen Dieselgate Scandal, see BGH, Feb. 22, 2019, V ZR 225/17, juris (Ger.) https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2019-2-22&nr=94803&anz=3&pos=1 (last visited Mar. 14, 2025); *infra* text accompanying note 147.

that aligns with their desired precedent, the gym chooses to proceed with litigation and indeed wins the case.[3]

In the third scenario, Clementine sues an agrochemical corporation for failing to disclose potential cancer risks associated with its weed killer. The company asserts that it had no duty to disclose information that contradicts the label the EPA approved for its weedkiller and prevails in district court. Facing the prospect of an appeal, the company's legal team grapples with strategic choices. Some advocate for inaction, while others suggest offering Clementine a sizable settlement on the condition that she refrains from appealing to safeguard their victory at the district court level. Alternatively, there are those who propose enticing Clementine with a generous sum to *prompt* an appeal, aiming to establish a precedent across the circuit. Ultimately, the company opts for the latter option, confident in its ability to persuade the Court of Appeal that they had no duty to disclose the information. They extend an offer to Clementine, who accepts, files an appeal, and indeed loses. Everyone is happy. Clementine receives more than the compensation she could get in court, while the company secures the precedent it desired.[4]

The common threads among the three scenarios are twofold. First, one of the parties is more resourceful, sophisticated, and has better access to legal counseling, enabling them to better assess their options, legal strategy, and the likelihood of success. Second, this same party considers the strategic implications of legal precedents on *other* current or future cases, whereas its adversary focuses solely on the outcome of the present case. In each of the cases described above, the stronger party not only excels in analyzing the legal terrain and assessing the immediate legal outcome but also considers the potential precedent, whether favorable or unfavorable, that could be established by the court's decision. This is evident in its decisions on whether to settle the case (as seen in the case of Afifa), pursue litigation (as in Bruce's case), settle to avoid an appeal, or perhaps settle in order to guarantee it (as demonstrated in Clementine's case).

The combination of superior legal expertise, greater resources, and a broader perspective that considers the implications of a single case on numerous future cases creates significant advantages for one category of litigants—the repeat players ("RPs"), usually wealthy corporate and institutional actors who commonly assume the role of defendants—over another category of litigants, the one-shotters ("OSs"), typically weaker individuals who often act as plaintiffs. Moreover, the RPs can oftentimes

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3 This vignette is based on *Marks v. Crunch San Diego, LLC*, 904 F.3d 1041, 1048 (9th Cir. 2018). *See infra* text accompanying notes 62–63.

4 This vignette is based on *Carson v. Monsanto Co.*, 508 F. Supp. 3d 1369 (S.D. Ga. 2020). *See infra* text accompanying notes 76–81.

even decide whether to play as plaintiffs or defendants in a particular dispute to fully extract the advantages the legal system provides.[5] Crucially, these advantages, over time, lead to the formation of precedents that tend to further favor the more powerful entities and are biased against the weaker ones. And this cycle perpetuates unceasingly. This argument is not new. It has been convincingly demonstrated by Marc Galanter as early as 1974 and has since been corroborated by numerous studies.[6] However, despite the problem being widely recognized, a satisfactory solution has eluded everyone thus far.

In this Article we aim to close the gap by offering market-based approaches to debias precedents, based loosely on the mechanism of insurance. We introduce two novel solutions: judgment insurance ("JI") and settlement insurance ("SI"). JI and SI do not formally fall under the legal category of insurance.[7] Nonetheless, owing to the economic function of shielding the OSs from the downside of losing the case, we colloquially refer to it as insurance. Both schemes include an "insurer," which could be a nongovernmental organization ("NGO"), an interest group, an institution, or a state entity, that cares about the precedential

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5 For simplicity in what follows, this Article will continue with the paradigmatic example of the defendant as the repeat player and the plaintiff as the OSs. However, it is important to note that our discussion applies equally to other scenarios.

6 *See generally* Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 LAW & SOC'Y REV. 95 (1974). Since the publication of Galanter's analysis, his theoretical insights have spawned numerous studies examining the advantages of RPs over OSs in a wide variety of trial and appellate courts. These studies have, by and large, confirmed Galanter's insights. A study of federal civil cases between the years 1971 and 1991 revealed that big business ("Fortune 2000" companies) had a success rate of 71% as plaintiff and 61% as defendant when facing all types of litigants in court, whereas nonbusiness litigants won only 64% of the time as plaintiff and a mere 28% of the time as defendant. *See* Terence Dunworth & Joel Rogers, *Corporations in Court: Big Business Litigation in U.S. Federal Courts, 1971–1991*, 21 LAW & SOC. INQUIRY 497, 558 (1996). Similarly, a study of diversity cases in federal courts found that in instances where litigants are of the same type (individual versus individual or corporate versus corporate), the plaintiff prevails 72.4% to 74.8% of the time; however, when corporate plaintiffs sue individuals, they win 90.8% of the time, and when individuals sue corporate plaintiffs, they win only 50.1% of the time. *See* Theodore Eisenberg & Henry S. Farber, *The Litigious Plaintiff Hypothesis: Case Selection and Resolution*, 28 RAND J. ECON. (SPECIAL ISSUE) S92, S103 tbl. 3 (1997). More recent empirical work assessing Galanter's theory has focused on appellate courts at the state and federal levels. *See, e.g.*, Paul Brace & Melinda Gann Hall, *"Haves" Versus "Have Nots" in State Supreme Courts: Allocating Docket Space and Wins in Power Asymmetric Cases*, 35 LAW & SOC'Y REV. 393 (2001); Kevin M. Clermont & Theodore Eisenberg, *Plaintiphobia in the Appellate Courts: Civil Rights Really Do Differ from Negotiable Instruments*, 2002 U. ILL. L. REV. 947; Theodore Eisenberg, *Appeal Rates and Outcomes in Tried and Nontried Cases: Further Exploration of Anti-Plaintiff Appellate Outcomes*, 1 J. EMPIRICAL LEGAL STUD. 659 (2004). A published book was devoted to exploring the continued validity of Galanter's theory in contemporary civil litigation. *See generally* IN LITIGATION: DO THE "HAVES" STILL COME OUT AHEAD? (Herbert M. Kritzer & Susan S. Silbey eds., 2003).

7 *See infra* text accompanying note 82.

value of a certain case and is willing to pay for it. The insurer enters into a contract with the plaintiff because the case may yield a precedent from which the insurer stands to gain, either monetarily or morally, and injects expertise, resources, and a larger perspective, which RPs possess and OSs lack.

JI involves a third-party "insurer" who provides premium-free coverage for the *expected judgment* that the plaintiff is likely to receive, based on an evaluation at the time the insurance contract is signed, contingent upon the plaintiff's commitment to pursue the case to its conclusion with a final judgment. The judgment is insured up to a specified amount, and this insured amount is guaranteed to be paid to the plaintiff regardless of the trial outcome (we call it the "guaranteed coverage amount" or "G"). If the plaintiff prevails in court, any excess amount beyond the insured judgment is shared between the plaintiff and the insurer based on a predetermined allocation outlined in the contract. We call the plaintiff's share of the potential gains "α."

SI operates similarly to JI but with a focus on insuring the settlement offer rather than the court judgment. It provides coverage to individual litigants who commit to pursuing their case to its conclusion. In SI, the insurer commits to paying the plaintiff the settlement amount that will be offered in the future (referred to as "anticipatory settlement offer insurance" or "ASI") or has already been offered (referred to as "post-settlement-offer insurance" or "PSI") by the defendant. This payment is made up to an amount agreed upon between the parties to the contract (also G).

The purpose of JI and SI (both ASI and PSI) is to counter the phenomenon, demonstrated in the three scenarios described above, where powerful RPs pressure weaker parties into accepting settlement offers that prevent pro-plaintiff precedents from evolving. By providing insurance coverage, they eliminate the risk of loss for plaintiffs and encourage them to proceed with litigation. If the plaintiff succeeds in court, they may receive a higher compensation than the original settlement offer and, most importantly for our purposes, establish a significant legal precedent. In the event of a court loss or a small damage award, the plaintiff still receives the guaranteed coverage amount (G) from the insurer, ensuring they are not financially disadvantaged.

Our proposed mechanism offers a better alternative to a variety of legal mechanisms presently aimed at addressing and resolving the issue of biased precedents, either directly or indirectly. These mechanisms include direct representation of weaker parties, assignment of the cause of action, third-party litigation funding (both for-profit and nonprofit), and judgment preservation insurance, among others. We explore these

mechanisms below and illustrate their inadequacy in effectively solving the problem.[8]

We also address certain doctrinal obstacles that, if left unattended, may hinder the effective implementation of the JI and SI schemes. These challenges encompass doctrines such as assignment and maintenance,[9] which in certain states may pose constraints on third parties looking to provide support or promotion to a litigant, and the justiciability doctrine, which might allow defendants to moot a case by either directly paying the plaintiff the entire requested relief or depositing it with the court.[10] In addition, various professional responsibility requirements could impede the feasibility of granting insurers veto power on settlements.[11]

The Article proceeds in four parts. Part I delves into the intricate problem of biased precedents, elucidating the complexities that render its resolution challenging. Part II introduces and elaborates on our proposed solutions—JI and SI—detailing their operational frameworks. We then proceed, in Part III, to survey previously proposed solutions and expound upon their shortcomings in addressing the problem. Part IV examines the doctrinal challenges that may impede the effective implementation of the JI and SI schemes and addresses them. Part V concludes.

I. THE INTRACTABLE CHALLENGE OF BIASED PRECEDENTS

Over the past few decades, there has been a notable decline in the percentage of cases that proceed to a full trial at both the state and federal level,[12] with settlements becoming the preferred method of resolving legal disputes.[13] In 1938, about 20% of civil cases in federal court were resolved through trials.[14] By the 1970s, this figure was halved, with only around 11.7% of cases reaching trial.[15] Presently, the overwhelming majority of cases are settled without a full trial, with just about 1% of federal civil

8 *See infra* Part III.

9 *See Assignment*, BLACK'S LAW DICTIONARY (12th ed. 2024); *Maintenance*, BLACK'S LAW DICTIONARY (12th ed. 2024).

10 *See infra* Section IV.C.

11 *See infra* Section IV.B.

12 *See* Marc Galanter, *The Vanishing Trial: An Examination of Trials and Related Matters in Federal and State Courts*, 1 J. EMPIRICAL LEGAL STUD. 459, 460 (2004).

13 *See, e.g.*, Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131 (2018).

14 *See* Stephen C. Yeazell, *The Misunderstood Consequences of Modern Civil Process*, 1994 WIS. L. REV. 631, 633 (1994).

15 *See* Judith Resnik, *Failing Faith: Adjudicatory Procedure in Decline*, 53 U. CHI. L. REV. 494, 558 tbl.1 (1986).

filings proceeding to trial.[16] This indicates a significantly reduced likelihood of cases of all types reaching a resolution on the merits and setting precedent.

The vanishing trial phenomenon,[17] as it has come to be known, can be attributed to several factors: the escalating costs associated with litigation,[18] the demand for expeditious resolutions,[19] and a growing emphasis on efficiency and the need to streamline the legal process at all levels of the judicial system.[20] Parties involved in legal disputes are increasingly opting for negotiated agreements and out-of-court settlements as a means of achieving faster and more cost-effective resolutions,[21] especially in tort and commercial contract disputes.[22] Data also indicate that this trend is not unique to the United States but is part of a growing international phenomenon.[23] The question of whether the vanishing trial is beneficial or detrimental to the civil justice system has sparked a longstanding dispute.

For some, the increasing prevalence of settlements raises concerns as they perceive them as detrimental to the pursuit of justice.[24] Settlements are viewed as a major cause of injustice, particularly in cases involving systemic wrongdoing.[25] They are also criticized for privatizing disputes and removing them from the public sphere, thereby eroding the transparency and visibility of legal proceedings.[26] Others argue that

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16 Jeffrey O. Smith & Grant R. MacQueen, *Going, Going, but Not Quite Gone: Trials Continue to Decline in Federal and State Courts. Does It Matter?*, 101 JUDICATURE 26, 28 (2017).

17 *See* Galanter, *supra* note 12, at 460.

18 *Id.* at 515–16; *see also* David J. Beck, *The Consequences of The Vanishing Trial: Does Anyone Really Care?*, 1 HOUS. L. REV. 29, 38 (2010).

19 Ad Hoc Comm. on Future Civ. Trial, *The "Vanishing Trial": The College, the Profession, the Civil Justice System*, 226 FED. RULES DECISION 414, 424, 428 (2005).

20 *See* Judith Resnik, *The Disappearance of Civil Trial in the United States*, 122 YALE L.J. 522, 560–61 (2012); *see also U.S. District Courts—Judicial Business 2021*, U.S. CTS., https://www.uscourts.gov/statistics-reports/us-district-courts-judicial-business-2021 [https://perma.cc/4K6R-YC64].

21 *See* Theodore Eisenberg & Charlotte Lanvers, *What Is the Settlement Rate and Why Should We Care?*, 6 J. EMPIRICAL L. STUDS. 111, 112–13 (2009).

22 NAT'L CTR. FOR STATE CTS., THE LANDSCAPE OF CIVIL LITIGATION IN STATE COURTS 22 (2015), https://www.ncsc.org/data/assets/pdf_file/0020/13376/civiljusticereport-2015.pdf [https://perma.cc/BT9M-YK5R].

23 Yun-chien Chang & Daniel M. Klerman, *Settlement Around the World: Settlement Rates in the Largest Economies*, 14 J.L. ANALYSIS 80, 92–94, 106 (2022).

24 *See* Owen M. Fiss, *Against Settlement*, 93 YALE L.J. 1073, 1085–65 (1984); David Luban, *Settlements and the Erosion of the Public Realm*, 83 GEO. L.J. 2619, 2620–21 (1995).

25 *See* Judith Resnik, *Whose Judgment? Vacating Judgments, Preferences for Settlement, and the Role of Adjudication at the Close of the Twentieth Century*, 41 UCLA L. REV. 1471, 1477 (1994).

26 *See* Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 HARV. L. REV. 668, 676–77 (1986); Marc Galanter & Mia Cahill, *"Most Cases Settle": Judicial Promotion and*

settlements offer advantages to both the parties and society as a whole. They save time, costs, and uncertainty while allowing for customized solutions.[27] Settlements also ensure privacy and confidentiality, promote goodwill and maintain relationships between parties.[28] In terms of societal impact, settlements contribute to the conservation of judicial resources and reduce the overall caseload.[29] Some commentators even argue that settlements have the potential to fulfill many of the public functions associated with the civil trial.[30] Nonetheless, even staunch supporters of settlements concede that they cannot entirely supplant trials, as only court decisions can establish precedents.[31]

A. *Precedents as (Biased) Public Goods*

As classic law and economics teaches us, the societal value of trials hinges on the efficiency of common law adjudication. If trials contribute to the creation of legal precedents, (some) settlements may cause a loss to society by foregoing something crucial. For many years, Richard Posner, a key figure in the law and economics movement, posited that common law evolved to maximize societal efficiency by adapting to changing circumstances and promoting optimal resource allocation. Posner argued that the common law's adaptability allows it to efficiently address new

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Regulation of Settlements, 46 STAN. L. REV. 1339, 1388 (1994); Judith Resnik, *Uncovering, Disclosing, and Discovering How the Public Dimensions of Court-Based Processes Are at Risk*, 81 CHI.-KENT L. REV. 521, 555–59 (2006).

27 *See, e.g.*, John Bronsteen, *Some Thoughts About the Economics of Settlement*, 78 FORDHAM L. REV. 1129, 1132–33 (2009); Michael Moffitt, *Three Things to Be Against ("Settlement" Not Included)*, 78 FORDHAM L. REV. 1203, 1210, 1229 (2009); J.J. Prescott & Kathryn E. Spier, *A Comprehensive Theory of Civil Settlement*, 91 N.Y.U. L. REV. 59, 61 (2016).

28 *See* Jeffrey R. Seul, *Settling Significant Cases*, 79 WASH. L. REV. 881 (2004).

29 *See* Jules Coleman & Charles Silver, *Justice in Settlements*, 4 SOC. PHIL. & POL'Y 102, 102–03 (1986); James A. Wall, Jr., & Lawrence F. Schiller, *Judicial Involvement in Pre-Trial Settlement: A Judge Is Not a Bump on a Log*, 6 AM. J. TRIAL ADVOC. 27, 28 (1982); Morton Denlow & Jennifer E. Shack, *Judicial Settlement Databases: Development and Uses*, 43 JUDGES J. 19, 22 (2004).

30 *See* Samuel Issacharoff & Robert H. Klonoff, *The Public Value of Settlement*, 78 FORDHAM L. REV. 1177, 1200–02 (2009); Amy Cohen, *Revisiting Against Settlement: Some Reflections on Dispute Resolution and Public Values*, 78 FORDHAM L. REV. 1143, 1165–67 (2009); Leora Bilsky & Talia Fisher, *Rethinking Settlements*, 15 THEORETICAL INQUIRIES L. 77, 89 (2014); Carrie Menkel-Meadow, *Whose Dispute Is It Anyway? A Philosophical and Democratic Defense of Settlement (In Some Cases)*, 83 GEO. L.J. 2663, 2692–93 (1995).

31 The exclusive authority of courts to establish precedents stems from both intrinsic and instrumentalist considerations. The intrinsic aspect revolves around a fundamental principle of democratic societies, where adjudication is deemed a legitimate source of new legal norms only when conducted by public officials. Private adjudicators inherently lack the political authority to promulgate legal rules binding not only on consenting litigants but also on society as a whole. *See* AVIHAY DORFMAN & ALON HAREL, RECLAIMING THE PUBLIC 14–63 (2024). In this Article, we focus on the instrumentalist concern regarding precedents as public goods, as discussed below.

circumstances without the need for legislative intervention.[32] This efficiency-centric view has faced criticism from various quarters,[33] including behavioral law and economics,[34] legal theorists,[35] feminist scholars,[36] as well as those who criticize the potentially inequitable outcomes of this approach.[37] Our criticism aligns closely with the public goods theory.[38]

Precedents are a public good. When a court of law resolves a dispute between two private individuals, its ruling occasionally extends beyond concrete dispute resolution to provide positive externalities to society. These externalities include clarifying legal uncertainties, resolving gaps in the law, and providing valuable information on the likely outcomes of future disputes. Given that these benefits are nonrivalrous and nonexcludable, they qualify as public goods.[39]

In the classic economic problem, public goods present challenges for their market provision and can give rise to the "free rider" problem, wherein individuals benefit from legal precedents without contributing

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32 *See* RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 25–26 (6th ed. 2003) (arguing that the common law is "best . . . explained as a system for maximizing wealth of society").

33 Within the law and economics movement, Guido Calabresi, for instance, argued that efficiency is just one of many normative goals that the law should pursue, with distributional goals chief among them. *See generally* Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1093–101 (1972).

34 Behavioral law and economics scholars asserted that individuals may exhibit systematic biases, such as overconfidence or loss aversion, leading to suboptimal decision-making. Additionally, Posner's hypothesis tends to downplay the role of emotions in decision-making, which can result in departures from purely utility-maximizing behavior. *See generally* EYAL ZAMIR & DORON TEICHMAN, BEHAVIORAL LAW AND ECONOMICS (2018); Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 STAN. L. REV. 1471 (1998).

35 Legal theorists argued that Posner's characterization of judges as "economic actors" oversimplifies the complexities of judicial decision-making, overlooking the impact of legal precedent and doctrinal constraints. *See* Ronald M. Dworkin, *Is Wealth a Value?*, 9 J. LEGAL STUD. 191, 220–23 (1980).

36 Feminist critiques contended that Posner's framework inadequately addresses power imbalances and systemic injustices. *Compare* Leslie Bender, *A Lawyer's Primer on Feminist Theory and Tort*, 38 J. LEGAL EDUC. 3, 30–32 (1988), *with* POSNER, *supra* note 32.

37 *See* Brooke D. Coleman, *The Efficiency Norm*, 56 B.C. L. REV. 1777, 1823–25 (2015).

38 *See* Bruno S. Frey, *A Dynamic Theory of Public Goods*, 32 FINANZARCHIV 185, 186 (1974).

