SECRET SETTLEMENTS AND PRACTICE RESTRICTIONS AID LAWYER CARTELS AND CAUSE OTHER HARMS

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In this article, the authors argue that the use of secrecy agreements and practice restrictions in settlement contracts should be prohibited not only by the ethics rules, but also by criminal and civil law. The authors begin by discrediting four arguments that are traditionally employed to support the use of secrecy agreements and practice restrictions. They then argue that the use of secrecy agreements and practice restrictions generate substantial costs, but do not secure any legitimate benefits that could not be attained by other, less costly means. The authors also explain how the problems caused by secrecy agreements and practice restrictions are particularly severe in the class action context.

I. INTRODUCTION

Two aspects of settlement practice—the use of secrecy agreements to limit publication of settlements and underlying discovery, and the inclusion of restrictions on future legal representation as terms of settlements—warrant greater attention. Both of these settlement practices are thriving, despite substantial criticism. The Ethics 2000 Commission rejected a proposal to bar secret settlements in cases of dangerous products and processes, just as the world learned that Firestone and various archdioceses of the Catholic Church had used secrecy agreements repeatedly to hide defects in tires and child abuse by priests, respectively.[1] Model

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1. *See* Martha Neil, *Confidential Settlements Scrutinized*, A.B.A. J., July 2002, at 20, 22 (discussing widespread criticisms of secret settlements in response to reports of secret settlements by the tire manufacturer Firestone in cases involving tires used on Ford Explorers that exploded, and by the Catholic Church in cases involving sexual misconduct by priests). The Ethics 2000 Commission reportedly rejected a proposal to regulate secrecy agreements in part on the ground that such regulation more appropriately falls in the category of substantive state law, rather than the law of legal ethics, and

Rule 5.6 bars lawyers from agreeing to restrict their future practice as part of a settlement, but some courts have refused to enforce that rule, finding that it lacked purpose, was inconsistent with freedom of contract and contract law, and was trumped by case law validating secrecy in settlements.[2] Discerning the incidence of secret settlements and settlements that restrict future practice is difficult because the former are by definition secret and the latter are by definition in settlements, many of which are secret and all of which are private contracts not easily accessible to the press or public.

Empirical data on the frequency of these practices is therefore unreliable, and some commentators have used that fact to argue that concerns with these practices may be overstated.[3] Nonetheless, in this article, we explain that there are sound reasons to believe that these practices are quite common. Moreover, we explain why the law should take steps to curtail these settlement practices. Finally, we argue that these practices should not only be curtailed by the ethics rules that govern the conduct of lawyers, but also by the civil and criminal law and the Rules of Civil Procedure.

Our analysis of secret settlements and restrictions on future practice differs from that of previous commentators. We conceptualize these problems as similar, and connected, to each other. We thus use the same framework to analyze both practices—a framework that others have not used, although this framework has been referred to in passing by some of those writing on these topics.

Our framework is simple. In both the secret settlement and the future practice-restriction settlement, something is being sold. In settlement agreements requiring secrecy, what is being sold is access by others

on the related ground that ethical restrictions on lawyers' participation in secret settlements would create the anomaly that nonlawyer parties lawfully could enter secret settlements, but lawyers would be unable to participate in, or assist clients with such settlements. We find both grounds unpersuasive. For one thing, the line between legal ethics and substantive state (or federal) law is blurry at best: rules of legal ethics, for example, govern lawyers' confidentiality obligations regarding communications with clients, even though state and federal substantive law also affects and limits those obligations and may do so more fully in the future. Any sharp division between legal ethics and other law is a legal fiction, useful in some contexts perhaps, but a fiction nonetheless. As to the point regarding nonlawyers entering into secret settlements, it is impossible to imagine secret settlements without lawyers: we have never heard of a secret settlement entered into in pro se litigation. Indeed, as we explain below, secret settlements are used most notably and most troublingly in the context of mass tort, class action litigation, and in that context, the plaintiffs are, for all relevant purposes, absent from the process of litigation decision making and settlement.

2. *See infra* Part II.B.

3. Most notably, Professor Miller argues that the evidence of secrecy agreements and any harm caused thereby is only "anecdotal" and not statistical. Arthur R. Miller, *Confidentiality, Protective Orders, and Public Access to the Courts*, 105 HARV. L. REV. 427, 480 (1991). Miller, however, presents no evidence of any kind demonstrating that secret settlements are not commonly used or that they are used only benignly. The definitional quality of secret settlements—their secrecy—makes assembly of a large database and statistical analysis impossible. Particularly in the wake of the revelation that consumers continued to buy Ford Explorers with Firestone tires for years after Firestone had begun secretly settling death and injury suits regarding those very same tires, the practice of secret settlements should not be dismissed as obviously harmless.

to information gained by the client's lawyer during discovery while pursuing the client's cause of action. In the case of restrictions on future practice, it is access to the client's lawyer by others who want to sue the defendant (or its designees) for any or some more circumscribed set of legal claims. In both cases, what is being sold is something that the client has no legitimate right to sell—something in which the client has no legitimate property right.

It is our position—a position considered bedrock in other settings—that the law should not recognize the right of people, including clients, to sell assets that are not theirs. Our position—a position again quite uncontroversial in other settings—is that the law should take steps to curtail such activity by punishing those who try to engage in it. Under contract law, such sales should be null and void; under civil law, attempts to make such sales should be actionable; under the Rules of Civil Procedure, those attempts should give rise to mandatory sanctions; and, finally, under criminal law, those attempts should be punishable, at least in the most egregious cases.

What about the buyer's interest in such sales (generally that means the defendant's interest, as it is usually the plaintiff who is selling and the defendant who is buying)? The defendant/buyer may have a strong practical interest in buying the right to close a lawyer's practice to all or some others who might want to sue that defendant/buyer. But it is not a legitimate interest, and the law should not protect it. On the other hand, we recognize that the buyer (be it defendant or plaintiff) may have a legitimate interest in keeping certain information from the public, such as trade secrets or intimate information of the type that tort law on privacy would normally protect. It is our position, however, that persons and entities should *not* have to pay to keep secret what they already have a right to keep secret; the law should protect such information for free. We also argue that prohibiting secrecy deals regarding "private" discovery information serves important purposes. In sum, it is our position that the legitimate interests of those who now buy silence about discovery information could be and should be protected by other means, and that the buyer's other interests are illegitimate and should be treated as such by the law.

Finally, it is our position that the sale of the right to limit access to discovery information and the sale of restrictions on a lawyer's future practice operate to reduce the competitiveness of the legal market. Indeed, we maintain that both practices serve to create and maintain lawyer cartels. As a result of their anticompetitive effects, the use of secrecy and future practice agreements result in higher fees for plaintiffs' lawyers and less complete compensation for plaintiffs. They also undermine the deterrent power of law to affect the conduct of defendants.

II. CLEARING THE BRUSH: FOUR CONCEPTUAL CONFUSIONS IN THE SECRET SETTLEMENT AND FUTURE PRACTICE-RESTRICTION DEBATE

Four arguments have confused the debate and the law on secret settlements and future practice restrictions. Before explaining why there are few (if any) benefits to permitting secret settlements and future practice agreements and very substantial costs to doing so, we want to clear away any confusion caused by these arguments.

The four arguments are: (1) that permitting secret settlements and future practice restrictions follows from a lawyer's duty to serve his or her client—a duty that surely includes maximizing the client's recovery; (2) that fundamental contract principles require enforcement of secrecy and future practice agreements; (3) that the Model Rule 5.6 bar is ineffectual and hence should be removed because defendants can as readily "conflict out" opposing lawyers by hiring them as consultants or lawyers; and (4) that both practices are essential to the promotion of settlement and that without them many cases now settled would go to trial, increasing the transaction costs of both parties and unduly burdening an already burdened court system.