39 Public goods possess two key characteristics: non-excludability and nonrivalry. Non-excludability means that once a public good is provided, it is difficult to exclude individuals from benefiting. Even if someone does not pay for the good, they still have access to it. Nonrivalry implies that the consumption of the good by one individual does not reduce its availability for others. *See generally* Richard A. Musgrave, *Provision for Social Goods*, *in* PUBLIC ECONOMICS: AN ANALYSIS OF PUBLIC PRODUCTION AND CONSUMPTION AND THEIR RELATIONS TO THE PRIVATE SECTORS 124–44 (J. Margolis & H. Guitton eds., 1969); Maxime Desmarais-Tremblay, *Musgrave, Samuelson, and the Crystallization of the Standard Rationale for Public Goods*, 49 HIST. POL. ECON. 59 (2017).

to their creation.[40] The entire burden of creating the precedent falls on the shoulders of the parties to litigation (and the adjudicator), while others can freely utilize them. Therefore, while mere dispute resolution services can be provided by both public and private decision-makers (such as arbitrators or mediators), if we leave the creation of precedents to market actors, it will likely lead to their *under*-provision.[41] This phenomenon helps explain why governments subsidize the public legal system despite its resolution of private disputes between parties, who, theoretically, could bear the costs of court proceedings themselves.[42]

The problem of biased precedents extends beyond this well-known problem. While, as we have observed, the classic problem involves the *under*-provision of public goods by the market, our focus lies in the *biased* manner in which they are provided. At the core of the biased precedent issue lies the acknowledgement that trials are *not* randomly selected from the overall pool of cases, nor are the precedents they generate.[43] One category of litigants—the RPs—possesses both a vested interest and the capability to influence future precedents, while the other category—OSs—lacks both. This leads to the formation over time of biased precedents. In essence, the problem of biased precedents highlights the overlooked inequitable aspect of the problem of under-provision of a crucial public good.

Let us elaborate.

B. *Repeat Players, One-Shotters, and the Problem of Biased Precedents*

In his seminal article, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, Marc Galanter made a significant observation about the basic architecture of the legal system, arguing that it tends to favor a certain type of party, known as RPs, over

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40 *See* MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS 21, 28, 38 (1965).

41 *See* William M. Landes & Richard A. Posner, *Adjudication as a Private Good*, 8 J. LEGAL STUD. 235, 237–40 (1979); *see also* POSNER, *supra* note 32, at 531. A second problem of a free market in rule production that would allow private adjudicators to produce precedents alongside public judges is that of inconsistent precedents which might undermine the guiding function of the precedent system. *See* Landes & Posner, *supra* note 41, at 239.

42 *See* Andrew P. Morriss, *Private Actors & Structural Balance: Militia & the Free Rider Problem in Private Provision of Law*, 58 MONT. L. REV 115, 118–21 (1997).

43 *See* Leandra Lederman, *Precedent Lost: Why Encourage Settlement, and Why Permit Non-Party Involvement in Settlements?*, 75 NOTRE DAME L. REV. 221, 228–31 (1999) ("[T]rials[] nonrandomly selected from the underlying group of cases, will in turn result in nonrandom precedent.").

another type—the one-shotters.[44] OSs rarely resort to the court, and are solely concerned with the desired outcome in their specific case, such as monetary remedy or an injunction.[45] With high stakes in the immediate outcome and no concern for future similar litigations, OSs have no interest in how their case could impact future precedent.[46] RPs, on the other hand, engage in many similar litigations and focus on shaping the rules of the game, thereby influencing numerous future cases.[47] They possess a broader perspective and the flexibility to settle a case if they anticipate an unfavorable precedent that might adversely affect their future interests or, alternatively, to actively pursue cases that are likely to establish favorable legal norms.[48]

RPs also tend to be more affluent and sophisticated than OSs. The auto-injury claimant, the tenant facing eviction, the worker experiencing salary withholding by his employer, and the taxpayer confronting bank account foreclosure are all examples of OSs. On the other hand, the insurance company, the bank, the condominium company, and the Internal Revenue Service are RPs.[49] Furthermore, the distinction between OSs and RPs in the legal system often correlates with their roles as plaintiffs and defendants, respectively. This alignment stems from the fact that they can assume the role of a plaintiff when they see fit.[50] Due to their market power and advanced sophistication, RPs can strategically structure future transactions and anticipate the potential for future lawsuits. They are the ones who draft the form contracts for consumers, demand security deposits, and make the first move.[51]

These party characteristics result in a nonrandom distribution of trials and settlements, which inevitably perpetuate the problem of biased

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44 Galanter, *supra* note 6, at 97–98.

45 *See id.*

46 *See id.*

47 *See id.*

48 *Id.* at 100–03.

49 *Id.* at 97–98.

50 *See* Yotam Kaplan & Ittai Paldor, *Choosing Sides: On the Manipulation of Civil Litigation*, 77 VAND. L. REV. 1211, 1223–27 (2024).

51 *See* Galanter, *supra* note 6, at 98; *see also* Eric A. Zacks, *The Moral Hazard of Contract Drafting*, 42 FLA. ST. U. L. REV. 991, 991, 1016–19 (2017) (arguing that "the use of standard form contracts in consumer transactions is an example of the drafting party being motivated and able to act in the drafting party's favor without detection or resistance by the non-drafting party"). For more evidence from consumer contracts, see OREN BAR-GILL, SEDUCTION BY CONTRACT: LAW, ECONOMICS, AND PSYCHOLOGY IN CONSUMER MARKETS 2 (2012) (arguing that consumers are short-sighted, and "imperfectly rational" attributes that enable sellers to offer them short-term benefits while imposing long-term costs and competition forces sellers to further exploit the biases and misperceptions of their customers). For an example from arbitration, see J. Maria Glover, *Recent Developments in Mandatory Arbitration Warfare: Winners and Losers (So Far) in Mass Arbitration*, 100 WASH. U. L. REV. 1617, 1635 (2023).

precedent. RPs, often the "haves," can offer to buy out OSs, typically the "have-nots," whenever a negative precedent is likely (or even possible), and OSs willingly (or reluctantly) accept the buyout. These settlement offers come with strings attached. Defendants propose settlements contingent upon the inclusion of a confidentiality clause in the agreement, which prohibits the plaintiff from disclosing any details of the settlement. These clauses are commonly enforced through substantial penalties in case of a breach. Consequently, confidentiality clauses find their way into most settlement agreements, transforming these resolutions into "secret" arrangements. In doing so, defendants not only remove the precedential case from the docket but also ensure its concealment from the public eye.[52]

This issue is exacerbated by the fact that OS plaintiffs typically face liquidity constraints, are more risk-averse, and lack the sophistication to assess their prospects in court. Therefore, OSs are unlikely to afford a prolonged and expensive legal battle with an uncertain outcome, which will generate a precedent that benefits everyone but them. On the other hand, RPs are sophisticated and possess significant financial resources. They have the means to credibly threaten OS plaintiffs with protracted and costly litigation in case they decide to reject a settlement offer.[53]

The convergence between the interests of the OS plaintiff and the RP defendant in settling, whenever a precedent that might harm the defendant is at stake, gives rise to a social problem. Whenever a powerful defendant seeks to prevent the creation of an unfavorable precedent, all it must do is offer an amount sufficient to convince the plaintiff to drop the lawsuit. And often, a monetary settlement becomes very appealing. Moreover, the more significant the precedent, the greater the threat to the RP defendant, resulting in larger settlement offers that are less likely for the one-shot plaintiff to reject. This imbalance in incentives leads to a systematic development of precedents favoring RP defendants, thereby undermining the broader public interest in establishing impartial precedents conducive to fair and just legal outcomes.[54]

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52 *See, e.g.*, Minna J. Kotkin, *Invisible Settlements, Invisible Discrimination*, 84 N.C. L. REV. 927, 933 (2006) (asserting that secret settlements have become standard practice in employment discrimination lawsuits). For more details, see discussion *infra* Section I.B.

53 *See* Galanter, *supra* note 6, at 103–04 ("It is not suggested that RPs are to be equated with 'haves' (in terms of power, wealth and status) or OSs with 'have-nots.' In the American setting most RPs are larger, richer are more powerful than are most OSs, so these categories overlap, but there are obvious exceptions.").

54 The same logic applies in the less frequent instances in which the RP endeavors to establish, rather than prevent, new legal precedents (such as in the scenarios involving Bruce and Clementine). In these circumstances, the RP employs their extensive expertise and financial resources to encourage the OS to persist in the litigation. They can offer a considerable sum of

The biased precedent problem is further intensified by a vicious cycle where the decreasing number of cases proceeding to trial amplifies the power of RPs, with implications that are particularly worrisome for future cases and settlements.[55] The abundance of precedents favoring RPs compels future plaintiffs to rationally accept increasingly unfavorable settlement offers. Furthermore, even in cases that proceed to final adjudication before a judge or jury, the pervasive influence of pro-defendant precedents can limit the likelihood of any favorable verdicts for the plaintiff. This detrimental trend exacerbates over time. As the number of plaintiff-friendly precedents dwindles due to settlements, the scales of judicial decisions increasingly tip in favor of defendants, perpetuating the cycle of pro-defendant outcomes.[56] This biased development of the law occurs evolutionally across all substantive areas, including pivotal social issues such as civil rights, sexual harassment, and discrimination, rendering it a significant societal concern of immense magnitude.[57]

Courts naturally emerge as potential candidates for addressing the issue of biased precedents. One might assume that by educating judges about the problem, they would become aware of it and endeavor to mitigate it by discouraging parties from settling cases where significant precedents are at stake. However, judges possess neither the legal authority nor the incentives to prevent parties from settling their case. As public choice theory suggests, judges and lawyers, like any individual, pursue self-interest, potentially resulting in judicial outcomes that are not necessarily socially efficient or in the public interest.[58] Like litigants, judges too do not internalize the social benefits derived from unbiased

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money, anticipating a favorable outcome in which they win the case. This victory would result in the creation of a precedent that assists them in future similar cases.

55 *Federal Judicial Caseload Statistics*, U.S. CTS. (2022), https://www.uscourts.gov/statistics-reports/federal-judicial-caseload-statistics-2022 [https://perma.cc/V23F-GZUP].

56 *See* Kathryn A. Sabbeth, *Market-Based Law Development*, LAW & POL. ECON. PROJECT (July 21, 2021), https://lpeproject.org/blog/market-based-law-development [https://perma.cc/5UQ8-BRZT] (arguing that in a civil justice system that is wholly dependent on the parties' choice for rule formation, courts inadvertently would end up developing law that aligns with the interests of wealthy people and corporations, while mainly ignoring the evolution of law that affects low-income people).

57 To be sure, there are exceptional cases where the legislature acknowledges that settlements can have detrimental effects on society, and thus it imposes restrictions on them. *See, e.g.*, Erik Hovenkamp & Steven C. Salop, *Strategic Incentives in Non-Coasean Litigation* 14 (Univ. S. Cal. L. Legal Stud., Paper No. 21-20, 2021), https://papers.ssrn.com/abstract=3821133 [https://perma.cc/VJ7X-P7GV]. However, these restrictions are narrowly tailored and designed to prevent immediate, clearly defined social harms, typically of an economic nature.

58 *See* Jonathan R. Macey, *Judicial Preferences, Public Choice, and the Rules of Procedure*, 23 J. LEGAL STUDS. 627, 630–38 (1994); Daniel Farber, *Public Choice Theory and Legal Institutions*, *in* THE OXFORD HANDBOOK OF LAW AND ECONOMICS: METHODOLOGY AND CONCEPTS 188, 195–98 (Francesco Parisi ed., 2017).

precedents. The practical constraints of overwhelmed court dockets and strained judicial resources make it unlikely that judges will encourage parties to litigate precedent-setting cases.[59]

C. *The Challenge of Identifying Biased Precedents*

Though widespread, it can be difficult to empirically examine and prove biased precedents due to the decentralized nature of settlement decisions made by numerous individual litigants and the strategic calculations of legal advisors of powerful corporations and institutions seeking to create favorable precedents made behind closed doors. Moreover, the inaccessibility of settlement information and the speculative nature of establishing counterfactual scenarios (such as predicting the outcome had the case not been settled), hinder our ability to systematically deduce the existence of biased precedents from observable reality. Nonetheless, while detecting biased precedents is challenging, it is widely acknowledged in the literature,[60] and traces of them can sometimes be discerned.[61]

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59 *See* Jon O. Newman, *The Current Challenge of Federal Court Reform*, 108 CAL. L. REV. 905, 911–12 (2020); Roger J. Miner, *"Dealing with the Appellate Caseload Crisis": The Report of the Federal Courts Study Committee Revisited*, 57 N.Y. L. SCH. L. REV. 517, 518–19, 529–31 (2012).

60 *See* Lederman, *supra* note 43, at 232–33 (arguing that "a model that focuses on the importance of precedent to repeat litigants suggests that cases that favor the repeat litigant will be more likely go to trial"); Yeon-Koo Che & Jong Goo Yi, *The Role of Precedents in Repeated Litigation*, 9 J.L., ECONS., & ORG. 399, 417 (1993); Bilsky & Fisher, *supra* note 30, at 89–90 (agreeing with Galanter's assertion that "repeat players . . . settle disputes when they face an unfavorable precedent"); Bruce H. Kobayashi, *Case Selection, External Effects, and the Trial/Settlement Decision*, *in* DISPUTE RESOLUTION: BRIDGING THE SETTLEMENT GAP 17, 37 (David A. Anderson ed., 1996) (noting that the selection of cases "is biased toward those cases likely to result in holdings favorable to the repeat litigant"); Frank B. Cross, *The Precedent-Setting Value of Litigation and the Selection of Cases for Trial* (May 1997) (unpublished manuscript), https://papers.ssrn.com/abstract=11388 [https://perma.cc/M9BD-PNV9] (arguing that the precedent-setting value of a case plays a major role in the selection of cases for trial, resulting in the phenomenon of skewed precedents in favor of RPs); Frank B. Cross, *In Praise of Irrational Plaintiffs*, 86 CORNELL L. REV. 1, 6–8 (2000); Tim A. Baker, *Sizing up Settlement: How Much Do the Merits of a Dispute Really Matter*, 24 HARV. NEGOT. L. REV. 253, 263–66 (2019); Paul H. Rubin, *Why Is the Common Law Efficient?*, 6 J. LEGAL STUD. 51, 55 (1977) ("If only one party to a dispute is interested in future cases of this sort, there will be pressure for precedents to evolve in favor of that party which does have a stake in future cases, whether or not this is the efficient solution."); Paul H. Rubin, *Third-Party Financing of Litigation*, 38 N. KY. L. REV. 673, 682–85 (2011); Bruno Deffains & Claudine Desrieux, *To Litigate or Not to Litigate? The Impacts of Third-Party Financing on Litigation*, 43 INT'L REV. L. & ECON. 178, 188 (2015); Julia Shamir, *Saving Third-Party Litigation Financing*, 9 NW. INTERDISC. L. REV. 141, 164–65 (2016); Ben Depoorter, *Law in the Shadow of Bargaining: The Feedback Effect of Civil Settlements*, 95 CORNELL L. REV. 957, 958–59 (2010).

61 *See* Lederman, *supra* note 43, at 235, 242–46 (discussing Piscataway Twp. Bd. of Educ. v. Taxman, 91 F.3d 1547 (3d Cir. 1996), where an interest group influenced Supreme Court precedent by orchestrating a settlement).

An illustrative example of an RP weighing the decision to settle or pursue a favorable precedent can be observed in *Marks v. Crunch San Diego, LLC*, where a large gym franchise opted for a settlement following an adverse ruling in the Ninth Circuit.[62] The settlement agreement resulted in the dismissal of the petition for writ of certiorari to the Supreme Court, aiming to avert the establishment of a pivotal consumer-rights precedent on a national scale. The story, which inspired the vignette about Bruce introduced at the outset of this Article, is as follows: When Jordan Marks, a consumer, received multiple automated text solicitations from Crunch Fitness, he sued under the TCPA.[63] The Ninth Circuit created a circuit split when it ruled in Marks's favor by expansively construing an "automatic telephone dialing system" (colloquially referred to as an "autodialer") to encompass the gym's automated text-solicitation program.[64] Four other circuits—the D.C. Circuit,[65] Third,[66] Seventh,[67] and Eleventh[68]—had previously issued narrow, pro-defendant rulings that significantly restricted the definition of the "autodialer" category. The Second and Sixth Circuits subsequently agreed with the Ninth Circuit's approach.[69]

In response to the Ninth Circuit's consumer-friendly interpretation, Crunch Fitness sought review by the Supreme Court.[70] But before the Court could weigh in, Crunch Fitness changed its mind, most likely because it feared an unfavorable precedent. The parties settled and asked the Court to dismiss the petition. As a result, the circuit split went unresolved and the Ninth Circuit's pro-plaintiff interpretation of the TCPA remained in place.[71] However, during the subsequent term, the Supreme Court heard a case involving a similar issue brought by the

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62 904 F.3d 1041 (9th Cir. 2018), *abrogated by* Facebook, Inc. v. Duguid, 592 U.S. 395 (2021); *see* Justin O. Kay, *Defendant in* Marks v. Crunch San Diego, LLC *Abandons Appeal*, NAT'L L. REV. (Mar. 5, 2019), https://www.natlawreview.com/article/defendant-marks-v-crunch-san-diego-llc-abandonsappeal [https://perma.cc/7Q7Z-VSN4].

63 *Marks*, 904 F.3d at 1048.

64 *Id.* at 1053.

65 *See, e.g.*, ACA Int'l v. FCC, 885 F.3d 687, 713–14 (D.C. Cir. 2018).

66 *See, e.g.*, Dominguez v. Yahoo, Inc., 894 F.3d 116, 117–18, 121 (3d Cir. 2018).

67 *See, e.g.*, Gadelhak v. AT&T Servs., Inc., 950 F.3d 458, 460 (7th Cir. 2020).

68 *See, e.g.*, Glasser v. Hilton Grand Vacations Co., 948 F.3d 1301, 1304–05 (11th Cir. 2020).

69 *See* Allan v. Pa. Higher Educ. Assistance Agency, 968 F.3d 567, 574 (6th Cir. 2020), *vacated*, 141 S. Ct. 2509 (mem.) (2021); *see, e.g.*, Duran v. La Boom Disco, Inc., 955 F.3d 279, 290 (2d Cir. 2020).

70 Petition for Writ of Certiorari, Crunch San Diego, LLC v. Marks, 139 S. Ct. 1289 (2019) (No. 18-995), 2019 WL 411371.

71 *See* David M. Gettings et al., *Does the TCPA Have Nine Lives? Parties Settle Ninth Circuit Appeal in Marks v. Crunch San Diego*, CONSUMER FIN. SERVS. L. MONITOR (Feb. 19, 2019), https://www.consumerfinancialserviceslawmonitor.com/2019/02/does-the-tcpa-have-nine-lives-parties-settle-ninth-circuit-appeal-in-marks-v-crunch-san-diego [https://perma.cc/99QV-CEPR].

corporate giant Facebook, which emerged victorious,[72] thereby establishing a pro-defendant precedent.[73]

A second case, demonstrating the strategy of RPs to establish favorable precedents, inspired another vignette. Recall the case of Clementine, wherein the agrochemical company prevailed at trial and extended a settlement offer to *entice her to appeal*, aiming to solidify its victory. An identical situation unfolded in the case of a Georgia man called John Carson, who alleged that he developed cancer from using Bayer's weed killer, Roundup.[74] Carson accused Bayer of failing to warn him about the cancer risk on the product's label.[75] Bayer contended that the product was safe and that it had no duty to provide such a warning because it would contradict the label approved by the EPA.[76]

After prevailing in the district court, Bayer allegedly paid the opposing plaintiff's lawyer to *continue* the legal battle by filing an appeal.[77] Bayer's strategy was likely twofold: first, to establish a favorable precedent in the Eleventh Circuit, and second, to prompt the Supreme Court to resolve the circuit split between the Eleventh and Ninth Circuits. A favorable Supreme Court ruling on preemption could potentially stem the influx of Roundup lawsuits nationwide.[78] However, the plan encountered setbacks. The Eleventh Circuit overturned the trial court's ruling, asserting that Bayer had failed to adequately warn about the risks of the weed killer.[79] Undeterred, Bayer successfully persuaded the Eleventh Circuit to grant en banc review, effectively vacating the panel's prior decision and reigniting Bayer's prospects for success in Carson's

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72 *See* Facebook, Inc. v. Duguid, 592 U.S. 395, 404–07, 409 (2021) (narrowing the definition of an "autodialer").

73 *See* Daniel E. Jones & Archis A. Parasharami, *Supreme Court Unanimously Holds that Congress Took a Narrow Approach to the Types of Autodialing Devices Covered Under the TCPA*, MAYER BROWN (Apr. 2, 2021), https://www.mayerbrown.com/en/insights/blogs/2021/04/supreme-court-unanimously-holds-that-congress-took-a-narrow-approach-to-the-types-of-autodialing-devices-covered-under-the-tcpa [https://perma.cc/7BE9-5VP5].

74 *See* Carson v. Monsanto Co., 92 F.4th 980, 986 (11th Cir. 2024).

75 *See id.*; Brendan Pierson, *Revival of Roundup Weedkiller Cancer Case to Be Examined by Full Appeals Court*, REUTERS (Dec. 20, 2022, 1:17 PM), https://www.reuters.com/legal/litigation/revival-roundup-weedkiller-cancer-case-be-examined-by-full-appeals-court-2022-12-20 [https://perma.cc/XC2W-MFKN].

76 *See Carson*, 92 F.4th 986; Pierson, *supra* note 75.

77 *See* Carson v. Monsanto Co., 508 F. Supp. 3d 1369, 1375–78 (S.D. Ga. 2020); Joel Rosenblatt, *Bayer Deal Pays Roundup Plaintiff to Keep Fighting in Court*, BLOOMBERG (Apr. 21, 2021, 12:01 AM), https://www.bloomberg.com/news/articles/2021-04-21/bayer-deal-pays-roundup-plaintiff-to-keep-fighting-it-in-court [https://perma.cc/XKK5-8N74].

78 *See* Rosenblatt, *supra* note 77.

79 *See* Carson v. Monsanto Co., 51 F.4th 1358, 1363–65 (11th Cir. 2022).

case.[80] A favorable outcome for Bayer would precipitate a circuit split, increasing the likelihood of the Supreme Court addressing the matter, and potentially resulting in limiting Bayer's liability in the multitude of lawsuits concerning Roundup.[81]

In the next Part, we introduce and elaborate on our proposed solutions, JI and SI, explaining how they work in theory. In Part V, we will demonstrate how these solutions can be applied in practice, addressing various doctrinal and strategic challenges.

II. JUDGMENT AND SETTLEMENT INSURANCE

We propose a solution that is grounded in the recognition that at their core, biased precedents stem not only from divergence in resources and expertise, but, more crucially, from incentives, or the lack thereof. As Part IV will demonstrate, the drawback of all alternative solutions lies in their inability to address the fundamental public goods problem. Even if we could bridge the resources and expertise gap between OS plaintiffs and RP defendants, the former would still be inclined to accept settlement offers from the latter. This inclination persists because OS plaintiffs have little incentive to prioritize precedent generation, while RP defendants are strongly motivated to both prevent *unfavorable* precedents and pursue *favorable* ones. A viable solution should, therefore, effectively shift the incentives of the parties engaged in litigation and harmonize the interests of the OS plaintiff with those of society, all without assuming the risks of doing so.

JI and SI serve precisely this purpose. They safeguard the financial interests of OS plaintiffs in case of a loss or difficulty proving actual damages at trial by providing coverage up to a guaranteed coverage amount in JI, or up to the final settlement offer by the defendant in SI. While we colloquially refer to it as insurance (due to the economic function of shielding the OS plaintiff from the downside of losing the case), both JI and SI do not formally fall under insurance law and its unique regulation.[82] They differ from traditional insurance as the client

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80 In February 2024, a three-judge panel unanimously ruled against Bayer once again. Carson v. Monsanto Co., 92 F.4th 980, 995, 997–99 (11th Cir. 2024). Within a few weeks, Bayer filed yet another request with the Eleventh Circuit for an en banc review. Petition for Rehearing En Banc at 1–3, Carson v. Monsanto Co., 92 F.4th 980 (11th Cir. 2024) (No. 21-10994), ECF No. 180-1.

81 As of the drafting of this Article, this case remains pending in the Eleventh Circuit.

82 *See* Herbert S. Denenberg, *The Legal Definition of Insurance: Insurance Principles in Practice*, 30 J. INS. 319, 323 (1963) ("[Insurance is] a written contract between parties. This contract is called a policy. The contracting parties are the insured, who pays a consideration, which is called a premium, and the insurer, who receives it. For this premium, the insurer engages to satisfy, and

does not pay any premium to the financier. Therefore, in legal terms they more closely resemble partnership contracts.

In the following sections, we will outline the various considerations involved in evaluating a case for insurance followed by our proposed solutions, beginning with JI and then moving to SI, while elucidating their respective benefits.

A. *Factors Influencing the Insurance Agreement*

This Section introduces several factors that influence JI and SI contracts, which the insurer must consider when proposing an insurance agreement to the plaintiff.

1. Precedential and Monetary Value of the Case

For insurers, the monetary value and precedential significance of a case are crucial. Cases with low monetary value but high precedential importance are more attractive than those with high monetary value but low precedential impact. Insuring a lawsuit is risky; a negative verdict results in a payout, and even a favorable verdict may not offer sufficient social benefit. Therefore, the decision to insure and the contract terms depend heavily on the case's monetary value and potential precedent. High precedential value can justify the financial risk, potentially leading to future victories for similar plaintiffs.

Symmetrically, both the monetary value in question and the perceived significance of the potential precedent impact the defendant's defense strategies and its propensity to offer a settlement of substantial value.[83] When a defendant is deeply concerned about avoiding an adverse precedential result, it is inclined to present a settlement offer that is practically impossible for an OS plaintiff to reject (and might even surpass the originally sought amount).[84] This strategic move is rooted in the understanding that the economic impact of a large settlement offer outside the courtroom could be significantly lower than the cascading liability resulting from a potential negative precedent.[85] Consequently,

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make good to the insured, unless a fraud appears, any loss, damage, or accident that may happen; according to the tenor of the contract or policy.").

83 *See* Galanter, *supra* note 6, at 100; *supra* note 60.

84 *See* Galanter, *supra* note 6, at 101; *supra* note 60.

85 *But see* Aleeza Furman, *"Not a Fluke": Plaintiffs Lawyers See Changing Tide in $175M Roundup Verdict*, LAW.COM (Oct. 30, 2023, 5:57 PM), https://www.law.com/thelegalintelligencer/2023/10/30/not-a-fluke-plaintiffs-lawyers-see-changing-tide-in-175m-roundup-verdict [https://perma.cc/K6RF-MNJ6].

the cost to insure the pending case is elevated, reflecting both the value of the precedent at stake and the reduced likelihood of the plaintiff's victory due to the defendant's vigorous defense efforts.[86]

2. Plaintiff's Risk Tolerance

The risk tolerance of the plaintiff is a critical factor in the insurance agreement.[87] The plaintiff's risk appetite not only influences their decision to engage in an insurance agreement but also significantly impacts G and other terms of the coverage.[88] The insurance agreement, by providing coverage, mitigates the risk from litigation for the plaintiff, trading the potential total loss in case of an unfavorable verdict for a reduction in gains in the event of a victory. This reduction is represented by the fraction (α) of the gain which exceeds G, that the plaintiff receives upon ultimately winning in court. Considering risk appetite on a scale from extreme risk aversion to complete risk tolerance, a more risk-averse plaintiff would make the insurance less expensive for the insurer (G or α or both will be smaller). This is because a risk-averse plaintiff would generally be willing to accept a lower G, along with a smaller share (α) from the gains, to mitigate the risks of litigation. Conversely, a more risk-tolerant plaintiff would demand a larger G or a higher α, as they would be more inclined to take the chance of a substantial judgment down the road, even at the risk of losing the case.

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86 *See* Che & Yi, *supra* note 60. The relationship between the class of plaintiffs and the defendant regarding the value of a precedent may be such that the class of plaintiffs (and their insurer) value the precedent equally to or even more than the defendant does. Take, for instance, a product liability case, where a car manufacturer faces a common issue across thousands of its vehicles. The manufacturer may indeed value the precedent since it impacts its own fleet. However, it might not fully internalize the broader implications on millions of cars produced by other manufacturers subject to the same precedent. By contrast, the insurer involved may better internalize the widespread benefits of the precedent on those millions of other cars. This dynamic underscores the nuanced evaluation of the value of a precedent, emphasizing that the *class* of plaintiffs may place equal or greater importance on the precedent compared to the defendant.

87 *See* Peter Toll Hoffman, *Valuation of Cases for Settlement: Theory and Practice*, 1991 J. DISP. RESOL. 1, 29; *see* Keith N. Hylton, *Mutual Optimism and Risk Preferences in Litigation*, 75 INT'L REV. L. & ECON. 1, 1–3 (2023) (introducing a litigation model influenced by risk preferences and exploring its ramifications for both trial proceedings and settlement outcomes).

88 Cédric Argenton & Xiaoyu Wang, *Litigation and Settlement Under Loss Aversion*, 56 EUR. J.L. & ECON. 369, 369 (2023) ("[A] loss-averse plaintiff demands a higher settlement for intermediate claims to maintain her threat to proceed to trial following rejection compared to a loss-neutral plaintiff. For larger claims, a loss-averse plaintiff demands a lower offer to increase the settlement probability as loss pains her extra in trial.").

3. Parties' Relative Assessment of the Case

A related yet distinct factor is the parties' relative assessment of the strength of the case. If the insurer is more optimistic about the chances of winning than the plaintiff, the insurer could offer the plaintiff a larger G in exchange for a smaller α in case the plaintiff prevails. Conversely, if the plaintiff is more convinced of her eventual success in court, she may opt to trade off the upside for the downside. In other words, the more convinced the plaintiff is about prevailing in court, the larger the α and the smaller the G she would demand from the insurer, holding everything else constant. This dynamic reflects a negotiation of terms based on the parties' differing perceptions of the case's strength and potential outcomes.[89]

4. Timing of the Insurance

The timing of the insurance arrangement within the litigation lifecycle is a significant factor influencing both the plaintiff's likelihood of entering into an insurance agreement and its terms (G and α). At the onset of the litigation process, substantial uncertainty exists regarding the case's future outcome. In such situations, a more risk-averse plaintiff may choose to mitigate this uncertainty by entering into an insurance agreement involving a relatively modest financial gain. As the litigation progresses, both parties accumulate better information regarding the likelihood of prevailing at trial and the potential for cascading liability from a harmful precedent. Consequently, an insurance agreement signed closer to final adjudication will better capture these variables, influencing the terms of the insurance contract (G and α) in an upward or downward direction.[90]

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89 The assessment of the case by the plaintiff may be influenced by the optimism bias. *See* Oren Bar-Gill, *The Evolution and Persistence of Optimism in Litigation*, 22 J.L. ECON. & ORG. 490, 490–91 (2006) ("Empirical evidence suggests that lawyers and litigants are systematically optimistic with respect to the outcome at trial.").

90 *See generally* Shay Lavie, *Asymmetric Information in Litigation*, *in* ENCYCLOPEDIA OF LAW AND ECONOMICS 78 (Alain Marciano & Giovanni Battista Ramello eds., 2021). A compelling example that highlights the significance of timing in insurance pricing can be found in the context of before-the-event ("BTE") and after-the-event ("ATE") litigation costs insurance in England. BTE insurance refers to insurance that a client already possesses before the possibility of legal proceedings arises, such as being included in the client's existing house or car insurance policies. This insurance covers some or all of the potential costs the client might incur in any subsequent legal proceedings. The premium for BTE insurance tends to be relatively low, given the lower probability of the insurance event occurring. In contrast, ATE insurance is a tailor-made policy

5. Plaintiff's Incentives to Cooperate

A final crucial factor is the insurer's need to ensure that the plaintiff continues to cooperate and exert optimal efforts in litigating the case. The concern arises from the fact that, as the plaintiff is insured, there may be a tendency to slack on efforts to litigate the case all the way to victory, creating what is known as the ex post and ex ante moral hazard problem.[91] While insurers typically include a duty-to-cooperate clause in the contract, which, if breached, can lead to the termination of the agreement, it is prudent to integrate additional financial incentives to motivate the plaintiff to exert effort and cooperate at trial.[92]

The key to addressing this issue is to ensure that the plaintiff has "skin in the game," meaning that if they do not cooperate, they will forfeit damages awards above and beyond G. Therefore, α should be structured to provide the plaintiff with sufficient incentives to actively pursue a victory in court. All else being equal, the more the plaintiff's cooperation is essential, the larger α will be, and consequently, the smaller G will be. This approach aligns the plaintiff's interests with the insurer's goal of diligent and committed litigation efforts throughout the legal proceedings.

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established after a legal dispute has commenced, intended to cover the costs associated with that specific legal action or dispute. The premium for ATE insurance is typically high, reflecting the increased risk for the insurer. *See* Willem H. van Boom, *Juxtaposing BTE and ATE: The Role of the European Insurance Industry in Funding Civil Litigation*, OXFORD U. COMPAR. L.F. (2010), https://ouclf.law.ox.ac.uk/juxtaposing-bte-and-ate-the-role-of-the-european-insurance-industry-in-funding-civil-litigation [https://perma.cc/N85E-7FGV].

91 *See* Tom Baker & Peter Siegelman, *The Law and Economics of Liability Insurance: A Theoretical and Empirical Review*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF TORTS 169 (Jennifer Arlen ed., 2013); *see also* Y. Kotowitz, *Moral Hazard*, *in* THE NEW PALGRAVE: ALLOCATION, INFORMATION AND MARKETS 207 (John Eatwell, Murray Milgate & Peter Newman eds., 1989); Tom Baker, *On the Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 270–71 (1996).

92 Steptoe & Johnson PLLC, *Can't We Just Get Along? The Duty to Cooperate*, NAT'L L. REV. (June 5, 2018), https://natlawreview.com/article/can-t-we-all-just-get-along-duty-to-cooperate [https://perma.cc/YKC9-GWVU]. The duty to cooperate is an important aspect in both liability insurance and first-party insurance policies. In liability insurance, the duty to cooperate typically arises when a claim is made against the insured. The insured is obligated to provide timely notice of the claim to the insurance company and to assist in the investigation and defense of the claim. This cooperation may include providing relevant information, documentation, and access to witnesses or evidence. Similarly, in first-party insurance, the duty to cooperate arises when the insured submits a claim for coverage under their policy. The insured is expected to provide accurate and complete information regarding the loss or damage covered by the policy. Failure to cooperate with the insurer in the investigation of the claim may result in a denial of coverage. *See* Doe v. OneBeacon Am. Ins. Co., 639 Fed. App'x 627, 628 (11th Cir.) (per curiam).

B. *Judgment Insurance*

In this part we explain in more details the fundamentals of JI. In essence, JI involves a third-party "insurer"—be it an NGO, government entity, or a commercial enterprise invested in the case's outcome[93]—agreeing to cover the *expected* court-awarded judgment for individual plaintiffs. In its most basic form, this coverage is contingent upon the plaintiff's commitment to fully pursue their case through litigation, including declining any settlement offers extended by the defendant.[94]

The core objective of JI is to mitigate the risks borne by the plaintiff during the litigation process, effectively addressing the challenge posed by powerful RPs pressuring weaker parties into settling prematurely. In the event of a successful court outcome, the plaintiff receives G, and any surplus proceeds are divided between the insurer and the plaintiff according to α, allowing the plaintiff to receive a larger compensation than G. Importantly, in case of a loss or if the court ruling awards the plaintiff an amount less than G, the insurer still pays the plaintiff either G (in the former case), or an amount equivalent to G minus the court award (in the latter case).

To illustrate our proposal, consider an example. Recall Clementine's lawsuit against the agrochemical company. Suppose Clementine seeks compensatory damages totaling $100,000 and punitive damages amounting to an additional $500,000. The local chapter of the American Public Health Association (APHA) sees this case as having a high probability of compelling the court to rule that manufacturers have a common law duty to disclose potential cancer risks even if the EPA approved the product's label. The precedential value of such a ruling is immense. Representatives of the APHA approach Clementine and propose to provide JI if a thorough review reveals the case's strength. After speaking with witnesses and examining the medical bills, they confirm that Clementine is likely to win the case. Additionally, they find the $100,000 in damages to be reasonable. However, they evaluate the probability of the court deeming the manufacturer's actions exceptionally egregious or demonstrating a deliberate disregard for Clementine's rights

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93 For an illustration of such a commercial funder in commercial arbitration, see Quasar de Valores SICAV S.A. v. Russian Fed'n, SCC Case No. 24/2007, Award, ¶ 223 (July 20, 2012), 19 ICSID Rep. 205 (2021). The funder, Group Menatep Limited, had previously been a majority shareholder in the Russian oil company Yukos. *Id.* at 1. By financing the *Quasar de Valores* case, Menatep aimed to establish a favorable legal "precedent," anticipating that such a precedent might be applicable in its subsequent and larger shareholder dispute against Russia under the Energy Charter Treaty. *Id.*

94 Below, we discuss more sophisticated JI contracts that incorporate SI in them. *See infra* note 99 and accompanying text.

to be very low.[95] Therefore, in their assessment, the likelihood of the court awarding punitive damages is small.[96]

Consequently, they propose to provide insurance for Clementine's case and offer the following three possible tracks:

> Option 1: G = $80,000, with any amount exceeding that figure to be divided 90% for Clementine and 10% for the APHA (α=90%).
>
> Option 2: G = $90,000, with any amount exceeding that figure to be divided equally between Clementine and APHA (α=50%).
>
> Option 3: G = $100,000, with any amount exceeding that figure to be divided 90% for APHA and 10% for Clementine (α=10%).

All else being equal, the more risk-averse or pessimistic about the chances of winning Clementine is (criteria 2 and 3 above, respectively), the more likely she is to prefer to mitigate the risk of losing, thus opting for a higher G and a lower α, and therefore to choose Option 3. If, however, APHA is worried about Clementine not cooperating (criterion 5 above), they might drop Option 3 and leave Clementine the choice between Option 1 and Option 2, both of which leave more skin in the game for Clementine so that a victory in court benefits her greatly (α is larger).[97]

C. Settlements Insurance

SI resembles JI, with the key difference being that it covers settlements offered by the defendant during the litigation. In this arrangement, the insurer—again, an interest group, government entity,

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95 *See, e.g.*, Anthony J. Sebok, *Punitive Damages in the United States*, *in* PUNITIVE DAMAGES: COMMON LAW AND CIVIL LAW PERSPECTIVES 155 (Helmut Koziol & Vanessa Wilcox eds., 2009); MANUAL OF MODEL CIVIL JURY INSTRUCTIONS § 5.5 (NINTH CIRCUIT JURY INSTRUCTIONS COMMITTEE 2017).

96 *See, e.g.*, BMW of N. Am., Inc. v. Gore, 517 U.S. 559, 574–75 (1996).

97 Importantly, the JI arrangement can, in many cases, aid in establishing precedents in situations where the remedy sought is not monetary but rather injunctive or declaratory relief. This is applicable when such relief can be monetized or replaced by an equivalent remedy. Consider, for example, a scenario where a housing chain initiates a legal claim against one of its tenants who refuses to pay rent, seeking an injunction to compel the tenant's eviction from the apartment. The tenant defends by asserting that the housing chain has breached the warranty of habitability. Suppose, furthermore, that a judgment in this case can have far-reaching implications for numerous future tenants across the state or even the country. In such a scenario, the insurer can approach the tenant and propose a JI arrangement. Under this agreement, the tenant is obligated to pursue the case to its conclusion, and in return, the insurer is committed to providing the tenant with a comparable apartment in the event they lose the case and face eviction.

or NGO—commits to paying the plaintiff "G_s."[98] This amount can mirror the precise settlement offer, or any predetermined multiplier or fraction thereof, should the plaintiff decline the settlement offer and the case fails in court or results in a lower compensation amount.