A. Client Service

Lawyers have a duty to serve their clients. That duty is limited by positive law restraints—including ethics rules restraints—on what is permissible service. Indeed, a substantial portion of our legal ethics regime is transparently an effort to stop lawyers from serving their clients too well to the detriment of other socially protected interests. Clients benefit financially from secret settlement and future practice agreements to the extent that they reap some share of the additional settlement amount paid by the defendant for the benefit of the secrecy and/or the practice restriction. But clients could and would benefit from all sorts of agreements in settlements that we would never allow. Consider a settlement that obliges the client not merely to remain silent about the settlement terms, but to affirmatively assist the defendant in committing an ongoing fraud. The appropriate question is not whether allowing secrecy agreements and practice restrictions helps certain clients, but whether secrecy agreements and practice restrictions fall within the range of socially permissible tools with which lawyers may and should fulfill their obligation of client service.

A variant of the client service argument is the property rights argument—to wit, clients own their legal claims and rights to settle, and hence restrictions on secret settlements and practice restrictions compromise property rights. But from a Lockean labor/investment conception of property rights at least, it is very odd to conceive of plaintiffs as "owning" the contents and result of a lawsuit because, besides the parties, the public pays for the legal structures (courts, judges, etc.) that

makes prosecution and resolution of litigation possible. Moving from theory to practice, the idea that the discovery rules transfer property rights in the information produced in discovery to the recipient of the information is belied by the ability and willingness of courts under certain circumstances to order the receiving party, without any compensation, not to use or disclose information it has received that the other party has a right to keep secret in all contexts but discovery.

The property rights claim in the practice-restriction context is even more strained: how is it that a plaintiff ever "owns" the labor (and hence the rights to control the labor) of a lawyer in other cases when the client has retained the lawyer only in his or her particular case?

B. Freedom of Contract

Some courts have held that future practice agreements that violate Rule 5.6 are nonetheless enforceable on contract principles.[4] In this view, practice-restriction agreements are like any other exchange of consideration and must be upheld as part of a legal regime committed to freedom of contract. We reject these cases for two reasons. First, and most importantly, they assume that contract law allows such contracts. But section 188 of the Restatement of Contracts provides that if the performance of a contract would restrict the party making the promise in the "exercise of gainful occupation," the contract is unenforceable because it is an unlawful restraint of trade.[5] The exceptions to this provision in section 186, for limited anticompete contracts, do not appear to apply.[6] Second, the cases seem nothing more than de facto attempts to abolish Rule 5.6.[7]

Our response to the "freedom of contract" argument parallels our response to "client service." Although the law usually allows freedom of contract, as it generally encourages client service, the law also places certain kinds of socially undesirable agreements and practices outside the realm of freedom of contract. As every first-year law student knows, contracts that violate positive law or compelling public policy are illegal and, hence, unenforceable. There is a strong argument that with or without Rule 5.6, future restrictions on practice are illegal and unenforceable contracts: as one of us has argued elsewhere, the criminal law of "compounding" and blackmail embodies the very sensible public pol-

4. *See, e.g.*, Lee v. Dep't of Ins. & Treasurer, 586 So. 2d 1185, 1188 (Fla. Dist. Ct. App. 1991); Feldman v. Minars, 658 N.Y.S.2d 614, 616–17 (N.Y. App. Div. 1997); Shebay v. Davis, 717 S.W.2d 678, 682 (Tex. Crim. App. 1986).

5. RESTATEMENT (SECOND) OF CONTRACTS § 188 (1981).

6. The exceptions are for anticompete clauses limited in geographical scope and time. RESTATEMENT (SECOND) CONTRACTS § 186 cmt. a (1981). The restrictions on future practice are not usually limited in either time or geographical scope.

7. Were secrecy agreements ever to be prohibited under the ethics rules, then courts could make a similar argument in nonetheless upholding them as enforceable contracts. In our view, that argument would be unsound for similar reasons.

icy against permitting people to take money to keep criminal conduct secret, and "most environmental hazards and virtually all frauds are not just torts [but] . . . also crimes."[8]

Moreover, Rule 5.6 does exist. Courts, some commentators, and a good number of practicing lawyers, however, have little trouble jumping over that Rule as if it were "wishful thinking" and not law at all.[9] Because the policy embedded in Rule 5.6's bar on practice restrictions is the right policy (it has no obvious costs and would yield real benefits, if applied), the Rule should remain a part of our legal regime and should be treated as a limit on private contract.

C. Alternative Means of Restricting Future Practice

Professor Stephen Gillers has argued that Rule 5.6's bar on future practice agreements lacks any rationale because defendants can just as easily restrict the future practice of plaintiffs' lawyers by hiring them as consultants or lawyers as by securing their consent to a future practice agreement.[10] The "same result" would be achieved, according to Gillers and others, because the conflicts rules that govern lawyers forbid the plaintiff's lawyer from suing his or her new "principal" or "client," at least on matters substantially related to "matters" about which the lawyer had agreed to consult with the defendant or to provide legal advice to the defendant.[11] This argument begs three questions: (1) Why any court, assuming it took Rule 5.6 seriously, would elevate form over substance by holding that a contract designed to circumvent Rule 5.6 was somehow not a violation of Rule 5.6?; (2) Why defendants and plaintiffs' counsel

8. For a more developed version of this argument, including a detailed explanation of the misdemeanor of compounding, which is found in the law of most states, see Susan P. Koniak, *Are Agreements to Keep Secret Information Learned in Discovery Legal, Illegal, or Somewhere in Between?*, 30 HOFSTRA L. REV. 783, 793 (2002).

9. For some courts it seems that ethics rules, even when incorporated into state statutes, are not "real" law in the same way as "regular" nonethics rules. So, for example, it is very hard to imagine any court holding that, even though prostitution is a crime under state law, a contract for prostitution services is enforceable under general freedom of contract principles. The best argument for treating the ethics rules as "nonlaw" when it comes time to enforce a contract is that the ethics rules say that they are for use in disciplinary proceedings only and not to be used in determining civil liability. That disclaimer is there in a vain effort to prevent the rules from being used in malpractice cases as evidence of the standard of due care. However, courts use the rules in malpractice settings anyway for the sensible reason that the rules are, of course, evidence of what a reasonable lawyer's duties are. If they are not that, then what are they? As to enforcing contracts that the ethics rules prohibit, courts need not hold that the ethics rules supercede contract law in order to hold that contracts in violation of Rule 5.6 are unenforceable because contract law doctrine states that contracts against public policy are void. Rule 5.6 is law of some form, and it clearly expresses that restrictions on future practice are against public policy. Thus, the argument that Rule 5.6 cannot trump contract law is a red herring. Contract law itself directs the court to rules like 5.6.

10. *See* Stephen Gillers, *A Rule Without a Reason*, A.B.A. J., Oct. 1993, at 118.

11. *See id.* The reason "consulting" contracts might be more attractive than lawyering contracts is that Rule 1.7(a) prohibits lawyers from suing their own clients on *any* matter, not just the "matter" the lawyering concerns. The defendant could waive the conflict as to "unrelated" matters, making the lawyering and consulting contracts the same. However, some courts might balk at that waiver, given that the exception under Rule 1.7(a) is generally construed quite narrowly.

would use agreements to restrict practice and not Gillers's supposedly foolproof or near-foolproof alternative?;[12] and, (3) If Rule 5.6 is the right policy, why courts, lawmakers, or commentators should not work to close the alleged "loophole" Gillers identifies?

As to form over substance, courts that take Rule 5.6 seriously have held that ploys such as those suggested by Gillers violate the Model Rules. We acknowledge that there may be occasions when it might be difficult to prove that a contract for future employment (consulting or legal work) executed by a defendant and plaintiff's counsel is an attempt to circumvent Rule 5.6. We contend, however, that if the Rule is good policy and worth enforcing, evidence on the contract's formation should be readily admissible to determine whether the consulting contract is connected with the settlement of a case.