There are two forms of SI.

(1) Anticipatory settlement-offer insurance ("ASI") occurs when the insurer is granted a right of first refusal to match one or more settlement offers presented by the defendant, *prior* to the plaintiff receiving any such offers. If the insurer chooses to exercise its right, it commits to paying the plaintiff G_s in the event of a loss by the plaintiff.[99]

(2) Post-settlement-offer insurance ("PSI") occurs when a plaintiff (without a previous JI) seeks coverage after receiving a settlement offer from the defendant. In PSI, the plaintiff is offered G_s for refusing an existing settlement offer.

In both cases, the insurance agreement is designed to rebalance the skewed incentive structure by incorporating the insurer's long-term interest in the case's precedential value into the plaintiff's decision to litigate. By extending insurance coverage, it reduces the financial risk for plaintiffs and encourages them to pursue litigation. If the plaintiff prevails in court, they may secure higher compensation than G_s, with the gains shared between the plaintiff and the insurer based on a predetermined allocation (α). In the event of a court loss, or if the court ruling awards the plaintiff an amount less than G_s, the plaintiff still receives either the original G_s from the insurer (in the former case), or an amount equivalent to G_s minus the court award (in the latter case). The same factors we saw in the case of JI determine the decision to engage in settlement insurance as well as G_s and α. These are the monetary and precedential value of the case, the plaintiff's risk tolerance, the parties' relative assessment of the

98 The subscript G_s stands for the fact that we are analyzing settlement insurance.

99 This type of insurance can be incorporated into a JI contract, with the distinction that, instead of pledging to forgo any settlement offer in return for the original G, as the most basic JI requires, the plaintiff in ASI is offered a different guaranteed coverage amount, denoted as G_s, in the contract. The G_s amount serves as the guaranteed coverage amount in case a settlement offer is presented later in the legal proceedings. G_s may be either lower or higher than the actual settlement offer made by the defendant, as well as lower or higher than the original contractual guaranteed coverage amount G. For example, the insurer can offer the plaintiff G=100 for litigating the case all the way. However, the insurer can also promise to pay G_s=120 of the settlement offer if one is made down the road. Suppose the defendant makes a settlement offer of 100 at some point. In the first case, the plaintiff will end up with 100, unless they win more in court. In the second case, the plaintiff can guarantee 120 from the insurer, unless they secure a higher amount in court down the road.

case, the timing of the insurance, and the plaintiff's incentives to cooperate.[100]

However, unlike JI, which is a singular occurrence, settlement offers can and often arise multiple times during the litigation process and are contingent on case developments, making the SI scheme more intricate. Thus, it would not necessarily make sense for the SI contract to be a one-time deal without considering the possibility of the defendant making better (or worse) settlement offers later on. Recall that in its most basic form, JI includes a commitment by the plaintiff to forgo *any* settlement offer she received during trial. In the context of SI (both ASI and PSI), one could draft an SI agreement wherein the plaintiff is restricted from accepting any settlement offer beyond the initial one. Alternatively, the plaintiff may be granted the option to consider additional settlement offers, and the insurer may, in turn, have the right to match subsequent settlement offers, with a potential cap on the number of settlement offers that the plaintiff may consider. Another possible SI arrangement might involve giving the plaintiff the option to entertain an unlimited number of settlement offers, and the insurer the option to match them. This arrangement is analogous to a situation where the plaintiff is only obligated to notify the insurer about a settlement offer, and the insurer has the right of first refusal to match any such offer. All else being equal, the greater the number of settlement offers the plaintiff can consider, the lower the G_s they receive for rejecting the *original* settlement offer, or the lower α is, or both. Conversely, the fewer the number of settlement offers the plaintiff can entertain, the larger their share of α, or the larger G_s is, or both.

1. The Structure of ASI Agreements

To illustrate ASI, let's assume that shortly after assessing Clementine's case, APHA is certain of its precedential value but remains uncertain about the case's provability. Hesitant to make a firm financial commitment at this juncture, APHA suggests entering into an ASI agreement with Clementine, delineating the following options:

> Option 1—APHA is granted a right of first refusal to match one settlement offer, and in return, Clementine commits to forego any subsequent settlement offer, no matter how large they are. Should APHA choose to exercise this right, it undertakes to pay Clementine the guaranteed covered amount (G_s) which equals to the settlement offer plus, say, 20%. Additionally, Clementine is entitled to a share (α)

100 *See* discussion *supra* Section II.A.

of 50% of the surplus in the event that she prevails at final adjudication and is awarded by the court an amount exceeding G_s.

Option 2—Clementine may insist on considering one additional settlement offer that could be presented by the defendant beyond the initial offer. In this case, the contract will have to include more parameters that reflect the guaranteed coverage amount in both rounds ("G_s1", "G_s2") and the share of proceeds ("α1," "α2"). For example, both G_s1 and G_s2 might now be set to equal to the settlement offers, while α1 and α2 remain at 50%. In this example, by forgoing the additional 20% on the first settlement offer, Clementine essentially "paid" for the option to receive a second settlement offer from the defendant (G_s2). She thus takes the risk that no second settlement offer will materialize or that the second settlement offer (G_s2) would be lower than G_s1 plus 20%.

Option 3—In an extreme scenario where Clementine insists on considering an unlimited number of settlement offers, Clementine would only be required to notify the insurer about each settlement offer, giving the insurer the right to match any offer. In such a case, the insurer would likely pay a lower fixed amount or offer a lower α (compared to previous cases) for essentially buying from Clementine a "right of first refusal" on all future settlement offers.

2. The Structure of PSI Agreements

To demonstrate how PSI works suppose that shortly after the lawsuit is filed (and before Clementine bought any JI or ASI), the agrochemical company extends a settlement offer of $80,000, which Clementine is contemplating accepting. Recognizing the substantial precedential value of this case, APHA (the insurer) proposes entering into a PSI agreement with Clementine, outlining the following options:

Option 1—Clementine agrees to forego any further settlement offers, and APHA commits to paying her an amount (G_s) of $100,000 (the settlement offer plus some compensation for its willingness to reject any future settlement offers) plus a share (α) of, say, 50% in the event that Clementine prevails at final adjudication and is awarded more than $100,000.

Option 2—Clementine is entitled to take a chance that a second, more favorable settlement offer might be made down the road by the defendant. In this case, the contract may give the insurer the right to increase the coverage amount (G_s2) while keeping the share of proceeds (α2) constant. G_s1 might equal now only $80,000, G_s2 could be set to equal the second settlement offer, and both α1 and α2 will be set to 50%. In this example, Clementine "paid" $20,000 for the option

> to receive a higher match (G_s2) for the second settlement offer, while keeping α1 and α2 intact.
>
> Option 3—Clementine is solely committing to notifying the insurer about any and all future settlement offers she receives, giving the insurer the option to match them. If the insurer chooses to match an offer, Clementine has to proceed with the litigation. In this arrangement, APHA commits to paying Clementine the value of the last settlement offer for which it exercised its right of first refusal ("G_sn"). Additionally, APHA may agree to pay a share (α) of, say, 10% in the event that Clementine prevails at final adjudication and is awarded more than the last settlement offer she received from the defendant.

It is important to note that the three examples provided for both ASI and PSI represent just a few among numerous potential options for insurance contracts regarding G and α. These options would be crafted by considering the parameters mentioned earlier, including the monetary and precedential value of the case, the plaintiff's risk tolerance, the parties' relative assessment of the case, the timing of the insurance, and the plaintiff's incentives to cooperate, as well as the respective bargaining power of the parties. Nonetheless, two general observations should be made. First, the more settlement offers the plaintiff wishes to secure of themselves, the smaller G is likely to be. Second, the "price" paid by the plaintiff for the option to consider future settlement offers can be deducted not only from G but also from α, or a combination of both.[101]

D. *Engaging the Lawyer*

For both the JI and the SI arrangements to be effective, it is crucial that the plaintiff's attorney is fully aligned with and cooperative toward the insurer's goal of establishing a legal precedent. To achieve this alignment, it is essential that the attorney's financial interests should mirror (or surpass) what they would have been without the insurer's involvement.[102] To accomplish this, the insurer should cover the attorney's fees as outlined in the representation agreement between the attorney and their client, the plaintiff.

When an attorney agrees to represent a client on a contingency fee basis, the initial fee structure may not always provide adequate protection

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101 For instance, in the above example of Option 2, instead of lowering G_s1 to $80,000 from $100,000, α1 and α2 can be set at 25% for Clementine and 75% for APHA.

102 Herbert M. Kritzer, *Lawyer Fees and Lawyer Behavior in Litigation: What Does the Empirical Literature Really Say?*, 80 TEX. L. REV. 1943, 1967–69 (2002); Herbert M. Kritzer, *Fee Regimes and the Cost of Civil Justice*, 28 CIV. JUST. Q. 344, 357–59 (2009).

for the attorney's interests in cases involving insurance. Typically, the fee agreement is signed before the insurer becomes involved in the case and is often based on the assumption that the defendant will likely make a reasonable settlement offer at a certain point in the litigation. The percentage of the relief or settlement offer that the lawyer charges as fees is typically calculated with this assumption in mind.[103] However, when an insurance agreement prohibits the plaintiff from accepting any settlement offers, this can change the calculation significantly. It may require the attorney to invest additional hours of work, especially in cases where the precedent's importance is high.[104] Without the option of settling, the defendant may vigorously contest the case, considering the potential impact of an adverse verdict on numerous future cases.[105] On the other hand, the insurance agreement alleviates the lawyer's risk associated with "no win, no fee" agreements, generally resulting in lower fees paid to the lawyer.[106] Therefore, it is advisable to revisit the fee agreement and calculate the percentage based on the anticipated additional time and effort the lawyer will need to invest in the case, balanced with the absence of risk due to the insurance, all while considering the size of the relief sought. This ensures that the attorney has a fair and equitable fee structure, considering the JI or SI arrangements. The original fee, as initially agreed upon between the attorney and the client, should be deducted from the plaintiff's relief, unless federal statutory fee-shifting applies.[107] Any additional fees should be covered by the insurer.

Hourly fee agreements present a different set of challenges. The issue of inadequate compensation does not arise because the lawyer is compensated for the entire scope of their work without the need for advance estimates. However, a different concern emerges—that of

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103 *See* Florian Baumann & Tim Friehe, *Contingent Fees with Legal Discovery*, 18 AM. L. & ECON. REV. 155, 162 (2016) (contending that the structuring of attorney's fees is influenced by the legal discovery process, which is predicated on the expectation that defendants will likely extend reasonable settlement offers at some stage during the litigation).

104 *See generally* Paula Hannaford-Agor, *Measuring the Cost of Civil Litigation: Findings from a Survey of Trial Lawyers*, VOIR DIRE, Spring 2013, at 22.

105 *See* Avery Katz, *Judicial Decisionmaking and Litigation Expenditure*, 8 INT'L REV. L. & ECON. 127, 135–36 (1988); Anthon D'Amato, *Legal Uncertainty*, 71 CALIF. L. REV. 1 (1983).

106 *See generally* HERBERT M. KRITZER, RISKS, REPUTATIONS, AND REWARDS: CONTINGENCY FEE LEGAL PRACTICE IN THE UNITED STATES (2004).

107 *See* Issachar Rosen-Zvi, *Just Fee Shifting*, 37 FLA. ST. U. L. REV. 717, 734–38 (2010) (discussing fee shifting statutes); Maureen Carroll, *Fee-Shifting Statutes and Compensation for Risk*, 95 IND. L.J. 1021, 1022–28 (2020).

potentially inflated hours.[108] This challenge is not unique and applies to any retainer agreement based on an hourly rate. Therefore, traditional methods of monitoring billable hours come into play.[109] A more complex issue is how to allocate fees between those paid by the client and those covered by the insurer. To address this, we propose adopting a methodology akin to the "lodestar method,"[110] commonly used to determine reasonable attorney hours in fee-shifting cases.[111] Under this approach, the parties would calculate the attorney's fees paid by the plaintiff by multiplying the number of hours reasonably expended by trial counsel on similar uninsured cases by the lawyers' hourly rate.[112]

E. The Dynamics of the Insurance Contract

Both JI and SI do not completely eliminate the plaintiff's incentive to settle the case. It is important to remember that the insurance contract is signed at a specific stage of the case, often in its preliminary phases. The G, the number of settlement offers, as well as allocation of surplus between the plaintiff and the insurer (α), are determined based on the information available at that time. Many factors can emerge during the course of litigation that can alter the plaintiff's likelihood of winning and the potential court award. For instance, new information may surface through discovery or during witness testimony that could either strengthen or weaken the plaintiff's case. If this new information favors the defendant's position, it is unlikely that they will offer a settlement exceeding G. However, if the new information supports the plaintiff's case, the defendant might be inclined to offer a settlement amount that exceeds G, especially when the case holds significant precedential value. They may even consider paying an amount that surpasses the entire relief sought in the current case, considering the potential ramifications of setting a precedent on future cases. In such a scenario, the plaintiff may

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108 *See generally* Nuno Garoupa & Fernando Gómez-Pomar, *Cashing by the Hour: Why Large Law Firms Prefer Hourly Fees over Contingent Fees*, 24 J.L. ECON. & ORG. 458 (2007) ("provid[ing] a moral hazard explanation" for the preference of large law firms for hourly fees over contingent fees, hinting at the potential for inflated hours under hourly fee structures).

109 *See* Amanda Pilon, Comment, *The Billable Hour: Critiques of the System and Two Potential Solutions*, 15 U. ST. THOMAS J.L. & PUB. POL'Y 852, 853–57 (2022).

110 *See* Rosen-Zvi, *supra* note 107, at 749 n.175 ("The lodestar figure is derived from the prevailing rates charged in the community for similar work, which means a reasonable hourly rate in the relevant market.").

111 *See* 10 CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND CIVIL PROCEDURE § 2675.2 (4th ed. 2024).

112 *Id.*

be tempted to accept the settlement that would result in a higher payout than what the insurance offers.

For this reason, the insurance contract should ideally explicitly forbid settlements without prior written consent from the insurer.[113] To ensure the plaintiff's adherence to this term, the contract may contain a provision stipulating that any settlement reached without the insurer's consent would result in the forfeiture of the entire settlement amount. This measure is implemented to weaken the motivation for the plaintiff to settle without consulting the insurer.[114] The insurance contract should also encompass standard terms commonly found in liability insurance contracts, designed to address moral hazard issues and ensure proper legal representation. These terms include cooperation requirements, which mandate the plaintiff's cooperation in fulfilling discovery requests and make both the plaintiff and pertinent witnesses available for depositions and trial,[115] as well as granting the insurer the right to assist in the litigation process.[116]

Another concern involves avoiding a situation where the insured has obtained more than one policy from different insurers. If the insured is over-insured, there might be less motivation to pursue a favorable case outcome, as multiple G amounts may be collected from various insurers, maximizing the plaintiff's return. In insurance contracts the provisions addressing this issue are commonly referred to as the "Other Insurance" clause or "Coordination of Benefits" clause, depending on the line of insurance.[117] These clauses are in place to prevent excessive compensation for the insured, ensuring that the cumulative benefits from multiple insurance policies do not surpass the actual amount of the loss or damage.[118] In the case of JI, such clauses will have to ensure that the plaintiff does not receive more than the expected outcome from the case, reducing their incentives to litigate it to its conclusion.

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113 *See* W. Bradley Wendel, *Controlling the Delegation of Control*, 25 THEORETICAL INQUIRIES L. (forthcoming 2025) (manuscript at 4–5), https://papers.ssrn.com/abstract=4566351 [https://perma.cc/9XX5-89JC] (discussing granting of veto rights over settlements in contexts involving third-party litigation funding and liability insurance).

114 *See infra* Part IV (addressing other contractual solutions to guarantee the plaintiff's cooperation in jurisdictions where such a sanction would be unenforceable).

115 *See, e.g.*, Nicholas J. Giles, Comment, *Rethinking the Cooperation Clause in Standard Liability Insurance*, 161 U. PA. L. REV. 585, 590–91 (2013) (arguing that the duty to cooperate is an unavoidable and uniform element in consumer liability insurance policies).

116 *See* Tom Baker, What Litigation Funders Can Learn About Settlement Rights from the Law of Liability Insurance (U. Penn. Inst. for L. & Econ., Rsch. Paper No. 23-41, 2025).

117 *Coordination-of-Benefits Clause*, LSD L., https://www.lsd.law/define/coordination-of-benefits-clause [https://perma.cc/7HWZ-6FC2].

118 *See* Mark V. Pauly, *Overinsurance and Public Provision of Insurance: The Roles of Moral Hazard and Adverse Selection*, *in* UNCERTAINTY IN ECONOMICS 307 (Peter Diamond & Michael Rothschild eds., 1978).

III. EXISTING SOLUTIONS AND THEIR DRAWBACKS

Despite widespread acknowledgment of the biased precedents phenomenon,[119] finding a satisfactory solution to the problem has remained elusive, and previously proposed solutions have fallen short. As we will demonstrate in this Part, the principal reason for their failure is that they did not target the root cause of the problem: the public good nature of precedents, which provides OS plaintiffs with no incentives to refrain from settling their cases even when a socially beneficial precedent is at stake. This Section outlines seven previously proposed or implemented solutions that aim, either directly or indirectly, at addressing the prevalence of settlements that hinder the civil justice system, underscoring their shortcomings in remedying the problem of biased precedents.

A. *Direct Legal Representation by Public Interest Organizations*

One strategy primarily utilized by legal public interest organizations or state agencies committed to aiding vulnerable individuals involves representing clients whose cases are poised to establish favorable precedents benefiting a class of plaintiffs, referred to as "public interest litigation"[120] or "impact litigation,"[121] which is often employed in civil rights litigation.[122] An entity interested in advancing a cause through litigation identifies a suitable client with a suitable case (or alternatively "manufactures" one) and provides representation throughout the legal process.[123] Some of the nation's most well-known precedents were established in this manner, including *Brown v. Board of Education*[124] and

119 *See supra* note 55.

120 *See* Jason M. Wilson, *Litigation Finance in the Public Interest*, 64 AM. U. L. REV. 385 (2014) (exploring the potential of the litigation finance sector to bolster public interest cases and improve access to justice).

121 *See* Lederman, *supra* note 43, at 241; *see also* Susan Wnukowska-Mtonga, *The Real Impact of Impact Litigation*, 31 FLA. J. INT'L L. 121 (2019) (discussing the pros and cons of impact litigation).

122 William B. Rubenstein, *Divided We Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623 (1997) (exploring the disparity between the necessity of collective decision-making for civil rights litigation and the individualistic nature inherent in civil procedure and professional ethics).

123 *See* Wnukowska-Mtonga, *supra* note 121, at 123.

124 347 U.S. 483 (1954); *see also History of Brown v. Board of Education*, NAACP, https://naacp.org/history-brown-v-board-education [https://perma.cc/2KWP-SMA8].

the overturned[125] *Roe v. Wade*.[126] Several notable international precedents were also ascertained in this way, including cases relating to mass surveillance in the United Kingdom,[127] proceedings against Augusto Pinochet,[128] Northern Ireland's near-total abortion ban,[129] pollution in the Niger Delta,[130] and opposition to the CIA's rendition programs.[131] Notwithstanding its undeniable importance, this classic approach to the creation of precedents presents two major challenges.

First, identifying the ideal client with a strong claim can be challenging. Searching for a suitable plaintiff with a strong case *prior* to filing a suit is akin to searching for a needle in a haystack.[132] Neither the state nor public interest organizations have access to information about individuals holding claims that possess the potential to set a precedent. Consequently, they rely on these individuals to approach them with such cases.[133]

An alternative approach involves intentionally "manufacturing" such cases. This might entail sending "testers" to interact with the prospective defendant in order to prompt them into engaging in the alleged prohibited conduct.[134] However, the deliberate creation of legal claims, often referred to as "manufacturing," engenders substantial challenges pertaining to the standing doctrine,[135] as well as professional responsibility dilemmas.[136] The Supreme Court "tends to disfavor suits by 'ideological' litigants seeking redress for broadly shared harms that they

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125 *Roe v. Wade* was overturned in 2022 by *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215 (2022). *See* Reva B. Siegel, *Memory Games:* Dobbs*'s Originalism as Anti-Democratic Living Constitutionalism—And Some Pathways for Resistance*, 101 TEX. L. REV. 1127 (2023).

126 *See* Roe v. Wade 410 U.S. 113 (1973). For the story of the involvement of the ACLU in this case, see Lucinda M. Finley, *Contested Ground: The Story of Roe v. Wade and Its Impact on American Society*, *in* CONSTITUTIONAL LAW STORIES (Michael Dorf ed., 2nd ed. 2009).

127 Big Brother Watch & Others v. United Kingdom, App. Nos. 58170/13, 62322/14, 24960/15 (May 25, 2021), https://hudoc.echr.coe.int/fre?i=001-210077 (last visited Mar. 14, 2025).

128 R v. Bartle & the Comm'r of Police for the Metropolis, *Ex Parte* Pinochet, [2000] 1 AC 147 (HL) (appeal taken from Eng.).

129 *In re* Northern Ireland Human Rights Comm'n [2018] UKSC 27, [2019] 1 All ER 173.

130 Gbemre v. Shell Petrol. Dev. Co. Nigeria Ltd. [2005] AHRLR 151 (Nigeria).

131 *See generally* El-Masri v. The Former Yugoslav Republic of Maced., 2012-VI Eur. Ct. H.R. 263 (2012).

132 MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2023).

133 AM. UNIV., CTR. FOR HUM. RTS. & HUMANITARIAN L., IMPACT LITIGATION: AN INTRODUCTORY GUIDE 3–4 (2016).

134 *See, e.g.*, Havens Realty Corp. v. Coleman, 455 U.S. 363, 373 (1982).

135 The doctrine, rooted in Article III of the Constitution, limits who can sue. Specifically, the plaintiff must demonstrate that they have been personally harmed by the defendant's conduct they are challenging before the court will consider the merits of their claims. *See* Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

136 MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2023).

have arguably courted by setting up a 'test case.'"[137] This means that it is likely many such cases will be dismissed for lack of standing. These cases also raise ethical dilemmas.[138] Actively seeking a plaintiff with a suitable case to represent could be considered prohibited solicitation in some states.[139]

Second, representing a client involves taking on fiduciary duties and adhering to professional conduct rules, which can hinder the pursuit of pro-plaintiff precedents. For instance, if the defendant offers a favorable settlement, the lawyer must relay this information to the client and cannot prevent them from accepting the settlement.[140] Therefore, this strategy does not solve the incentive of both parties to settle at the expense of the public interest underlying the biased precedents problem. Furthermore, a lawyer representing a client cannot provide direct financial assistance to their clients (and thus counter any attempt to entice them with a settlement) because such behavior may run afoul of the ABA's Model Rules of Professional Conduct, which prohibit attorneys from providing financial aid to clients in connection with ongoing litigation.[141]

Our proposal offers an advantage by removing the requirement to find a plaintiff with a claim possessing precedential value before initiating legal action and addressing standing and professional conduct issues. It enables "insurers" to systematically review a diverse array of cases already filed in federal and state courts across the United States. Through this process, insurers can selectively identify cases with the highest potential to establish valuable precedents and approach the plaintiff to offer insurance coverage. Moreover, if our proposal is adopted, plaintiffs with cases holding the potential to set precedents are likely to actively seek out (themselves, or through their lawyers) JI or SI. This proactive engagement by plaintiffs streamlines the process for insurers, saving both time and resources that are typically involved in the exhaustive search for cases with precedential value. In addition, since the insurer does not represent

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137 Rachel Bayefsky, *Public-Law Litigation at a Crossroads: Article III Standing and "Tester" Plaintiffs*, 99 N.Y.U. L. REV. 128, 130 (2024).

138 *See* Alex Young K. Oh, *Using Employment Testers to Detect Discrimination: An Ethical and Legal Analysis*, 7 GEO. J. LEGAL ETHICS 473 (1993) (analyzing the potential legal and ethical dilemmas associated with the utilization of testing methods to identify instances of discrimination).

139 *See* MODEL RULES OF PRO. CONDUCT r. 7.3 (AM. BAR ASS'N 2023); *see also* Anita Bernstein, *Sanctioning the Ambulance Chaser*, 41 LOY. L.A. L. REV. 1545, 1551 (2008); David L. Hudson, Jr., *Avoiding Unlawful Client Solicitation*, 108 A.B.A. J. 20 (2022).

140 *See* MODEL RULES OF PRO. CONDUCT r. 1.2(a) (AM. BAR ASS'N 2023) ("A lawyer shall abide by a client's decision whether to settle a matter."); *see also* Douglas R. Richmond, *Lawyers' Professional Responsibilities and Liabilities in Negotiations*, 22 GEO. J. LEGAL ETHICS 249 (2009).

141 *See* MODEL RULES OF PRO. CONDUCT r. 1.8(e) (AM. BAR ASS'N 2023) ("A lawyer shall not provide financial assistance to a client in connection with pending or contemplated litigation . . . .").

the client, they do not face the professional conduct hurdles that attorneys encounter.

B. *Requiring Court Approval of Settlements*

A second potential approach could entail requiring court approval for all settlements, akin to the process observed in class action suits.[142] Currently, in routine cases, judges lack the legal authority to proscribe or impede parties from reaching settlements.[143] However, one might envision a framework where the judge is authorized to approve or reject any settlement reached by the parties.[144] Under this framework, a settlement would not receive court approval if it were determined that the case involves significant novel legal issues. Nevertheless, this solution faces at least two major challenges: information and incentives.

First, requiring trial court judges to meticulously evaluate the consequences of each settlement before approval would come with substantial social costs. When parties present a settlement to the court, the court often lacks comprehensive information to assess its societal implications and impact on public interest.[145] To make such determinations, parties would need to present arguments before the court, elucidating why the case *lacks* broader societal significance. This additional involvement could strain the court system and potentially impede the adjudication of other pending cases.

Second, as argued above, considering the existing burden on courts, their incentives lie in expediting case clearance, which renders them inadequately positioned to discern and reject settlements.[146] Indeed, why would judges willingly assume the additional workload associated with presiding over a precedent-setting case and crafting a comprehensive opinion when their evaluation (and subsequent promotion) often primarily hinges on the volume of cases they resolve? Altering the existing practice of permitting settlements without court endorsement would likely pose significant difficulties and is therefore unlikely to garner

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142 *See* FED. R. CIV. P. 23(e) ("The claims, issues, or defenses of a certified class—or a class proposed to be certified for purposes of settlement—may be settled, voluntarily dismissed, or compromised *only with the court's approval*." (emphasis added)).

143 *See* John Lande, The Deplorable Vanishing of Fox's Trial 4 (Apr. 24, 2023) (unpublished manuscript), https://ssrn.com/abstract=4427849 [https://perma.cc/HB97-CRRX].

144 *See* Ezra Freidman & Abraham L. Wickelgren, *No Free Lunch: How Settlement Can Reduce the Legal System's Ability to Induce Efficient Behavior*, 61 SMU L. REV. 1355, 1355 (2008) ("[J]udges should be more circumspect about encouraging settlements and that there may be situations where some restrictions on settlement are warranted.").

145 *See* Galanter & Cahill, *supra* note 26, at 1379–81.

146 *See supra* text accompanying notes 58–59.

substantial support, despite exceptional examples in both Germany[147] and Israel.[148] In the United States, an attempt by a district court judge to reject a proposed settlement between the Securities Exchange Commission and Citigroup, arguing that it was impossible for him to say that the settlement is in the public's interest,[149] was overturned by the Court of Appeals, which contended that the judge had abused his discretion.[150] It is worth noting that a similar issue arises when parties seek to have an appellate court vacate a lower court's ruling as part of their settlement.[151]

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147 One such example is the 2019 German "Diesel Gate" scandal where Volkswagen employed routine settlements to circumvent a verdict from Germany's highest court concerning the cheating software in its diesel cars. In response to a split among lower courts, the German Federal Court of Justice adopted an unconventional approach by issuing a "advisory decision," asserting the cars' defectiveness, despite the settlement and withdrawal of the plaintiff's complaint. *See* BGH, Feb. 22, 2019, V ZR 225/17, juris (Ger.) https://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2019-2-22&nr=94803&anz=3&pos=1 (last visited Mar. 14, 2025). Nevertheless, this step generated considerable controversy in Germany, and seems improbable to find an equivalent in the United States. *See* Ronen Avraham & William H. J. Hubbard, *Civil Procedure as the Regulation of Externalities: Toward a New Theory of Civil Litigation*, 89 U. CHI. L. REV. 1 (2022). This approach underscores the importance of upholding legal precedent for the broader societal benefit.

148 In the Israeli case *Dirot Yokra*, the Israel Supreme Court declined a request from involved parties to withdraw the appeal due to a settlement agreement reached by the parties. The court asserted that the matter at hand was too foundational to be resolved through settlement, emphasizing the need for a comprehensive resolution by the court. *See* CivA 7368/06 Luxury Apartments Ltd. v. Mayor of Yavne, Nevo Legal Database (June 27, 2011) (Isr.).

149 *See* SEC v. Citigroup Glob. Mkts. Inc., 827 F. Supp. 2d 328, 332 (S.D.N.Y. 2011), *vacated and remanded*, 752 F.3d 285 (2d Cir. 2014); *see also* Edward Wyatt, *Judge Blocks Citigroup Settlement with S.E.C.*, N.Y. TIMES (Nov. 28, 2011), https://www.nytimes.com/2011/11/29/business/judge-rejects-sec-accord-with-citi.html [https://perma.cc/P58Y-Z8HV].

150 *See Citigroup*, 752 F.3d at 289; *see also* James B. Stewart, *Reassessing Reversal of Adversary to S.E.C.*, N.Y. TIMES (June 13, 2014), https://www.nytimes.com/2014/06/14/business/rethinking-courts-reversal-of-sec-challenger.html [https://web.archive.org/web/20240708062543/https://www.nytimes.com/2014/06/14/business/rethinking-courts-reversal-of-sec-challenger.html].

151 The leading case in the United States is the 1994 *U.S. Bancorp Mortgage v. Bonner Mall Partnership* case. 513 U.S. 18 (1994). In this case, the Supreme Court determined that parties who settle a case on appeal qualify for vacatur of the underlying judgment only under "exceptional circumstances." *Id.* at 29. The Court's rationale centered on the principle that preserving precedents serves the public interest, even if the involved parties aim to dismiss the case. *Id.* at 26. While *Bonner* holds significance in preserving precedents, it fails to resolve the underlying issue. As cases ascend to higher courts, assessing their precedential value may become more feasible, but the challenge of addressing judicial incentives remains unchanged. Moreover, given that the majority of disputes are settled at the trial court level rather than on appeal, even if all appellate courts strictly adhere to the principle that vacatur is permissible only in exceptional circumstances, the problem of biased precedents will persist. Notwithstanding *Bonner*, at least three different courts of appeals have been willing to find "exceptional circumstances" and vacate trial courts' rulings. *See* Hartford Casualty Ins. Co. v. Crum & Forster Specialty Ins. Co., 828 F.3d 1331, 1332, 1336 (11th Cir. 2016)

C. *Prohibiting Secret Settlements*

Another solution involves the prohibition of secret settlements. Undoubtedly, the challenge of biased precedents is exacerbated by the utilization of secret settlements and vacatur. In most cases, defendants stipulate their willingness to settle contingent upon the inclusion of a confidentiality clause in the settlement agreement, which are frequently upheld through substantial fines in case of a breach. Confidentiality clauses are prevalent in the majority of settlement agreements across various legal domains including those with significant public interest implications, such as medical malpractice,[152] defective products,[153] and labor discrimination.[154]

Defendants gain advantages from secret settlements as they evade adverse publicity and potential future legal actions from others harmed under similar circumstances.[155] Confidentiality clauses can sometimes be advantageous to plaintiffs as well, as they can negotiate higher settlement amounts by leveraging the secrecy element.[156] And due to their positive impact on overloaded dockets, courts generally favor settlements, and therefore often allow parties to resolve their disputes discreetly.[157] Nonetheless, secret settlements come at a significant societal cost. They inhibit the potential for exposing relevant facts that can attract other victims to sue and deter other defendants from committing wrongs.[158]

(providing that "courts determine the propriety of granting vacatur by weighing the benefits of settlement to the parties and to the judicial system (and thus to the public as well) against the harm to the public in the form of lost precedent"); Motta v. INS, 61 F.3d 117, 118 (1st Cir. 1995) (dismissing appeal as moot where parties settled following oral argument); Major League Baseball Props., Inc. v. Pac. Trading Cards, Inc., 150 F.3d 149, 150 (2d Cir. 1998) (finding exceptional circumstances where "vacatur of the district court's order and opinion was a necessary condition of settlement").

152 *See* William M. Sage, Joseph S. Jablonski & Eric J. Thomas, *Use of Nondisclosure Agreements in Medical Malpractice Settlements by a Large Academic Health Care System*, 175 JAMA INTERNAL MED. 1130 (2015); *see also* Kay Lazar, *Secrecy Pervades Medical Malpractice Settlements*, BOS. GLOBE (Sept. 8, 2022, 10:37 PM), https://www.bostonglobe.com/2022/09/08/metro/secrecy-pervades-medical-malpractice-settlements [https://perma.cc/4J6G-SSUX].

153 *See* Richard A. Zitrin, *The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 119–20 (1999).

154 *See* Kotkin, *supra* note 52, at 929.

155 *See* Erik S. Knutsen, *Keeping Settlements Secret*, 37 FLA. ST. U. L. REV. 946, 951 (2010).

156 *See id.* at 952–53.

157 *See* Freidman & Wickelgren, *supra* note 144, at 1360.

158 In the wake of revelations surrounding sexual misconduct by repeat offenders like Hollywood producer Harvey Weinstein, Fox News Chairman and CEO Roger Ailes, and former USA Gymnastics national team doctor, Dr. Larry Nassar, whose actions were shielded for years by nondisclosure agreements ("NDAs") signed by victims as part of their settlement agreements,

They can also prove detrimental to plaintiffs who lack the knowledge to assess the merit of their claims in comparison to similar past cases.[159] If settlement terms were made publicly available, future litigants could utilize them to make informed decisions, including whether to pursue litigation or settle for a reasonable amount.[160] Vacatur, when granted alongside settlements, compounds their threat to the unbiased creation of precedents.[161]

Banning secret settlement, while socially advantageous, would not fully resolve the challenge of biased precedents for at least three reasons: First, settlements, even if not confidential vis-a-vis the court, often remain undisclosed to the public, thereby eluding public awareness in most instances.[162] Second, it is unlikely that even a non-secret settlement, approved by the court, would provide all the essential details—both factual and legal—necessary for a precedent to later be generated. Third, and most crucially, prohibiting secret settlements would influence the bargaining power of both plaintiffs and defendants, yet it would not fundamentally address the root issue. This underlying problem pertains to the private incentives of both parties to settle the case and sidestep the establishment of a precedent when such a precedent is unfavorable to the RP defendant. The RP may alter the settlement amount in a way advantageous to the OS, but the inclination of both parties to settle remains intact.[163]

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several states—including California, New York, New Jersey, Tennessee, Nevada, and Louisiana—have introduced legislation barring employers from mandating employees to sign NDAs in settlements related to sexual harassment, among other matters, or have deemed such NDAs null and void. *See* ANDREA JOHNSON, RAMYA SEKARAN & SASHA GOMBAR, NAT'L WOMEN'S L. CTR., 2020 PROGRESS UPDATE: METOO WORKPLACE REFORMS IN THE STATES 2–3 (2020); *see also* Gilat Juli Bachar, *The Psychology of Secret Settlements*, 73 HASTINGS L.J. 1, 5–6 (2022).

159 *See, e.g.*, Knutsen, *supra* note 155, at 962; *see also* Zitrin, *supra* note 153, at 119–21 (advocating against confidential settlements across a spectrum of tort cases, encompassing instances such as defective products). *See generally* Kotkin, *supra* note 154, at 961–62, 971 (criticizing secret settlements in the realm of labor discrimination cases and proposing remedies). This is also true for cases that are resolved in arbitration. *See* E. Gary Spitko, *Arbitration Secrecy*, 108 CORNELL L. REV. 1729, 1733–34 (2024).

160 *See* Stephen C. Yeazell, *Transparency for Civil Settlements: NASDAQ for Lawsuits?*, *in* CONFIDENTIALITY, TRANSPARENCY, AND THE U.S. CIVIL JUSTICE SYSTEM 143 (Joseph W. Doherty, Robert T. Reville & Laura Zakaras eds., 2012); *see also* Bachar, supra note 158, at 14–15.

161 Circuits that widely allow vacating lower court decisions as a settlement condition do so at the expense of third parties who might have relied on the vacated ruling in the future. *See* Robert P. Deyling, *Dangerous Precedent: Federal Government Attempts to Vacate Judicial Decisions upon Settlement*, 27 J. MARSHALL L. REV. 689, 692 (1994).

162 *See* Roy Shapira, *Reputation Through Litigation: How the Legal System Shapes Behavior by Producing Information*, 91 WASH. L. REV. 1193, 1239–40 (2016).

163 Galanter, *supra* note 6.

D. *Third-Party Litigation Funding*

Third-party litigation funding has also been suggested as a solution to the issue of biased settlements. Third-party litigation finance serves as a financial mechanism, akin to a cash advance, enabling litigants to access funds against a future judgment or settlement award.[164] In the event of a dispute, individual plaintiffs can seek financial support from external entities to cover legal expenses, address medical bills or lost wages, or monetize a portion of their legal claim.[165] Notably, this funding is typically "non-recourse," meaning plaintiffs are not obligated to repay the financier if their case is unsuccessful.[166] However, in the event of a settlement or monetary judgment, the financier is directly compensated from the litigation proceeds.[167]

The availability of consumer third-party litigation finance ("TPLF") empowers financially disadvantaged plaintiffs to decline inadequate settlement offers that they might otherwise be compelled to accept to meet immediate financial needs.[168] According to some commentators, TPLF can bolster access to justice and "helps align the bargaining power of different categories of litigants and gives previously excluded categories (e.g., 'one-shotters' and modified 'one-shotters') a chance to play for rule change as modified repeat players."[169] By enhancing the bargaining power of OSs, such as individuals, while diminishing the bargaining power of RPs, like corporations, both of whom must cede

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164 Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 149–54 (2021).

165 *Id.*

166 Ken Clark, *Recourse vs. Non-Recourse Loan: What's the Difference?*, INVESTOPEDIA (May 11, 2023), https://www.investopedia.com/ask/answers/08/nonrecourse-loan-vs-recourse-loan.asp [https://perma.cc/224K-NV2N].

167 *See* Sean Thompson, Dai Wai Chin Feman & Aaron Katz, *United States*, *in* THE THIRD PARTY LITIGATION FUNDING 217, 230 (Leslie Perrin ed., 3d ed. 2019).

168 *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third-Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133, 1176 (2019); Ronen Avraham & Abraham Wickelgren, *Third-Party Litigation Funding—A Signaling Model*, 63 DEPAUL U. L. REV. 233, 234 (2014). As of 2021, the litigation funding market, encompassing both TPLF and commercial litigation finance, was estimated at over $12 billion and is projected to exceed $25 billion by 2030. Despite its substantial growth, the industry remains relatively new. In the United States, consumer TPLF emerged in the late 1980s and early 1990s as states reconsidered and overturned prohibitions on champerty and maintenance. In contrast, commercial litigation finance took root in 2006 with Credit Suisse's Litigation Risk Strategies group and gained visibility in 2008 with Juridica launching the first publicly traded litigation finance firm. *Global Litigation Funding Investment Market 2024–2033*, Custom Market Insights Consulting, https://www.custommarketinsights.com/report/litigation-funding-investment-market [https://perma.cc/L78K-PS6Q].