Next, if a defendant and a plaintiff's lawyer could achieve precisely the same effect by (pre/post or simultaneously with the settlement) entering into a contract for future employment as by contracting for a practice restriction, why would they ever opt for the practice-restriction agreement? After all, some courts do enforce Rule 5.6.[13] That means agreements obviously in violation of the Rule are of questionable validity, whereas, according to Gillers, his alternate route is lock solid.[14] More fundamentally, if Gillers's alternative were the functional equivalent of contracts to restrict practice and both were equally legal, one would expect that the plaintiff's lawyer and the defendant would always choose the alternative: by definition under a contingency fee system, the plaintiff, as the settling client, will share in the "surplus" resulting from a practice-restriction deal, but has no claim to any of the value generated by a consultancy deal.

Gillers's analysis also overlooks secrecy and transparency considerations: when practice-restriction agreements are folded into secret settlements, they provide a well-hidden means for a lawyer to receive payment for restricting his or her future practice (and for a defendant to make such payment). While contracts for future employment are not inherently public, they are certainly not as shrouded in secrecy as settlements can be, at least under the current legal regime; notably, when a lawyer is hired and receives payment as a consultant, he or she is obliged to report that income and its source to the government on tax returns,

12. While we (or as far as we know, anyone) do not have many hard figures on the use of practice agreements, our contacts in the plaintiffs' bar and experience tells us that these agreements are hardly rare, and the existence of disciplinary actions and litigation regarding such agreements supports that conclusion.

13. *See, e.g.*, Hu-Friedy Mfg. Co. v. Gen. Elec. Co., No. 99-C762, 1999 WL 528545 (N.D. Ill. July 19, 1999) (holding that a protective order and cooperation agreement barring representation of future clients was void under Rule 5.6); *In re* Conduct of William D. Brandt, 10 P.3d 906, 918, 924–27 (Or. 2000) (citing and "agree[ing] with" the rationales for Rule 5.6 set forth by the ABA Committee on Ethics and Professional Responsibility and upholding an attorney suspension based in part on a violation of that prohibition).

14. *See* Gillers, *supra* note 10, at 118.

which, if not public, are hardly private, either. Secrecy in settlements helps the agreeing parties to maintain collusive, anticompetitive relationships that might well be harder to maintain in the glare of daylight.[15]

Moreover, even if defendants' retention of plaintiffs' lawyers as consultants were the functional equivalent of future practice agreements made in the context of settlement, the normative questions would remain. Is it wise policy to allow defendants to limit the pool of lawyers available to litigate as-yet-unresolved claims? Is it wise policy to allow defendants to limit the kinds, timing, or number of claims that can be brought by that lawyer against the defendant, as some restrictions on future practice provisions do? As discussed below, we believe such agreements weaken the competitiveness of the legal market to the detriment of society as a whole.

Professor Gillers ducks the question of the costs of future practice agreements and strategic retention of consultants and lawyers by arguing that everything is cured by the abundance of lawyers in the marketplace.[16] But if defendants—especially corporate, economically oriented defendants—are paying to restrict some lawyer's future practice (whether by paying larger settlements or consultancy fees), they must be convinced that they are receiving return on their investment. In other words, defendants must be convinced that, the abundance of lawyers notwithstanding, they are made better off by restricting the future practice of those particular lawyers with knowledge of, and experience in, litigating the kinds of claims for which their conduct makes them potentially liable.[17]

D. Encouraging Settlements

Proponents of secrecy agreements sometimes argue that such arguments are justified because they encourage settlements. Even if the availability of secrecy settlements did increase the frequency or speed of settlements, that would not establish the normative case for such agreements. If settlement in itself is a social good, it is because it reduces the transaction costs of litigation and reduces the load on overburdened

15. Even where future practice agreements are not secret, moreover, they may less starkly communicate the impression that the plaintiff's lawyer is part of the defendant's "camp" than the disclosure that the plaintiff's lawyer was in the employ of the defendant. Plaintiff's lawyers can explain away agreements to bar future practice made in the settlement context as tools to achieve generous settlements and hence as a pro-plaintiff device. There is no similar pro-plaintiff account of why the plaintiff's lawyer would go to work for the defendant.

16. For a similar argument, see Richard Painter, *Rules Lawyers Play by*, 76 N.Y.U. L. REV. 665, 714 (2001) (arguing that "market forces" should assure that "as some lawyers retire from suing certain defendants, others will recognize the opportunity, move in, and take their place").

17. The ABA has long noted the special expertise of lawyers with experience in particular kinds of cases as a rationale for restrictions on future practice agreements. *See* ABA Comm. on Ethics and Prof'l Responsibility, Formal Op. 371 (1993) ("[P]ermitting such agreements restricts the access of the public to lawyers who, by virtue of their background and experience, might be the very best available talent to represent these individuals.").

courts. But those benefits are insufficient to trump the point of law itself. If they were, closing the courts altogether or eliminating most causes of action would be of even greater "benefit." Liability regimes provide defendants with incentives to exercise due care and to refrain from conduct that is intentionally tortious, and provide injured plaintiffs with full compensation where the injuries were caused by the defendant's absence of care or defendant's intentionally tortious conduct. A regime that fails to meet these deterrence and compensation goals is normatively unattractive, even if it is characterized by a very high rate of quick settlements.

Moreover, the argument that the availability of secrecy agreements affects overall litigation or settlement rates or the average time needed to consummate settlements lacks any evidentiary support. Some jurisdictions restrict the use of secrecy agreements in settlements to some degree, but most others do not. To our knowledge, there is no evidence that these differences among jurisdictions have translated into differences in settlement timing and/or settlement rates.[18]

Indeed, in one respect, one might suppose that the use of secrecy settlements itself encourages more litigation and hence more litigation costs. One rationale for the use of secret settlements is that secrecy is necessary because the disclosure of a large settlement in a frivolous case will encourage other baseless suits.[19] The most effective way for a defendant to combat truly frivolous suits, arguably, would be to prevail (or pay only a nominal settlement) and publicize, rather than hide, the outcome. At any rate, whether frivolous or not, a lawsuit would seem to be worth *more* in a jurisdiction that allows secrecy agreements than in one that does not, because the plaintiff in a jurisdiction that allows secrecy settlements can demand and receive more out of a settlement—that is, payments for her claims *plus* payment for secrecy. By increasing the expected value of lawsuits, the availability of secrecy agreements increases the incentive for plaintiffs to litigate.

18. *See* Richard A. Zitrin, *Legal Ethics: The Case Against Secret Settlements (Or, What You Don't Know Can Hurt You)*, 2 J. INST. STUD. LEGAL ETHICS 115, 118 (1999) (noting that following enactment of restrictions on secret settlements in some states, there was "no indication of a resulting court logjam, or even that settlement rates have gone down"). According to a recent study by the Association of Trial Lawyers (admittedly not an entirely unbiased source), per capita litigation rates fell in Florida following enactment of a state statute restricting secret settlements. *See* Diana Digger, *Confidential Settlements Under Fire in 13 States*, 2 ANN. 2001 ATLA-CLE 2769 (available on WESTLAW TP-ALL). The complete absence of any reports of studies suggesting a decrease in settlement rates following the enactment of restrictions on secret settlements is notable given the substantial resources of those interest groups that favor secret settlements, and their ability to fund research.

19. For an argument that the absence of future practice restrictions may increase litigation rates, see Painter, *supra* note 16, at 714 (arguing that permitting future practice restrictions "creates perverse incentives for a lawyer to file a series of frivolous suits . . . in return for a covenant not to sue on behalf of future clients").

III. THE EXAGGERATED BENEFITS AND ALL BUT IGNORED COSTS OF SECRET SETTLEMENTS AND AGREEMENTS TO RESTRICT PRACTICE

A. The Illusory Benefits of Permitting Secret Settlements and Practice-Restriction Agreements

Before analyzing the costs of allowing secret settlements and practice-restriction agreements, we must consider their benefits. If (as we argue) the legitimate benefits of these practices are minimal, then the case against the practices can be made even if there is evidence of only modest costs or suspicion of substantial costs that are difficult to prove. This is an important point because some of the costs we suspect result from these practices are difficult to verify.