169 Maya Steinitz, *Whose Claim Is This Anyway? Third Party Litigation Funding*, 95 MINN. L. REV. 1268, 1326 (2011).

some power to the funders, litigation funding would essentially transform all types of parties into "modified repeat players."[170]

Unfortunately, TPLF is not properly designed to address the problem of biased settlements for three main reasons. First, litigation funders find areas of the law lacking financial remedies, particularly injunctive and declaratory reliefs, unattractive, even in meritorious cases. This is because these cases do not yield a financial return from which the funders can derive their fee.[171] Second, litigation funders tend to disregard the public value of a case and typically prioritize settlements that offer substantial financial gains for themselves, while also sparing them from significant litigation costs and the risk of an unfavorable court ruling.[172] Consequently, they cannot be relied upon to facilitate the creation of significant legal precedents. Third, since litigation financiers are motivated by profit maximization, they may be incentivized to use case selection and influence the courts to expand tort liability into new domains.[173] These pursuits, primarily geared toward financial gains rather than the pursuit of justice, could lead tort law astray from its goals of ensuring both justice and efficiency.[174]

E. *Not-for-Profit Litigation Funding*

In recent years, state actors and NGOs aiming to promote the public interest through litigation have adopted novel strategies that mirror TPLF. This phenomenon represents a novel form of not-for-profit third-party funding.[175] Two prominent examples for such a strategy are the class action litigation funds established in Israel and Canada, as well as private funds that provide funding for impact litigation in the United States and elsewhere.

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170 *Id.* at 1303.

171 *See* Victoria Shannon Sahani, *Rethinking the Impact of Third-Party Funding on Access to Civil Justice*, 69 DEPAUL U. L. REV. 611, 628–29 (2020).

172 *See* J.B. Heaton, *The Siren Song of Litigation Funding*, 9 MICH. BUS. & ENTREPRENEURIAL L. REV. 139, 149–51 (2019).

173 Avraham & Wickelgren, *supra* note 168, at 233; *see id.* at 247 ("Once the precedent for new tort law is established, these financiers will then be available for future funding, meaning that more loans can be made. These pressures on the court system will be driven by monetary incentives—not the interests of justice.").

174 *See* Jeremy Kidd, *To Fund or Not to Fund: The Need for Second-Best Solutions to the Litigation Finance Dilemma*, 8 J.L. ECON. & POL'Y 613, 634–35 (2012).

175 *See* Victoria Shannon Sahani, *Revealing Not-for-Profit Third-Party Funders in Investment Arbitration*, OXFORD UNIV. PRESS (Mar. 1, 2017), http://oxia.ouplaw.com/page/third-party-funders [https://perma.cc/8WSS-3YMG]; Victoria Shannon Sahani, *Third-Party Funders*, *in* CAMBRIDGE COMPENDIUM OF INTERNATIONAL COMMERCIAL AND INVESTMENT ARBITRATION 305 (Stefan Kroll, Andrea Bjorklund & Franco Ferrari eds., 2023).

The Israeli class action law,[176] along with the laws governing class actions in the Canadian provinces of Ontario and Quebec,[177] incorporate a significant innovation: the establishment of public funds to support class actions that serve the public interest. These funds are government-run initiatives designed to assist representatives of a plaintiff class in funding petitions to certify class actions that hold public and social significance.[178] Public class action funds prioritize public impact over legal implications, signifying the state's support for individual efforts aimed at advancing the public interest.[179]

Not-for-profit litigation funding is a strategy utilized by governments and private entities. For instance, the Impact Fund is an NGO that supports impact litigation on behalf of marginalized communities advocating for economic, environmental, racial, and social justice.[180] It accomplishes this by awarding grants that support cases affecting substantial populations, with the goal of instigating systemic changes or fostering significant legal reforms.[181] Additionally, they maintain an extensive and varied portfolio of impactful civil rights cases, operate an active amicus program, and provide pro-bono consulting to civil rights practitioners dealing with multifaceted issues.[182] Their aspiration is to create "a more equitable world where everyone can achieve justice."[183] Another example of a not-for-profit private funder is the Anti-Tobacco Trade Litigation Fund, a not-for-profit initiative supported by the Bloomberg Foundation and Gates Foundation that assists poor countries facing lawsuits from the tobacco industry.[184]

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176 § 27, Class Action Law, 5766–2006, SH 2054 (Isr.).

177 Class Proceedings Act, S.O. 1992, c 6 (Can. Ont.); Code of Civil Procedure, C.Q.L.R. 2024, c C-25.01, art. 593 (Can.).

178 Eli Bukspan, *The Israeli Public Class Action Fund: New Approach for Integrating Business and Social Responsibility*, *in* THE CAMBRIDGE HANDBOOK OF CLASS ACTIONS 528, 532 (Brian T. Fitzpatrick & Randall S. Thomas eds., 2021); Catherine Piché, *Public Financiers as Overseers of Class Proceedings*, 12 N.Y.U. J.L. & BUS. 779, 800 (2016); David Collins, *Public Funding of Class Actions and the Experience with English Group Proceedings*, 31 MANITOBA L.J. 211, 217–18 (2005).

179 Bukspan, *supra* note 178, at 532; Piché, *supra* note 178, at 800; Collins, *supra* note 178, at 217–18.

180 *See About Our Grant Program*, IMPACT FUND, https://www.impactfund.org/about-legal-case-grants [https://perma.cc/L3PV-4UMJ].

181 *See id.*

182 *See id.*

183 *See About Us*, IMPACT FUND, https://www.impactfund.org/aboutus [https://perma.cc/L8RD-AGZ4].

184 *See* Press Release, Bloomberg Philanthropies, Bloomberg Philanthropies & The Bill & Melinda Gates Foundation Launch Anti-Tobacco Trade Litigation Fund (Mar. 18, 2015), www.bloomberg.org/press/releases/bloomberg-philanthropies-bill-melinda-gates-foundation-launch-anti-tobacco-trade-litigation-fund [https://perma.cc/P7AR-6NM6].

Public and private funds should be lauded for serving as vital tools for leveling the playing field between stronger and weaker parties in cases of public and social significance. However, they are ill-designed to address the challenge of biased precedent for two main reasons. First, these funds prioritize specific legal areas or large-scale impact litigation, yet they do not attend to the more mundane cases that have the potential to establish precedents. Second, and more importantly, while not-for-profit funders are primarily focused on the pursuit of justice rather than financial gains, they are not geared toward setting legal precedents. They do not, and indeed cannot, insist that the plaintiff decline attractive settlement offers as a condition for funding because there is no necessary correlation between the amount provided by the funder and the potential relief sought by the plaintiff, which could be significantly higher. Indeed, observing the outcomes of both public and private fund-supported cases reveals that the majority of funded cases are settled rather than pursued to the conclusion, thereby failing to establish a precedent.[185]

F. *Assignment of Legal Claims*

Another potential solution lies in the assignment of the right-to-sue, commonly referred to as the "choses in action" doctrine.[186] Assignment of the right-to-sue pertains to the transfer, either wholly or partially, of the right to initiate a legal claim to a third party, referred to as the

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185 The 2020 Impact Fund Annual Report disclosed that by the year's end, seventeen funded cases were concluded: three resulted in victories, one ended in a loss, one was dismissed, and twelve cases were settled. In the 2021 Annual Report, it was noted that by the end of that year, fourteen funded cases were closed: three achieved successful rulings, one concluded in a loss, two were resolved successfully without litigation, and nine were settled. The 2022 Annual Report outlined that by the year's end, twenty funded cases were concluded: five resulted in a win, five ended in a loss, one was resolved successfully without litigation, and nine cases were settled. *See* IMPACT FUND, 2023 ANNUAL REPORT (2023), https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/653836e60c63b6137607bebb/1698182891470/2023_IF_Annual Report_FINAL_LoRes_Pages.pdf [https://perma.cc/NP3Z-USPK]; IMPACT FUND, 2022 ANNUAL REPORT (2022), https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/653703dd3e828223e11dc10e/1698104290856/IFAR22+Final+LoRes.pdf [https://perma.cc/NE88-UPSK]; IMPACT FUND, 2021 ANNUAL REPORT (2021), https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/6179ac01ab812e66cc336cb5/1635363848550/2021_IF_AnnualReport_Final4_LoRes_102621.pdf [https://perma.cc/27E4-8PLK]; IMPACT FUND, 2020 ANNUAL REPORT (2020), https://static1.squarespace.com/static/559b2478e4b05d22b1e75b2d/t/6179b44f269cd9592344b41f/1635365974708/IFAR20+Single+Page+LoRes.pdf [https://perma.cc/CW4Y-BY72].

186 *See* Kevin Sobel-Read, Glen Anderson & Jaakko Salminen, *The Critical Role of Choses in Action: A Call for Harmonization Across Common Law Jurisdictions*, 45 FORDHAM INT'L L.J. 513 (2022).

assignee.[187] In contrast to TPLF, where the plaintiff retains legal ownership throughout the judicial process, the assignment of the right-to-sue involves a *substitution* of the legal owner, placing the assignee in the plaintiff's position.[188] The assignment of legal claims can offer a partial remedy for the biased precedent predicament. This is because precedential cases can be acquired from the original plaintiff by a third party interested in establishing the precedent. The third party then assumes the responsibility of pursuing the case to its conclusion. Unfortunately, the assignment of legal claims is afflicted by both doctrinal and strategic shortcomings that render it insufficient to fully address the biased precedent problem.

Doctrinally, the rules governing the assignment of legal claims vary across the United States, and in most jurisdictions, there are prohibitions against the transferability of at least some types of legal claims.[189] While some states permit the assignment of certain tort claims, those related to personal injury are almost universally considered nontransferable.[190]

From a strategic perspective, there are several issues that render the assignment of legal claims less favorable than our proposal. First, in some situations, it is beneficial to have the injured party serve as the actual plaintiff, as some courts, and especially juries, may view unfavorably a third party stepping into the plaintiff's shoes, potentially resulting in an adverse decision.[191] Second, many plaintiffs with strong precedential claims may be disinclined to assign their cause of action to a third party due to both symbolic and financial considerations. They may fear that selling their claim at an early stage of litigation might result in financial loss.[192] Lastly, insuring a case is cheaper than buying it. In certain cases, the entity interested in establishing the precedent might not be willing to purchase the claim either because it is too expensive or too risky. For example, in high-risk cases where there is a substantial chance that the claim might not yield the hoped-for result, insuring future settlements through ASI, may prove more affordable to the entity interested in setting the precedent than buying the claim.[193]

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187 *See id.* at 515–16; Anthony J. Sebok, *The Inauthentic Claim*, 64 VAND. L. REV. 61 (2011).

188 *See* Sebok, *supra* note 187, at 66–72.

189 *Id.*; *see supra* Part II.

190 *See* Sobel-Read et al., *supra* note 186, at 526.

191 *See* Brian H. Borstein, *David, Goliath, and Reverend Bayes: Prior Beliefs About Defendants' Status in Personal Injury Cases*, 8 APPLIED COGNITIVE PSYCH. 233, 235–36 (1994); Joni Hersch & W. Kip Viscusi, *Punitive Damages: How Judges and Juries Perform*, 33 J. LEGAL STUD. 1 (2004).

192 *See* Sebok, *supra* note 188, at 82.

193 For a discussion of the ASI arrangement, see *infra* Section II.C.1.

G. *Judgment Preservation Insurance*

Something that might at first blush look akin to our proposal has recently emerged in U.S. markets—judgment preservation insurance ("JPI"). This specialized insurance policy is crafted to shield plaintiffs from the potential drawbacks of a protracted appellate process that may follow a favorable legal judgment.[194] JPI acts as a safeguard against the risk of the trial court decision being overturned or reduced on appeal.[195] By establishing a financial floor, the policy ensures that the insured plaintiff receives a minimum amount from the case, offering financial certainty throughout the appellate proceedings.[196] The coverage extends until a final, unappealable judgment or settlement is reached, providing comprehensive financial protection during the entirety of the legal process.[197] Payouts occur only if the insured plaintiff suffers an unfavorable final appeal or if the award is reduced below the policy value. This type of insurance is gaining popularity, particularly in complex multimillion-dollar corporate lawsuits, where the appeals process introduces uncertainty, prompting companies to mitigate the financial risks associated with potential adverse outcomes in court.

There are three primary reasons why JPI faces limitations in addressing the issue of biased precedents. First, the insurers underwriting JPI are typically attracted to significant commercial cases involving RPs who pay high premiums to purchase insurance coverage, and not OSs, who cannot afford paying such premiums.[198] Second, while JPI is centered on resolving concerns at the appellate stage, the majority of settlements occur at the trial court level and are not appealed. Therefore, its capacity to effectively address the problem of biased precedents remains very limited.[199] Lastly, similar to third-party litigation financiers,

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194 *See* Howard B. Epstein & Theodore A. Keyes, *Judgment Preservation Insurance Emerges as a Valuable Risk Management Option*, LAW.COM (Nov. 15, 2023), https://www.law.com/newyorklawjournal/2023/11/15/judgment-preservation-insurance-emerges-as-a-valuable-risk-management-option [https://perma.cc/YQM4-ZR4W].

195 *See* Ross Weiner, *Judgment Preservation Insurance: Protecting Plaintiffs' Awards*, BLOOMBERG L. (Apr. 2022), https://www.bloomberglaw.com/external/document/XM3LAH4000000/litigation-professional-perspective-judgment-preservation-insura [https://perma.cc/5V5E-3YFR].

196 *Id.*

197 *Id.*

198 Jonathan Stroud & Sam Korte, *Insuring Judgments and the Disclosure Gap*, 73 AM. U. L. REV. 1057, 1061, 1071 (2024).

199 There is, however, intriguing potential for collaboration between our proposed scheme and JPI, particularly at the appellate level. For example, envision organizations such as the ACLU assuming the role of covering the JPI premium in a pertinent discrimination case to safeguard a

JPI insurers are inclined to accept reasonable settlement offers without necessarily prioritizing the pursuit of the case to establish a socially desirable precedent due to a divergence in objectives.

IV. DOCTRINAL AND STRATEGIC CHALLENGES

As the JI and SI schemes aim not merely to remain theoretical constructs but to offer practical solutions to significant issues, addressing various doctrinal and strategic challenges becomes imperative to lend credibility and feasibility to our proposal. While the principle of freedom of contract allows plaintiffs and insurers the freedom to enter into JI or SI, this principle is not boundless. JI, and to a lesser extent SI, may encounter potential legal challenges grounded in common law doctrines such as champerty and maintenance. Additionally, challenges may arise based on contract law doctrines like unconscionability and equity, public policy concerns, and adherence to ethical rules for lawyers. We take these various concerns in turn.

A. *Maintenance and Champerty*

1. Background

Champerty is defined as "maintenance" for profit, involving maintaining a suit in return for a financial interest in the outcome.[200] More specifically, champerty is "[a]n agreement between an officious intermeddler in a lawsuit and a litigant by which the intermeddler helps pursue the litigant's claim as consideration for receiving part of any judgment proceeds."[201] Interestingly, two exceptions to the champerty doctrine have emerged over the years. The first involved contingency fees, which allow lawyers to fund litigation in return for a share of the proceeds in case of a win.[202] The second, and more relevant, exception applied to

favorable judgment obtained at the lower court. However, a persisting challenge still remains due to the tendency of JPI underwriters to accept settlement offers that the ACLU might prefer to reject.

200 *See In re* Primus, 436 U.S. 412, 424 n.15 (1978) ("Put simply, maintenance is helping another prosecute a suit; champerty is maintaining a suit in return for a financial interest in the outcome.").

201 *Champerty*, BLACK'S LAW DICTIONARY (12th ed. 2024). For the historical rationales for the prohibition, see Supplemental Expert Report of Professor Maya Steinitz in Support of Sysco Corporation's Amended Petition to Vacate Arbitration Award, Glaz, LLC. v. Sysco Corp., No. 123-cv-2489 (S.D.N.Y. Mar. 20, 2023), 2023 WL 3778761.

202 Stephan Landsman, *The History of Contingency and the Contingency of History*, 47 DEPAUL L. REV. 261, 264 (1998); Steve P. Calandrillo, Chryssa V. Deliganis & Neela Brocato, *Contingency*

insurers, also considered fiduciaries or quasi-fiduciaries for the insured defendant, subject to regulations aimed at safeguarding the interests of the insured and society at large.[203] And while the majority of states still have champerty restrictions, some states have abandoned champerty prohibitions.[204] Even in those states, in some cases the underlying rationales are still protected via known contractual tools such as unconscionability and equity.[205]

In recent years, some case law has developed on questions of champerty and maintenance in the context of TPLF. The most important factor for our purposes is that control over litigation and settlement decisions is a key factor in determining whether an agreement is champertous; the greater the influence a funder wields over the litigation's course, the more potentially champertous its involvement becomes.[206] In addition to violating champerty and maintenance, JI and SI might also violate federal and state public policies that encourage settlement of civil suits and reserve control over settlement for the involved parties.[207]

These doctrines present a potential obstacle to our proposal. As previously discussed, both JI and SI are contingent upon the plaintiff's firm obligation not to settle the case, but to pursue litigation to its conclusion with a judgment on the merits. Allowing the plaintiff to retain the authority to accept a lucrative settlement would undermine the fundamental logic of our proposal. It would enable defendants to entice plaintiffs into accepting settlement offers exceeding the insured sum (G), if a judgment is likely to set a precedent that could prove detrimental to

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Fee Conflicts: Attorneys Opt for Quick-Kill Settlements When Their Clients Would Be Better Off Going to Trial, 26 N.Y.U. J. LEGIS. & PUB. POL'Y 1, 6 (2024).

203 Anthony J. Sebok, *Betting on Tort Suits After the Event: From Champerty to Insurance*, 60 DEPAUL L. REV. 453, 464–71 (2011) (offering an overview of the legal perspective on insurance, highlighting its distinction from the traditional doctrine of champerty).

204 *See* ETHICS COMM. OF THE COM. AND FED. LITIG. SECTION OF THE N.Y. STATE BAR ASS'N, REPORT ON THE ETHICAL IMPLICATIONS OF THIRD-PARTY LITIGATION FUNDING 11 (2013).

205 *See, e.g.*, Maslowski v. Prospect Funding Partners LLC, 944 N.W.2d 235, 238 (Minn. 2020), (eliminating the common law doctrine of champerty in Minnesota). However, the *Maslowski* court clarified that the abolition of champerty as a defense does not imply automatic enforceability of all such agreements, emphasizing that parties like Maslowski retained the common law defense of unconscionability. *See id.*; *see also* Osprey, Inc. v. Cabana Ltd. P'ship, 340 S.C. 367, 381–84 (S.C. 2000) (abolishing champerty in South Carolina). *See generally* Expert Report of Professor Maya Steinitz in Support of Sysco Corp.'s Petition to Vacate Arbitration Award at 10–12, Sysco Corp. v. Glaz LLC, No. 23-cv-1451 (N.D. Ill. Mar. 8, 2023).

206 For example, recently, the Superior Court of Delaware, New Castle, held that a litigation finance agreement was not champertous under Delaware law because the funder was not "controlling or forcing [the plaintiff] to pursue litigation, or . . . controlling the litigation for the purpose of continuing a frivolous or unwanted lawsuit." Charge Injection Techs. v. E.I. Dupont De Nemours & Co., No. N07C-12-134, 2016 WL 937400, at *5 (Del. Super. Ct. Mar. 9, 2016).

207 *See* Steinitz, *supra* note 205, at 20–56.

the defendants. Hence, it is crucial to devise a solution capable of withstanding judicial scrutiny, empowering the insurer to prevent any attempt by the plaintiff to accept a settlement offer, thereby averting the establishment of a precedent. In California, the State Bar's Committee on Professional Responsibility and Conduct has stated that it does not deem any particular degree of control by litigation funders as per se unethical.[208] However, other states have adopted more stringent regulations to limit or prohibit funder control over legal proceedings. For example, in March 2024, Indiana enacted legislation that explicitly prohibits litigation funders from directing, controlling, or influencing the outcome of a case.[209] The same principle applies to other pertinent doctrines, including maintenance, unconscionability, equity, and public policy.[210] Each jurisdiction may interpret and apply these legal principles differently, highlighting the state-specific, and sometimes intrastate, nature of these restrictions on freedom of contract.[211]

A recent dispute between litigation funder Burford Capital and the major food supplier Sysco Corporation provides a good example for this point. In that dispute, the focal point was whether Sysco could give up its control over settlements.[212] Originally, Sysco secured $140 million from Burford to pursue antitrust claims against pork and poultry producers.[213] Sysco chose to settle the case without obtaining Burford's consent.[214]

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208 State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct, Formal Op. 2020-204, at 5 (2020) ("The Committee does not reach a general conclusion that any particular degree of control is per se unethical.").