First, as to secret settlements, there are no legitimate interests protected by "private" secrecy agreements that could not be as well protected by court orders where appropriate.[20] As to business defendants, the principal claim made on behalf of secrecy settlements is that they are necessary to protect trade secrets. However, this claim is insufficient to explain secrecy agreements aimed at preventing nondisclosure of either the legal claims in a lawsuit or the settlement amount; those are not trade secrets. Where trade secrets might be an issue—for example, where trade secrets are discussed in discovery—the parties always have the option of jointly moving for a protective order from the court protecting from disclosure the material containing trade secrets,[21] or the party with the alleged trade secret can move on its own for protection.

Where parties resort to secrecy agreements, as part of settlement or as part of the discovery process, ostensibly to protect trade secrets or other legitimate privacy rights, there is no external mechanism for determining whether secrecy is sought for legitimate reasons (e.g., protection of trade secrets or protection of intimate information) or illegitimate reasons (e.g., defendant's desire not to face other suits based on defendant's wrongful conduct from as-yet-uninformed parties). Of course, societal resources are consumed by a court order process, but the expenditure of court time on motions that result in court orders protecting "legitimate secrets" entails a corollary saving in court time. Enforcement of court orders entails considerably less transaction costs for the parties and uses much less court time than the pursuance of a claim for breach of

20. This point is also developed in Koniak, *supra* note 8, at 800–02.

21. The reason the other party might join in such a motion is that it too may have trade secrets to protect, as in litigation between an inventor and a corporation or two corporations. Also, the party who gains access to the trade secret through discovery may face significant liability if it uses or discloses the secret in violation of the other party's right, i.e., we do not believe access in discovery automatically alters the nature of the "secret," although in some circumstances it may.

contract,[22] which would be the enforcement mechanism for private agreements.

It is also doubtful that secrecy agreements generate significant benefits in the form of discouraging truly frivolous litigation. We know of no evidence that supports the claim that public disclosure of settlement amounts encourages frivolous suits. The discouragement of "frivolous suits" is not the same thing as the discouragement of suits generally. If it were, then keeping a great deal more secret than settlement amounts would make sense. Why not keep the existence of "treble damages" provisions in law secret? Or the possibility of "punitive damages?" These ideas suffer from the same defective assumption relied upon by those justifying secrecy of settlement amounts: that providing information about the value of claims is bad, a net social loss. That is a strange assumption, to say the least, given that information on the price of assets is generally considered important to the proper functioning of markets.

Next, as to practice-restriction agreements, we perceive no social value in allowing defendants to use the settlement process to limit the pool and scope of practice of the lawyers who are most familiar with the kind of claims that may arise from the defendant's conduct. Of course, these restriction agreements may (and presumably do) benefit defendants by making it more difficult for others with claims against the defendants to learn about those claims and secure willing and effective counsel. But as long as we take a full and fair adversary system as a baseline measure of what is socially desirable, the benefits secured by defendants from practice-restriction agreements cannot be understood as societal benefits; indeed quite the contrary is true. At the very least, it is not clear that any affirmative case can be made for shrouding practice restrictions in secrecy, and this is precisely what happens when such restrictions are put into place as part of secret settlements, which is where they are most likely to be found.

B. The Costs of Secrecy and Practice-Restriction Agreements

To the extent our system of tort and other systems of liability serve socially desirable dual ends of deterrence and corrective justice, anything that impedes potential plaintiffs from learning about and bringing valid claims and receiving full compensation is undesirable. Secrecy agreements allow defendants to avoid fully compensating those they injure. Agreements to restrict practice have the same effect. When joined, the two devices have an even greater ability to undercut the deterrent value of law.

22. Consider, for example, the Securities and Exchange Commission's (SEC's) use of injunctions to prohibit future violations of the securities laws. The injunctions (court orders) are much easier and less costly to enforce than enforcing the laws themselves.

From the perspective of deterrence, secrecy and practice restrictions are troubling because they lower the aggregate liability for conduct that society has deemed harmful. The result is lower incentives for defendants to exercise due care and refrain from intentionally tortious conduct. The result is more "bad" conduct (more conduct for which social harm exceeds social cost).

From the perspective of corrective justice, secrecy and practice restrictions are problematic for two reasons. First, they result in less aggregate recovery from culpable defendants (or parties that should be defendants) than the (monetary equivalent of) the harm the defendants (or parties that should be defendants) caused. Second, they result in the distribution of payment to the plaintiff—payment of a share of the settlement premium in return for secrecy and/or the practice restriction—that cannot be justified as a corrective for a past wrong committed by the defendant against the plaintiff.

IV. FOUR POSSIBLE REGIMES

To illustrate the social costs of secrecy and practice-restriction agreements it may be helpful to compare four possible regimes: (1) Regime One, in which both secrecy and practice-restriction agreements are prohibited; (2) Regime Two, in which secrecy agreements are allowed, but practice-restriction agreements are prohibited (more or less, the regime that in theory exists now in most jurisdictions, although theory and practice may diverge severely in this area of law); (3) Regime Three, in which secrecy agreements are prohibited, but practice-restriction agreements are permitted; and (4) Regime Four, in which both secrecy and practice-restriction agreements are allowed. In our view, Regime One is the most likely to effectuate the twin aims of deterrence and corrective justice, while Regime Four is the least likely.

A. Regime One: Complete Prohibition

In a regime where both secrecy and practice-restriction agreements are prohibited, there nonetheless might be de facto agreements between the defendant and the lead plaintiffs' lawyers litigating a particular kind of claim against a defendant. The first plaintiffs' lawyers to successfully litigate a particular claim against a defendant have an advantage in recruiting and retaining future clients with similar claims; by virtue of their experience, such plaintiffs' lawyers know where to look for good clients, how to convince those clients of their ability (i.e., they have a track record), how to evaluate clients' claims, and how best to litigate them. It is thus unsurprising that a few plaintiffs' lawyers would emerge as dominant in the market for a certain kind of claim against a certain defendant, such that these plaintiffs' lawyers would find themselves in multiple-case,

long-term relationships with the defendant. In the context of such relationships, tit-for-tat patterns of cooperation might well emerge.

For the individual plaintiff, these patterns of cooperation are mixed blessings. On the one hand, they mean that the client's lawyer may not press for as much recovery as she would otherwise. But lawyers who lack a relationship with the defendant may do even worse for several reasons: they lack experience with the claims, and the defendant may seek to preserve its mutually beneficial arrangement with cooperative counsel by playing "hardball" with any other plaintiffs' lawyers, thereby raising the cost of litigation and delaying recovery. Thus, even where the law formally bars secrecy and practice-restriction agreements, the market in mass tort and other multiple-victim claims is unlikely to be fully competitive.

B. Regime Two: Secrecy Agreements Permitted

Where secrecy agreements are permitted, and are legally enforceable, the ability of the defendant to skew the operation of the market for representation of plaintiffs and potential plaintiffs is enhanced. Most obviously, if the defendant can purchase the secrecy of the settling plaintiff and plaintiff's lawyer, then the defendant may reduce the chance that further claims—legally valid claims—are ever brought. Particularly in the context of toxic torts and products liability, long periods of latency after exposure and difficult causation issues may mean that potential plaintiffs who have suffered or will suffer a legally cognizable injury will never know the source of that injury. This elimination of a pool of future plaintiffs also reduces the defendant's incentives to remove or remediate the hazard, where it is ongoing. For example, if Firestone's settlements with crash victims and their families had not been secret, more suits would have been brought years ago, and Firestone presumably would have discontinued production of defective tires. Many lives would have been saved.