209 H.B. 1160, 2024 Leg., Reg. Sess. (Ind. 2024) ("A commercial litigation financier may not make any decision, have any influence, or direct the plaintiff or the plaintiff's attorney with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding, or make any decision with respect to the conduct of the underlying civil proceeding or any settlement or resolution of the civil proceeding. The right to make these decisions remains solely with the plaintiff and the plaintiff's attorney in the civil proceeding.").

210 Ronen Avraham, Anthony J. Sebok & Joanna M. Shepherd, *The Whac-A-Mole Game: An Empirical Analysis of the Regulation of Litigant Third Party Financing*, 25 THEORETICAL INQUIRIES L. (manuscript at 26–27). (forthcoming 2025), https://papers.ssrn.com/abstract=4852085 [https://perma.cc/P2RK-LP5M].

211 For a compilation of states that either recognize or do not recognize champerty and other pertinent doctrines, see *id.* (manuscript at 26–27).

212 Mike Scarcella, *Litigation Funder Burford Sues Sysco over $140 Million Antitrust Investment*, YAHOO FIN. (Mar. 13, 2023), https://finance.yahoo.com/news/litigation-funder-burford-sues-sysco-181726965.html [https://web.archive.org/web/20241024055143/https://finance.yahoo.com/news/litigation-funder-burford-sues-sysco-181726965.html].

213 Emily R. Siegel, *Burford and Sysco End Legal Dispute over Antitrust Claims*, BLOOMBERG L. (June 28, 2023, 7:15 PM), https://news.bloomberglaw.com/business-and-practice/burford-and-sysco-end-legal-dispute-over-antitrust-claims [https://web.archive.org/web/20240210152559/https://news.bloomberglaw.com/business-and-practice/burford-and-sysco-end-legal-dispute-over-antitrust-claims].

214 Scarcella, *supra* note 212.

Following the settlement, Burford contested the settlement amounts, citing them as "too low."[215] Sysco initiated legal proceedings against Burford in an arbitral court, with the aim of invalidating the contract with Burford.[216] Sysco alleged the contract, which granted the funder veto power over settlements, was champertous and in violation of public policy, among other grounds.[217] Ultimately, the arbitration tribunal ruled in favor of Burford, determining that its contract with Sysco, which conferred Burford with the authority to veto settlements, did not violate any laws.[218]

2. State Law Challenges

As discussed above, JI and SI do not meet the legal criteria for insurance, and therefore they are not governed by insurance laws and regulations.[219] Nonetheless, they may fall under the definition of TPLF and thus be subject to the rulings and regulations that apply to it.[220] Even in states that do not specifically regulate litigation funding, the contractual arrangements underlying the JI and SI mechanisms are likely

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215 Siegel, *supra* note 213.

216 Scarcella, *supra* note 212.

217 Siegel, *supra* note 213.

218 For a discussion of this story, see Baker, *supra* note 116, at 9–10. The parties eventually settled in court, transferring the lawsuit to Carina Ventures, LLC, a Burford-created entity, which subsequently filed an antitrust claim against the food suppliers. *See* Hailey Konnath, *Burford, Sysco Agree to Drop Litigation Funding Suits*, LAW360 (June 28, 2023, 11:48 PM), https://www.law360.com/articles/1694223/burford-sysco-agree-to-drop-litigation-funding-suits[https://perma.cc/BV23-MH65].

219 In the United States, the regulation of insurance sales is primarily managed at the state level. In addition to state regulations, federal laws and regulations may also apply to specific aspects of insurance, such as those related to antidiscrimination practices and privacy. Given that JI and SI do not conform to standard insurance, they are likely categorized under the excess and surplus ("E&S") lines. These represent segments of the insurance market providing coverage for risks considered unconventional for standard insurance carriers. Such risks may be unique, possess high loss potential, or fall outside the underwriting guidelines of admitted or standard insurance carriers. The E&S lines market allows for flexibility in underwriting, enabling insurers to undertake risks that standard carriers might reject. Most importantly, E&S lines face less stringent regulation compared to the standard insurance market. The regulatory framework is often more adaptable, fostering innovation and responsiveness to unique risks, given that these risks are often specialized and do not neatly fit into standard insurance categories. *Regulatory Framework and Compliance in the Excess and Surplus Lines Market*, FASTERCAPITAL, https://fastercapital.com/topics/regulatory-framework-and-compliance-in-the-excess-and-surplus-lines-market.html [https://perma.cc/F635-GCFB].

220 For example, the West Virginia Code defines a litigation financing transaction as "a transaction in which financing is provided to a consumer in return for a consumer's assigning to the litigation financier a right to receive payment contingent in any respect on the outcome of the legal claim." W. VA. CODE § 46A-6N-1 (2024). Both JI and SI seem to fall under this definition.

subject to general laws of applicability, such as those concerning champerty, maintenance, and unconscionability.[221]

A significant number of states have abandoned champerty, maintenance, or both.[222] In those states both JI and SI should face no such legal hurdles. Even in states that still recognize champerty and maintenance, a careful state-by-state analysis of the nuances of these doctrines is required to determine whether JI and SI violate them. For instance, in states that have only abandoned maintenance (meaning "intermeddling" is allowed as long as it is not for money), parties may enter contracts with funders that promise plaintiffs all future recovery (α=100%), so that the funders (in our case the insurer) receive no financial gains from the litigation.

The primary challenge arises from JI's delegation of control over settlements to the insurer. Indeed, between JI and SI, the latter appears to raise fewer problems. When a plaintiff receives an unfavorable settlement offer, seeking a loan from a bank to continue litigation is a legitimate option that does not pose the legal challenges associated with champerty or any of the other legal doctrines, as long as the bank is not delegated control over settlement decisions.[223] An SI contract that does not compel the plaintiff to reject future settlements should be treated similarly. However, challenges mirroring the concerns identified in the analysis of JI, may arise in the context of SI contracts with a limited number of settlement offers that the plaintiff may entertain where parties commit to rejecting future settlements beyond this number.

In conclusion, due to the third-party insurer's control over settlement decisions, JI and multi-round SI contracts may encounter legal challenges in some states, rooted in champerty and maintenance doctrines, contract law, or other public policy considerations. In contrast, multi-round SI, which does not require plaintiffs to forego future settlement offers, faces no such legal hurdles.

In states where doctrines of maintenance and champerty prohibit any form of insurer veto on the plaintiff's acceptance of a settlement offer, the insurance contract can adopt an alternative approach. For instance, the contract might specify that if the plaintiff accepts such an offer, they must compensate the insurer with liquidated damages. These damages could range from the settlement offer amount down to the coverage extended by the insurer (G) plus an interest rate, effectively acting as a

221 Jarrett Lewis, Note, *Third-Party Litigation Funding: A Boon or Bane to the Progress of Civil Justice?*, 33 GEO. J. LEGAL ETHICS 687, 692 (2020).

222 *See* Avraham et al., *supra* note 210 (manuscript at 26–27).

223 *See* Julia H. McLaughlin, *Litigation Funding: Charting a Legal and Ethical Course*, 31 VT. L. REV. 615, 639 (2007).

fine.[224] This fine could represent a significant portion of the potential upside, making the settlement economically unfeasible for the plaintiff. It is worth noting, however, that some states may view such liquidated damages as prohibited under the "penalty default rule."[225] In these states, therefore, the only available option is an SI contract stipulating that the insurer has a right of first refusal to match any settlement offer the insured receives. This approach maintains the insurer's involvement in settlement decisions without running afoul of legal constraints related to penalty provisions.

B. *Lawyer's Rules of Professional Conduct*

Our proposal faces the potential challenge of conflicting with the rules of professional conduct for lawyers. Ethical guidelines for lawyers in specific states may be interpreted as indirectly implying that a lawyer engaged in collaboration with JI or SI, granting the insurer control over the litigation process, could be in violation of professional conduct rules for lawyers. This situation draws an analogy to TPLF contracts. Concerns have been raised in both academic literature and practical applications regarding whether a contract that confers veto power over settlements or the authority to instruct the lawyer in managing the litigation process aligns with the lawyer's ethical responsibilities and fiduciary duties.[226] Although a definitive answer to this question remains uncertain, notable scholars argue that it does align.[227]

The foundational assumption in litigation finance is that the primary beneficiary is the claim holder, leading to the funder entering into a contract with the plaintiff for this purpose.[228] This type of finance, where the funder directs funds to the claim owner, is commonly known

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224 *See* Maslowski v. Prospect Funding Partners LLC, 978 N.W.2d 447, 455–57 (Minn. Ct. App. 2022), *rev'd*, 994 N.W.2d 293 (Minn. 2023). Although the Minnesota Supreme Court reversed the case on certain aspects, the holdings relevant to our claim remained unaffected.

225 Ian Ayres & Robert Gertner, *Filling Gaps in Incomplete Contracts: An Economic Theory of Default Rules*, 99 YALE L.J. 87, 95–97 (1989); *see* RESTATEMENT (SECOND) OF CONTRACTS § 356 (AM. L. INST. 1981).

226 *See* Anthony J. Sebok, *The Rules of Professional Responsibility and Legal Finance: A Status Update*, 57 WAKE FOREST L. REV. 777, 788 n.65 (2022) ("[A] lawyer should counsel a client to refuse any funding agreement that allows a funder to take control of any settlement, which would be seen as against public policy in every state or withdraw from representation if the client persists in granting the funder control."); MODEL RULES OF PRO. RESP. r. 1.2(a) (AM. BAR ASS'N 2023) ("A lawyer shall abide by a client's decision whether to settle a matter.").

227 *See* Sebok, *supra* note 226, at 788 n.65.

228 *See* Maya Steinitz & Abigail C. Field, *A Model Litigation Finance Contract*, 99 IOWA L. REV. 711, 734–35 (2014).

as "client-directed funding."[229] It is crucial to note from the outset that the laws and regulations governing litigation finance are distinct from those that govern lawyers.[230] Instead, it is the relevant domestic law of the jurisdiction overseeing the conduct of both the claim owner and the funder, neither of whom is acting as a lawyer. The rules of professional responsibility become relevant as a secondary concern, wherein the claimholder's lawyer is obliged to ensure that the contract with the funder does not compromise the client's legal interests. If the contract does impact these interests, the lawyer must provide competent legal counsel to the client regarding the contract's implications on their legal interests.[231] Moreover, in certain cases, the lawyer must abstain from actions that encroach upon these interests.[232] What about a contract that grants the funder the authority to veto settlements or to instruct the lawyer on managing the litigation process?

Several scholars argue that governing the lawyer-client relationship does not prohibit the client from establishing contractual relationships with third parties that impact the client's litigation strategy or the instructions given to the lawyer about its interests.[233] They contend that "[l]awyers should not second-guess these instructions and do not have duties of loyalty or independence to inquire into the reasons the client may have for encumbering its decision-making authority in one way or another."[234] In fact, applying the rules of professional conduct in such scenarios is considered redundant and detrimental.[235] They suggest that any potential risks for both funders and their clients, stemming from litigation funding agreements, can be effectively managed by general

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229 Sebok, *supra* note 226 at 789. This form of legal finance should be distinguished from "lawyer-directed finance," in which the primary beneficiary of the funding is the lawyer and the funder is contracting with the lawyer. *Id.* at 790.

230 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD PARTY LITIGATION FUNDING MARKET: CHARACTERISTICS, DATA, AND TRENDS (2022) ("The third-party litigation financing industry is not specifically regulated under U.S. federal law."); Sebok, *supra* note 226, at 789 ("It is important to recognize that the law that directly controls legal finance is not the law of lawyering and the rules of professional responsibility.").

231 *See, e.g.*, State Bar of Cal. Standing Comm. on Prof. Resp. and Conduct, Formal Op. 2020-204 (2020).

232 *See* Sebok, *supra* note 226, at 789–90.

233 *See* Anthony J. Sebok & W. Bradley Wendel, *Duty in the Litigation-Investment Agreement: The Choice between Tort and Contract Norms When the Deal Breaks Down*, 66 VAND. L. REV. 1831, 1836–37, 1850–51 (2013); *see* Baker, *supra* note 116 (manuscript at 3).

234 *See* W. Bradley Wendel, *Controlling the Delegation of Control*, 25 THEORETICAL INQUIRIES L. (forthcoming) (manuscript at 2–3), https://papers.ssrn.com/abstract=4566351 [https://perma.cc/QNB2-BA6V].

235 *Id.* (manuscript at 9).

contract principles, including implied terms of good faith and fair dealing.[236]

Therefore, if the claim holder expresses interest in transferring control of litigation management to the funder, the lawyer should adhere to the fundamental duty ingrained in agency law "to advance a client's lawful objectives, as defined by the client after consultation."[237] These lawful objectives can be influenced by contractual duties the client owes to a third party (such as a duty not to settle without the funder's prior consent). Hence, if the client expresses a desire to grant the funder the authority to veto settlements or instruct the lawyer in conducting the litigation, the lawyer is duty-bound to comply with the client's request. This action does not generate any conflict with the lawyer's ethical conduct rules. Furthermore, a funder endowed with veto rights over settlements should have the ability to enforce this right by seeking an injunction.[238]

A relevant comparison, which has a definitive legal answer, exists within the domain of liability insurance. In liability insurance, insurers have the right to direct defense counsel and make settlement decisions for the insured, despite potential conflicts of interest.[239] If an insurer acts against the insured's best interests, such as by refusing to settle within policy limits, it may be held liable for breaching its duty of good faith.[240] TPLF, and to a greater extent JI and SI, share numerous parallels with defense-side liability insurance, albeit on the plaintiff side.[241] While control over litigation, including settlement decisions, can be outsourced to third-party funders or insurers, there is a key difference: third-party funders and liability insurers are profit-driven, whereas JI and SI insurers aim to promote public interest.[242] This distinction should shape the duty of good faith and fair dealing in their contracts. Consequently, in the context of JI and SI, exercising veto power should rarely, if ever, be considered a breach of the duty of good faith.

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236 *See* Sebok & Wendel, *supra* note 233, at 1835–36.

237 *See* Wendel, *supra* note 199 (manuscript at 5).

238 *See* Baker, *supra* note 116 (manuscript at 28).

239 James M. Fischer, *Insurer or Policyholder Control of the Defense and the Duty to Fund Settlements*, 2 NEV. L.J. 1, 8–9 (2002).

240 The first case to hold an insurer liable in tort for bad faith conduct is *Crisci v. Sec. Ins. Co. of New Haven*. 426 P.2d 173, 176–78 (Cal. 1967); *see* Wendel, *supra* note 199 (manuscript at 7 n.21); Kent D. Syverud, *The Duty to Settle*, 76 VA. L. REV. 1113, 1123 (1990); Douglas R. Richmond, *Advice of Counsel and Insurance Bad Faith*, 73 MISS. L. REV. 95, 100–01 (2003).

241 *See* Baker, *supra* note 116, at 12–13.

242 *See supra* Part II.

C. *Justiciability and Mootness*

Another concern arises when, to avoid a bad precedent, the defendant offers to pay the entire amount the plaintiff sued for, followed by a motion to dismiss the case as moot, deeming it no longer "alive."[243] The mootness doctrine dictates that when the presented controversy is no longer actual or the parties lack a legally cognizable interest in the outcome, the court should refrain from adjudicating the case.[244] This principle ensures that the court only decides actual controversies and avoids rendering advisory opinions. The mootness problem is exacerbated as the importance of the precedent increases. In such instances, defendants may take extensive measures to render a case moot, such as paying the plaintiff an amount well beyond their actual damages, considering the far-reaching implications of the looming precedent for numerous upcoming cases.

In situations where judgment or settlement insurers are aware of the case before it is filed, strategic maneuvers may be employed. For instance, insurers might require the plaintiff to request in the pleading an award

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243 *See* N.Y. St. Rifle & Pistol Ass'n v. City of New York, 590 U.S. 336, 351 (2020) (Alito, J., dissenting) (per curiam). Indeed, such strategic maneuvers are not uncommon. In this case, New York City enacted an ordinance prohibiting individuals with a handgun license from taking their firearms to a firing range outside the city. *Id.* at 337 (majority opinion). Although the city initially prevailed in both the district court and the court of appeals, the Supreme Court's decision to grant certiorari prompted swift action from both the City and the State of New York to avert a Supreme Court ruling. Anticipating the Supreme Court's involvement, the city promptly revised its ordinance and the state enacted legislation rendering the old New York City ordinance illegal. Subsequently, the city moved for dismissal on grounds of mootness. In a 6–3 decision, the Supreme Court, in a per curiam opinion, ruled that the petitioners' claim for declaratory and injunctive relief concerning the city's rule had become moot. *Id.* Sometimes it is the plaintiff who can behave strategically. In a recent Supreme Court case, the petitioner asserted that the respondent, who had emerged victorious as a plaintiff in an Americans with Disabilities Act suit at the lower court, strategically dismissed her case in the district court after the Supreme Court granted certiorari. Acheson Hotels, LLC v. Laufer, 601 U.S. 1 (2023). This move rendered the case moot, seemingly as an attempt to circumvent the Court's jurisdiction over a circuit split. *Id.* at 3–5. The Court was not swayed by the petitioner's argument that the plaintiff abandoned her case merely to avoid the Court's review. As a result, the Court decided to vacate the case as moot, sidestepping the resolution of a circuit split on the crucial question of whether the plaintiff had standing. Notably, Justice Thomas submitted a concurring opinion on the merits. *Id.* (Thomas, J., concurring). He contended that Acheson Hotels and the Court's "colleagues on the courts of appeal and district courts" deserved a substantive answer to the recurring question of standing. *Id.* at 6–11.

244 The principle originates from Article III of the U.S. Constitution, where "[t]he judicial power" encompasses "[c]ases [and] . . . [c]ontroversies." U.S. CONST. art. III, §§ 1–2. The Supreme Court has consistently construed this provision to signify that federal courts possess jurisdiction solely over cases wherein the involved parties have concrete interests to be adjudicated by a judicial decision. *See, e.g.*, Already, LLC v. Nike, Inc., 568 U.S. 85, 91 (2013). The Court has emphasized that these tangible interests must be evident at every stage of the lawsuit, spanning from the initial filing to the ultimate resolution.

for general compensatory damages, the precise amount of which will be determined during trial, or to seek a substantial amount of damages, encompassing elements like pain and suffering and punitive damages, making it either impossible or economically impractical for the defendant to pay the entire amount sued. Alternatively, insurers might advocate for the inclusion of a declaratory judgment in the plaintiff's claims to prevent the payment of damages from rendering the case moot. However, these solutions pose challenges when the insurer's involvement occurs during later stages of the litigation cycle, which is often the case. The insurer may insist that the plaintiff petition the court for permission to amend the pleadings to include one or more of the aforementioned reliefs, but the court is not obliged to grant such a request for amendment.[245] Therefore, it becomes crucial to analyze the extent to which courts are authorized not to grant defendants' motions to dismiss the case for mootness.

Several well-established exceptions allow courts to consider cases that might otherwise be considered moot. These exceptions recognize that certain situations may persist or recur, and it is in the interest of justice to address these cases.[246] The most important exception for our purposes is the public interest exception, though others exist including voluntary cessation,[247] capable of repetition yet evading review,[248] and declaratory judgement actions.[249] The public interest exception to the mootness doctrine typically allows appellate courts (both state and federal) to entertain an otherwise moot case when (1) the question presented is of a public nature; (2) there is a need for an authoritative

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245 FED. R. CIV. P. 15.

246 *See* Lorelei Newdelman, *Constitutional Law—Exceptions to the Prohibition Against Considering Moot Questions*, 17 DEPAUL L. REV. 590, 591–94 (1968).