Secrecy agreements also benefit the plaintiffs' lawyers who enter them. In theory, the secrecy agreement prevents the settling plaintiff as well as her lawyer from making specified disclosures. But unless the secrecy agreement also includes a practice-restriction agreement, the plaintiff's lawyer is free to seek out prospective plaintiffs with similar claims and represent them. And because the story of the previous settlement and relevant evidence had not been made public (assuming compliance with the secrecy agreement), the plaintiff's lawyer may face little competition in recruiting the clients with the best claims and settling their claims, agreeing each time to keep the settlement and the information learned in discovery secret. Thus, secrecy agreements may benefit the settling plaintiff's lawyer both because he receives a cash payment upfront for entering the agreement and because he reaps advantages later on as a result of the competitive advantage he enjoys by virtue of infor-

mation that he possesses exclusively or that only a few other lawyers (with similar secrecy agreements) possess. Again, as for the defendant, secrecy agreements promise fewer claims than would be brought otherwise. Even if the settling plaintiff's lawyer goes on to bring some similar claims, one or a small group of lawyers cannot bring as many claims as a large, virtually unlimited number of lawyers can.

The ones who suffer are prospective plaintiffs who may never bring claims because they lack the necessary information, or who may find it difficult to find willing, competent, and affordable[23] lawyers because of the interference with competition in the market for lawyers. Secrecy agreements also harm people who might have avoided all injury had the defendants' dangerous conduct been exposed earlier, and had the defendants, consequently, terminated such conduct.

C. Regime Three: Practice-Restriction Agreements Permitted

As the Advisory Committee's explanatory notes to Model Rule 5.6 plainly state, the prohibition on practice-restriction agreements is designed to preserve competitiveness in the market for plaintiffs' lawyers—and hence the ability of plaintiffs and prospective plaintiffs to find the best qualified lawyers at reasonable fees—by preventing defendants from removing from the pool of plaintiffs' lawyers those lawyers whose experience makes them the best qualified to bring future cases against the defendant.[24]

Professor Gillers has argued that, in light of changes in the dominant modes of litigation, Rule 5.6's concern with keeping the market for lawyers competitive is anachronistic, even assuming it made sense at some earlier point in time.[25] Quite the opposite is true. The barriers to

23. We understand that plaintiffs' lawyers almost always work for a contingent fee, but that does not eliminate the problem of "affordability." Many, if not all, plaintiffs' lawyers take forty percent or more of the plaintiff's recovery. When punitive damages are not available, that means that the recovery actually going to the plaintiff may simply not cover his actual out-of-pocket costs attributable to the defendant's conduct. Moreover, the forty percent rate seems quite steep for lawyers who have to do little work in subsequent cases because earlier litigation has provided them with most or all of the information they need to negotiate a decent settlement (decent, at least, before attorney's fees are deducted). We also understand that the plaintiffs' bar argues that the forty percent is fair in subsequent cases because they must be ready to try a few cases and must occasionally try some of these cases to keep their average settlement recovery high. But going to trial is not a real prospect for a plaintiff's lawyer with a standing secrecy agreement with the defendant. Threatening to reveal the information, with or without trial, is generally enough to keep the average recovery high for clients of those lawyers and the lawyers themselves.

24. *See* MODEL RULES OF PROF'L CONDUCT ANN. R. 5.6(b) cmt. (1995) (explaining that this rationale for Rule 5.6 "is clear") (quoting ABA Comm. on Ethics and Prof'l Responsibility Formal Op. 93-371 (1993)); *see also* Blue Cross & Blue Shield of N.J. v. Philip Morris, Inc., 53 F. Supp. 2d 338, 344 (E.D.N.Y. 1999) ("What must be guarded against is the danger of a defendant . . . blocking future litigation by buying off the individual plaintiff's counsel in return for an agreement not to bring future suits on behalf of future clients.").

25. At least one court has embraced Professor Gillers's reasoning that "'Rule 5.6(b) . . . is an anachronism, illogical and bad policy.'" Feldman v. Minars, 658 N.Y.S.2d 614, 617 (N.Y. App. Div. 1997) (citing Gillers, *supra* note 10).

entry—the investment costs for unfamiliar lawyers—are higher in more recent, factually complex tort and fraud litigation than in old-style tort cases involving, for example, car accidents caused by negligent drivers. Consequently, the advantage to defendants of removing those plaintiffs' lawyers with relevant experience is greater in the context of more recent, more complex cases than in traditional litigation.[26]

Moreover, practice-restriction agreements not only may reduce competitiveness in legal markets by removing experienced lawyers, but also may help preserve cartels created by plaintiffs' lawyers willing to collude with one or more defendants. Completely removing an experienced plaintiffs' lawyer or all experienced plaintiffs' lawyers from the market may not be the optimal move for a defendant (assuming a regime that would allow such complete removal through practice-restriction agreements) where the underlying claims against the defendant are strong. When the claims are strong enough that even an inexperienced lawyer can litigate the claim successfully, the experienced plaintiffs' lawyer and the defendant have an incentive to cut the following kind of deal. The defendant helps the experienced plaintiffs' lawyers maintain their domination in the market. In exchange for providing protection from competition for experienced lawyers (or an otherwise select group of lawyers), the defendant can gain valuable concessions from their contractual counterparts, such as promises from plaintiffs' lawyers to refrain from bringing certain possible claims against the defendant (for example, loss of consortium or low-level injury claims) or promises to request no more than x, y, and z for the types of claims that might be brought against the defendant.

Such promises might be made by experienced plaintiffs' lawyers even when inexperienced plaintiffs' lawyers are not a threat. For example, it might well be in the interest of an experienced plaintiffs' lawyer to trade similar promises for quicker and more effortless settlement deals. The capacity to obtain quick, easy settlements allows the lawyer to strengthen his market position. Quick, easy settlements translate into lower lawyer labor costs per settlement, thereby boosting the profit margin and compensating, or even more than compensating, for any "cooperation discount" the lawyer affords the defendant. The lawyer's capacity to advertise himself as able to deliver quick cash to clients also helps him attract clients who otherwise might have been recruited by other lawyers (with expertise or not). The end result is market dominance by a lawyer or group of lawyers who engage in a high-volume business of rapid-fire settlements.

As we suggested earlier, some, if not all, of these "benefits" for a selected group of plaintiffs' lawyers can be achieved without contracts.

26. The Comments to Model Rule 5.6 suggest this point as well. *See* MODEL RULES ANN. R. 5.6(b) cmt. (explaining that settlements with future practice restrictions "are particularly common in class actions or cases involving mass product liability or disaster claims").

Nonetheless, practice-restriction agreements can help solidify such arrangements in two ways. First, such agreements, where permitted, can specifically incorporate concessions to defendants (e.g., by allowing future litigation of certain claims but not others or setting specific recovery caps), and hence give the defendant a tool to compel compliance on the part of the plaintiffs' lawyers, whether through court enforcement or the reputational costs of breaking one's word. Second, such agreements could bar future representation, leaving defendants free to allow such representation as long as the "signing" lawyer remains cooperative (e.g., continues to accept low-ball settlement agreements or refrains from bringing certain claims).

D. Regime Four: Secrecy and Practice Agreements Permitted

By now it should be obvious that a regime in which both secrecy and practice-restriction agreements are permitted is troubling. In such a regime, Firestone could, for example, buy both the secrecy of the plaintiffs' lawyers who brought the first wave of claims against them and the rights of those lawyers to take any future similar cases. With the effective elimination of the group of persons most capable by deed and word of further publicizing Firestone's misdeeds and forcing the company to pay for those misdeeds, Firestone may well decide not to worry about the problem, resulting in the needless injury of more people.

In an era of relatively weak and resource-depleted government agencies (at least those agencies responsible for protecting consumer, investor, and general citizen health, safety, and welfare), government investigations cannot be expected to counter the effect of secrecy and practice-restriction agreements. Indeed, quite often government regulators rely on information generated and made public in litigation to justify the initiation of full-scale investigations. Because (as noted above) some courts and commentators are moving toward acceptance of practice-restriction agreements and because secrecy agreements already are permitted in most jurisdictions, Regime Four may soon be the de jure regime in many or most jurisdictions. We fear that it is already the de facto regime in most of our country.

V. CLASS ACTIONS AND SECRECY AND PRACTICE-RESTRICTION AGREEMENTS

One might think that the rise of class actions as a means of resolving multiple claimant litigation would have eliminated the need to worry about secrecy or practice-restriction agreements.[27] If all the claims against a particular defendant are lumped together in a class action, such that no one is left out, what difference does it make if discovery material

27. Gillers has made this claim. *See* Gillers, *supra* note 10, at 118.

and the terms of the settlement are kept secret, and why would a defendant need plaintiffs' lawyers to promise not to bring similar cases against it?

In fact, secrecy and practice-restriction agreements are much *more* troubling in the class action context. First, these devices have been used to increase the (already high) likelihood of court approval of a bad settlement for the class.[28] Second, and even worse, these devices have been used to nullify the effect of that all-too-rare event—court rejection of a class settlement on the ground that it is unfair to the class or that it violates the rights of the absent class under Federal Rule of Civil Procedure 23 or under the Due Process Clause of the Constitution. We will take those points in order, but first we provide some information on class action practice as background.

To understand how secrecy and future practice restrictions create bad effects in class actions, one needs to start with some basic understanding of how mass tort class actions are typically structured. Mass tort class actions almost never include everyone injured by a particular practice or defective product of a defendant.[29] Almost all mass tort class actions are for money damages and involve some issues not common to the entire class.[30] Class actions with those characteristics are typically certified under (b)(3) of the class action Rule 23, which mandates that class members have the opportunity to opt out.[31] For the opt-outs, secrecy agreements and practice restrictions will matter, if and when they choose to exercise their right to file individual actions against the defendant.

But whether or not anyone opts out—and here we must note the fact that some small number of mass tort class actions get certified under (b)(1) or (b)(2) of Rule 23, both of which preclude opt-outs, and the fact that few, if any people, may choose to opt out even when they have the right—the definition of the class in a mass tort action may exclude substantial numbers injured in the same manner by the same defendant as

28. For an analysis of the Federal Judicial Center Study showing that courts approve almost all proposed class settlements, see Susan P. Koniak & George M. Cohen, *Under Cloak of Settlement*, 82 VA. L. REV. 1051, 1103–15 (1996).

29. Almost all mass tort class actions are settled before trial. *See, e.g.*, THOMAS E. WILLGING ET. AL, EMPIRICAL STUDY OF CLASS ACTIONS IN FOUR FEDERAL DISTRICTS: FINAL REPORT TO THE ADVISORY COMMITTEE ON CIVIL RULES 60 (Federal Judicial Center 1996) (reporting high settlement rates in class actions in all four of the federal districts included in the study); George L. Priest, *Procedural Versus Substantive Controls of Mass Tort Class Actions*, 26 J. LEGAL STUD. 521 (1997) (observing that "virtually every mass tort class action that has been successfully certified has settled out of court"). It is very difficult to document much about settled class actions, even who is included and who is not, for a number of reasons, most notably because courts do not always report class action settlement decisions. *See* Koniak & Cohen, *supra* note 28, at 1081–89 (discussing the difficulties of documenting what occurs in class action settlements). But we can say, in all our extensive research into class actions, that we have found no mass tort class action, whether an opt-out or a non-opt-out action, that included everyone.

30. *See* ROBERT H. KLONOFF & EDWARD K. M. BILLICH, CLASS ACTIONS 767–93 (2002) (explaining the presumptive use of FED. R. CIV. P. 23(b)(3) for mass tort class actions).

31. FED. R. CIV. P. 23(b)(3).

those in the class.[32] Why? To minimize the risk that plaintiffs' lawyers, particularly those who are not lead class counsel, will obstruct settlement negotiations or delay and possibly derail court approval of a settlement, defendants agree to exclude from the class those injured persons whose claims are part of the existing "inventory" of any plaintiff's lawyer.[33] Once inventory clients are excluded from the class definition (much less trouble than opting them all out, which would raise the opt-out levels substantially and make it more difficult to win court approval of the settlement), plaintiffs' lawyers may enforce their thirty-five to forty percent contingency fee agreements with their existing clients, fees that would typically be limited to twenty-five percent or lower by court order of the individual recovery rewarded each client, if they were included in the class.[34] Payment of fees in "inventory" cases is also faster than payment of fees for individual recoveries under a class settlement because the latter must await final approval of the settlement, any appellate review, the setting up of an administrative process for processing class claims, and the processing of class claims through that process, which typically includes "spend-thrift" provisions that limit the number of claims a defendant must satisfy in any given year.

With that brief primer on mass tort class actions, we are ready to explain how restrictions on future practice and secrecy agreements cause problems in the class action context that are at least as serious as those we have discussed thus far. At the start of this part, we identified those harms. We will now take them in order.

Some class action settlements of mass torts should be rejected as unfair to the class. Consider that, at the bargaining table for a settlement, class counsel is present (with its interest in high fees), and the defendant is present (with its interest in keeping its liability low). But the class is not present or, if you insist, is present only through an agent (class counsel), with important interests that conflict with those of the class and over which the class has no effective control.[35] The court is supposed to protect the class by rejecting unfair settlements,[36] but it is dependent on information provided by class counsel and the defendants, both of whom

32. *See* Koniak & Cohen, *supra* note 28, at 1085–87 (citing *Amchem*, *Ortiz*, and *In re Diet Drugs*, all examples of this, and analysis of why this is likely).

33. *See* George M. Cohen, *The "Fair" Is the Enemy of the Good:* Ortiz v. Fibreboard Corporation *and Class Action Settlements*, 8 SUP. CT. ECON. REV. 23, 34–35 (2000) (discussing how this process occurred in the *Ortiz* litigation); Susan P. Koniak, *Feasting While the Widow Weeps:* Georgine v. Amchem Products, Inc., 80 CORNELL L. REV. 1045, 1057–64 (1995) (describing the same phenomenon in the *Amchem* litigation).

34. *See* Koniak, *supra* note 33, at 1068 (discussing the twenty-five percent limit on fees for processing individual claims after a class settlement).

35. In Judge Easterbrook's words, "[r]epresentative plaintiffs and their lawyers may be imperfect agents of other class members—may even put one over on the court, in a staged performance. . . . The court can't vindicate the class's rights because the friendly presentation means that it lacks essential information." Kamilewicz v. Bank of Boston Corp., 100 F.3d 1348, 1352 (7th Cir. 1996) (Easterbrook, J., dissenting from denial of rehearing en banc).

36. *See* FED R. CIV. P. 23(c)–(e).

have incentives to keep information exposing a settlement's unfairness from the court. In addition, the court itself has an interest in approving whatever deal is set before it as it is not in a position to rewrite the deal and rejection leaves the matter on its already clogged docket.[37]

Objecting counsel are almost never awarded fees for exposing a class settlement's defects and never obtain fees for causing a court to reject a settlement altogether.[38] Nonetheless, those with substantial inventories of claims have an incentive to mount a serious campaign to scuttle a class settlement that would effectively bar all individual actions against the defendant in question. Serious objections, however, are quite costly to present and have little chance of success. They generally entail, at a minimum, the hiring of expensive experts, costly fights to obtain meaningful discovery (as discovery for objectors is left to the judge's discretion), and high costs to execute any discovery granted (often, for example, substantial cross-country travel).[39]

There is, therefore, a deal to be struck here. Exclude inventory clients from the class, and increase the settlements to each inventory client, thereby raising their lawyers' fees and thus compensating the lawyers in present dollars for some of the fees they might be expected to generate from future clients, if there were no class deal.[40] Disclosure of such deals might cause class members and the courts (trial and appellate) to question whether the settlement is actually fair to the class. Why are folks outside the class doing better for similar claims than those within the class? Why are lawyers with inventory clients receiving settlement offers that yield the lawyers such fat fees? Secrecy is thus important to the success of these deals.