247 If there is a reasonable expectation that the defendant will resume the challenged behavior, the court may still hear the case to prevent strategic avoidance of judicial review. United States v. W.T. Grant Co., 345 U.S. 629, 632–33 (1953); Friends of the Earth, Inc. v. Laidlaw Env't Services, Inc., 528 U. S. 167, 189 (2000) (explaining that "'a defendant's voluntary cessation of a challenged practice'" will moot a case only if the defendant can show that the practice cannot "'reasonably be expected to recur'" (citing City of Mesquite v. Alladin's Castle, Inc., 455 U.S. 283, 289 (1982), United States v. Concentrated Phosphat Export Ass'n, 393 U.S. 199, 203 (1968)); FBI v. Fikre, 601 U.S. 234, 241–43 (2024).

248 This exception applies when the challenged action is of such short duration that it is likely to evade review before the case can be fully adjudicated. Roe v. Wade, 410 U.S. 113, 125 (1973), *overruled by* Dobbs v. Jackson Women's Health Org., 597 U.S. 215, 292 (2022). Even if the specific plaintiff's situation is moot, the court may hear the case if the same controversy is likely to recur with other parties. *Id.* at 125.

249 In cases seeking declaratory relief, where the plaintiff is asking the court to clarify the legal implications of certain conduct, the court may exercise discretion to hear the case even if the underlying controversy is moot. Steffel v. Thompson, 415 U.S. 452, 461–69 (1974).

determination for the future guidance of public officers; and (3) there is a likelihood of the future recurrence of the question.[250]

In conclusion, courts have crafted exceptions to the mootness doctrine to thwart parties from strategically evading judicial review and to guarantee the resolution of crucial legal matters, even when the initial controversy seems moot.[251] An unresolved question lingers on whether the public interest exception (and other exceptions) to the mootness doctrine exclusively applies at the appellate level. Some trial courts took the stance that the public interest exception does not extend to trial court proceedings,[252] while many other trial courts applied the exception as circumstances warranted.[253]

It is important to note that, from a practical point of view, the incentives for defendants to render a case moot by paying the entire requested relief might not be as substantial as initially perceived. Settlement agreements often transpire without the defendant admitting liability. Typically, these agreements also involve the plaintiff signing an NDA, which prohibits them from disclosing any specifics regarding the settlement, including the monetary amount.[254] Mooting the case by

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250 *In re* County Treasurer, 2022 IL App (1st) 200604, ¶¶ 7–14, 224 N.E.3d 213, 217–18. For example, in two separate cases, the Equal Employment Opportunity Commission (EEOC) appealed district court decisions that dismissed their actions against a trucking company for employment discrimination as moot. The EEOC argued that an employee's acceptance of an arbitration award in one case and a settlement in the other should not preclude the EEOC's right to pursue action in the public interest to eradicate discriminatory practices. In both cases the appeal was successful and the lower court's dismissal for mootness was reversed. *See* EEOC v. McLean v. Trucking Co., 525 F.2d 1007, 1010 (6th Cir. 1975) (arbitration); EEOC v. Dayton Tire & Rubber Co. 573 F. Supp. 782, 783–85 (S.D. Ohio 1983) (settlement).

251 Not all courts have adopted the public interest exception to the mootness doctrine. *See, e.g.*, Seneca Res. Corp. v. Township of Highland, 863 F.3d 245, 255 (3d Cir. 2017) ("The Third Circuit has never adopted a standalone public interest exception to mootness.").

252 *See* Hopper v. Snohomish County, No. 66325-9-I, 2011 WL 6382139, at *7 (Wash. Ct. App. Dec. 19, 2011); s*ee also* State v. Lluvera, No. cr-18-20619, 2018 WL 7021718, at *2 (Me. Super. Ct. Dec. 20, 2018) ("The 'public interest' exception to the mootness doctrine authorizes an *appellate* court to reach an appeal; it does not extend to *trial* courts, which are charged with adjudicating a live controversy."); Young v. Young, 810 A.2d 418, 421–22 (Me. 2002) ("An issue that is technically moot may still be addressed on appeal if one of the three narrow, yet established, exceptions to the mootness doctrine applies: '(1) sufficient collateral consequences will flow from a determination of the questions presented, (2) the question, although moot in the immediate context, is of great public interest and should be addressed for future guidance of the bar and public, or (3) the issue may be repeatedly presented to the trial court, yet escape review at the appellate level because of its fleeting or determinate nature.'" (quoting Sordyl v. Sordyl, 692 A.2d 1386, 1387 (Me. 1997))).

253 *See* Zelaya v. Cargo Logistics Grp. USA LLC, No. 16-cv-23669, 2017 WL 283259 (S.D. Fla. Jan. 23, 2017); EEOC v. Dayton Tire & Rubber Co., 573 F. Supp. 782, 786–87 (S.D. Ohio 1983); Tulou v. Raytheon Serv. Co., No. Civ. A. 94A-05-3, 1995 WL 269898, at *1–2 (Del. Super. Ct. May 4, 1995); Chute v. Orting Pub. Sch. Dist. 34, No. 92-2-08328-6, 1994 WL 750592, at *1 (Wash. Super. Oct. 28, 1994).

254 *See* text accompanying *supra* notes 152–161.

paying the entire requested relief is executed without the plaintiff's consent, thus limiting the defendant's ability to seek anything in return. Under such circumstances, the plaintiff is likely to publicize the fact that the defendant paid the entire relief, implicitly acknowledging liability, along with the sum of money involved. This publicity could invite individuals with similar grievances to file suits against the defendant, knowing they have agreed to a significant settlement. In essence, the settlement in such cases might function as a quasi-precedent, diminishing the benefits of rendering the case moot.[255]

D. *Transparency of the Insurance Agreement*

The permissibility of withholding disclosure of the JI and SI agreements, including the mere existence of such an agreement, from both the defendant and the judge, is another significant yet unresolved issue that influences our proposal. The rationale behind nondisclosure relates to the impact of insurance details on the strategic behavior of the defendant. For instance, if the defendant becomes aware that the plaintiff has entered into a JI agreement with the insurer, it might lead to the realization that offering a settlement would be futile. Consequently, the defendant might attempt to moot the case by offering to pay the entire relief sought or, alternatively, invest significant sums of money in the litigation to counter a potential adverse judgment, creating an asymmetric investment in the litigation. This asymmetric investment could diminish the plaintiff's chances of winning.[256]

A different issue may arise when the defendant becomes aware of the plaintiff's SI agreement. In such scenarios, bidding wars could potentially ensue between the insurer and the defendant, each attempting to persuade the plaintiff to either reject (the insurer) or accept (the defendant) a settlement. Should the defendant also possess information about the number of settlement offers permitted for the insurer to counter, or the agreed-upon allocation of the proceeds of a winning verdict beyond the covered amount, it would enable the defendant to engage in strategic gameplay aimed at significantly escalating costs for the insurer. Additionally, in certain scenarios, there exists a potential threat of collusion between the plaintiff and the defendant against the insurer, where the defendant might attempt to entice the plaintiff into breaching the agreement.[257]

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255 *See* Yeazell, *supra* note 160, at 20–23.

256 *See* ROBERT BONE, CIVIL PROCEDURE: THE ECONOMICS OF CIVIL PROCEDURE 246–49 (2003).

257 Michael J. Meurer, *The Gains from Faith in an Unfaithful Agent: Settlement Conflicts Between Defendants and Liability Insurers*, 8 J.L. ECON. & ORG. 502 (1992).

The initial question that arises is whether the courts would perceive the JI and SI arrangements as more akin to liability insurance agreements, to third-party funding agreements or neither. If considered as liability insurance contracts, courts might subject them to mandatory disclosure requirements.[258] However, such a comparison would be erroneous for both formal and normative reasons. From a formal legal perspective, as explained earlier, while colloquially referred to as "insurance" due to its economic function, neither JI nor SI falls under insurance law. Because the client does not pay any premium to the financier, these arrangements differ from traditional insurance. Consequently, they are not formally subject to the legal regulations that insurance agreements must adhere to, including mandatory disclosure. From a normative standpoint, JI and SI serve markedly different roles compared to conventional insurance. Insurance policies primarily cater to the private interests of the parties involved in litigation and might lead to behaviors misaligned with the public interest. This is why they are heavily regulated. In contrast, JI and SI are explicitly designed to serve the public interest. And since revealing these arrangements might hinder their efficacy, they should be exempted from disclosure requirements.

A more probable scenario is that courts will perceive JI and SI agreements as analogous to TPLF contracts. If that occurs, the legal landscape becomes less clear. Nationwide, there are no uniform requirements for disclosing TPLF agreements, neither to the court nor to the opposing party.[259] However, a few states and certain federal courts mandate disclosure through legislative acts, local rules, or standing orders.[260] Disclosure proponents, frequently representing pro-defendant commercial interests, assert that these agreements might violate state champerty laws or create conflicts of interest between the plaintiff and their attorneys, and therefore should be disclosed. On the other hand, advocates of TPLF argue that defendants aim to obtain access to these agreements to strategically outmaneuver plaintiffs, gaining insights into the plaintiff's litigation budget.[261] The Advisory Committee on Civil Rules has raised an additional concern that mandatory disclosure could prompt

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258 *See* FED. R. CIV. P. 26(a)(1)(iv) (mandating the disclosure of "any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment" without awaiting a discovery request).

259 *What You Need to Know About Third-Party Litigation Funding*, INST. FOR LEGAL REFORM (June 7, 2024), https://instituteforlegalreform.com/what-you-need-to-know-about-third-party-litigation-funding [https://perma.cc/57NP-TKX9].

260 *See* U.S. GOV'T ACCOUNTABILITY OFF., GAO-23-105210, THIRD-PARTY LITIGATION FINANCING: MARKET CHARACTERISTICS, DATA AND TRENDS 26–29 (2022).

261 *See id.* at 21 n.50.

litigation regarding the adequacy of the disclosure, potentially resulting in the wastage of court resources and inefficiencies.[262]

Among the states, only Wisconsin,[263] West Virginia,[264] and Indiana[265] were persuaded by the arguments in favor of disclosure, leading them to mandate the disclosure of TPLF agreements. In the federal domain, approximately a quarter of district courts have required the discovery of TPLF agreements, at least in specific circumstances, while the rest have declined to allow such discovery for lack of relevance or as shielded by the work-product doctrine and attorney-client privilege protections.[266] But even within courts that require disclosure, the scope of discoverable information significantly varies. While some district courts mandate the disclosure of only the identity of any person or entity funding certain types of actions (i.e. class, collective, or representative actions),[267] others require all litigants involved in specific TPLF agreements to submit a comprehensive statement. This statement should identify the funder, describe whether the funder's approval is necessary for litigation or settlement decisions, outline the terms and conditions of that approval if required, and offer a brief description of the funder's financial interest.[268]

To sum up, considering the potential contribution of JI and SI agreements to the advancement of the efficiency, fairness, and equality of the legal system, it is advisable to fully exempt them from disclosure. Disclosing these agreements would lack a legitimate purpose and could potentially harm the public interest. However, in cases where certain

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262 *See* ADVISORY COMM. ON CIV. RULES, ADVISORY COMMITTEE ON RULES OF CIVIL PROCEDURE 354 (2017).

263 *See* WIS. STAT. § 804.01(2)(bg) (2024) ("Except as otherwise stipulated or ordered by the court, a party shall, without awaiting a discovery request, provide to the other parties any agreement under which any person, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent on and sourced from any proceeds of the civil action, by settlement, judgment, or otherwise.").

264 W. VA. CODE § 46A-6N-6 (2024) ("Except as otherwise stipulated or ordered by the court, a party or his or her counsel shall, without awaiting a discovery request, provide to the other parties any agreement under which any litigation financier, other than an attorney permitted to charge a contingent fee representing a party, has a right to receive compensation that is contingent in any respect on the outcome of the legal claim.").

265 IND. CODE § 24-12-4-2 (2023).

266 For a comprehensive list of disclosure rules in federal courts, see Mark Behrens, Shook, Hardy & Bacon, *Third-Party Litigation Funding: State and Federal Disclosure Rules & Case Law* (Aug. 1, 2024), https://www.iadclaw.org/assets/1/6/5.1_-_Third-Party_Litigation_Funding_-_State_and_Federal_Disclosure_Rules_and_Case_Law.pdf [https://perma.cc/Q3SM-FWNR].

267 *See Order for All Judges of the Northern District of California on the Contents of Joint Case Management System*, U.S. DIST. CT. N.D. CAL. (Nov. 30, 2023), https://www.cand.uscourts.gov/wp-content/uploads/2023/03/Standing_Order_All_Judges-11-30-2023.pdf [https://perma.cc/3FJX-3S58].

268 *See* D.N.J. LOC. CIV. RULE 7.1.1.

courts mandate their disclosure, prudent insurers might carefully draft these agreements, considering the possibility of judges and defendants eventually reviewing them. Furthermore, the disclosure rules imposed by some courts should be seen as an opportunity. The confidence exhibited by an independent and often astute entity to invest significantly in a claim can be leveraged to highlight the case's inherent strengths. Indeed, for this reason, it is expected that in jurisdictions that require disclosure, the terms of the insurance contract between the plaintiffs and the JI or SI will likely be more favorable for the plaintiff as a method of signaling the strength of their case and increasing their chance of recovery.[269]

CONCLUSION

The current legal system exhibits structural biases favoring the legally sophisticated and resourceful RP entities, who can strategically shape legal precedents as defendants, thus creating advantages over weaker OSs who typically act as plaintiffs.[270] The systematic exclusion of precedents favorable to the less privileged undermines both the efficiency of judge-made law and the fairness of the American civil justice system. Indeed, the troubling scenario where wealthy defendants exploit their financial advantage by offering settlements to impoverished plaintiffs, once they realize they are likely to lose a case and potentially set a precedent detrimental to their interests, appears in many contexts. To counter this trend, we devised a strategic, game-changing approach involving what we termed JI and SI.

These inventive, insurance-inspired frameworks enable third parties—be they private or public entities—interested in advancing public and social objectives to invest in setting precedents. This is accomplished by providing coverage for plaintiffs, safeguarding them against potential losses resulting from an adverse judgment. These proposed mechanisms present an additional tool for state actors and civil society organizations leveraging the legal system to drive social change, complementing traditional litigation finance and direct client representation.

While our solution is surely innovative, it is not entirely out of this world. As shown above, in recent years, new financial instruments related to litigation have surfaced, enhancing the feasibility of our proposal. The most notable example is JPI, which allows the prevailing party to

269 *See* Avraham & Wickelgren, *supra* note 168, at 251–52; *see also* Ronen Avraham & Abraham L. Wickelgren, *Third-Party Litigation Funding with Informative Signals: Equilibrium Characterization and the Effects of Admissibility*, 61 J.L. & ECON. 637, 639 (2018).

270 *See* Galanter, *supra* note 6, at 98–100.

purchase insurance safeguarding against an unfavorable outcome in an appeal.[271] In essence, JPI establishes a market mechanism for the appeal stage, introducing a unique avenue for managing the risks of lost precedents at the appellate level. However, as we have demonstrated above, the current JPI market is not well-suited for plaintiffs who may struggle to afford the insurance, as weak OSs often do. If future developments ever bring free JPI to the markets, our mechanisms remain relevant at the trial level, offering an effective approach to addressing biased precedents.

Surely, our proposals for resolving the biased precedent problem should be complemented by other legal or market-based mechanisms. For instance, we do not address the challenge of insufficient financial resources for low-income individuals to cover their expenses during litigation (which might be necessary even under our schemes). To address this issue, various mechanisms have evolved to support disadvantaged plaintiffs financially or otherwise. Such mechanisms include pro-bono legal assistance, the Legal Services Corporation, loans provided by financial institutions, and support from other public and private entities.[272] Most importantly, in the past decades, an entire industry of TPLF has been developed to address this challenge.[273] Second, JI and SI are unable to address cases where a large number of weak parties endure minimal harm relative to the litigation costs—commonly referred to as "negative value cases."[274] Many legal jurisdictions have introduced aggregation mechanisms such as class actions to tackle this issue. By consolidating claims, plaintiffs can economize on litigation costs,

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271 *See* Jae Lynn Huckaba, Patrick Miller McDermott & Geoffrey Fehling, *Risky Business: Insuring Damage Awards*, A.B.A. (Mar. 14, 2024), https://www.americanbar.org/groups/business_law/resources/business-law-today/2024-march/risky-business-a-insuring-damage-awards [https://perma.cc/R2N5-H7UV].

272 *See, e.g.*, James J. Sandman, *The Role of the Legal Services Corporation in Improving Access to Justice*, 148 DAEDALUS 113, 113–14 (2019); *Charitable Arms of the American Bar Association*, A.B.A., https://www.americanbar.org/about_the_aba/charities [https://perma.cc/228P-3KAW]. Notably, in Texas, loans made by plaintiff's lawyers themselves have also been employed to provide financial support to disadvantaged plaintiffs. *See* Nora Freeman Engstrom, *Lawyer Lending: Costs and Consequences*, 63 DEPAUL L. REV. 377, 388–94 (2014).

273 *See* Ronen Avraham & Anthony Sebok, *An Empirical Investigation of Third-Party Consumer Litigant Funding*, 104 CORNELL L. REV. 1133 (2019); Ronen Avraham, Lynn A. Baker & Anthony J. Sebok, *The MDL Revolution and Consumer Legal Funding*, 40 REV. LITIG. 143, 145 (2021) ("[T]he consumer-litigant funding business in the U.S. has rapidly grown into a competitive, billion-dollar industry.").

274 *See generally* Lucian Arye Bebchuk, *Suits with Negative Expected Value*, *in* 3 THE NEW PALGRAVE DICTIONARY OF ECONOMICS AND THE LAW 551 (1998) (explaining the problem with negative value suits).

transforming their claims into positive-value cases.[275] In this article, we specifically focus on the generation of biased precedents resulting from the incentive structures of OS plaintiffs, who are solely concerned with their compensation, and RP defendants, who seek to establish precedents.

Lastly, there may be concerns that our system could be exploited by RPs, providing them with an additional tool to further their agenda at the expense of OSs. We find this concern to be unfounded. First, presuming (as we should) that courts function as diligent public servants dedicated to the advancement of justice, the creation of new legal precedents through our mechanism should be considered advantageous, even if some contributions stem from RPs. Second, and more importantly, while we acknowledge that RPs could theoretically employ our mechanisms, we posit that in practice, these tools will be notably more valuable to entities seeking to champion the cause of OSs than to RPs. Recall that the problem we address is not liquidity constraints faced by OSs (an issue that various financial mechanisms such as consumer litigation funding can address), but rather the insufficient *incentives* for OSs to contribute to the generation of precedents, as precedents are a public good. In contrast, RPs, almost by definition, encounter neither financial constraints nor misaligned incentives, making our mechanism much less valuable to them. Therefore, overall, our system levels the playing field by primarily providing OSs with the necessary support and incentives to pursue litigation, ensuring a more equitable generation of legal precedents.

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275 *See* Linda S. Mullenix, *Complex Litigation: Negative Value Suits*, 26 NAT'L L.J. 11, 12 (2004) (explaining that the Supreme Court in *Amchem Products Inc. v. Windsor* acknowledged that the primary purpose of the Rule 23(b)(3) class action was to provide a vehicle for the prosecution of such negative value suits (citing 521 U.S. 591, 617 (1997))); Linda Sandstorm Simard, *A View from Within the Fortune 500: An Empirical Study of Negative Value Class Actions and Deterrence*, 47 IND. L. REV. 739, 771–72 (2014) (arguing, based on empirical research, that negative-value class actions may not be as effective at deterring wrongful conduct as commonly anticipated). For the E.U. perspective, see Till Schreiber & Martin Seegers, *Collective or Class Actions and Claims Aggregation in the European Union: the Claimant's Perspective*, CARTEL DAMAGE CLAIMS (Jan. 23, 2020), https://carteldamageclaims.com/2020/01/23/collective-or-class-actions-and-claims-aggregation-in-the-eu-the-claimants-perspective [https://perma.cc/GWA8-T95Q]; *see also* Samuel Issacharoff & Geoffrey P. Miller, *Will Aggregate Litigation Come to Europe?*, *in* THE LAW AND ECONOMICS OF CLASS ACTIONS IN EUROPE: LESSONS FROM AMERICA 37, 47–49 (Jürgen G. Backhaus, Alberto Cassone & Giovanni B. Ramello eds., 2012).