And the no-object deals are restrictions on future practice. They are not simply deals to release the claims of the inventory clients who accept the defendants' offer; they are agreements not to object in the future to the class deal presented on behalf of either current clients or future

37. *See* Koniak & Cohen, *supra* note 28, at 1122–30 (explaining the difficulties courts have in discerning bad settlements, and the incentives of courts not to look too hard for them).

38. Where would such fees come from? More to the point, class counsel, the defendant, and even the court have an interest in avoiding objections, if possible, because they entail substantial costs, either in terms of costly last minute payoffs to objectors to get them to go away (and those with frivolous objections are generally paid off along with the rest) or in the outright rejection of a settlement.

39. *See id*. at 1109–10, 1122–30 (explaining these points). Professor Koniak served as an expert witness for the objectors in *Amchem* and has personal knowledge of those costs. She also followed the progress of the objections in *Ortiz*, which, if anything, entailed greater costs because of the complicated appellate route that case took, i.e., after the initial appeal, there was a request for rehearing en banc, a first petition to the Supreme Court for certiorari, a remand to the Fifth Circuit, a second petition for certiorari, which was granted, entailing more briefing, more appendices and another appellate argument. *See* Cohen, *supra* note 33, at 26–33 (detailing this procedural history). Professor Koniak also served briefly as an expert consultant to the objectors in *In re Diet Drugs* and was in constant contact with the objectors (public interest and private lawyers) in the Prudential litigation.

40. *See* John C. Coffee, *Class Wars: The Dilemma of the Mass Tort Action*, 95 COLUM. L. REV. 1343 (1995) (describing the "new collusion"); *see also* Koniak & Cohen, *supra* note 28, at 1066–75 (detailing Coffee's expert testimony in *Amchem*, which explained the premium included in the inventory settlements in that case).

clients. Notice, too, that the defendant has a stronger than normal interest in keeping that restriction secret because it impinges on a matter currently or soon-to-be pending before a court and might impede the desired result—approval of the class settlement. Also, notice that the defendant has a very strong interest in keeping the dollar amounts of the settlements offered to the inventory clients secret because that allows the defendant to mask any premiums paid to gain the plaintiffs' bar cooperation with the class deal—premiums that might be enough to show the class deal is unfair because class members are getting inferior settlements to those offered to similarly situated inventory clients. Thus, secrecy agreements and practice restrictions in deals connected to a class settlement are likely to prevent serious objectors from appearing to identify any serious defects with the class deal, leading to court approval of class action settlements that probably should be rejected.

That only begins to explain the harm these devices can cause in the class action context. The greater harm is that these devices may function to negate all the protections granted absent class members under Rule 23—protections that include, *inter alia*, insistence that a class be homogeneous enough to have individual claims disposed of *en masse*; that guarantee the class be represented by adequate counsel and by named plaintiffs with claims similar to those within the class; and court review of any disposition, including any settlement, of class claims.[41] How can this happen?

Reexamine the bargain, described above, which the defendants and plaintiffs' lawyers with inventories have an interest in striking. One problem is that the defendants have to contract to pay substantial sums to inventory lawyers to increase the chances of the class deal being approved, but are left with no guarantee that the class deal actually will be approved. Approval is something that is not within the power of the inventory lawyers to guarantee. Not all serious potential objectors can be bought; for example, public interest lawyers[42] or plaintiffs' lawyers without substantial inventories against a particular defendant, but who may have inventories of similar claims against a different defendant, may object to signal their commitment to individual resolution of client claims. Once a serious objector shows up, the settlement is in some jeopardy, albeit small, if only because appellate courts do not have precisely the same incentive to approve settlements as trial courts have. And even a

41. *See* FED. R. CIV. P. 23(a)–(e); *see also* Amchem Prod., Inc. v. Windsor, 521 U.S. 591, 620–24 (1997) (addressing how these provisions function as protections for the absent class).

42. Indeed, Public Citizen Litigation Group, a not-for-profit public interest firm, is probably the most successful and active filer of objections to class action settlements in the country. *See* Public Citizen, The Litigation Group, *Public Citizen's Involvement in Class Action Settlements*, *available at* http://dev.citizen.org/litigation/briefs/class_action/articles.cfm?ID=552 (last visited Feb. 18, 2003) (detailing specific cases with Litigation Group involvement).

small chance of rejection matters a great deal to defendants, who may save hundreds of millions of dollars by closing a favorable class deal.[43]

Making the defendant's dilemma worse, the payments to inventory lawyers have to be made prior to court approval of the deal. Otherwise plaintiffs' lawyers will file objections to maintain their leverage, and that would all but defeat the point of the agreement.[44] What is a defendant to do?

What they do is get the inventory lawyers, including class counsel, to agree as part of the inventory settlements to abide by the terms included in the class deal in all future cases, even if a court rejects the class deal. This provides the defendant with the near equivalent of a guarantee that it will save a considerable amount of money, even if an appellate court ultimately rejects the class deal. It also increases the premium defendants are willing to pay the inventory clients and their lawyers. At the same time, it costs the inventory clients nothing and the inventory lawyers little, given how unlikely it is that a court would reject a class settlement. So why not agree to abide by the terms of a deal that a court will probably impose upon the inventory clients and their lawyers anyway, that is, by approving the class settlement for all similar claims filed against the defendant now or in the future?

But that restriction on practice—a restriction in the form of an agreement by all the major inventory lawyers to abide by a class settlement even when it is rejected by a court—is tantamount to imposing the class settlement upon the class even when a court has found that it fails to meet Rule 23's requirements and is unfair, or otherwise fails to satisfy due process. This would not be such a serious problem if new entrants had a good shot of moving into the market for claims of a particular type against a defendant or group of defendants. But entry is, as we have discussed, not so easy.

43. The inventory settlements in *Amchem* were worth over a billion dollars, slightly more than the class settlement, which was also over a billion dollars. The class deal covered all future asbestos cases; the inventories just the current cases, a much smaller group. Those figures should give some idea of the savings to be gained by a defendant through a class deal. *See Amchem*, 521 U.S. at 633 (Breyer, J., dissenting) (discussing the magnitude of the settlement).

44. In *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the defendants tried a more complicated move: paying inventory clients and lawyers 50% in advance and promising the other 50% when the class deal won final approval. Of course, this made the *quid pro quo* between class counsel, who signed inventory deals along with other inventory lawyers, and the defendants even more blatant and highlighted the no-object promises that were part of the inventory settlements for other lawyers. After the Supreme Court decision in that case, one would not expect to see a repeat of this transaction structure. Moreover, *Ortiz* involved a complicated fact pattern that gave plaintiffs' lawyers a reason to agree to the 50% later part of the deal. That fact pattern is too complicated to explain here. It is sufficient for the purposes of this Article that the defendant was not the entity that would have to pay the inventory settlements (or much of the class deal either). Instead, it was a third party, the defendant's insurance company. The insurance company and the defendant were in litigation over whether the insurance company was obligated to pay for the inventory or class claims and the 50% now, 50% later structure was in part a function of that insurance coverage litigation and defendant's inability to pay anyone absent its insurance. *See* Cohen, *supra* note 33, at 27–34.

The harms we have just described are not speculative. They are real, have occurred already,[45] and presumably will continue to occur unless courts adopt a different attitude toward secrecy agreements and future practice restrictions, at least in the class action context. Consider the agreements entered into in connection with the *Amchem* class settlement.[46] The inventory clients' settlements said, in effect, that all signing lawyers would, in the future, not seek monetary compensation for clients suffering from pleural plaques, the least serious injury that asbestos exposure can cause.[47] The class settlement also included this provision.[48] The restrictions on future practice provisions (in the inventory settlements) said that the class terms would trump the pleural plaques provision, if the settlement were approved (the class settlement included more specifics on how future practice would be restricted than the current client settlement provisions).[49] They also said that if the class settlement were not approved, the future practice provisions (mirroring the class provisions, albeit with less detail) would remain in place.[50]

In the real world, this means that, despite the Supreme Court's rejection of the *Amchem* settlement, in part because of the treatment of the future clients with pleural plaques,[51] those future clients are nonetheless subject to the rejected terms of the class action settlement, i.e., no monetary compensation if they walk into any of the current major asbestos plaintiff's firms. Those firms all had inventories, and, with one exception—the firm that launched the "successful" challenge to the class agreement—they all agreed to limit future practice in accord with the class deal, court rejection of the settlement notwithstanding. Of course, people with pleural plaques could go to some nonsigning lawyer somewhere, but adding to the already substantial market entry problems, the defendants could discourage this behavior by giving "signers" better,

45. As with "ordinary" secrecy agreements, the very nature of the agreement makes it difficult to discern just how frequently these deals occur. Two cases that document the existence of these deals are *Amchem*, 521 U.S. at 591, and *Ortiz*, 527 U.S. at 815.

46. As mentioned above, Professor Koniak served as an expert witness to the objectors in *Amchem*. She was compensated for her time, receiving about $50,000 over a two year period, which to her is a great deal of money. She discusses her reluctance to be involved in that case in the biographical footnote to Koniak, *supra* note 33, at 1045, and explains there that she was not paid by anyone to write that article. For the record, she has never accepted any compensation (other than an honorarium from a law school) for any article published in a scholarly journal.

47. For a description of these agreements, see Koniak & Cohen, *supra* note 28, at 1057–68. Asbestos defendants deny that pleural plaques on one's lungs is an injury in any (or almost any) circumstance. But for years they had paid out settlements of $10,000 or more for such "noninjuries" because at trial juries tended to see injury where the defendant saw none. Indeed, in *Amchem*, all the inventory clients with pleural plaques received monetary compensation, although the proposed class settlement provided no money for these injuries and the restrictions on future practice in the current client settlements bound all signing counsel to refrain from asking for money for those injuries in the future. *Amchem*, 521 U.S. at 603–05.

48. *Amchem*, 521 U.S. at 603–05.

49. *Id.*. at 601–05 (dismissing the specifics of the class settlement).

50. *Id.*

51. *See id.* at 604 (discussing claims that received no compensation under the class deal).

quicker deals in future cases than new players or old nonsigners. That means the big players in the asbestos bar stay the big players, which makes it even more difficult for new lawyers to enter the game.

Given the absent class's right to notice and, in mass tort actions filed under Rule 23(b)(3), right to a meaningful opportunity to opt out, as well as the court's obligation to approve or reject the class deal, one might think that courts would insist that settlement amounts for inventory clients and any future practice restrictions made in connection with a pending or contemplated class settlement be disclosed to the class and the court. That is not the case. In the remainder of this part, we will refer to the inventory settlements that so often accompany class settlements in mass tort cases as "side deals," for brevity's sake.

In *Amchem* and *Ortiz*, a determined and very well-financed objector pressed for and won substantial discovery, which revealed the existence of the side deals and some of the details of those deals, in particular, the nature of the future practice restrictions.[52] But settlement amounts were still kept secret from the absent class and objecting counsel, making it extremely difficult for objecting counsel to show the size of the premium paid to inventory clients and their lawyers. The district court had access to those figures and appointed a special master to review them and compare them to past settlement amounts obtained by the "signing firms."[53] The judge did not, however, order a comparison of the amounts being offered to class members and those given to the inventory clients, and by keeping the latter amounts secret, he made it almost impossible for anyone else to make the comparison.

The above represents the "best case scenario." Usually there is no well-financed, committed objecting counsel. And even if there is one, courts typically do not grant an objector the kind of discovery afforded the objectors in *Amchem*; indeed, courts need not grant an objector any discovery.[54] As for the class, few courts insist that the existence of side deals be disclosed to the class, and none, that we know of, provide class members with the details of such deals, i.e., courts maintain their prosecrecy posture even as to absent class members for whom much, if not all, of the information in the secret inventory settlements is "material" to whether or not they stay in the class or object to the settlement. As for future practice restrictions, the class is not informed of the law firms who have agreed to abide by the class settlement even without court approval, so that those firms might be avoided, which might, in turn, help new en-

52. *See* Alison Frankel, *Traitor to His Class*, AM. LAW., Jan. 2002, at 75 (reporting that Baron Budd spent more than $4.5 million challenging the legal settlements in *Amchem* and *Ortiz*).

53. *See* Koniak, *supra* note 33, at 1064–78 (explaining the special master's assigned role and John Coffee's testimony on behalf of the objectors describing why the special master's work was not meaningful). Professor Coffee explained that at the time the inventory and class settlements were made, asbestos cases were no longer worth what they had been in the past. Therefore, the relevant comparison is between the inventory and class amounts. *Id.* at 1068.

54. *See id.* at 1109–11.

trants into the market.[55] Moreover, restrictions on future practice that are aimed at imposing terms, later rejected by a court as unfair on future clients, are treated like almost all future practice restrictions—as presumptively acceptable.

In half-hearted recognition of these problems, one of the recently proposed amendments to Rule 23 would have required, for the first time, disclosure to the court of the existence of "side deals" between class counsel and the defendants *and* between the defendant and inventory lawyers. But this proposal (which in any extent has been rejected by the standing Committee on Rules) was hardly robust. First, it only required that summaries of the deals be disclosed to the court. Second, only the court, not objecting counsel or the absent class, would have been informed of all material terms.[56] The proposal said nothing about outlawing side deals that restrict future practice in such a way as to impose, as a practical matter, even rejected settlements on the absent class.

The key danger in all class actions is collusion between the defendants and the class counsel or plaintiffs' lawyer. Secret settlements and restrictions on future practice not only increase that danger but also add a new avenue for collusive behavior: collusion between defendants and plaintiffs' lawyers who are not officially part of the class action case. This kind of collusion is even more difficult to guard against than the first type of collusion and potentially even more dangerous to the absent members, as they may be left with a class deal even *after* a court's rejection of it.

VI. CONCLUSION

The case for secrecy and practice-restriction agreements has been overstated by the beneficiaries of these devices; all of the benefits of these devices that are legitimate and can withstand the light of day can be accomplished through other means. At the same time, the costs of these devices have been too narrowly conceived, even by the critics of these devices. Secrecy and practice-restriction agreements do have the potential, and as the Firestone litigation reminds us, have already realized some of the potential, to subject innocent people to needless harm and to impede the recovery of fair compensation for harm that has been suffered. But these devices also skew the legal market more generally by increasing the likelihood of cartels of plaintiffs' lawyers operating in tacit

55. We know of no court that has even considered providing this information to the absent class. It follows from the courts' willingness to deny the absent class knowledge of the existence of inventory side deals that they would reject any requests to release lists of firms that had agreed to abide by class settlements even in the absence of court approval.

56. *See Hearing Before the Comm. on Rules of Practice and Procedure of the Judicial Conference of the United States* (Jan. 22, 2002) (statement of Brian Wolfram, Staff Lawyer, Public Citizen Litigation Group), *available at* http://www.dev.citizen.org/litigation/briefs/class_action/articles.cfm?ID=665 (summarizing and criticizing Advisory Committee proposal regarding side agreement). For a general treatment of the Advisory Committee proposals, see Edward H. Cooper, *Federal Class Action Reform in the United States: Past and Future and Where Next*, 69 DEF. COUNS. J. 432 (2002).

collusion with defendants, to the detriment of the rest of society. In the increasingly important context of class actions, the centrality of these devices as a means of cementing collusion, and the injustice flowing from that collusion, are even more marked. Settlement is, in some sense, a realm of private ordering, but it is also a realm of public ordering where the actors owe duties to the public as a whole and where public institutions—notably the legal system (including the courts)— give the whole process of reaching legally binding settlements any real value. The public, therefore, has a right to ask that settlements not employ devices, such as secrecy and practice-restriction agreements, that are decidedly and dramatically against the public interest.